

Editorial

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The genesis and impetus for the works presented in this special edition of the *Northern Ireland Legal Quarterly* lie in the Age of Criminal Responsibility conference convened by the guest editors and jointly supported by Northumbria University's Centre for Evidence and Criminal Justice Studies and the Sydney Institute of Criminology at the University of Sydney. While the works themselves stand as the contributions of the individual scholars, they have been influenced by and represent some of the views put forward at this conference, which was held at Northumbria University in Newcastle in September 2015.

In England and Wales the age of criminal responsibility is set at 10 years. The current law therefore assumes all children are sufficiently mature at this age to accept criminal responsibility for their behaviour. This collection of papers collectively makes a powerful case for urgently reviewing this age of criminal responsibility which is the lowest in the EU and is well below the international average outside of Europe. This position has drawn criticism from the UN Committee on the Rights of the Child and the Council of Europe's Human Rights Commissioner as constituting a breach of international children's human rights standards.

This approach to young people in conflict with the law misrepresents the evidence we have regarding young people who offend. It ignores the evidence that children's inexperience and under-developed powers of self-control and reasoning make them prone to acting in ways they cannot help, understand or intend. Children involved in crime, particularly persistently, are often the least ready to assume the responsibilities associated with adulthood and the most seriously in need of adult help and guidance. The adoption of such a low age is also inconsistent with other statutory age-related safeguards and regulations that apply to children. A child of primary school age may be processed through the criminal courts and acquire a criminal record that, for some purposes, will remain with them for life; that same child cannot consent to sexual relations, including consensual sexual relations with another young person, until they are 16. A young person cannot join the armed forces until they are 16 years old. They must be 18 years old to buy cigarettes or alcohol, get a tattoo or vote. The law recognises that these actions require a certain level of maturity and that children need protection from the long-term consequences of their immaturity in various areas of their lives. However, children who offend are characterised as rational actors who are capable of dealing with complex realities and have the capacity to be mentally culpable.

The collection commences with a contribution from Raymond Arthur. Arthur notes that the current law in England and Wales considers that all children below 10 years of age are exempt from criminal liability for their actions, as such children are morally not responsible and lacking blameworthiness. According to Arthur, this approach to young people in conflict with the law misrepresents the evidence regarding young people who offend and encourages highly contestable judgements about individuality, identity and welfare. Arthur argues that children have a right to respect for their evolving capacities and that respecting this right would help to re-direct the criminal justice system towards a normative framework better equipped to accommodate the realities of childhood and in which the child's experience of vulnerability and powerlessness is embedded throughout.

In 'The common law influence over the age of criminal responsibility – Australia', Thomas Crofts explores how Australian jurisdictions came to have an approach to the age of criminal responsibility similar to that which existed in England and Wales until 1998. It discusses recent debates in Australia about reforming the minimum age of criminal responsibility and the presumption of *doli incapax*. This shows that, while there has been criticism of the presumption of *doli incapax* within Australia, no jurisdiction has taken the English step of abolishing it. It finds that a greater challenge to the presumption of *doli incapax* may, however, come from calls for an increase in the minimum age of criminal responsibility to the age of 12. While several common law countries have raised the minimum age level to 12 (as called for by the UN Committee on the Rights of the Child), they have also abolished the presumption of *doli incapax*, thus reducing protection for 12- and 13-year-olds. Crofts argues that, unless the minimum age of criminal responsibility is raised to 14 or 16, as preferred by the UN Committee, there are good reasons to retain the presumption of *doli incapax*.

In 'The minimum age of criminal responsibility in continental Europe has a solid rational base', Ido Weijers considers the meaningfulness of the term 'age of criminal responsibility'. Weijers argues that there is no proof that today's young children have a greater understanding of the world than children had in the past and suggests that the principle that children below a certain age are too young to be held responsible for breaking the law can be based on strong scientific evidence. According to Weijers, it is unacceptable in the light of these empirical findings to decide not to have a national minimum age of criminal responsibility and to leave the decision to prosecute a child under a certain age to the Lord Advocate. It is stated that there is sufficient scientific ground to conclude that a realistic minimum age of criminal responsibility would be at age 14 or 15.

The need to raise the minimum age of criminal responsibility is supported by empirical evidence provided in "'If you are 10, you go to prison': children's understanding of the age of criminal responsibility" by Dawn Watkins, Effie Lai-Chong Law, Joanna Barwick and Elee Kirk. Under Article 12 of the UN Convention on the Rights of the Child (UNCRC), all children who are capable of forming their own views have the right to express those views freely in all matters affecting them. Through the use of innovative, participatory methods, the authors of this paper have gathered the views of over 600 children aged 8 to 11 years concerning the current age of criminal responsibility under English law. The aim of this article is to demonstrate what and how children think about the age of criminal responsibility in the hope that children's views, both individually and collectively, will both inform and influence debate on this significant issue. Through their analysis of children's views, the authors demonstrate in this article that there exists for children a strong association between the notion of criminal responsibility and

imprisonment. The authors suggest that, alongside the discussions that are taking place around the appropriate age for setting criminal responsibility, priority must also be given to the consideration of steps that can and should be taken to increase children's awareness of the English legal system, to enhance their understanding of the criminal justice system and to improve their knowledge and understanding of children's rights both in the context of wrong-doing and more widely.

In addition to the measures identified by Watkin's et al, Claire McDiarmid, in 'After the age of criminal responsibility: a defence for children who offend', argues that a further mechanism is needed to protect the young who do wrong within the criminal process and advances a new, bespoke defence, to be available to young people from the age of criminal responsibility until they attain the age of 18. Focusing on the position in Scotland and England and Wales, the article looks firstly at criminal capacity – what it is that needs to be understood fairly to hold anyone criminally responsible – and draws on material from developmental psychology and neuro-science, as well as looking at the child's lived experience, to provide some evidence that the young may, without fault, lack this capacity. It then examines the use of age generally in law, and the age of criminal responsibility within this. Next, it considers existing lack of capacity defences – nonage, diminished responsibility, insanity (or mental disorder) and absence of *mens rea* – to consider their suitability for use by young and immature defendants. Finally, it presents a proposal for the form of the new defence, taking into account the need for balance with the public interest in conviction of the guilty. Throughout, it notes and analyses the Law Commission's proposals in this respect.

Jonathan Herring, in 'The age of criminal responsibility and the age of consent: should they be any different?', considers the connection between the age of criminal responsibility and the age at which a person is able to give effective consent. Jonathan argues that there are good reasons why these two ages could be different. In considering this issue, the article looks at the concepts of criminal responsibility and consent within the criminal law. It claims that these involve assessment of very different factors. It could, therefore, be entirely appropriate for a court to determine that a child has sufficient legal capacity to be guilty of a criminal offence, but lack capacity to consent to behaviour that would otherwise be a criminal offence.

Anqi Shen, in 'The age of criminal responsibility and juvenile justice in mainland China: a case study', uses China as a case study to claim that attention to juvenile justice in any given jurisdiction should be shifted away from (re)setting the minimum crime age to the development of child-centred juvenile justice that should be research-informed, under the human rights framework, and that moves away from legal institutions and disproportionate punitive interventions. Anqi concludes that China's problem is not about a low age of criminal responsibility or resistance to the international law, but more to do with a deeper understanding of it and implementation of international law standards.

In 'Raising the age of criminal responsibility in the Republic of Ireland: a legacy of vested interests and political expediency', Dermot Walsh examines why the age of criminal responsibility in the Republic of Ireland maintained the common law age of 7 years for so long, why there should have been such dithering over the reform when it eventually did come and why the current law in the Irish Republic still criminalises children at a very young age. Walsh argues that the answers to these questions can be found in a volatile combination of religious values and interests, economic and social constraints, public intolerance of childhood offending, a lack of principled political leadership at the heart of the state and the relative neglect of expert knowledge from the behavioural and neuro-sciences.

Elaine Sutherland, in 'Raising the minimum age of criminal responsibility in Scotland: law reform at last?', makes a powerful case that the climate for raising the age of criminal responsibility in Scotland has never been better. This argument is framed in the context of historical, international and comparative developments and the burgeoning contemporary literature.

The diversity of the articles presented here demonstrates the multiplicity of challenges that the age of criminal responsibility presents for criminal justice systems, in addition to advancing optimal solutions for potential future reform.