Northern Ireland Legal Quarterly

Volume 67 Number 3

EDITOR
PROFESSOR SALLY WHEELER

Northern Ireland Legal Quarterly Volume 67 Number 3

Contents

Special Issue: The Age of Criminal Responsibility

Guest Editors: Nicola Wake, Raymond Arthur and Thomas Crofts

Age of Criminal Responsibility
Lord Dholakia **263**

Editorial
Nicola Wake, Raymond Arthur, Thomas Crofts **265**

Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales
Raymond Arthur **269**

The common law influence over the age of criminal responsibility – Australia
Thomas Crofts **283**

The minimum age of criminal responsibility in continental Europe has a solid rational base
Ido Weijers **301**

'If you are 10, you go to prison': children's understanding of the age of criminal responsibility
Dawn Watkins, Effie Lai-Chong Law, Joanna Barwick and Elee Kirk **311**

After the age of criminal responsibility: a defence for children who offend
Claire McDiarmid **327**

The age of criminal responsibility and the age of consent: should they be any different?
Jonathan Herring **343**

The age of criminal responsibility and juvenile justice in mainland China: a case study
Anqi Shen **357**

Raising the age of criminal responsibility in the Republic of Ireland: a legacy of vested interests and political expediency
Dermot Walsh **373**

Raising the minimum age of criminal responsibility in Scotland: law reform at last?
Elaine E Sutherland **387**

NILQ 67(3): 263–64

Age of Criminal Responsibility

LORD DHOLAKIA

At 10 years old, the age of criminal responsibility in England, Wales and Northern Ireland is the lowest in Europe and one of the lowest in the world. The UN Committee on the Rights of the Child has repeatedly stated that our minimum age of criminal responsibility is not compatible with our obligations under international standards of juvenile justice. There is a growing wealth of evidence from national and international arenas and across disciplines, including neuro-science and academia, that set out why children require a different approach.

Research indicates that early adolescence is a period of marked neuro-developmental immaturity, during which children's capacity is not equivalent to that of an older adolescent or adult. Such findings cast doubt on the culpability and competency of early adolescents to participate in the criminal process. Children of 10 and 11 have less ability to think through the consequences of their actions, less ability to empathise with other people's feelings and less ability to control impulsive behaviour. It therefore cannot be right to deal with such young children in a criminal process based on ideas of culpability which assume a capacity for mature, adult-like decision-making.

I have for many years been working to raise the age of criminal responsibility in England and Wales and, in 2013, introduced a Bill to increase the age from 10 to 12 (Age of Criminal Responsibility Bill 2013). Approaches from other countries have shown that taking 10- or 11 year-olds out of the criminal justice system does not mean doing nothing with children who offend. Instead, it means dealing with the causes of children's offending through intervention by children's services teams. Dealing with children who by nature are some of society's most vulnerable through welfare interventions and, where necessary, family court proceedings for the children who would otherwise have been charged and prosecuted.

Children who go through the criminal process at a young age are often young people from chaotic, dysfunctional and traumatic backgrounds involving some combination of poor parenting, physical or sexual abuse, conflict within families, substance abuse or mental health problems. The prospects for diverting the child from offending are far better if these problems are tackled through welfare interventions, rather than by imposing punishments in a criminal court. A welfare approach avoids unnecessarily giving children a criminal record, which can make it harder for them to gain employment when they reach working age, and helps deal with the entrenched problems that cause offending. As

unemployment increases the chances of reoffending, this is another way in which criminalising children can increase, rather than reduce, the likelihood of future crime.

It has been extremely encouraging to see the continued decline in incarceration of children and reduction in the number of children in the criminal justice system in England and Wales over recent years. The small numbers provide a real opportunity for a different approach; one that puts both the needs of children and the interests of society at the centre.

I welcome the contributions contained within this special edition and encourage the learning to be shared as widely as possible. I will continue my work on this matter. Increasing the age of criminal responsibility would be an important step towards dealing with vulnerable, difficult and disturbed children in a way that befits our civilised society.

NILQ 67(3): 265–68

Editorial

NICOLA WAKE
Associate Professor of Law, University of Northumbria
RAYMOND ARTHUR
Reader, University of Northumbria
THOMAS CROFTS
Professor, University of Sydney

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.

NILQ 67(3): 269–82

Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales

RAYMOND ARTHUR*

Northumbria University

Abstract

Currently in England and Wales the law 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. 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. I will argue that children have a right to respect for their evolving capacities and that respecting this right would help to redirect 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.

Introduction

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 the age of 10 to accept criminal responsibility for their behaviour. This means that normative criteria, such as the physiological and psychological development of the individual child, are not being used to identify the divide between childhood and adulthood. Instead, the low age of criminal responsibility misrepresents the evidence we have regarding young people who offend and their evolving capacities. Children are still in the process of maturing at this stage of life and may not yet be developed enough to understand the wrongfulness of what they do. Children and young people are less mature than adults in terms of their judgement and sensation-seeking and experience difficulties in weighing and comparing consequences when making decisions and contemplating the meaning of long-range consequences. These cognitive difficulties also have implications for a young person's ability to be a competent defendant in an adversarial atmosphere. Young defendants who may not understand the consequence of their offending, including those with impaired mental capacity, are exposed to the full rigours of the criminal justice system unless their decision-making capacities are impaired, for example, by a mental illness which is attributable to a condition falling within the M'Nagthen rules, or they are substantially intellectually impaired.

This approach to young people in conflict with the law effectively constructs such children as non-children who do not deserve to remain children. Consequently, the rights of the offender as a child, in particular, marginalised and socially excluded children,

* Reader in Law, Faculty of Business and Law.

become invisible and ignored. This article will argue that children have a right to respect for their evolving capacities and that respecting this right would redirect the criminal justice system towards a normative framework better equipped to accommodate the realities of childhood; one which contains a clear foregrounding of the child's experiences and the reality of their daily lives and in which the child's experience of vulnerability and powerlessness is embedded throughout. If such a focus on children's rights were applied to young people in conflict with the law, it would ensure that young people who are not sufficiently mature and competent to understand the process of a trial in a criminal court, including the youth court, could not be held criminally culpable for their behaviour. Criminal liability could only be imposed upon children who had sufficient mental capacity, competence and maturity to understand the nature of their conduct and exercise volition over their behaviour.

Childhood

Ferguson has argued that any debate over the value of children's rights both begins and ends with the social construction of childhood.[1] Childhood is a contested terrain which suggests the physical growth of the child to full maturity, mirrored by intellectual, psychological, social and moral development.[2] Aries noted that 'in medieval society the idea of childhood did not exist' and that various languages did not even have words to describe childhood.[3] Aries argued that it was not until the mid-eighteenth century that the modern concept of childhood emerged, with the child occupying a central place in the family. For the Romantics, the concept of childhood became synonymous with a concept of 'original innocence' derived from Rousseau. Rousseau, in *Social Contract* of 1762, considered that childhood was a period of innocence and mutability.[4] In particular, he stressed the natural goodness of children and evoked sentiments that children were deserving of protection and education rather than punishment. For Rousseau, the innocent child is recognisable through encouragement, assistance, support and facilitation. Similarly Locke, in *Some Thoughts Concerning Education* (1693)[5] and *An Essay on Human Understanding* (1700),[6] believed that, whatever children are, they are not partially formed adults as there are incontrovertible cognitive and developmental differences between adults and children. Locke believed that children did not possess inbuilt categories of understanding or a general facility to reason. Locke assumed that through natural development the child's dependency, incompetence and irrationality give way to adult independence, competency and the ability to reason and to act responsibly.[7] These views sowed the seeds of the belief that children are everybody's concern and that they constitute an investment in the future in terms of the reproduction of social order.

From the middle of the nineteenth century the concept of childhood developed together with ideas of responsibility for children's moral and social development. Out of this developed notions of parental responsibility and the general collective interest of the

1 Lucinda Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumptions of the Importance of Children's Rights' (2013) 21 International Journal of Children's Rights 177, 179.

2 Deena Haydon and Phil Scraton, '"Condemn a Little More, Understand a Little Less": The Political Context and Rights Implications of the Domestic and European Rulings in the Venable–Thompson case' (2000) 27(3) Journal of Law and Society 416.

3 Philippe Aries, *Centuries of Childhood* (Penguin 1962).

4 Jean-Jacques Rousseau, *Social Contract* (Penguin 1968)

5 John Locke, *Some Thoughts Concerning Education* (A & J Churchill 1693)

6 John Locke, *An Essay on Human Understanding* (Beecroft 1700)

7 Also Allison James, Chris Jenks and Alan Prout, *Theorizing Childhood* (Polity 1998) 10–12.

state for the well-being of children as a future generation.[8] Such realities were bolstered by law. Compulsory education began to develop during the 1870s and cruelty to children became a criminal offence with the passing of the Prevention of Cruelty to Children Act 1899. The 1899 Act aimed to deter the mistreatment of children and made it an offence for a person over the age of 16 years to 'assault, ill-treat, neglect or abandon any child for whom he has responsibility'. These modern constructions of childhood dictate empowering children through seeing them as deserving of some respect and privileging of children's special interests through acknowledging the aspirations of rights for children.

Arneil argues that children's rights theorists have very good reason for advocating rights for children. If you want to take children's needs and interests seriously, and make claims on their behalf that will compete with any other moral claims, it is necessary to make such claims in the language of rights. It is clear that any non-rights moral claim simply does not carry the same weight in contemporary moral or political debate.[9] Similarly, Archard reasons that '[p]erhaps it is a fundamental mistake legally to give children that to which they are not morally entitled'; nevertheless, giving children legal rights will make a huge difference to how we think about them.[10] For Ferguson, rights talk is beneficial because it empowers children in the sense of ensuring their equal respect and it enfranchises them by enabling their unique narratives and perspectives to be shared. However, Brighouse warns that children's rights talk could 'systematically mislead people into neglecting the facts of children's vulnerability, dependence, and inabilities'.[11] Similarly, O'Neill argues that children's fundamental rights are best grounded by embedding them in a wider account of fundamental obligations, which can also be used to justify positive rights and obligations.[12] O'Neill examined the legal and moral principles behind children's rights. She argued that children should be protected and nurtured because of their special vulnerabilities and thus should not have full rights. Huntington supports this view, arguing that children do not have full autonomy and, therefore, rights as a mechanism for promotion of their welfare or access to citizenship are ineffective and inappropriate.[13] Huntington argues that a rights-based model of child welfare does not protect the interests of children as it privileges autonomy over assistance and obscures the important role of poverty in the lives of children suffering disadvantage; it perpetuates an adversarial approach to decision-making and consequently fosters conflict, rather than collaboration, between the state and families. Huntington therefore recommends 'shifting rights to the background'[14] echoing O'Neill's view that a child's 'main remedy is to grow up'.[15] However, this proposed remedy is of little use to young people involved in the criminal justice system. There is considerable evidence to confirm that the criminalisation of children is associated with higher levels of offending in adulthood. Significantly, this effect has been demonstrated across different jurisdictions, including those that adopt more or less punitive approaches to youth-

8 Michael Wyness, *Childhood and Society* (Palgrave 2006); Robert Dingwall, John Eekelaar and Topsy Murray, *The Protection of Children: State Intervention and Family Life* 2nd edn (Blackwell 1995) 220.

9 Barbara Arneil, 'Becoming Versus Being: A Critical Analysis of the Child in Liberal Theory' in David Archard and Colin M Macleod, *The Moral and Political Status of Children* (OUP 2002) 86.

10 David Archard, *Children: Rights and Childhood* 2nd edn (Routledge 2004) 57.

11 Harry Brighouse, 'What Rights (if Any) Do Children Have?' in Archard and Macleod (n 9) 35.

12 Onora O'Neill, 'Children's Rights and Children's Lives' (1988) 98 Ethics 445; see also, Onora O'Neill, 'Children's Rights and Children's Lives' (1992) 6 International Journal of Law and the Family 24.

13 Claire Huntington, 'Rights Myopia in Child Welfare' (2006) 53 UCLA Law Review 637.

14 Ibid 642.

15 O'Neill (n 12).

offending.[16] Contact with the youth justice system reduces the likelihood that children will complete school and obtain educational qualifications and, consequently, impacts directly on the chances of future employment.[17]

In this article I will argue that in the context of the youth justice system in general, and the age of criminal responsibility in particular, emphasising an approach which recognises that the child has rights helps to ensure a clear foregrounding of the child's experiences and an invitation to empathise with the child's feelings. Acknowledging the child's right to respect for their evolving capacity holds significant potential to address many of the profound theoretical and practical shortcomings of the youth justice system.[18] The expressive values of rights should not be discounted as mere semantics, rights matter to children because the language of children's rights may be regarded as a vital tool in defending the intrinsic importance of children and articulating what it is about children that gives them such value.[19] Choudhry and Fenwick contend that thinking in terms of rights makes it more likely that we consider all the relevant interests at stake because of the explicit articulation such an analysis requires.[20] Considering the issue in broader terms, Freeman reasons that: '[t]he language of rights can make visible what has for too long been suppressed. It can lead to different and new stories being heard in public.'[21] The suggestion is that, even if outcomes remained unchanged, it would be better for children to be seen through the lens of rights.[22] As Ferguson notes:

> The statement that a child has a particular right is both an expression of an existing social norm that recognises the importance of the content of that legal right to the child, as well as a means of changing social norms to be more reflective of that importance.[23]

The relevance and application of a child's rights-based approach in the context of children's criminal capacity cannot be underestimated as this approach acknowledges children's inherent vulnerability and immaturity and their lack of capacity and agency to make decisions in their own best interests. Woodhouse has characterised such an approach as an environmentalist model that focuses on the ecology of the child rather than the child as an isolated individual.[24] Such an 'environmentalist/rights' approach would better serve the twin goals of the youth justice system to prevent offending by children and young

---

16 Tim Bateman, *Children in Conflict with the Law: An Overview of Trends and Developments – 2010/2011* (National Association for Youth Justice 2012); David Huizinga, Karl Schumann, Beate Ehret and Amanda Elliott, *The Effect of Juvenile Justice System Processing on Subsequent Delinquent and Criminal Behavior: A Cross-National Study* (US Department of Justice 2003); Leslie McAra and Susan McVie, 'Youth Justice?: The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) European Journal of Criminology 315.

17 Jon G Bernburg and Marvin D Krohn, 'Labelling Life Chances and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood' (2003) 41(4) Criminology 1287.

18 See Kathryn Hollingsworth, 'Theorising Children's Rights in the Youth Justice System: The Significance of Autonomy and Foundational Rights' (2013) 76(6) Modern Law Review 1049; Raymond Arthur, 'Recognising Children's Citizenship in the Youth Justice System' (2015) 37(1) Journal of Social Welfare and Family Law 21.

19 Tom D Campbell, 'The Rights of the Minor: As Person, as Child, as Juvenile, as Future Adult' (1992) 6 International Journal of Law and the Family 1.

20 Shazia Choudhry and Helen Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 Oxford Journal of Legal Studies 454, 468–69.

21 Michael D Freeman, 'Why it Remains Important to Take Children's Rights Seriously' (2007) 15 International Journal of Children's Rights 6.

22 Ibid 7.

23 Ferguson (n 1) 183.

24 Barbara B Woodhouse, 'Reframing the Debate about the Socialization of Child Welfare: An Environmental Paradigm' 2004 University of Chicago Legal Forum 85.

people[25] and to have regard to the welfare of the child.[26] This focus on children as rights-holders would avoid conflict between the competing rights of young people, parents, victims and the state and instead create a rhetoric which focuses more on adult responsibility and children's needs and the broader issues affecting the young person.

Children's rights approach to the 'age of criminal responsibility'

Babic is critical of any approach which offers a 'fairly undifferentiated understanding of children and childhood' and which fails to recognise that a child does not simply 'turn into an adult all of a sudden but needs to go through processes of development and growth till they reach adulthood'.[27] Children of 10 years are not adults and the more a young person is involved with crime, the greater the gap with adults tends to be. Yet, once they are 10 years of age, they can be subject to an adversarial system, modelled closely on a criminal justice system designed for convicting and punishing adults, a system that prioritises the finding of guilt or innocence and sentencing for a particular offence. The low age of criminal responsibility in England and Wales reflects a simplistic functionalist perspective which focuses its attention on a policy of containment through the morality of blaming young people's behaviour as a product of personal pathology. This construction of childhood is wedded to a punitive model which focuses on the offence alone at the expense of considering the connections between the child and their wider social situation. This approach ignores the socio-economic and cultural contexts of young people's lives and fails to respect the child's present and future rational autonomy and capacity. It ignores the evidence that the child's inexperience and under-developed powers of self-control and reasoning make them prone to acting in ways they cannot help, understand or intend. Instead, children who are involved in offending behaviour are reconstructed as non-children and consequently are denied the right to respect for their evolving capacities. The child offender is considered an agentive child who must accept responsibility. Although the youth courts are required to have regard to the welfare of the child,[28] welfare issues are not a primary or paramount consideration of the court.[29]

This simplistic, desensitising and pejorative portrayal of young people in trouble plays on popular fears about young offenders and provides a 'discursive benchmark'[30] which underpins and dominates the development of youth justice law and policy in a way which is unsympathetic to a discourse of rights, egalitarianism, inclusion and justice. What the current system of youth justice does insufficiently is to locate the behavioural repertoires of young people within a holistic socio-economic context. Arguably, this void constitutes a significant political, organisational and moral failure that could be rectified by

25 Crime and Disorder Act 1998, s 37.

26 Children and Young Persons Act 1933, s 44.

27 Benrhard Babic, 'Ohne intellektuelle Redlichkeit kein Fortschritt. Kritische Anmerkungen zum Umgang mit dem Capability Approach aus erziehungswissenschaftlicher Sicht' in Clemens Sedmak, Bernhard Babic, Reinhold Bauer and Christian Posch (eds), *Der Capability-Approach in sozialwissenschaftlichen Kontexten* (VS Verlag fur Sozialwissenschaften 2011) 82. Also Gunter Graf, Oscar Germes-Castro and Bernhard Babic, 'Approaching Capabilities with Children in Care: An International Project to Identify Values of Children and Young People in Care' in Ortrud Lebmann (ed), *Closing the Capabilities Gap* (Barbara Budrich 2011) 267.

28 Children and Young Persons Act 1933, s 44.

29 Crime and Disorder Act 1998, s 37; Raymond Arthur, 'Protecting the Best Interests of the Child: A Comparative Analysis of the Youth Justice Systems in Ireland, England and Scotland' (2010) 18(2) International Journal of Children's Rights 217.

30 Marcia K Meyers, Bonnie Glaser and Karin MacDonald, 'On the Front Lines of Welfare Delivery: Are Workers Implementing Policy Reforms?' (1998) 17 Journal of Policy Analysis and Management 22.

emphasising the importance of acknowledging children's evolving capacities in the maintenance of their rights. Such an approach would redirect the criminal justice system towards a normative framework better equipped to accommodate the realities of childhood. This framework would contain a clear foregrounding of the child's experiences and the reality of daily life and one in which the child's experience of vulnerability and powerlessness is embedded throughout. An approach based upon respect for children's rights is one which clearly resonates with Dixon and Nussbaum's capabilities (or human development) approach.[31]

Evolving capacities

Dixon and Nussbaum's capabilities approach is an emerging theory based on the idea of human dignity. According to Dixon and Nussbaum's capabilities approach, children come into the world with a variety of undeveloped capacities and there is a consequent moral need to protect them while these capacities develop.[32] The capabilities approach aims at supporting the growth of agency and practical reasoning by urging a duty upon the state to help realise the capacity of each individual to think and reason in an informed and independent way. As such, children should be afforded the maximum scope for decisional freedom consistent with their actual capacity for rational and reasoned forms of choice or judgement.[33] Dixon and Nussbaum argue that children have a right to assistance in reaching their capabilities, otherwise they will be 'mutilated and deformed' by their experiences. This right to assistance and protection is recognised in other parts of the English legal system. For instance, a young person must be 16 years old before they can consent to sexual relations, including consensual sexual relations with another young person. 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. There are exceptions to the rules of contract which apply to young people.[34] Within family law, young people are assumed to lack the competency to participate responsibly and articulate their own wishes and feelings unless they can prove to the court that they have sufficient understanding.[35] Thus, the law recognises that these actions require a certain level of maturity and capacity and that children need protection in a paternalistic form from the long-term consequences of their immaturity in various areas of their lives.

Dixon and Nussbaum argue that it is because of their human frailty, particularly so with children, that the 'state has an obligation to ensure that all persons have access to a life worthy of human dignity'.[36] A particularly salient feature of the capabilities approach in the context of youth criminal liability is that it provides a normative framework for the evaluation of the development and well-being of individual persons, as well as for the assessment of the quality of social arrangements.[37] Clark and Eisenhuth suggest that the 'same metric of human dignity applied to adults should also be addressed to children,

31 Rosalind Dixon and Martha Nussbaum, 'Children's Rights and a Capabilities Approach: The Question of Special Priority' (2012) 97 Cornell Law Review 549.

32 Jean-Michel Bonvin and Daniel Stoeklin, 'Introduction' in Daniel Stoecklin and Jean-Michel Bonvin (eds), *Children's Rights and The Capability Approach: Challenges and Prospects* (Springer 2014) 10.

33 Ibid.

34 Sales of Goods Act 1979S, s 3(2).

35 *F (Mother) v F (Father)* [2013] EWHC 2683 (Fam); *Gillick v West Norfolk & Wisbech AHA* [1986] AC 112; *Mabon v Mabon* [2005] EWCA Civ 634; *Re H* [1993] 1 FLR 440.

36 Dixon and Nussbaum (n 31).

37 Hans-Uwe Otto, Albert Scherr and Holger Ziegler, 'On the Normative Foundation of Social Welfare: Capabilities as Yardstick for the Critical Social Work' in Hans-Uwe Otto and Holger Ziegler (eds), *Enhancing Capabilities: The Role of Social Institutions* (Barbara Budrich 2013) 197.

even though it might need to be specified in a certain age-dependent way'.[38] The capabilities approach implicitly advocates egalitarian, political conceptions of social justice which are concerned with the cultivation, maximisation and just distribution of the (real) freedom of individuals.[39] The attention to what rights, goods, institutions or services do to human beings implies the necessity to focus on real tangible, dependent and vulnerable human beings with their own biographies, specific needs and socially and culturally embedded ways of conducting their lives. Therefore, the capabilities perspective commands a high degree of context sensitivity.[40] From the capabilities perspective, it is the task of public institutions to ensure that individuals can in reasonable and tolerable conditions decide on their own in favour of the realisation of these capabilities.[41] Beyond looking at the actual choices made by children, it is much more interesting to consider the fact that they may not have freedom to choose alternative ways of being and acting.[42] Children and young people are still developing in terms of their cognitive capacity and emotional maturity and are often much more impulsive than adults. Children involved in crime, particularly persistently, are often the least ready to assume the responsibilities associated with autonomous individuality, to participate effectively in their own criminal proceedings, and the most seriously in need of adult help and guidance.

Other theorists have also developed paternalistic approaches which, similar to Dixon and Nussbaum, acknowledge the right of the child to recognition and protection of their vulnerability. In Feinberg's view, children cannot be adjudged as autonomous agents.[43] Autonomy connotes the capacity for 'ethical evaluation and self-control',[44] as well as the competency for self-rule or self-government, which is based on personal rationale, deliberations, choices and motivations and, more importantly, freedom from external manipulations, distortions and coercions.[45] Feinberg contends that children possess 'anticipatory autonomy rights' that draw their importance from the adult the child will become. Feinberg designated these rights as the child's right to 'an open future' because they exist to facilitate the child's development of autonomy.[46] Feinberg's 'open future' principle has been widely invoked in applied ethical discourses such as genetic reproductive technologies,[47] however, its relevance for application in the context of children involved in the criminal justice system cannot be underestimated as it acknowledges children's inherent vulnerability and immaturity and their lack of capacity and agency to make decisions in their own best interests. The right to an open future is a

38 Zoë Clark and Franziska Eisenhuth, 'The Capability Approach and Research on Children' in Sabine Andresen, Isabell Diehm, UweSander and Holger Ziegler (eds), *Children and the Good Life: New Challenges for the Research on Children* (Springer 2010) 72.

39 Zoë Clark and Holger Ziegler, 'The UN Children's Rights Convention and the Capabilities Approach: Family Duties and Children's Rights in Tension' in Bonvin and Stoecklin (n 32) 215.

40 Ibid 216.

41 Ibid 218.

42 Ibid 221.

43 Joel Feinberg, 'The Child's Right to an Open Future' in William Aiken and Hugh LaFollette (eds), *Whose Child?* (Rowman & Littlefield 1980) 124; Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (OUP 1986) 325–26.

44 Andrew Franklin-Hall, 'On Becoming an Adult: Autonomy and the Moral Relevance of Life's Stages' (2013) 63 Philosophical Quarterly 223, 251.

45 Immanuel Kant, 'Grounding for the Metaphysics of Morals' in *Ethical Philosophy,* James W Ellington (trans) (Hackett Publishing 1785/1983).

46 Oduntan Jawoniyi, 'Religious Education, Critical Thinking, Rational Autonomy, and the Child's Right to an Open Future' (2015) 42 Religion and Education 34.

47 For example, see Dena S Davis, *Genetic Dilemmas: Reproductive Technologies, Parental Choices and Children's Futures* (Routledge 2000).

right to have future options available until the child is 'a fully formed self-determining adult' capable of making their own choices.[48] This right protects the child against having important life choices determined by others before she has the ability to make them for herself so as to preserve the child's future options. It therefore includes restrictions on what others are allowed to do to children as it is imperative that the child's future options are not prematurely closed.[49]

Hollingsworth has suggested that a system of criminal justice will be illegitimate if it permanently restricts the child's ability to develop the capacities necessary for future global autonomy.[50] To ensure that children can develop into fully autonomous rights-holders when they achieve majority, the state must give special status to a particular category of childhood rights that Hollingsworth characterises as 'foundational rights', which support the child in becoming autonomous at the point of achieving majority. This 'foundational rights' approach requires that children are treated according to principles of equality, due process and justice, but any punishment cannot permanently restrict the child's ability to develop the capacities necessary for future global autonomy. Specifically, in this context it requires the age of criminal responsibility to be set above the age at which punishment would cause irreparable harm to the child's foundational rights.

Tobin's rights-based construction of childhood develops Feinberg's 'open future' principles and Hollingsworth's 'foundational rights' approach further by arguing that the best interests of the child are, as a minimum, a primary consideration in all matters concerning them.[51] Tobin argues that a rights-based approach provides conceptual clarity when determining the meaning and content of the child's best interests. The indeterminacy of the child's best interests has often allowed it to be used as a proxy for the interests of others.[52] Ultimately, Tobin posits that a rights-based approach demands that a child's best interests be informed by a consideration of all of the other rights of the child.[53] Tobin recommends that courts adopt an evidence-based approach when determining the best interests of the child by using empirical evidence in relation to the specific child, or children more generally. The law's assumptions about children's criminal capacity are unsupported by the bulk of empirical research concerning the mental capabilities of preadolescents. Developments in neuro-imaging technology have allowed for a more detailed understanding of the adolescent brain which has found that there are developmental differences in the brain's biochemistry and anatomy that may limit adolescents' ability to perceive risks, control impulses, understand consequences and control emotions.[54] The prefrontal lobe is 'involved in behavioural facets germane to

48 Mianna Lotz, 'Feinberg, Mills, and the Child's Right to an Open Future' (2006) 37(4) Journal of Social Philosophy 537, 539.

49 Claudia Mills, 'The Child's Right to an Open Future' (2003) 34(4) Journal of Social Philosophy 499; Joseph Millum, 'The Foundation of the Child's Right to an Open Future' (2014) 45(4) Journal of Social Philosophy 522.

50 Kathryn Hollingsworth, 'Theorising Children's Rights in the Youth Justice System: The Significance of Autonomy and Foundational Rights' (2013) 76(6) Modern Law Review 1049.

51 John W Tobin, 'Courts and the Construction of Childhood: A New Way of Thinking' in Michael D Freeman (ed), *Law and Childhood Studies: Current Legal Issues* (OUP 2012) 55.

52 Robert van Krieken, 'The Bests Interests of the Child and Parental Separation' (2005) 68(1) Modern Law Review 25, 39.

53 John W Tobin, 'Taking Children's Rights Seriously: The Need for a Multilingual Approach' in Alison Diduck, Noam Peleg and Helen Reece (eds), *Law in Society: Reflections on Children, Family Culture and Philosophy* (Brill 2015) 127–40, 134.

54 Frances J Lexcen, Dickon N Reppucci, 'Effects of Psychopathology on Adolescent Medical Decision-Making' (1998) 5(63) University of Chicago Law School Roundtable 63, 77; Sara B Johnson, May Sudhinaraset, Robert W Blum, 'Neuromaturation and Adolescent Risk Taking: Why Development is Not Determinism' (2010) 25(1) Journal of Adolescent Research 4, 10.

many aspects of criminal culpability' including 'the control of aggression and other impulses'[55] and yet this lobe is the last area to mature.[56] This research has examined the brain development and cognitive functioning of adolescents and has found that, with respect to moral culpability, those parts of the brain that deal with judgement, impulsive behaviour and foresight develop in the twenties rather than the teen years.[57] Because the prefrontal lobe is not fully mature and is still developing during adolescence, teens are almost inevitably overly emotional, more prone to risk-taking and subject to wide mood swings, immature judgement, decreased risk perception and impaired future-time perspective.[58] Furthermore, their functioning in respect of considering issues empathically from the perspective of others, capacity for autonomy and resisting pressure from others and their ability to experience guilt and shame are under-developed.[59] This contributes to the tendency to make choices that are harmful to themselves and others.

Additionally, the way in which psycho-social factors influence decision-making and the kinds of choices adolescents make depend in part on the social and family context in which young people find themselves. Children involved in crime, particularly where that involvement is persistent, have often had difficult, deprived backgrounds and serious multiple problems in terms of their school achievement, psychological health, alcohol and drug abuse and family life.[60] The challenges that confront children who are engaging in anti-social and offending behaviour, their families and the various professionals who work with them are complex, deep-rooted and multi-faceted. These children are the most disadvantaged, have the poorest educational experiences and are more likely to suffer from poor health, including mental health and substance misuse.

These developmental differences render such children and young people the least ready to assume the responsibilities associated with autonomous individuality and to participate effectively in their own criminal legal proceedings, and the most seriously in need of adult help and guidance. Evidence suggests that young defendants often do not understand legal proceedings or the language used by lawyers, they report feeling intimidated and isolated in court and may not receive a proper explanation of what has happened until after a hearing is over.[61] Children lack the ability to concentrate for long periods and it may be difficult for them to participate properly in proceedings. The child may not be able to follow evidence and may not understand the complex language used in court. As a result he may not be able to give instructions to his lawyer and may not be in a position to make vital decisions.[62] Young offenders also feel frustration that the

55 Ruben C Gur, 'Brain Maturation and the Execution of Juveniles' (2005) University of Pennsylvania Gazette 103.

56 Peter Kelly, 'The Brain in the Jar: A Critique of Discourses of Adolescent Brain Development' (2012) 15(7) Journal of Youth Studies 944, 946.

57 William Di Mascio, 'Punishment Has Replaced Juvenile Redemption' (2006) Correctional Forum 2; Gur (n 55).

58 Kathryn L Modecki, 'Addressing Gaps in the Maturity and Judgment Literature: Age Differences and Delinquency' (2008) 32 Law and Human Behaviour 78; Jane Rutherford, 'Juvenile Justice Caught between *The Exorcist* and *A Clockwork Orange*' (2002) 51 De Paul Law Review 715, 727.

59 Nigel Stone, 'Old Heads upon Young Shoulders: "Compassion to Human Infirmity" Following R v JTB' [2010] 32(3) Journal of Social Welfare and Family Law 287, 292.

60 Raymond Arthur, *Family Life and Youth Offending: Home is Where the Hurt Is* (Routledge 2007).

61 Neal Hazel, Ann Hagell and Laura Brazier, *Young Offenders' Perceptions of their Experiences in the Criminal Justice System* (Policy Research Bureau 2002); Michelle Botley, Becca Jinks and Carol Metson, *Young People's Views and Experiences of the Youth Justice System* (Children's Workforce Development Council 2010); Ali Wigzel, Amy Kirby and Jessica Jacobson, *The Youth Proceedings Advocacy Review: Final Report* (Bar Standards Board 2015).

62 Thomas Croft, *The Criminal Responsibility of Children and Young Persons* (Ashgate 2002) 78.

courts seem rarely to understand the context in which their offences were committed, including the pressures facing them.

Schapiro characterises childhood as a 'non-ideal status of normative immaturity'. Schapiro suggests that the progression from childhood to adulthood is a progression from heteronomy to self-hegemony.[63] According to Schapiro, 'autonomy starts out as sovereignty over limited domains of discretion'. The development of children's autonomy will be aided by allowing them to develop their self-hegemony in a piecemeal fashion, such that they gradually achieve self-determination over the various 'domains of their lives'.[64] For Schapiro, this imposes an obligation on the part of parents and the state to strive to reduce their child's predicament of subjection to the will of others, so as to enable them to 'awaken to a sense of their own freedom and responsibility' and become 'free to control themselves'.[65] It is in this way that children become able to govern themselves *as* free wills.[66] For Schapiro, recognition that children occupy a 'non-ideal status of normative immaturity' imposes obligations on parents and society to do what is in our power as adults to help children work their way out of childhood. Our negative obligation as adults must be to refrain from hindering them in this effort.[67]

UN law and European law

The current law on the age of criminal responsibility takes no account of the child's inexperience and evolving capacities and powers of self-control and reasoning, which make them prone to acting in ways they cannot help, understand or intend. In international human rights law, the child's 'anticipatory autonomy rights' are explicitly linked to the concept of the child's evolving capacities in the UN Convention on the Rights of the Child (UNCRC) which represents the most comprehensive legally binding statement of children's rights. The UNCRC embraces the concept of autonomy where it is inextricably linked to the concept of the child's evolving capacities,[68] the principle of the child's active and informed participation in all matters affecting her or him[69] and the understanding that children are independent holders of rights.[70] The evolving capacities principle of the UNCRC is codified in Article 5 which states that:

> States parties shall respect the responsibilities, rights and duties of parents or, where applicable the members of the extended family or community as provided for by local custom . . . to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

The notion of the child's evolving capacities is also reflected in Article 12.1 which reads as follows:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the

63 Tamar Schapiro, 'What Is a Child?' (1999) 109 Ethics 715.

64 Mianna Lotz, 'Feinberg, Mills, and the Child's Right to an Open Future' (2006) 37(4) Journal of Social Philosophy 537, 539.

65 Schapiro (n 63).

66 Christine M, Korsgaard, *Creating the Kingdom of Ends* (CUP 1996) 159.

67 Schapiro (n 63).

68 Article 5, UNCRC.

69 Ibid Article 12.

70 Manfred Liebel, 'From Evolving Capacities to Evolving Capabilities: Contextualizing Children's Rights' in Bonvin and Stoecklin (n 32) 67.

> views of the child being given due weight in accordance with the age and maturity of the child.

Furthermore, the preamble of the UNCRC refers to the notion of dignity:

> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[71]

This echoes the Universal Declaration of Human Rights which states that: 'All human beings are born free and equal in dignity and rights.'[72] The evolving capacities principle can thus be understood as a stimulant for the recognition of the special capacities of children and their promotion, taking into account that children are in a process of development, but not necessarily ranking these capacities in a hierarchical sense.

The UNCRC promotes the view that children are no longer merely 'potential adults' but are cast as full human beings invested with important social citizenship rights,[73] including the right to have their best interests seen as a primary consideration in all court actions involving them (Article 3). The primary importance of Article 3 is in making children's interests visible and giving them force in decision-making processes.[74] The UNCRC not only constructs children as rights-bearing citizens with a range of social, political and civil rights, but also calls upon states to ensure that they are active, participating citizens, playing a role in governance 'according to their age and maturity', rather than simply 'being passively governed'.[75] The UNCRC recognises that young people under the age of 18 years may need special protection because of their age or emotional development. Consequently, in the context of the age of criminal responsibility, Article 40 of the UNCRC requires each state to set a reasonable minimum age of criminal responsibility. The UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985 recommend that this minimum age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. The important consideration, as outlined in rule 17 of the Beijing Rules, is whether a child, by virtue of his or her individual discernment and understanding, can be held responsible for their behaviour. The Commentary to the Beijing Rules stresses that there should be a close relationship between the age of criminal responsibility and the age at which young people acquire other social rights such as marital status and the right to vote. In line with this rule, the UN Committee on the Rights of the Child has recommended the age of 12 years as the absolute minimum age of criminal responsibility.[76]

In *R v G*[77] Lord Steyn believed that the UNCRC created a norm which acknowledged that the criminal justice system should take account of a defendant's age, level of maturity, and intellectual and emotional capacity. Lord Steyn emphasised that ignoring the

---

71 Preamble, UNCRC.

72 Article 1, Universal Declaration of Human Rights.

73 Raymond Arthur, 'Recognising Children's Citizenship in the Youth Justice System' (2015) 37(1) Journal of Social Welfare and Family Law 21.

74 Rachel Taylor, 'Putting Children First? Children's Interests as a Primary Consideration in Public Law' (2016) 28(1) Child and Family Law Quarterly 45.

75 Daiva Stasiulis, 'The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement' (2002) 6(4) Citizenship Studies 507, 509.

76 UN Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice* (UN Committee on the Rights of the Child 2007) 32.

77 [2003] UKHL 50, [2004] 1 AC 1034.

special position of children in the criminal justice system is not acceptable in a modern civil society. In the same case, Lord Bingham held that it was neither moral nor just to convict a young person on the strength of what someone else would have apprehended if the defendant himself had no such apprehension. As Lord Diplock stated, in the differing context of the former partial defence of provocation to murder, 'to require old heads on young shoulders is inconsistent with the law's compassion of human infirmity'.[78] More recently, the Court of Appeal stated in *R v L*, in the context of young defendants trafficked into the UK who had been convicted of various offences including the production and supply of cannabis and use of a forged passport, that age is always a relevant factor in the case of a child defendant which may significantly diminish, and in some cases effectively extinguish, their culpability.[79]

The EU Commission's 2006 communication, *Towards an EU Strategy on the Rights of the Child*, adopts the UNCRC as the established benchmark for children's rights at EU level.[80] The 2011 EU *Agenda for the Rights of the Child* reinforces the full commitment of the EU to promote, protect and fulfil the rights of the child in all relevant EU policies and actions. The 2011 Agenda includes 11 concrete actions where the EU can contribute in an effective way to children's well-being and safety; these actions include the development of a 'child-friendly' justice system. The European Committee of Social Rights has also declared that the age of criminal responsibility in England is 'manifestly too low' and accordingly is not in conformity with Article 17 of the European Social Charter which provides mothers and children with a right to social and economic protection.[81] The European Social Charter, a Council of Europe treaty signed in 1961, guarantees social and economic human rights. The Council of Europe's Human Rights Commissioner has also frequently expressed concern at the low age of criminal responsibility in England. The Commissioner in 2005, Alvarez Gil-Robles, commented that he had 'extreme difficulty in accepting that a child of 12 or 13 can be criminally culpable for his actions, in the same sense as an adult'.[82] While noting that the European Convention on Human Rights (ECHR) does not require any age limit to be set before a child can be held criminally responsible, the Commissioner suggested that the age level in England should be raised to bring it into line with other European countries. In 2009 the Commissioner Thomas Hammarberg argued for an increase in the age of criminal responsibility across Europe with the aim of progressively reaching 18 years and recommended that innovative systems of responding to juvenile offenders below that age should be tried with a genuine focus on their education, reintegration and rehabilitation.[83] In *V and T v UK*[84] the European Court of Human Rights recognised the variation in minimum ages across Europe and, though stating that the age of 10 years in England is at the lower end of the spectrum, held that 'it cannot be said to be so young as to differ disproportionately from the age limit followed in other European States'.[85] Nevertheless, the principle of acknowledging the evolving capacities of young people was recognised by the European

78 *Camplin* [1978] AC 705, 717.

79 [2013] EWCA Crim 991, para 13.

80 EU Commission, *Towards an EU Strategy on the Rights of the Child* (COM367 2006).

81 European Committee of Social Rights, *Conclusions XVII-2 (UK) Articles 7, 8, 11, 14, 17 and 18 of the Charter* (Council of Europe 2005) [30].

82 Alvarez Gil-Robles, *Report on his Visit to the UK 4th–12th November 2004 for the Attention of the Committee of Ministers and the Parliamentary Assembly* (Council of Europe 2005) [105].

83 Thomas Hammarberg, *The Human Rights Dimension of Juvenile Justice* (CommDH/Issue Paper Council of Europe 2009).

84 (2000) 3 EHRR 121.

85 Ibid [74].

Court of Human Rights in *V and T v UK*. In this case Lord Reed held that: 'Even children who may appear to be lacking in innocence or vulnerability are nevertheless evolving, psychologically as well as physically, towards the maturity of adulthood.'[86] This case involved Jon Venables and Robert Thompson, two boys convicted of murdering toddler James Bulger in 1993. The European Court of Human Rights was particularly struck by the paradox that children who were deemed to have sufficient mental capacity to engage their criminal responsibility had a play-area made available to them during adjournments. Indeed, five dissenting judges expressed the view that fixing 10 as the age of criminal responsibility was almost certainly in breach of Article 3 ECHR.

Conclusion

What is evident is that the youth justice system in England and Wales uses an adult template to measure young people's criminal responsibility and overlooks young people's particular vulnerabilities. Acknowledging that the child has a right to respect for their evolving capacities does not seek to impose controls on children but to provide boundaries which are not fixed and are typically renegotiated by children.[87] Applying such a children's rights approach to young people in conflict with the law would ensure that young people who are not sufficiently mature and competent to understand the process of a trial in a criminal court, including the youth court, could not be held criminally culpable for their behaviour. Criminal liability could only be imposed after an assessment of the mental capacity, competence and maturity of each child. Such an assessment would need to acknowledge the limitations of criminal justice as a means of preventing and dealing with crime and antisocial behaviour and instead consider whether the child's needs would best be met by non-criminal methods of social intervention.

The method being advocated here is not without criticism as it may lead to unclear and unpredictable outcomes. Emphasising such an individualised focus on the child's needs may plausibly result in uncertain and unclear outcomes and disproportionate and indeterminate treatments, in circumstances where if an adult had committed the offences they would have been treated more leniently. Certainty has traditionally been seen as an important and defining characteristic of the rule of law.[88] For example, Hayek stressed that the rule of law should involve rules rather than standards, determinate rather than open-ended language and closure rather than continued deliberation.[89] What is being proposed here undermines the certainty that is emphasised as part of the rule of law ideal. However, Eekelaar asks whether it should always be an object of legal processes to provide clear and predictable outcomes.[90] Instead, he argued that the law provides points of departure and frameworks within which reasoned decisions are taken, but 'thoughtful discretion' is also included rather than the law operating in a mechanical and thoughtless way in the pursuit of an exalted ideal of predictability. Waldron has described the processes by which such decisions are taken within legal systems as 'forms of argumentative thoughtfulness'[91] which he considers to be a key feature of the rule of law.

86 Ibid.

87 Jerome Ballet, Mario Biggeri and Flavio Comim, 'Children's Agency and the Capability Approach: A Conceptual Framework' in Mario Biggeri, Jerome Ballet and Flavio Comim (eds), *Children and the Capability Approach* (Palgrave 2011) 30.

88 Friedrich von Hayek, *The Road to Serfdom* (University of Chicago Press 1944); Friedrich von Hayek, *The Constitution of Liberty* (University of Chicago Press 1960).

89 Ibid.

90 John Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23(3) International Journal of Children's Rights 3, 25.

91 Jeremy Waldron, 'Thoughtfulness and the Rule of Law' (2011) 18 British Academy Review 4.

This altruistic paternalism is justified as the temporal position of childhood and adolescence in the ordinary lifespan justifies holding children to different standards when determining their ability to make choices.[92] This is not to imply that the harms caused by youth-offending should be tolerated, but means ensuring that all children who are alleged to have offended have access to the range of health and social care services they require whether they are formally prosecuted or not. This view of young people recognises that the child offender lacks capacity and, consequently, there is a need for both the family and the state to take responsibility for children's needs and to respond to youth-offending by providing young people with the necessary tools to grow into civilised and competent adults. This is underpinned by the pursuit of social justice and a prevailing assumption that the role of the state is to try to realise a more just, equitable and inclusive society.

The low age of criminal responsibility underestimates the relevance of age and the full trajectory of development from childhood through adolescence and to adulthood. It ensures that the power imbalance between children and adults is sustained, the special status of childhood is diminished and the child's human rights are violated. The low age of criminal responsibility marginalises the important developmental differences between children and adults and allows the criminal justice system to treat young offenders as entirely rational, fully responsible young adults rather than children, thus justifying their subjection to the full rigours of the criminal law. As Lord Dholakia stated when introducing the Age of Criminal Responsibility Bill in the House of Lords, 'children who are too young to attend secondary school can be prosecuted and receive a criminal record'.[93] Raising the age of criminal responsibility would bring conceptual attention to the nature of the child's evolving capacities and would stimulate an integrated analysis of how to respond to youthful antisocial and offending behaviour by considering how multiple stakeholders such as families, schools, social workers and government can affect children's well-being. Such an approach opens the way for evaluating the effect of criminal justice responses on particular children and for creative solutions to be developed. As Lord Dholakia stated:

> It cannot be right to deal with such young children in a criminal process based on ideas of culpability which assume a capacity for mature, adult-like decision-making. There is no other area of law – whether it is the age for buying a pet, the age for paid employment, the age of consent to sexual activity or the age for smoking and drinking – where we regard children as fully competent to take informed decisions until later in adolescence. The age of criminal responsibility is an anomalous exception.[94]

92 Andrew Franklin-Hall, 'On Becoming an Adult: Autonomy and the Moral Relevance of Life's Stages' (2013) 63 Philosophical Quarterly 223.

93 HL Deb 8 November 2013, vol 749, cols 476, 479.

94 HL Deb 8 November 2013, vol 749, col 477.

NILQ 67(3): 283–300

The common law influence over the age of criminal responsibility – Australia

THOMAS CROFTS*

Sydney Law School, University of Sydney

Abstract

This article 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. This article 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.

Introduction

It is well known that age levels and methods for assessing the criminal responsibility of children[1] vary significantly across the world. However, the effects of colonisation mean that it is possible to identify patterns across jurisdictions. Generally speaking, countries affected by the English common law, such as Australia, India, Malaysia, New Zealand, Singapore and South Africa, have tended to have low age levels of criminal responsibility compared to those influenced by the civil law tradition.[2] However, comparing age levels of criminal responsibility can be difficult. This is because there may be differences in approaches to the age of criminal responsibility with some jurisdictions having a single minimum age of criminal responsibility under which a child can never be prosecuted,[3] while some set such a minimum age level generally, but allow prosecution below this age for

* Professor and Director of the Sydney Institute of Criminology.

1 The term child and children will be generally used throughout this article to refer to any young person under the age of 18.

2 See Donald Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Ashgate 2009) 71–76.

3 For instance, England and Wales, Children and Young Persons Act 1933, s 50 (as amended by Children and Young Persons Act 1963, s 16(1)).

specific offences.[4] Other jurisdictions have a minimum age of criminal responsibility and also a higher conditional age level where a child's liability to prosecution depends on an individual assessment of his or her criminal capacity (often referred to as the presumption of *doli incapax* in common law jurisdictions).[5] Another approach is to not set any minimum age of criminal responsibility, but only a conditional age level so that criminal prosecution always depends on an assessment of a child's criminal capacity up until this age.[6] This complexity in approaches to the age of criminal responsibility is further compounded by differences in jurisdictional and discipline understandings of what the age of criminal responsibility means and differences in how young people who commit crimes are dealt with. For instance, some countries may have a low age of criminal responsibility, but may not permit the prosecution of a child under a certain age in any criminal proceedings[7] or may only permit the prosecution of a child in youth-specific courts. Some jurisdictions which allow a child to be prosecuted in criminal proceedings may only allow certain non-punitive measures to be applied to a child under a certain age (which may differ from the age at which they can be held responsible for criminal conduct).[8]

In order to place the discussion of the age of criminal responsibility in Australia into context and help clarify what exactly is being discussed, this article will begin by exploring the meaning and importance of the age of criminal responsibility. It will then explain the background to the current approach to the age of criminal responsibility in Australia and how the law came to be similar to that in England and Wales (before the abolition of the presumption of *doli incapax* in 1998).[9] It will then examine recent debates about reform to the age of criminal responsibility in Australia. This will show that, despite sharing a common tradition, the laws relating to the age of criminal responsibility now differ significantly from the law in England and Wales and it is unlikely that any Australian jurisdiction would take a similar approach to England and Wales. Finally, it will be argued that recent calls for a higher minimum age of criminal responsibility based on obligations under the UN Convention on the Rights of the Child (UNCRC) could end up leaving children with less protection if this is combined with an abolition of the presumption of *doli incapax*.

---

4 For instance, Ireland, Children Act 2001, s 52(1) and s 52(2) (as amended by Criminal Justice Act 2006, s 129). A further complexity is that in Ireland a child under 14 cannot be prosecuted without the permission of the Director of Public Prosecutions (s 52(4)).

5 For instance, all Australian jurisdictions, see, for example, Criminal Code of Western Australia, s 29 ; *RP v R* [2015] NSWCCA 215.

6 For instance, France, Penal Code, Article 122–8.

7 For instance, Scotland has a minimum age of criminal responsibility of 8, but does not allow the prosecution of any child under 12 and children between 12 and 16 can only be prosecuted with permission of the Lord Advocate, Criminal Procedure (Scotland) Act 1995, s 41 and s 41A, as amended by Criminal Justice and Licensing (Scotland) Act 2010, s 52.

8 For instance, according to the French Penal Code, Article 122–8, while maintaining that any minor able to understand what they are doing is wrong is criminally responsible for the felonies, misdemeanours or petty offences for which they have been found guilty, restricts the measures available depending on the age of the minor. The educational measures available for 10- to 18-year-olds are specified in the legislation as well as the penalties that may be imposed on those aged between 13 and 18, taking into account the reduction in responsibility resulting from their age.

9 The rebuttable presumption of *doli incapax* was abolished by the Crime and Disorder Act 1998, s 34.

What do we mean by the age of criminal responsibility?

The age of criminal responsibility can be understood in various ways.[10] One understanding relates to the age at which it is thought that children are old enough to be processed within the criminal justice system in the same way as adults. This can mean the age at which it is thought that children no longer need to be dealt with in specialised children's courts with modified procedures. It may also mean the age at which it is thought that the young can be punished in the same way as adults, i.e. the age at which it is thought that the young no longer deserve, or are amenable to, modified, education/welfare-oriented measures.[11] This understanding of the age of criminal responsibility is less, if at all, concerned with the capacities of the individual child and more with the appropriateness of certain procedures and measures for children in general.

A different understanding of the age of criminal responsibility relates to the fundamental understanding of the nature of criminal law and culpability. It is based on the idea that, unless a person has certain capacities, they should not be liable to conviction and punishment in criminal proceedings. Hale explained the capacities that underlie the concept of criminal responsibility in 1736:

> Man is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath a capacity to obey . . . And because liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will, it follows that where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions. But general notions or rules are too extravagant and undeterminate . . . and therefore it hath been always the wisdom of the states and law-givers to prescribe limits and bounds to these general notions, and to define what persons and actions are exempt from the severity of the general punishments of penal law in respect of their incapacity or defect of will.[12]

The examples that Hale gives in his work, *Pleas of the Crown*, of where capacity is thought to be lacking are infancy (ch III) and 'madness and lunacy' (ch IV). Criminal responsibility is, according to this conceptualisation, based on a cognitive element, the ability to orientate oneself on legal norms, to understand what the law requires one to do or not to do and the ability to understand the nature of the act committed and its consequences.[13] It is also based on a volitional element, the ability to control one's actions and thus the ability to behave according to the legal norms recognised.[14] In the case of adults it is

---

10 See, for example, Scottish Law Commission, *Report on Age of Criminal Responsibility* (Scot Law Com No 185 Stationery Office 2002). See also the webpage of the British government which, under the heading 'Age of criminal responsibility', notes that the age of criminal responsibility is 10 and on the same page also details how children aged 10 up to the age of 18 are treated differently from adults <www.gov.uk/age-of-criminal-responsibility>.

11 This does not deny the fact that some measures available for young people are punitive.

12 Matthew Hale, *The History of the Pleas of the Crown* vol 1 (1736: reprint Professional Books 1971) 14–15.

13 Although in English law there is a tendency to only focus on the former capacity, the capacity to understand. For discussion of this, see Thomas Crofts, *The Criminal Responsibility of Children and Young Persons* (Ashgate 2002); Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' (2011) 75 Journal of Criminal Law 289–308.

14 H L A Hart, *Punishment and Responsibility* (OUP 1968) 218; Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory' 64 Modern Law Review (2001) 350, 353.

assumed that these abilities are given[15] and it can be taken that they are criminally responsible for what they do. In exceptional situations where this is not the case, such as where the person suffers from some mental impairment, the law allows a defence. In contrast, children are in the process of developing these abilities and lacking these abilities is not an exception to the norm, rather it is a stage 'through which we must all of us have passed before attaining adulthood and maturity'.[16] According to this understanding, the age of criminal responsibility relates to the age at which it is thought that a child has the capacities required to be criminally responsible and thus can appropriately be found guilty of criminal offences and subjected to sanctions of the criminal justice system.

Some consider that getting the age of criminal responsibility in the former sense right is more important than fixing the age in the latter sense at an appropriate level. The Independent Commission on Youth Crime and Antisocial Behaviour in the UK did not, for example, recommend raising the age level of criminal responsibility in England and Wales because it was of the view that even jurisdictions reliant on criminal justice proceedings 'apply welfare-oriented principles and can refer children to protective and educative measures, including secure care'.[17] This sort of view might also go some way to explaining why there is a good deal more discussion about the age at which the young should be dealt with by separate modified proceedings, at what age and under what circumstances young people should be diverted from formal proceedings and what measures are appropriate once the young are drawn into the criminal justice system, while much less attention has been paid to the concept of criminal responsibility, as it relates to a child's capacity to be held responsible.[18]

Such a view is, however, problematic because it insufficiently acknowledges that the system that frames these modified procedures and sanctions, and diversionary measures, is still a criminal justice system regardless of how tempered it is by welfare considerations. This means that diversionary measures, such as warnings, cautions and restorative measures, while providing important alternatives to prosecution,[19] do not completely prevent prosecution. They can still have criminal justice consequences, for instance, they may only be applied a limited number of times and may be taken into consideration to determine whether or not to prosecute a child in subsequent cases. If conditions that are attached to diversionary or restorative measures are not complied with, they may trigger prosecution for the original offence.

Thus, while there is no doubt that it is essential to consider how the criminal justice system should be modified to best address offending by young people and what measures might be appropriate to divert young people from prosecution, it must be remembered that, whatever modifications are made, a criminal justice system functions on the basis of individual responsibility and choice and aims to ensure that any measures applied are

15 Packer calls the idea of free will not a statement of fact but 'a value preference having very little to do with the metaphysics of determinism and free will'. Herbert Packer, *The Limits of the Criminal Law* (Stanford University Press 1968) 74.

16 Bridge LJ in *R v Camplin* [1978] 1 All ER 1236, 1241.

17 Independent Commission on Youth Crime and Antisocial Behaviour, *Time for a Fresh Start* (2010) 14 <www.police-foundation.org.uk/uploads/catalogerfiles/independent-commission-on-youth-crime-and-antisocial-behaviour/fresh_start.pdf>.

18 Julia Fionda, 'Youth and Justice' in J Fionda (ed), *Legal Concepts of Childhood* (Hart 2001) 77–97, 85–86; Gerry Maher, 'Age and Criminal Responsibility' (2005) 2 Ohio State Journal of Criminal Law 493–512.

19 Restorative measures, such as conferencing, can take many forms and be described in various ways, they may also take place as diversionary measures or as post-conviction measures.

based on the guilty commission of a criminal act.[20] The criminal justice system can pose a heavy and stigmatising burden on a child and it is well documented that early involvement in the criminal justice system can have negative impacts on a child and lead to enmeshment within that system.[21] It is therefore vital that attention is paid to the fundamental question of the age at which it appropriate to presume that children lack the capacity to be responsible for their criminal behaviour and hence should be completely protected from criminal proceedings. The following will trace the background to age of criminal responsibility in Australia as it relates to the capacity to be held responsible.

The common law position of the age of criminal responsibility

Until changes made in the twentieth century in England and some other common law countries (which will be discussed in the following section), the common law approach was to have two age levels of criminal responsibility; a lower one where the child was absolutely presumed incapable of guilt and a higher age period where the presumption of incapacity (or so called presumption of *doli incapax*) was rebuttable. Traditionally, the lower age level (age of absolute criminal incapacity or minimum age of criminal responsibility) was set at 7 and the higher period of conditional criminal responsibility was set at 14. In comparison to jurisdictions influenced by civil law, these age levels seem relatively low and it is interesting to briefly trace how the common law determined these age levels.

From the earliest times, allowance has been made for the differential treatment of children who commit crime or who are involved in crime. As far back as the time of King Ine (688–725) the law stated that a boy of 10 could be privy to theft[22] and the law of King Aethelstan (925–935) held that, if a child above the age of 12 stole an item valued at over eight pence, he should not be spared punishment.[23] This protection under the law of King Aethelstan was not, however, absolute, because if the child defended himself or attempted to flee then he was not to be spared punishment.[24] At the *Judicia civitatis Lundoniae* King Aethelstan also made it known that he had heard that young men had been killed for stealing and that he found this cruel. He therefore commanded that no person under 15 years of age should be slain, provided that the child surrendered him or herself and did not make resistance or flee.[25] The fact that children could be punished below these age levels dependent on their behaviour casts doubt on the accuracy of Blackstone's statement that '[b]y the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when *first* understanding might open'.[26] Rather than being a minimum

---

20 For further discussion, see, for example, Michael Freeman, *The Rights and Wrongs of Children* (Frances Pinter 1983) 81–86.

21 See, for example, Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (2012) <www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJ_Youth_Justice_Full_Report.pdf>.

22 Laws of King Ine 7.2 reproduced in Wiley B Sanders (ed), *Juvenile Offenders for a Thousand Years: Selected Readings from Anglo-Saxon Times to 1900* (University of North Carolina Press 1970) 3. This law related to stealing and provided that if the wife and children had knowledge that the head of the household had stolen then they should all go into slavery. Thus, noting that a boy of 10 could be privy to theft suggests that below this age he was to be spared such punishment.

23 Laws of King Aethelstan (Council of Greatanlea) reproduced in ibid. See also Benjamin Thorpe (ed), *Ancient Law and Institutes of England* (Lawbook Exchange 1840) 85.

24 Laws of King Aethelstan (Council of Greatanlea) reproduced in Sanders (n 22) 3.

25 Laws of King Aethelstan (*Judicia civitatis Lundoniae* 12, 1) reproduced in ibid 3–4.

26 William Blackstone, *Commentaries on the Laws of England* Book 4 (Clarendon Press 1769) ch 2 (emphasis added). For more discussion see Thomas Crofts, *The Criminal Responsibility of Children and Young Persons* (Ashgate, 2002).

age of criminal responsibility, as we would understand it today, it indicates a view that children generally deserved protection from punishment unless there was some form of behaviour that indicated that they deserved treating as an adult below that age level.

These age levels in Anglo-Saxon laws seem, at a first reading, relatively high compared to the age levels that form the basis of the modern common law approach. Walker finds that this might be because the test for whether a child had 'discretion' would have been very practical in those times, such as could the child count to 12.[27] He notes that: '[I]t is tempting to generalize and say that the test was whether he had the understanding of an adult.'[28] He attributes what he sees as a lowering of the age of criminal responsibility to the influence of Roman Law:

> It was not until the law had come firmly under the influence of the Continental Church, and thus of Roman Law, that the age of seven is mentioned. This as the age at which both Roman Law and the Church assumed that a child begins to know good from evil.[29]

Evidence can be found that does suggest, as noted by Walker, that reference to the age of 7 is due to the influence of Roman Law. Roman Law is thought to have begun to influence common law more clearly through legal writers such as Glanville[30] and Bracton[31] in the twelfth and thirteenth centuries.[32] Several early cases do mention the age of 7, for instance, in a case from 1313–1314 Spigurnel J stated that a child charged with homicide ought not to suffer judgment if he did the deed before he was 7, because he does not know of good and evil, but after that age he should be able to have such knowledge.[33] The mentioning of the age of 7 does not, as suggested by Walker, appear to have meant a reduction in the age of criminal responsibility. Rather, it represents the concretisation of an age level under which a child could never be subject to punishment, thus, what we would now call the age of absolute criminal incapacity or minimum age of criminal responsibility. Above this age a child was still generally protected from punishment, as in earlier times, unless there were indicators that he or she had knowledge of good and evil. This represents what we might now call the age of conditional criminal responsibility, where the presumption of *doli incapax* applies.

It seems clear that from ancient times there has always been a conditional age period where children were generally protected from punishment and, from around the time of the influence of Roman Law, common law began to distinguish two age levels. It continued the higher conditional age period where the child's liability to conviction and punishment depended on an assessment of his or her ability to discern good from evil, but it also introduced a lower age level at 7 under which there was absolute protection from prosecution. The age at which the upper conditional age period ended and the child's liability to punishment was no longer dependent on an assessment of whether he or she understood the difference between good and evil seems to have been unclear for a

27 Nigel Walker, 'Childhood and Madness: History and Theory' in Allison Morris and Henri Giller (eds), *Providing Criminal Justice for Children* (Edward Arnold 1983) 19–35, 23.

28 Ibid 23.

29 Ibid.

30 Ranulf de Glanvill, *Tractatus de Legibus et Consuetudinibus Regni Angliae* (Treatise on the Laws and Customs of the Kingdom of England) (c 1180–1190).

31 Henry de Bracton, *De Legibus et Consuetudinibus Angliae* (On the Laws and Customs of England) c 1235.

32 See Thomas Scrutton, *The Influence of the Roman Law on the Law of England* (CUP 1885) 2, 74–121 (particularly 106–12 in relation to Bracton on criminal law). Scrutton notes that there are two distinct periods in which Roman Law influenced English Law, separated by the arrival of Vacarius in England in 1143 who gave lectures on Roman Law at Oxford around 1149.

33 The Eyre of Kent, 6 & 7 Edward II (1313–1314), *Selden Society* XXIV 109.

relatively long period. Some early authorities do not mention a specific upper age level at all while others vary between 12 and 14.[34] Kean explains why this may have been the case:

> In all probability it was well understood that in his early years a child was too young to be punished at all, and that later, and until the age of puberty, special *dolus* had to be proven; whether a child was old enough to be convicted or not, and whether he was of the age of puberty or not, were questions of fact to be decided by the judge in each case.[35]

It seems clear that by the seventeenth century the upper age level had become fixed at 14. Kean is of the opinion that this is because 'Coke dogmatized the results of the Middle Ages and subsequent lawyers took his word.'[36] This was the state of the common law at the time that it was received in Australia.

Background Australian law

When Australia began to be colonised in 1788, it was deemed to be *terra nullius*[37] and therefore it was held to have been settled rather than ceded or conquered. It followed from this that the common law in existence at the time in England was held to be applicable in the colony of New South Wales. Blackstone explained how this process was understood to operate according to 'the law of nature, or at least upon that of nations':

> For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately in force there. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony.[38]

As a result, the age of criminal responsibility as fixed in common law became the law in the Australian colonies. When the individual colonies became states upon forming the Commonwealth of Australia in 1901, they retained criminal jurisdiction which means that the laws relating to the age of criminal responsibility are a matter for each state and territory.[39]

---

34 It is interesting to note that the 1619 edition of Michael Dalton's *Countrey Justice* does not specify the upper age level when there was to no longer be protection from punishment if the infant lacked knowledge of good and evil, but the 1682 edition does specify that this protection did not apply from the age of 14: Michael Dalton, *Countrey Justice* (1682) 350. Similarly, the first edition of William Lambard's *Eirenarhca* (1581 at 218) does not mention an upper age level, but the third edition mentions 12: William Lambard, *Eirenarhca* (1588) 234–35.

35 A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53 Law Quarterly Review 364, 368.

36 Ibid 369.

37 According to Brennan J in the High Court of Australia in *Mabo [No 2] v Queensland* (1992) 175 CLR 1 [1992] HCA 23, under the enlarged notion of *terra nullius*, even a land that was inhabited was treated as a 'desert uninhabited country' if the 'indigenous inhabitants were not organized in a society that was united permanently for political action' [32]. If this were otherwise, the territory could not be settled, but would have to have been acquired by conquest or cession and as such local law would continue to apply until modified. However, Brennan J noted at [37]–[38] that: 'It is one thing for our contemporary law to accept that the laws of England, so far as applicable, became the laws of New South Wales and of the other Australian colonies. It is another thing for our contemporary law to accept that, when the common law of England became the common law of the several colonies, the theory which was advanced to support the introduction of the common law of England accords with our present knowledge and appreciation of the facts . . . The facts as we know them today do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory.'

38 William Blackstone, *Commentaries of the Laws of England* Book I (Clarendon Press 1765) ch 4, 106–08.

39 The Australian Constitution (Commonwealth of Australia Constitution Act) details in s 51 the legislative powers of the Commonwealth legislature.

The twentieth-century started with a common minimum age of criminal responsibility of 7 across Australia and ended the century with a common age level of 10, but throughout the century there were considerable variations in the minimum age level. Some jurisdictions more clearly followed England and Wales by increasing the age level from 7 to 8 towards the middle of the century and then in the latter half of the century to 10, while others retained the age of 7 for longer and went straight from 7 to 10. The initial change in minimum age in England and Wales from 7 to 8 in 1933[40] was followed in New South Wales in 1939,[41] South Australia in 1941[42] and Victoria in 1949.[43] The increase to the age of 10 which occurred in England and Wales in 1963[44] also occurred considerably later in Australia, mainly in the late 1980s to early 1990s (New South Wales in 1987,[45] Western Australia in 1988,[46] Victoria in 1989[47] and South Australia in 1993).[48] There were some outliers to this general trend, with Queensland raising the age much earlier in 1976[49] and Tasmania and the Australian Capital Territory much later in 2000.[50]

In contrast, the upper age level of conditional criminal responsibility, where the rebuttable presumption of *doli incapax* applies, has remained where it was originally set in common law in the seventeenth century in all Australian jurisdictions, aside from Queensland.[51] This contrasts, to England and Wales, where the Crime and Disorder Act 1998 abolished the presumption of *doli incapax*.[52] It may seem surprising that this change to abolish the presumption of *doli incapax* was not followed anywhere in Australia given that Australian jurisdictions have tended to follow, albeit generally with a delay, reforms relating to the age of criminal responsibility in England and Wales. The following will explain the current law in relation to the age of criminal responsibility across Australia before showing that, while there might have been appetite for a reduction in the protections provided by the rebuttable presumption of *doli incapax* in the late 1990s and early 2000s in some Australian jurisdictions, more recent debates have centred on raising

40 Children and Young Persons Act 1933, s 50.

41 Child Welfare Act 1939 (NSW), s 126.

42 Juvenile Courts Act 1941 (SA), s 23.

43 Crimes Act 1949 (Vic), s 9.

44 Children and Young Persons Act 1933, s 50 as amended by Children and Young Persons Act 1963, s 16(1). There was a provision in the Children and Young Persons Act 1969, s 4, which would have raised the age at which a child could be prosecuted to 14 for all offences other than homicide. However, this provision was never implemented and was later repealed.

45 Children (Criminal Proceedings) Act 1987, s 5.

46 Criminal Code (WA), s 29, first para, as amended by the Acts Amendment (Children's Court) Act 1988, s 44.

47 Children and Young Persons Act 1989, s 127.

48 Young Offenders Act 1993, s 5.

49 Criminal Code Amendment Act 1976 (Qld), s 19.

50 Criminal Code (Tas), s 18(1), as amended by Youth Justice (Consequential Amendments) Act 1999 (Tas), s 3; Criminal Code 2002 (ACT), s 25, amending the Children and Young People Act 1999 (ACT), s. 71(1) (repealed).

51 Aside from Queensland where there was an increase to 15 in 1976, Criminal Code Amendment Act 1976, s 19. This was reduced to 14 in 1997, Criminal law Amendment Act 1997, s 12.

52 With the result that in England and Wales a child goes from being absolutely criminally incapable to being fully criminally responsible on their 10th birthday. For discussion of whether the Act merely abolished the presumption of *doli incapax* but left in place a common law defence of *doli incapax*, see Nigel Walker, 'The End of an Old Song' (1999) 149 New Law Journal 64; *DPP v P* [2007] EWHC 946 (Admin); *R v T* [2008] EWCA Crim 815; Natalie Wortley, 'Hello Doli . . . Or is it Goodbye?' [2007] Journal of Mental Health Law 234; Thomas Crofts, 'Taking the Age of Criminal Responsibility Seriously in England' (2009) 17 European Journal of Crime, Criminal Law and Criminal Justice 267–91.

the minimum age level. Raising the minimum age level could, however, pose a threat to the rebuttable presumption of *doli incapax* and reduce protection available for children.

Current approach to the age of criminal responsibility

Despite the fact that the age of criminal responsibility is a matter for each state and territory in Australia to determine, since 2000 there has been uniformity in setting the minimum age of criminal responsibility at 10 and the conditional age of criminal responsibility at 14. For children in this conditional age period (aged 10 but not yet 14), either the common law presumption of *doli incapax* applies or legislative equivalents. The presumption of *doli incapax* and the equivalent legislative provisions operate in much the same way as they did in England and Wales. For instance, the Criminal Codes of Queensland and Western Australia provide that:

> A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.[53]

In order for this presumption to be rebutted, or for the legislative equivalent to be satisfied, the prosecution must bring proof[54] alongside all other elements of the offence, including any necessary mental element, that the child understood that what they were doing was seriously wrong as opposed to merely naughty.[55] This means that the presumption must be rebutted beyond reasonable doubt.[56] In *R v ALH*, Cummins AJA took the view that the prosecution should prove that a child understood that the act was seriously wrong as part of the mental element of the offence.[57] This is not, however, the traditional (and preferable) interpretation, which requires that there is proof of such understanding separate from proof of any necessary mental element.[58] Being able to understand that an act is seriously wrong is distinct from forming a mental element in relation to the physical element(s) of the offence. As noted by Williams, it is possible to do an act with intention without knowing it is wrong.[59]

While in England and Wales there was a degree of discussion about what sort of understanding this required, i.e. whether this required an understanding of the moral or legal wrongfulness of the act,[60] Australian courts have consistently interpreted the essential understanding in line with that required in cases of insanity.[61] It is not necessary to prove that the child understood that the act or omission was against the law, but it must

---

53 Criminal Code of Queensland, s 29(2); Criminal Code of Western Australia, s 29, second para. Broadly similar provisions apply in the Criminal Code of the Northern Territory, s 38(2); Criminal Code of Tasmania, s 18(2); Criminal Code of the Australian Capital Territory, s 26; and the Criminal Code of the Commonwealth, s 7.2.

54 A relatively common mistake is to refer to the presumption as a defence. This would indicate that the defence would need to raise this issue and bring proof that the child did indeed lack the capacity to be criminally responsible. This is not, however, the case, as noted as early as the eighteenth century by Hale (n 12) 27: 'It is necessary that very strong and pregnant evidence ought to be to convict one of that age, and to make it appear he understood what he did.' See also *C v DPP* (1996) AC 1, 38; *RP v R* [2015] NSWCCA 215, [4].

55 *R v JA* [2007] ACTSC 51.

56 *C v DPP* [1996] AC 1, 38; [1995] 2 All ER 43, 62; *RP v R* [2015] NSWCCA 215, [4].

57 *R v ALH* [2003] VSCA 129 per Cummins AJA.

58 Glanville Williams, *Criminal Law: The General Part* 2nd edn (Stevens 1961) 814.

59 Ibid 815, fn 8.

60 *C v DPP* [1995] 2 All ER 43, 57; see also Williams (n 58) 817–18; T Crofts, *The Criminal Responsibility of Children and Young Persons* (Ashgate 2002); Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2013) 13 Youth Justice, 145–60.

61 *R v M* (1977) 16 SASR 589.

be shown that the child understood that it was wrong according to the ordinary standards of reasonable people.[62] Understanding that the act was disapproved of by adults would not be sufficient because '[a]dults frequently disapprove of breaches of decorum and good manners on the part of children . . . without regarding the acts or omissions in question as wrong in the relevant sense'.[63]

Many of the principles in Australia regarding what evidence is thought sufficient and appropriate to rebut the presumption of *doli incapax* find their basis in cases from England and Wales. Alongside the basic proposition that the presumption must be rebutted to the criminal standard, i.e. beyond reasonable doubt, is the rule that the required understanding 'must be proved by express evidence, and cannot in any case be presumed from the mere commission of the act'.[64] The correctness of this approach was questioned in Australia in *R v ALH* where Callaway JA took the view that authorities suggesting this approach 'are wrong in principle and should not be followed'.[65] Similarly, Cummins AJA in the same case felt that, provided adult judgements are not attributed to children, 'there is no reason in logic or experience why the proof of the act charged is not capable of proving requisite knowledge'.[66] This is because some acts are so 'serious, harmful or wrong' that they establish the required understanding, while others are less obvious and so may be equivocal or insufficient to establish the understanding.[67] The views of Callaway JA and Cummings AJA do not, however, seem to have been widely accepted. In *R v JA*, Higgins CJ noted the arguments raised by Callaway JA and Cummins AJA in *R v ALH* and commented that this 'decision should not, however, be taken to establish that proof of the voluntary and intentional commission of the acts charged will constitute *prima facie* evidence of *doli capax*'.[68] The reason for not allowing acts themselves to be used as evidence alone is to prevent assumptions about what every child would have known about the wrongfulness of the act from being used to rebut the presumption and ensure that there is investigation of the individual child's capacity. While evidence of the acts constituting the offence should not alone be sufficient to rebut the presumption, evidence of factors surrounding the offence (e.g. the degree of planning, whether the child tried to hide the crime, whether there was pressure to commit the crime etc.)[69] may be relevant. A major form of evidence comes from what the child says to police or others.[70] Other factors that may be adduced to rebut the presumption include expert testimony from a psychologist or psychiatrist,[71] evidence of family background,[72] educational level,[73] social environment and previous convictions for similar offences.[74]

62 Ibid; *R v Whitty* (1993) 66 A Crim R 462; *R v JA* [2007] ACTSC 51 at [82]; *RH v DPP* (NSW) [2013] NSWSC 520, [17]–[19].

63 *R v M* (1977) 16 SASR 589, 591.

64 Erle J in *Smith* (1845) 9 JP 682.

65 *R v ALH* [2003] VSCA 129. This criticism and the fact that it was at odds with the earlier law was noted in *BP v* R [2006] NSWCCA172, but the court did not feel it necessary to resolve the conflicting views on whether the acts constituting the offence could alone establish sufficient understanding.

66 *R v ALH* [2003] VSCA 129.

67 Ibid.

68 *R v JA* [2007] ACTSC 51, [81]. See also *RH v DPP* (NSW) [2013] NSWSC 520, [17]–[19]; *RP v* R [2015] NSWCCA 215, [35].

69 *RP v* R [2015] NSWCCA 215.

70 *BP v* R, *SW v* R [2006] NSWCCA 172; *RH v DPP (NSW)* [2013] NSWSC 520.

71 *R v JA* [2007] ACTSC 51.

72 *M v AJ* (1989) 44 A Crim R 373.

73 *R v JA* [2007] ACTSC 51.

74 *R v M* (1977) 16 SASR 589; *R v F* (1998) 101 A Crim R 113; *R v GW* [2015] NSWDC 52.

The overall aim should be to gather evidence from as many sources as possible to gain an overall picture of the child's capacities.[75]

Recent debate

In Australia the minimum age of criminal responsibility and the presumption of *doli incapax* have been subject to a degree of criticism. In recent years there have been calls for an increase in the minimum age of criminal responsibility and there has been criticism of the conditional age period and presumption of *doli incapax* for being both over-protective and under-protective of young people.

Minimum age of criminal responsibility

In 1997 the Australian Law Reform Commission (ALRC) and the Equal Opportunity Commission (EOC) published the report *Seen and Heard* which called on all Australian jurisdictions to agree on a uniform age of criminal responsibility. It was felt wrong that a child could be liable to be charged in one state but not another for the same behaviour only because of his or her age.[76] The ALRC and EOC came to the conclusion that the obvious choice for the minimum age was 10 because most Australian jurisdictions had already set the minimum at that level and this was consistent with the age in other common law countries.[77] This recommendation was followed, as noted earlier, by the two jurisdictions with lower age levels (Tasmania and the Australian Capital Territory) in 2000.

Despite the fact that most Australian jurisdictions had set the age at 10, as had England and Wales, it is still perhaps somewhat surprising that the ALRC and EOC did not recommend a higher minimum age of criminal responsibility given that the report also notes that the UN Committee on the Rights of the Child (UN Committee) had expressed concern over the low age level in the UK and had asked Australia if it had plans to raise the minimum age level.[78] Indeed, when the UN Committee heard that Australia was 'planning to harmonize the age of criminal liability and raise it in all the states to 10', it commented that it believed that this age level was still too low.[79] This is a position that the UN Committee has maintained (not just in relation to Australia)[80] and it has repeatedly recommended that Australia '[c]onsider raising the minimum age of criminal

75 *RP v R* [2015] NSWCCA 215, [65].

76 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84 Australian Government Publishing Service 1997) [18.16].

77 Ibid [18.13], [18.16].

78 Ibid [18.15] referring to UN Committee, *Report of the Committee on the Rights of the Child: Sixth to Eleventh Sessions* (UN 1996) 73, 76, and 'Letter to the Australian Government from the Committee on the Rights of the Child' 10 February 1997.

79 UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia* (UN Doc CRC/C/15/Add79 1997) para 29 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f15%2fAdd.79&Lang=en>.

80 For instance, when legislation was drafted in South Africa, which proposed to raise the minimum age from 7 to 10 years, the UN Committee commented that 'it remains concerned that a legal minimum age of 10 years is still a relatively low age for criminal responsibility': UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: South Africa* (UN Doc CRC/C/15/Add122 2000) para 17 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f15%2fAdd.122&Lang>.

responsibility to an internationally acceptable level'.[81] The UNCRC does not specify any age in calling on nations to establish a minimum age 'below which children shall be presumed not to have the capacity to infringe penal law'.[82] Neither do the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), although these rules do state that 'the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental, and intellectual maturity'.[83] The Commentary on this rule also notes that '[i]n general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.)'.

By 2007 the UN Committee felt that some guidance on the minimum internationally acceptable age level was necessary given that there were such wide variations among state parties with some having very low age levels of 7 or 8 and others having 'the commendable high level of 14 or 16'.[84] The UN Committee concluded that 12 is the minimum internationally acceptable age level, but in doing so it emphasised that states should see this as the absolute minimum and work towards a higher age level of 14 or 16.[85] It took the view that such an age level was preferable because it 'contributes to a juvenile justice system which, in accordance with article 40(3)(b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings'.[86] It is also in line with the Beijing Rules, which note that there should be a correlation between the age of criminal responsibility and the age at which a child is deemed to have other civic rights and responsibilities.

Since that time arguments have been advanced for an increase in the minimum age of criminal responsibility to 12 throughout Australia. The latest example is a report entitled *A Brighter Tomorrow: Keeping Indigenous Kids in the Community and Out of Detention in Australia* released in 2015 by Amnesty International which recommends that the Commonwealth government take action to fulfil Australia's international obligations under the UNCRC and to address the crisis of over-representation of Indigenous children in detention. The report finds that Indigenous children are 26 times more likely to be in detention than non-Indigenous youth.[87] While the overall rate of children in detention in Australia is relatively low (975 young people aged between 10 and 17 were in detention on an average day in 2012–2013),[88] the rate of over-representation is particularly bleak for younger

81 UN Committee on the Rights of the Child, *Committee on the Rights of the Child: Concluding Observations: Australia* (UN Doc CRC/C/15/Add268 2005) para 74a <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f15%2fAdd.268&Lang=en>; UN Committee on the Rights of the Child, *Committee on the Rights of the Child: Concluding Observations: Australia* (UN Doc CRC/C/AUS/CO/4 2012) para 84(a)) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUS%2fCO%2f4&Lang=en>.

82 Article 40.3, UNCRC <www.refworld.org/docid/3ae6b38f0.html>.

83 Rule 4.1, Beijing Rules <www.refworld.org/docid/3b00f2203c.html>.

84 UN Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice* (44th session UN Doc CRC/C/GC/10 25 April 2007) para 30 <www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

85 Ibid para 32.

86 Ibid para 33.

87 Amnesty International, *A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia* (2015) 5 <www.amnesty.org.au/images/uploads/aus/A_brighter_future_National_report.pdf>. This refers to Australian Institute of Health and Welfare, 'Youth Detention Population in Australia' Juvenile Justice Series No 16 (2014) <www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675>.

88 Australian Institute of Health and Welfare, 'Youth Justice in Australia 2012–13' Bulletin 120, Cat No AUS 179 (2014) 5 <www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129546897>.

Indigenous children. The youngest cohort makes up 'more than 60 percent of all 10-year-olds and 11-year-olds in detention in Australia in 2012–13'.[89] One measure which the report recommends in order to address over-representation is that the Commonwealth government legislates to increase the minimum age of criminal responsibility across Australia to 12.[90]

Conditional age of criminal responsibility and presumption of *doli incapax*

Despite the fact that the presumption of *doli incapax* has been subject to a degree of criticism, particularly in recent times,[91] it has remained relatively stable throughout history. Debate around the continued need for the conditional age period and presumption of *doli incapax* has tended to peak in the wake of concern over specific cases of children committing particularly serious crimes and/or around election times with governments promising to crack down on youth crime. It is well documented, for instance, that the abolition of the presumption of *doli incapax* in England and Wales indirectly followed the public alarm over the *Bulger* case.[92] Similarly, in New South Wales there was discussion over the future of the presumption of *doli incapax* following the prosecution of an 11-year-old[93] for manslaughter when he pushed a 6-year-old child, Corey Davis, into a river which led to his death in 1999. This led to the Criminal Law Review Division of the New South Wales Department of Attorney-General publishing a discussion paper containing options for reforming the presumption of *doli incapax*.[94] In the same year a Bill was laid before the Parliament of Queensland which proposed to reverse the presumption of *doli incapax*, such that the prosecution would not need to rebut the presumption, but the child could raise incapacity as a defence.[95] A few years later, a Bill in Western Australia sought to amend s 29 of the Criminal Code of Western Australia to include a requirement that all first-time offenders undertake counselling on what constitutes an unlawful act or omission and what the potential consequences of engaging in such behaviour are. This then fed into the second proposed amendment which provided that 'a person under the age of 14 years who is a repeat offender at the time of doing the act or making the omission, has the capacity

---

89 Amnesty International (n 87) 5.

90 While the Commonwealth government does not have general criminal jurisdiction it does have jurisdiction over international obligations and therefore could arguably pass criminal laws to give effect to such obligations. It is, however, highly unlikely that the Commonwealth government would take such a step and override state and territory laws: for discussion, see Thomas Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27 Current Issues in Criminal Justice 123.

91 Although criticism is not limited to recent times. For instance, as early as 1883 James Fitzjames Stephens criticised that the rule was 'practically inoperative, or at all events operates seldom and capriciously': *A History of the Criminal law of England* vol 2 (Macmillan 1883) 98. In 1954 Glanville Williams commented that the *doli incapax* presumption was of obsolete character considering the changes made in the way children were dealt with by the criminal system: 'The Criminal Responsibility of Children' [1954] Criminal Law Review 493–500, 493. In 1960 the Ingelby Committee recommended setting aside the presumption because of its doubtful value for any child: Home Office, *Report of the Committee on Children and Young Persons* (Cmnd 1191 HMSO 1960) para 94. Similarly, the Law Commission saw no case for retaining the presumption in the draft criminal code in 1985: *Commentary on the Draft Criminal Code* (Law Com No 143 HMSO 1985) para 11.22. The presumption was also subject to criticism in a range of cases prior to *C v DPP* [1995] 1 Cr App R 118, in which Laws J proclaimed it no longer part of the law of England, before it was restored by the House of Lords, e.g. *JBH and JH v O'Connell* [1981] Crim LR 632 and *A v DPP* [1992] Crim LR 34.

92 See for instance, Michael Freeman, 'The James Bulger tragedy: Childish Innocence and the Construction of Guilt' in Anne McGillivary (ed), *Governing Childhood* (Ashgate 1997) 123.

93 He was 10 at the time of the incident.

94 New South Wales Attorney-General's Department, Criminal Law Review Division, *A Review of the Law on the Age of Criminal Responsibility of Children* (Discussion Paper 2000).

95 Criminal Code Amendment Bill 1999 (Qld).

to know that he ought not to do the act or make the omission'.[96] Calls for reform have also come from members of the judiciary, for instance, Lerve DCJ called for either the presumption of *doli incapax* to be abrogated, the age level reduced to 12 or a legislative change to allow a previous finding of guilt to be sufficient to rebut the presumption without any further evidentiary requirement.[97]

Such proposals for reform of the presumption of *doli incapax* have often been based around common-sense claims, unsupported by any research, that children now develop more quickly than in previous times. For instance, during debate on the law in Queensland, it was said that:

> I believe it would be a difficult task to find a child aged 10 to 14 years who does not know the difference between right and wrong according to what the community would find reasonable, especially in a time when it is clear that the incidences of children, sometimes younger than 10, being involved in serious crime are definitely on the increase.[98]

Similarly, in support of the proposed amendment in Western Australia it was argued that 'the majority of children in this age bracket have a reasonable understanding of what is right and what is wrong'.[99]

Another common argument is that the presumption must be abolished because it is over-protective of young people and hinders their prosecution. For instance, in the lead-up to the 2007 elections in New South Wales, the then leader of the New South Wales opposition promised to reduce the (conditional) age of criminal responsibility if the Liberal Party were elected because, in his view, the current age of 14 is 'a severe impediment to policing and responding to criminal behaviour by very young children'.[100] This argument typifies the belief that young children should be drawn into the criminal justice system and made responsible for criminal behaviour. It goes hand in hand with the claim that children do not need the protection that the presumption of *doli incapax* provides because the criminal justice system is no longer as punitive as in former times.[101]

In contrast to arguments that the presumption is overly protective of young people is the argument that it is insufficiently protective. For instance, the ALRC and EOC noted that the presumption of *doli incapax* is problematic because:

> . . . it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.[102]

Despite these problems, the ALRC and EOC recommended that the presumption should be retained and placed on a statutory footing in all Australian jurisdictions.[103] There is a real concern that the presumption does not provide a great deal of protection and is

96 Criminal Code Amendment Bill No 3 2003 (WA).

97 *R v GW* [2015] NSWDC 52, [41]–[46].

98 Queensland, *Hansard*, Legislative Assembly, 18 August 1999, p 3179 (Jack Paff).

99 Western Australia, *Hansard*, Legislative Assembly, 3 December 2003, p 14088 (Ross Ainsworth).

100 See Debnam, cited by S Benson, *Daily Telegraph* (Sydney 2 March 2007).

101 See, for example, Home Office, *Tackling Youth Crime: A Consultation Paper* (HMSO 1997).

102 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (n 76) [18.20].

103 Ibid recommendation 195.

relatively easily rebutted.[104] In 2000, during debate on the Criminal Code Amendment Bill 1999 (Qld), it was noted in the Queensland Parliament that '[t]here is not a shred of evidence before this Parliament that this is causing a difficulty in the prosecution of child offenders'.[105] Those in practice also pointed out that '[t]here are no statistics on the number of times *doli incapax* is argued in New South Wales Courts, successfully or otherwise'.[106] Even more concerning is the comment that in Victoria, in rural and regional areas, many practitioners are not even familiar with the principle.[107] Rather than form an argument for abolition of the presumption, these concerns should build a strong argument for taking the presumption seriously and clarifying what the presumption requires and what sort of evidence is appropriate and sufficient to rebut it.

The UN Committee has also been critical of conditional age periods where the presumption of *doli incapax* applies. It considers that this is confusing and could lead to children being treated differently based on the evidence led to rebut the presumption, which might not necessarily require evidence from an expert such as a psychologist.[108] In its view, this rule means that often in practice only the minimum age is applied, particularly for serious offences. The UN Committee therefore prefers a single minimum age level of criminal responsibility set at 12 at least, but preferably higher. It is this approach, rather than arguments that the presumption is over-protective, which represents perhaps the biggest threat to the presumption of *doli incapax* and which could lead to an overall reduction in the protection available to young people. While there are problems with the presumption of *doli incapax*, there are good reasons to retain it.

The first main argument in favour of retaining the presumption of *doli incapax* is a practical one. Although the UN Committee has emphasised that it sees 12 as the minimum acceptable age level, those common law jurisdictions that have raised the minimum age of criminal responsibility have tended to see 12 as the appropriate age level and have abolished the higher conditional age level where the presumption of *doli incapax* applied (e.g. Canada, Ireland and Uganda). While this step enhances protection for 10- and 11-year-olds in making their protection absolute[109] rather than dependent on an assessment of their individual capacities, it removes the potential protection for children aged 12 and 13.

It may well be thought that no child under 12 should ever be dealt with in criminal proceedings regardless of their individual capacity, but that does not mean that all children will be developed enough to have sufficient capacity to be held criminally responsible as soon as they reach the age of 12. Recent research does show that younger children might generally be able to make moral judgements about right and wrong in an abstract context. For instance, an Australian study suggests that children, even from the age of 8, are as capable as 12-year-olds, 16-year-olds and adults 'of appreciating the

104 See, for example, A West, 'Immature Age and Criminal Responsibility' (1998) 19 Queensland Lawyer 56; M Groves, 'Are You Old Enough?' (1996) Law Institute of Victoria Journal 41; Queensland, *Hansard*, Legislative Assembly, 4 October 2000, p 3452 (Matthew Foley, Attorney-General and Minister for Justice and Minister for the Arts).

105 Ibid p 3453 (Matthey Foley, Attorney-General and Minister for Justice and Minister for the Arts).

106 Association of Child Welfare Agencies, *Newsletter*, February 2000 < www.acwa.asn.au/sites/default/files/subsites/acwa/Downloads/ACWA%20News/2000/ACWA%20NEWS%20Feb%202000.pdf>.

107 L Schetzer, Director and Principal Solicitor, National Children's and Youth Law Centre, witness before the Victorian Parliament Law Reform Committee, Inquiry into Legal Services in Rural Victoria, Wodonga, 13 June 2000.

108 UN Committee on the Rights of the Child (n 84) [30].

109 Although it should be noted that in Ireland the protection for 10- and 11-year-olds is not absolute because they can be prosecuted under this age for certain serious offences.

wrongfulness of criminal conduct and differentially evaluating it from mischievous conduct'.[110] However, earlier research has found that, even though children may have the capacity to make moral judgements about right and wrong in an abstract context, those who were most at risk of committing offences often lacked the capacity to use this knowledge to regulate their behaviour.[111] This study by Newton and Bussey found that:

> . . . even though children and adolescents may possess this knowledge [of right and wrong] at younger ages they can be hindered from making intelligent decisions through the influence of psychosocial factors involved in criminal decision making. That is, developmental differences on psychosocial factors such as self-efficacy beliefs can influence children to make poor judgments in relation to delinquent behavior and undermine their knowledge of right and wrong.[112]

Research is also increasingly showing that young people 'are less psychosocially mature than adults in ways that affect their decision-making in antisocial situations'.[113] Adolescence is a period of neuro-developmental immaturity where the young are prone to impulsive, sensation-seeking behaviour with an under-developed capacity to gauge the consequence of actions.[114] As a report by the Sentencing Advisory Council on sentencing of young people in Victoria notes:

> The frontal lobe, which governs reasoning, planning and organisation, is the last part of the brain to develop. This is likely to contribute to adolescents' lack of impulse control, although their attraction to risk and the high value they place on the immediate rewards flowing from risky behaviour, as well as their heavy 'discounting' of the future costs of this behaviour, also contribute. Adolescents are very vulnerable to peer pressure (which in turn can strongly affect their risk-taking behaviour), in part due to the importance they place on peers and in part due to neurological and hormonal changes. Scott and Steinberg conclude that although adolescents have roughly the same ability as adults to employ logical reasoning in making decisions by early to mid adolescence, adolescents have far less experience using these skills.[115]

---

110 Paul Wagland and Kay Bussey, 'Appreciating the Wrongfulness of Criminal Conduct: Implications for the Age of Criminal Responsibility' (2015) 20 Legal and Criminological Psychology 13.

111 Nicola C Newton and Kay Bussey, 'The Age of Reason: An Examination of Psychosocial Factors Involved in Delinquent Behaviour' (2012) 17 Legal and Criminological Psychology 75.

112 Ibid 85.

113 Elizabeth Cauffman and Laurence Steinberg, '(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults' (2000) 18 Behavioral Sciences and the Law 741, 759. See also, for example, Carrie Fried and N Dickon Reppucci, 'Criminal Decision Making: The Development of Adolescent Judgment, Criminal Responsibility, and Culpability' (2001) 25 Law and Human Behavior 45; Laurence Steinberg and Elizabeth Scott, 'Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty' (2003) 58 American Psychologist 1009; Kathryn Monahan, Laurence Steinberg and Elizabeth Cauffman, 'Affiliation with Antisocial Peers, Susceptibility to Peer Influence, and Antisocial Behavior during the Transition to Adulthood' (2009) 45 Developmental Psychology 1520.

114 Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (2012) 201 <www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJ_Youth_Justice_Full_Report.pdf>. Furthermore, it has been found that child abuse or neglect can 'impair brain development leading to anxiety, impulsivity, poor affect regulation, hyperactivity, poorer problem-solving and impoverished capacity for empathy': ibid 202.

115 Sentencing Advisory Council Victoria, Sentencing Children and Young People in Victoria (2012) <www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Sentencing%20Children%20and%20Young%20People%20in%20Victoria.pdf>.

This development does not take place at a steady or a constant rate[116] and it is difficult to make generalisations about the abilities of the young and to set fixed age limits. This highlights a second and more fundamental justification for the presumption of *doli incapax*: that it is in line with the concept of criminal responsibility and the reality of young people's development. It is therefore 'a practical way of acknowledging young people's developing capacities. It allows for a gradual transition to full criminal responsibility.'[117] Thus, while the system for addressing criminal behaviour by children is rooted within a criminal justice system, there is a need for some mechanism to prevent young people from being drawn into that system if they are not developed enough to have the capacities required to be held criminally responsible.

The presumption of *doli incapax* serves an important function in ensuring that children are only prosecuted when absolutely necessary. It should, if taken seriously, prevent the police and the courts simply relying on assumptions about what average children might know and understand and ensure that there is a thorough assessment of whether prosecution really is the best way of dealing with the child. This is in line with the basic principle enshrined in the UNCRC for '[w]henever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings'.[118] Those who argue that the presumption should be abolished or weakened so that children can be brought within the reaches of the criminal law tend to minimise or even overlook the dangers associated with punishing children at a young age. In strongly arguing against Australia taking the path of England and abolishing the presumption of *doli incapax*, Cummins AJA comments that some of the criticisms of the rule 'are infected by the therapeutic theory of criminal justice whereby the coercive dealing with children as criminals is held *a priori* to be a benefit to them'.[119]

Conclusion

The age of criminal responsibility is a fundamental legal gatekeeper[120] to the criminal justice system. In jurisdictions which deal with children who commit crimes within criminal justice proceedings, this age should reflect the age at which it is thought that a child is developed enough to be held criminally responsible. Australia, like many other countries profoundly influenced by the common law of England and Wales, has followed the traditional approach of setting two age levels of criminal responsibility. Like England and Wales, the minimum age of criminal responsibility, under which a child can never be subjected to criminal proceedings, was raised from the traditional level of 7 to its current level of 10 over the course of the late twentieth century. While the conditional age period from 10 to 14 and the rebuttable presumption of *doli incapax* has been subject to criticism, intensifying in the late twentieth and early twenty-first century in England and Wales and throughout Australia, unlike in England and Wales, where it was abolished by the Crime and Disorder Act 1998, it has resisted any change in Australia.

Internationally, there is now pressure to raise the minimum age of criminal responsibility to at least 12. This is the age level that the UN Committee finds to be the minimum internationally acceptable age and it is the age level that has been adopted by several common law countries. On either of the understandings of the age of criminal

116 See, for instance, Cauffman and Steinberg (n 113).

117 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (n 76) [18.20].

118 Article 40(3)(b), UNCRC.

119 *R v ALH* [2003] VSCA 129.

120 Of course, there are other gatekeepers, such as police and prosecutors exercising discretion whether or not to pursue prosecution.

responsibility discussed earlier in this article, it is clear that the minimum age of criminal responsibility should be raised to at least 12, but preferably 14 or 16. It is well known that early involvement in the criminal justice system can have severely negative impacts on a child and this is not the best place for dealing with offending behaviour. Recent research also confirms that children into adolescence and beyond may lack the capacities required to be criminally responsible. Furthermore, in a country which has an alarming rate of over-representation of young Indigenous Australians in detention, which shows no sign of abating, there is a clear imperative to raise the minimum age of criminal responsibility to keep young Indigenous children out of the criminal justice system.

These calls for an increase in the minimum age of criminal responsibility and dissatisfaction with how the presumption of *doli incapax* operates (both because it is over-protective and under-protective) of children can undermine the protection available to children. Unlike the abolition of the presumption of *doli incapax* in England and Wales, other common law countries have tended to appear more benevolent by abolishing the presumption of *doli incapax* in combination with an increase in the minimum age of criminal responsibility. However, while securing the protection of 10- and 11-year-olds, such reform removes the conditional protection for 12- and 13-year-olds. The UN Committee has stated that it would prefer nations to set the minimum age of criminal responsibility at 14 or 16 – an age level which would keep children out of the criminal justice system and bring the minimum age of criminal responsibility into line with the age at which other rights and responsibilities arise. Unless and until governments are willing to increase the minimum age of criminal responsibility to such a level, there is a continued need for the conditional age period with a rebuttable presumption of *doli incapax*.

NILQ 67(3): 301–10

The minimum age of criminal responsibility in continental Europe has a solid rational base

Ido Weijers*
Utrecht University School of Law

Abstract

The focus this article takes is on the proposition that the age of criminal responsibility is a meaningful term. It will be stated that there is no proof that today's young children have a greater understanding of the world than children had in the past. The article wants to make clear 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. It argues that it is unacceptable in the light of these empirical findings to decide not to have a national minimum age of criminal responsibility (MACR) 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 MACR would be at age 14 or 15.

Introduction

Considering the age of criminal responsibility implies an assessment of juvenile justice systems. The significant diversity that is typical of this field worldwide is striking. Countries vary far more widely in juvenile than in adult justice systems.[1] Juvenile justice systems vary in their age boundaries, as they do in their sentences and educational measures. At first sight there seems to be a rather modest variety of upper age jurisdictions. These vary between 15 and 18, with the exception of Japan, where youths can only be brought before the adult criminal court once they are aged 20 or older. In fact, these small margins of upper age limits of juvenile justice systems are profoundly relativised by a wide variety of options to transfer or waive young offenders to adult criminal courts in some countries.[2]

Comparing continents concerning the minimum age limits of criminal responsibility (MACR) worldwide, however, we find far more extreme contrasts. In Europe, the absolute lower age limit below which children cannot be held criminally responsible varies

* Professor of Law, Willem Pompe Institute for Criminal Law and Criminology.

1 Michael Tonry and Anthony Doob (eds), *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* (University of Chicago Press 2004).

2 See Ido Weijers, An Nuytiens and Jenneke Christiaens, 'Transfer of Minors to the Criminal Court in Europe: Belgium and the Netherlands' in Josine Junger-Tas and Frieder Duenkel (eds), *Reforming Juvenile Justice* (Springer 2009) 105–24.

Country	Youngest age: juvenile court	Country	Youngest age: juvenile court
Scotland	8 (12)	Georgia	14
Greece	8 (13)	Germany	14
Malta	9 (14)	Italy	14
England & Wales	10	Latvia	14
Ireland	10 (12)	Liechtenstein	14
Northern Ireland	10	Lithuania	14
Switzerland	10	Macedonia	14
Andorra	12	Moldova	14 (16)
Hungary	12 (14)	Montenegro	14
Netherlands	12	Romania	14 (16)
Portugal	12	Russian Federation	14 (16)
San Marino	12	Serbia	14
France	13 (10)	Slovakia	14
Monaco	13	Slovenia	14
Albania	14	Spain	14
Armenia	14 (16)	Ukraine	14 (16)
Azerbaijan	14 (16)	Czech Republic	15
Austria	14	Denmark	15
Belarus	14	Finland	15
Bosnia-Herzegovina	14	Iceland	15
Bulgaria	14	Norway	15
Croatia	14	Poland	15 (17)
Cyprus	14	Sweden	15
Estonia	14	Belgium	16

Table 1: MACR for juvenile court jurisdiction in Europe

from 8 (Scotland and Greece), 9 (Malta), 10 (England and Wales) to 15 (Czech Republic, Poland, the Scandinavian countries) and 16 (Belgium).[3]

Notwithstanding the contrasting lower age limits within this continent, there is a dominant European picture represented by the large group of countries on the European continent where 14 or 15 is the age of criminal responsibility. Overall, this results in 13 years being the average and typical age of criminal responsibility in Europe. If we take a worldwide view, it may be concluded that Europe has by far the highest average MACR of all continents.[4]

There are significant difficulties, though, in establishing the MACR. Firstly, Table 1 makes clear that several European countries, like Scotland, Ireland and Poland, have a standard minimal age for 'common' criminal cases involving young offenders (12, 13, 14, 16 or 17) *and* a deviant, *lower* age limit concerning 'extreme' cases, like murder, manslaughter, rape (8, 9, 10, 12, 14 and 15). Actually, these lower age limits must be interpreted as implying the bottom-line and absolute MACR, and not the other way round, as is sometimes the interpretation. France, on the contrary, has a standard minimal age of 13, which means that young offenders may be subjected to punishment (*peine*) from that age, but at the same time it has a minimal age of 10 concerning minor offenders, who may receive educational treatment (s*anction éducative*). The Netherlands had a comparable sanction (*Stop*) for minor offenders younger than 12 between 2001 and 2010. England

3 In Belgium, children cannot normally be held criminally responsible before their 18th birthdays, but in the case of murder or manslaughter they can be held criminally responsible from their 16th birthdays.

4 The juvenile codes in most of the USA do not indicate a minimum age of jurisdiction for delinquency cases – see Donna M Bishop and Scott H Decker, 'Punishment and Control: Juvenile Justice Reform in the USA' in Josine Junger-Tas and Scott H Decker (eds), *International Handbook of Juvenile Justice* (Springer 2006) 3–35.

introduced the Child Safety Order for children younger than 10 under the Crime and Disorder Act in 1998, designed for 'nipping crime in the bud'. All three deviations are (or were) incompatible with the UN Convention on the Rights of the Child (UNCRC).

Secondly, what does the minimum age of criminal responsibility exactly tell us about the age at which children can be prosecuted? There is a remarkable differentiation between the age of criminal responsibility and the age of prosecution in several countries. The age of criminal responsibility is understood in general as denoting a complete bar to prosecution; but this does not necessarily mean that youths will be prosecuted from that age. Many countries do not prosecute youths as soon as they reach this minimum age. They operate a typical compromise, combining two different age levels with more or less discretion. They use the age of criminal responsibility as the upper limit of absolute criminal incapacity *and* as the beginning of a period of *conditional* criminal responsibility.[5]

A well-known formula for this solution is the *doli incapax* presumption. According to this presumption, youths will not be prosecuted in principle until they have reached a certain age, some years after the age of criminal responsibility. In jurisdictions where the presumption operates, there are significant differences, both in the period of the presumption and in its actual application.

In some countries, such as the Netherlands, there has never been a period of *conditional* criminal responsibility. The Netherlands introduced a special juvenile justice system in 1901 and there was no minimum age of criminal responsibility until 1965. The MACR was settled at the age of 12. Notwithstanding the implementation of the MACR, 12- and 13-year-olds are rarely prosecuted in criminal courts in the Netherlands. In practice, most are punished via a police referral (*HALT*) and young, repeat or more serious offenders by the prosecutor (*Strafbeschikking*).

The *doli incapax* presumption was abolished in England and Wales by the Crime and Disorder Act 1998.[6] The Home Secretary, Jack Straw, made clear that he wanted to break with the history and philosophy of youth justice in England and Wales, which he branded as an 'excuse culture'.[7] The consequence is that children in England and Wales have become accountable for their offending at age 10.

In contrast, a classical version of the *doli incapax* presumption can be found in Ireland. The age of criminal responsibility is currently 12 years, but the presumption applies to children from the ages of 10 to 14. On raising the minimum age to 12 (previously 8 and then 10) with the introduction of the Children Act 2001, this presumption was implied for children aged over 12 but under 14, despite this aspect never being formally enacted. Ireland retains significant discretion in terms of prosecution and the court, with few exacting rules regarding how the presumption may be rebutted.[8]

The situation in Germany is comparable, albeit that the age of criminal responsibility is higher. The age of absolute criminal incapacity ends at the age of 14. Full criminal responsibility starts in Germany at 18 years of age. What is particularly important here is

---

5 Thomas Crofts, *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (Ashgate 2002).

6 In 1994 Laws J had published fierce criticism of it ([1994] 3 All ER 190, 197), quoted in Julia Fionda, *Devils and Angels. Youth Policy and Crime* (Hart 2005) 15. New Labour responded in *Tackling Youth Crime: A Consultation Paper* (Home Office 1997) in England and Wales suggesting that this presumption prevented youths being held accountable for their actions. One year later, the Home Office paper, *No More Excuses: A New Approach to Tackling Youth Crime* (Home Office 1997), announced the abolition of the presumption.

7 Anthony Bottoms and James Dignan, 'Youth Justice in Great Britain' in Tonry and Doob (n 1) 21–183.

8 Mairead Seymour, 'Transition and Reform: Juvenile Justice in the Republic of Ireland' in Junger-Tas and Decker (n 4) 117–143.

that variations of the German model can be found all over continental Europe, in the West and in the East. In the Czech Republic, for instance, the age of criminal responsibility is 15, but responsibility from age 15 is conditional, depending on individual maturity.[9]

Slovenia, to take another example, similarly applies two age limits. Yugoslavia's first Criminal Code and Criminal Procedure Code (1929) contained provisions pertaining to young offenders. They were divided into two groups: younger (14–17) and older juveniles (17–21). The younger ones were considered relatively irresponsible, which implied that the court could impose a sentence or educational measures only if their maturity was proven. This division remained intact after the Second World War and it was further expanded into four categories in 1995 under the new Criminal Code: children under 14, who could never be held criminally responsible; young minors (14–16) against whom only educational measures may be applied; older minors (16–18) and young adults (18–21).[10]

In short, this means that the average age at which children can actually be held criminally responsible and be prosecuted in Europe is 14.

Consensus and debate

The curious thing is that there exists broad consensus that children below a certain age are too young to be held responsible for breaking the law, but there is an extreme variety of MACRs worldwide and there is continuing debate as to the advisable age of criminal responsibility. There exists a set of rules, guidelines and court decisions that presuppose or clarify the implications of an MACR. For example, the Beijing Rules provide a framework and model for national juvenile justice systems.[11] These rules state that the MACR 'shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity' (rule 4.1).[12] The UNCRC similarly articulates that children below a certain age cannot be held criminally responsible. The UNCRC calls for nations to establish a minimum age 'below which children shall be presumed not to have the capacity to infringe the penal law' (Article 40, II.7a). It was not until 2007, however, that the UN Commission on the Rights of the Child settled on an MACR, which, in its opinion, has to be at least 12 years.[13]

In 2007 the European Ministers of Justice decided that European guidelines on child-friendly justice should be prepared. Three years later *Guidelines on Child-Friendly Justice* were published by the Committee of Ministers of the Council of Europe, providing practical guidance to member states of the Council of Europe regarding the adaptation of juvenile justice systems to accommodate the specific rights and needs of children. The guidelines require 'due consideration to the child's level of maturity and understanding . . . justice that is accessible, age appropriate' and that 'the rights of the child including the rights to due process, to participate in and to understand the proceedings' are respected (para IIc).

---

9 Helena Valkova, 'Restorative Approaches and Alternative Methods: Juvenile Justice Reform in the Czech Republic' in Junger-Tas and Decker (n 4) 277–318.

10 Katja Filipcic, 'Welfare Versus Neo-Liberalism: Juvenile Justice in Slovenia' in Junger-Tas and Decker (n 4) 397–413.

11 Geraldine van Bueren, 'Child-Oriented Justice: An International Challenge for Europe' (1992) 6 International Journal of Law and the Family 381–99.

12 At the time of drafting the Beijing Rules a broad consensus on a minimum age of criminal responsibility among the UN states parties was hoped for, but that appeared to be impossible: Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Ashgate 2009).

13 UN Commission on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice* (CRC/C/GC/10 2007) para 30.

Several important European Court of Human Rights (ECtHR) rulings have also elucidated particularly crucial procedural implications of an MACR, most notably the notorious *Bulger* case arising in England and Wales.[14] Two 10-year-old boys kidnapped and beat to death 2-year-old James Bulger. The two minors (who at the time of trial had turned 11 years old) were prosecuted on indictment in the Crown Court, in public, before a judge and 12 jurors. The trial caused national and international outrage, with hostile crowds gathered outside the court building and a packed public gallery in the courtroom. After three weeks, both defendants were found guilty by the trial jury. The ECtHR maintained the view:

> . . . that it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings (para 84).

It concluded that the defendants had been 'unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing' (para 89).

This statement was further considered in *SC v UK*.[15] Despite special arrangements,[16] the ECtHR concluded that 11-year-old SC 'was unable fully to comprehend or participate in the trial process' (para 26). The court explained that Article 6 European Convention on Human Rights does not imply that a juvenile defendant should understand every legal detail during the criminal trial. However, he or she should have:

> . . . a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she . . . should be able to understand the general thrust of what is said in court.[17]

An alternative point of view has been expressed by the Scottish Law Commission. In Scotland the lower age limit of criminal responsibility remains at 8 years, strikingly low in comparison to other European countries. However, instead of recommending a higher minimum age, the Commission proposed abolition of the rule that a child has no criminal capacity below a certain age. Surprisingly, this recommendation was clearly not inspired by a call to be more tough on youth crime: the Commission confirmed the characteristic rule in Scottish criminal law that no child under the age of 16 should be prosecuted for any offence except on the instructions of the Lord Advocate (Criminal Procedure Act 1995, c 46, s 42).

The Commission advanced three arguments in support of this proposal. First, it argued that today children of eight years of age have a greater understanding of the world than children of this age had in the past. This might suggest, in its opinion, that there could be a case for further lowering the age.[18] Second, if an age of criminal responsibility was a matter of applying developmental psychology, then why was there such disparity in

---

14 *T and V v UK* App nos 24724/94, 24888/94 (ECtHR, 16 December 1999.

15 *SC v UK* App no 60958/00 (ECtHR, 15 June 2004).

16 The hearing in the Crown Court was adjusted to the child's age insofar as the defendant was accompanied by a social worker: he was not required to sit in the defendant's dock, judges did not wear wigs and gowns and frequent breaks were taken.

17 'The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence . . .' (para 29). More recently (2009) the court has repeated in its judgment in the case of a 15-year-old Turkish boy, who complained that he had been deprived of a fair trial because he was not able to participate effectively: *Güveç v Turkey* App no 70337/01 (ECtHR, 20 January 2009).

18 Gerry Maher, 'Age and Criminal Responsibility' (2005) 2 Ohio State Journal of Criminal Law 493-512.

the ages adopted in different countries? Finally, it noted, relying on the findings of the well-known Kilbrandon Committee, that the principle that children below a certain age are too young to be held responsible for breaking the law was not based on any empirical data concerning their understanding:

> The legal presumption by which no child under the age of 8 can be subjected to criminal proceedings is not therefore a reflection of any observable fact . . . It is clear, therefore, that the 'age of criminal responsibility' is largely a meaningless term.[19]

This article adopts the opposite view. Its main focus is on the proposition that the age of criminal responsibility is far from being a meaningless term and that there is convincing evidence available which makes clear that the age of criminal responsibility is indeed meaningful. This argument is advanced in four parts. First, there is no evidence that today's young children have a greater understanding of the world than children had in the past; secondly, the principle that children below a certain age are too young to be held responsible for breaking the law, as stated in the UNCRC and other international standards, is based on strong scientific evidence; thirdly, it is unacceptable in the light of these empirical findings to reject a national MACR, leaving the decision to prosecute a child under a certain age to a Lord Advocate, or a comparable person or institution; finally, there is sufficient scientific grounds to conclude that a realistic MACR would be at age 14 or 15.

The level of understanding held by young children

The peremptory tone with which it is alleged that young children have more understanding of the world than children in the past is staggering. The Anneveldt Commission in 1982 argued that we should take account of the 'empirical fact' that 'young people adopt more mature and independent attitudes at a younger age than they did twenty years earlier'.[20] However, there is simply no empirical basis to this assertion. Worse still, all scientific evidence suggests otherwise.

The idea of more mature children who have a greater understanding of the world may have emerged, at least partly, from popular psychology, which has paid much attention to early manifestations of puberty. Puberty may start as early as 8 in girls and 9 in boys in Western countries (while generally the range for the first signs is still taken as 14 for girls and 16 for boys). Early puberty, however, seems to be a typical cultural phenomenon, dependent on factors like diet and lifestyle, endocrine disrupters and obesity, which seem to have had an epidemic character in the recent decades in jurisdictions such as the USA.[21] Puberty is simply one element in the many physical changes children experience. More importantly, there exists no systematic relationship between the timing of puberty and the intellectual and emotional development of adolescents.[22] As every paediatrician, pedagogue and experienced teacher knows, there is little correlation between physical development and mental and emotional development in adolescents.

---

19 Committee on Children and Young Persons Scotland, *Report of the Committee on Children and Young Persons* (HMSO 1964) 73.

20 Anneveldt Commission, *Sanctierecht voor jeugdigen* (Staatsuitgeverij 1982).

21 Marcia E Herman-Giddens, Paul B Kaplowitz and Richard Wasserman, 'Navigating the Recent Articles on Girls' Puberty in Pediatrics: What Do We Know and Where Do We Go from Here?' (2004) 113(4) Pediatrics 911–17.

22 Laurence Steinberg and Robert G Schwartz, 'Developmental Psychology Goes to Court' in Thomas Grisso and Robert G Schwartz (eds), *Youth on Trial: Developmental Perspectives on Juvenile Justice* (University of Chicago Press 2000) 9–31.

It is true that the intellectual abilities of children develop markedly during adolescence. Young children are not able to think in abstract ways, while adolescents are often able to think in more advanced, abstract, efficient and effective ways.[23] Logical reasoning skills gradually increase between the ages of 11 and 16. From approximately their 12th birthday, young people acquire the ability to reflect on more abstract issues. Matters such as poverty, justice, fairness and love attract significantly more attention from young adolescents around the age of 12.[24] They start to become interested in knowledge of the world, in social relations, rights, news, politics. Step-by-step young adolescents start to reflect on relationships and on themselves as persons with a past, present and future.[25]

Nevertheless, there are no indicators that suggest major changes in children's cognitive development in contemporary times, as compared to years ago. Children still act without considering the consequences of their behaviour in any (real) detail. Some may be able to repeat political slogans, others may show outstanding practical abilities in using laptops or smartphones, some can recite an impressive list of television stars, heroes in sport or pharaohs, but since they still lack the ability to think in abstract and reflexive ways, they do not act more maturely nor do they understand more of the world.[26]

Young children ought not to be held responsible for breaking the law

There is strong scientific evidence that children below a certain age are too young to be held responsible for breaking the law. Children, studied from an objective, mature perspective, do not fully know what they are doing. This is a conceptual, political–philosophical consideration, implying that they may know what they are doing in that they are correctly apprised of the relevant facts, but they simply are unable to grasp the moral and legal importance of these facts.[27]

Young children cannot fully perceive themselves as citizens, or as subject to the law. If they do something wrong, they perceive this as a wrong against their parents, the wider family or their teacher, their neighbour or their friend. Their reasoning is not yet adequate; their notions of the law, an offence, criminal court, state and citizenship are typically childish and need further maturation; and they lack experience with things like the law, the state, etc.[28]

23 Laurence Steinberg, *Adolescence* 5th edn (McGraw Hill 1999); Steinberg and Schwartz (n 22).

24 They also start to think experimentally and are fascinated by hypothetical thoughts, (endlessly) considering all sorts of possibilities and solutions to a problem. Abstract thinking develops gradually over the course of adolescence until around the age of 17 or 18, when this ability no longer notably improves. See Laurence Steinberg and Elizabeth Cauffman, 'Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-Making' (1996) 20 Law and Human Behavior 249–72; Laurence Steinberg, *The Science of Adolescent Risk-Taking* (National Academies Press 2011).

25 Generally, only by mid-adolescence do the formal cognitive capacities resemble those of adults. See Elizabeth Scott and Laurence Steinberg, *Rethinking Juvenile Justice* (Harvard University Press 2008).

26 A good example is provided by the difference between what is called 'digital literacy' and 'digital skills'. Whereas digital skills refers to practical abilities in using digital devices, digital literacy refers to a range of digital skills, knowledge of the basic principles of computing devices and skills in using computer networks, as well as to an ability to engage in online communities and social networks while adhering to behavioural protocols, to an ability to find, capture and evaluate information and, what's more, to an understanding of the societal and ethical issues raised by digital technologies and to an ability to think critically about these technologies.

27 David Archard, 'Philosophical Perspectives on Childhood' in Julia Fionda (ed), *Legal Concepts of Childhood* (Hart 2001) 43–56.

28 Joseph Adelson, 'The Political Imagination of the Young Adolescent' (1971) 100 Daedalus 1013–50; Anna Emilia Berti and Alessandra Andriolo, 'Third Graders' Understanding of Core Political Concepts (Law, Nation-State, Government) before and after Teaching' (2001) 127 Genetic Social and General Psychology Monographs 346–77; Martin D Ruck, Rona Abramovitch, and Daniel P Keating, 'Children's and Adolescent's Understanding of Rights: Balancing Nurturance and Self Determination' (1998) 69 Child Development 404–17.

Young children lack the capacity to form criminal intent or to fully understand the moral and legal implications of their actions. They may understand (or not) that what they are doing or have done may be naughty or mischievous, but they are unable to fully understand their actions as a criminal offence, that is, as actions contrary to the law. They do understand themselves as children who have to obey their parents and teachers, but not the law or the state. Criminal responsibility requires a perception of the law, of acting and wrong-doing. It requires a capacity to grasp the legal impact of actions, 'to know what we are responsible for and what our prospective responsibilities are'.[29]

There are several psychosocial factors that can explain the unsophisticated judgements made by children and young adolescents. Peer pressure is a significant environmental factor affecting value judgements. From around the age of 8, children begin to focus on associating with peers. During this period, making friends is of crucial importance to children and there seems to be less motivation to associate with adults.[30] This is especially relevant with regard to antisocial behaviour, since peer pressure blocks young adolescent's recently acquired ability (and interest) in hypothetical reflection. Warr suggests that a crucial factor influencing children's behaviour is 'fear of ridicule'. Young adolescents tend to conform to their peers' behaviour, even peers who encourage antisocial behaviour, in order to avoid ridicule and rejection.[31]

Another important factor pertains to emotional development. Volatility of mood (i.e. mood swings or moodiness) is considered to be a characteristic for young adolescents.[32] When negative emotionality is part of the temperament of a child, it is associated with higher levels of aggression and externalising problems. These children tend to deal less constructively with perceived feelings of anger which, in combination with lower levels of impulse control, can lead to delinquent behaviour.[33]

Children also have difficulty in perspective-taking. Skills associated with a developed sense of identity include the ability to form interpersonal relationships, to reflect on one's own behaviour and to be able to morally reason on a higher level. Perspective-taking ability gradually increases until the age of 16. This ability enables the young person to understand how decisions or actions are viewed by other persons, even if that is not the persons' own view. Perspective-taking is closely related to being able to have feelings of empathy towards others.[34] Empathy is the result of emotional as well as cognitive processes. The emotional state of another person has to be understood by the adolescent and the adolescent must be able to share in the emotional state of that other person, thereby adequately regulating his or her own emotions. Empathy decreases the probability

---

29 Peter Cane, *Responsibility in Law and Morality* (Hart 2002) 54.

30 Susceptibility to peer pressure peaks around the age of 14 and then declines. This implies that sometime between the ages of 12 and 16 peer pressure is highest and declines gradually thereafter: Scott and Steinberg (n 25).

31 Mark Warr, 'Making Delinquent Friends: Adult Supervision and Children's Affiliations' (2005) 43(1) Criminology 77–106.

32 Scott and Steinberg (n 25). Research suggests that a positive mood can increase risk-taking behaviour to a certain extent. When risks are low, they are taken more easily when in a positive mood. But when risks are perceived to be high, individuals do not want to have their good mood destroyed by taking risks and tend to be more conservative in decision-making. See Steinberg and Cauffman (n 24).

33 Nancy Eisenberg, 'Emotion, Regulation and Moral Development' (2000) 51 Annual Review of Psychology 665–97.

34 Eisenberg has defined empathy as 'an affective response that stems from the apprehension or comprehension of another's emotional state or condition and is similar to what the other person is feeling or would be expected to feel': ibid 671.

of certain types of criminal behaviour, while a lack of empathy is assumed to have a facilitating influence on offending.[35]

The conclusion that children below a certain age are too young to be held responsible for breaking the law does not imply that the child should simply be viewed in law as completely irresponsible. On the contrary, children must be viewed as beings with 'evolving capacities' (UNCRC Article 5), with a growing responsibility and a growing awareness of their position as legal subjects. Our modern view of childhood is a developmental one. The normal youth acquires moral and legal autonomy step by step, developing from extreme dependence and vulnerability in infancy to near independence, partial self-sufficiency and growing maturity in adolescence.

Rejecting an MACR would result in the gravity of the crime being decisive

It is unacceptable not to have a national MACR and to leave the decision to prosecute a child under a certain age to the Lord Advocate, or a comparable person or institution. The standard implication of the absence of a minimum age of criminal responsibility means the gravity of the crime will be decisive for bringing (very) young defendants into the juvenile justice system and for punishing (very) young offenders according to this system, while this system also presupposes that the participants can be held responsible (albeit, that responsibility is deemed to be reduced) for their actions.

It is essential to adopt a bright-line rule that very young offenders should not (normally) be handled in a juvenile justice system. We should not accept the idea that these same very young offenders should go to the youth court if they are suspected of something very serious, like manslaughter, murder or rape. A very young person has an insufficient degree of capacity to form criminal intent, no matter what crime he or she commits.

A realistic age of criminal responsibility is 14 or 15

Holding children responsible for breaking the law requires an assessment of their adjudicative capacities.[36] Juvenile defendants have to be competent to be brought before a court for adjudication. The legal concept of competence to stand trial (or the capacity to defend) in the USA – which is defined as 'sufficient ability to consult with his attorney with a reasonable degree of rational understanding as well as factual understanding of the proceedings against him'[37] – requires that the defendant has sufficient ability to understand and to recognise the importance of criminal proceedings and to assist his or her lawyer in the defence.[38]

The UN Committee on the Rights of the Child states that, when an accused juvenile is brought before court, he or she should be capable of participating in criminal proceedings. When the young person is not capable of participating in and understanding the proceedings, he or she should not be criminally charged and prosecuted.[39] As noted above, according to the ECtHR (*T and V v UK* (1999); *SC v UK* (2004); *Güveç v Turkey* (2009)) and the European *Guidelines on Child-Friendly Justice*, it is essential that a child charged with an offence is dealt with in a manner which takes full account of his or her

35 Darrick Jolliffe and David P Farrington, 'Empathy and Offending: A Systematic Review and Meta-Analysis' (2004) 9 Aggression and Violent Behavior 441–76.

36 Richard J Bonnie and Thomas Grisso, 'Adjudicative Competence and Youthful Offenders' in Grisso and Schwartz (n 22) 73–103.

37 *Dusky v United States* 362 US 402 (US Supreme Court, 18 April 1960).

38 Thomas Grisso, 'What We Know about Youths' Capacities as Trial Defendants' in Grisso and Schwartz (n 22) 139–72.

39 CRC/C/GC/10, 25 April 2007, para 46.

age, level of maturity and intellectual and emotional capacities and that steps are taken to promote his or her ability to understand and participate in the proceedings. The minor should be able 'to understand the general thrust of what is said in court'.

In the last 20 years, several studies have been conducted on children's understanding of the nature of criminal proceedings.[40] From these studies, it can be concluded that juveniles below the age of 14 or 15 are unlikely to be familiar with trial-related information.[41] Grisso concludes that, generally, young people around 14 years of age are able to form an adequate conception of what it means to appear before a judge in court.[42] Many young people between the ages of 14 and 16 who have to appear in court, though, are not yet capable of forming accurate ideas about what they can expect or what is expected of them, partly because of individual differences in maturity and partly because of the range of problems they may experience.[43] The stress of having to appear before a judge and being sentenced in court can impact upon their understanding of the youth court hearing even more.

From these studies it can be concluded that juveniles aged 14 and younger are more likely than older adolescents and young adults to be impaired in their ability to understand criminal proceedings.[44] Children are only beginning to be capable of understanding enough of what it means to appear before a judge when they are around 14 or 15 years of age.

Conclusions

The age of criminal responsibility is far from being a meaningless term. Formal cognitive abilities mature by middle adolescence, many psychosocial abilities mature somewhat later and brain development may continue (far) into early adulthood. There is no evidence that children in contemporary society have a greater understanding and more advanced cognitive abilities than children had in the past, whereas there is enough evidence to recommend 12 as the age below which we should presume absolute lack of criminal responsibility in general. There is also strong evidence for adolescent immaturity in a range of factors related to decision-making for adolescents aged 15 and under as a group. This would suggest that, for the relevant group of delinquent youths, with its high prevalence of mental disorders and developmental disorders and low intelligence, the appropriate age of criminal responsibility would be 15 or at least 14.

40 Emma Crawford and Ray Bull, 'Teenagers' Difficulties with Key Words Regarding the Criminal Court Process' (2006) 16(6) Psychology, Crime and Law 653–67; Christine Driver and Eve M Brank, 'Juveniles' Knowledge of the Court Process: Results from Instruction from an Electronic Source' (2009) 27 Behavioral Sciences and the Law 627–42; Carolyne Greene, Jane B Sprott, Natasha S Madon and Maria Jung, 'Punishing Process in Youth Court: Procedural Justice, Court Atmosphere and Youths' Views of the Legitimacy of the Justice System' (2010) 52 Canadian Journal of Criminology and Criminal Justice 527–44.

41 Grisso (n 38).

42 Ibid.

43 Scott and Steinberg (n 25); Ido Weijers and Thomas Grisso, 'Criminal Responsibility of Adolescents: Youth as Junior Citizenship' in Junger-Tas and Dünkel (n 2) 45–67.

44 Ibid.

NILQ 67(3): 311–26

‘*If you are 10, you go to prison*’: children’s understanding of the age of criminal responsibility

Dawn Watkins, Effie Lai-Chong Law, Joanna Barwick and Elee Kirk*

University of Leicester

Abstract

Under Article 12 of the UN Convention on the Rights of the Child, 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 8–11 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. In light of this, 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.

Introduction

The discussion in this paper is based around findings from an empirical study Law in Children's Lives (LICL) that has used digital gaming as a research tool to assess how far, if at all, children aged 8–11 years perceive themselves to be empowered by law in their everyday lives. The research was funded by the Economic and Social Research Council under its transformative research grant scheme. In the course of this study, we gathered both quantitative and qualitative data from over 600 children concerning a wide range of law-related issues, situated in contexts that many children encounter on a day-to-day basis. The data that we gathered concerning children's knowledge and understanding of the age of criminal responsibility (ACR) – together with children's views on the age they think that ACR should be – are the focus of this paper.

From our analysis of the quantitative data, we found that a good number of children (63.9 per cent) demonstrated accurate knowledge that the current ACR is 10. However, our analysis of the qualitative data reveals a more complex picture; far fewer children

* Respectively, Associate Professor, Leicester Law School, Reader (Associate Professor) Department of Informatics, and Research Associates, Leicester Law School. Elee Kirk passed away in August 2016. We would like to dedicate this paper to the memory of a much loved and sadly missed friend and colleague.

Figure 1: The shop – parallax view

were able to volunteer their knowledge of ACR in their responses to a relevant scenario, and those that did so showed a strong tendency to associate ACR with imprisonment. Through our discussion of children's views on what ACR should be we demonstrate that, although their responses varied considerably, just over half of all children who participated in the study would prefer ACR to be over 10; with the mean average of their choices being 11.5 years old. Our descriptive analysis of these quantitative data is then informed by a thematic analysis of the qualitative data that we gathered from children's explanations of their choices; where we again identify a tendency for children to associate ACR with imprisonment.

In the final part of the paper, we discuss the findings of our advanced statistical analysis concerning the relationship between children's choices for what ACR is and their choice for what ACR should be and we identify factors that influence children's responses to the questions presented in this part of the study.

Gathering and analysing children's views on ACR

Quantitative and qualitative data were gathered from children using a specially designed digital game; *Adventures with Lex*. The game was designed using a participatory approach.[1] Full ethics approval was obtained from the University of Leicester research ethics committee prior to the commencement of the study. We worked with 634 children from eight different schools in the Leicester area.[2] For all of these children, informed written consent was obtained from their parent or carer, as well as from the children themselves, and it was explained to parents and children that they were free to withdraw from the study at any time, for any and for no reason. Children's anonymity was assured through the allocation of a coding system; each child was given a unique number and this was combined with letters or numbers that indicate the child's school, year group and gender. Each child played the game individually, in a classroom setting, using a tablet and headset that we provided for them.

Adventures with Lex was designed to comprise four everyday 'worlds' – a school, a park, a shop and a friend's house. Children explore each of these worlds, accompanied by a naïve alien named Lex, who asks the children to demonstrate and/or explain what they would do in response to a series of challenges that they encounter. The data that forms the focus of this study was gathered in the context of the shop. The shop is presented to

1 Further details concerning the reasons for adopting this method and the development of the game are in Joanna Barwick, Dawn Watkins, Elee Kirk and Effie Lai-Chong Law, 'Adventures with Lex: The Gamification of Research' (forthcoming) Convergence: The International Journal of Research into New Media Technologies.

2 Prior to inviting schools to participate, we created three categories of school (most, median and least deprived) drawing on secure data provided to us by the East Midlands Widening Participation Research and Evaluation Partnership. These data map all local schools against the Income Deprivation affecting Children Index. Of the schools who participated, three schools were in the most deprived category, two in the median, and three in the least deprived.

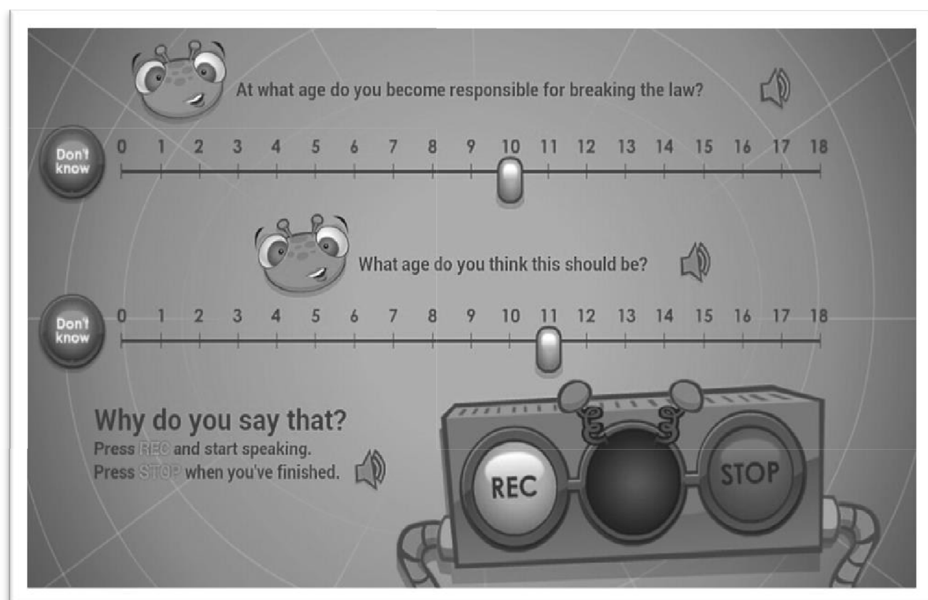

Figure 2: Layout of questions concerning children's knowledge and views on ACR

children in the form of a parallax view and they are required to navigate a number of scenarios in turn, as indicated to them automatically by the game (see Figure 1).

The data to which this study relates derives from an animated scene in which a child steals an object from a shopper's bag. Following this scenario, Lex first invites children to record into the game their verbal response to his question: 'What happens to a child who is caught stealing?' Following on from this, children were asked: 'At what age do you become responsible for breaking the law?'; and then 'What age do you think this should be?' Their answers to both of these questions were given via a sliding scale (presented one after the other) from which children could choose an age between 0 and 18 years old, or choose 'don't know'. Finally, in this scenario children were asked: 'Why do you say that?' and recorded their verbal explanations of their choices of answer into the game (see Figure 2). Through setting out the questions in this way, we were able to assess the extent to which children volunteered information concerning the relevance of ACR, as well as assessing their knowledge and views on ACR more directly.

A range of basic (e.g. bivariate correlation analysis) and advanced statistical methods (e.g. multivariate regression analysis) were used to analyse the quantitative data gathered in the course of the LICL project. With regard to the qualitative data gathered in the project, children's responses were analysed thematically, drawing on a coding scheme that was developed collaboratively by three members of the research team. A sample of data was coded independently and scored for reliability; amendments were made through discussion, and a second test carried out to confirm an acceptable level of consistency.[3] Subsequently, to allow for a more in-depth analysis of children's responses relating to ACR, a dataset relating only to the ACR questions was extracted from the main dataset. From here, data were organised into two matrices; plotting children's correct or incorrect

3 The result of the initial reliability test was adequate ($k = 0.61$), but increased to an even higher level following discussion and amendment of the coding structure ($k = 0.74$).

knowledge of ACR (quantitative data) against their volunteering of information concerning the relevance of age if a child is caught stealing (qualitative data). This second level of coding and analysis was carried out solely by the principal investigator.

Children's knowledge of ACR

As stated in the introduction to this paper, some 63.9 per cent of children (n = 405) who participated in our study correctly identified that a child becomes responsible for breaking the law at the age of 10 years. Multivariate analysis of the data revealed that children in Year 4 (aged 8–9 years) demonstrated a far lower level of accuracy than children in Years 5 (aged 9–10 years) and Year 6 (aged 10–11 years) in response to this question; 43 per cent of Year 4 children answering correctly, compared to 77 per cent and 79 per cent of children in Years 5 and 6 respectively. Analogous studies that have tested the accuracy of children's knowledge of legal language[4] and the role of legal actors[5] have indicated that children's level of accuracy does tend to improve as they get older. For example, Rhona Flin et al report that: 'There appears to be a clear developmental trend in children's performance; 10 year olds had a superior knowledge of legal terms to both eight-and six year-olds.'[6] And in their study of young people's knowledge of the UK criminal justice system, Karen Barnes and Claire Wilson found that 'knowledge of the criminal justice system was positively correlated with age overall'.[7] However, the findings here indicate a more complex picture concerning children's knowledge of ACR. There is no steady progression in knowledge, but rather a steep increase in knowledge between Years 4 and 5, and only a very small increase from Year 5 to Year 6. An investigation into the possible reasons for this were beyond the scope of this research, but it is conceivable that schools and external agencies are focusing educational activities concerning ACR towards children who have reached or are very close to reaching ACR.

More generally, we have found that children's school environment is a highly significant factor in determining children's knowledge of ACR. For the purposes of this analysis we ordered children's responses into four sub-groups; children who chose an age between 0–9 years (ACR<10); children who chose age 10 (ACR=10); children who chose an age between 11 and 18 years (ACR>10) and children who responded 'don't know' (ACR=DK). As demonstrated in Table 1, there were significant differences in ACR accuracy among the eight schools that participated in the study, with ACR accuracy being highest in school PP (87 per cent) and lowest in school AA (32 per cent).

Interestingly, one child from school XX who accurately identified ACR as 10 explained:

---

4 Karen Saywitz and Carol Jaenicke, 'Children's Understanding of Legal Terms: A Preliminary Report of Grade-Related Trends', paper presented at the Society for Research in Child Development Conference, 1987, referred to in Rhona Flin, Yvonne Stevenson and Graham Davies, 'Children's Knowledge of Court Proceedings' (1989) 80 British Journal of Psychology 285–97, 287. See further Karen Saywitz, Carol Jaenicke and Lorinda Camparo, 'Children's Knowledge of Legal Terminology' (1990) 14(6) Law and Human Behavior 523–35.

5 Amy Warren-Leubecker, Carol Tate, Ivora D Hinton and Nicky Ozbeck, 'What Do Children Know about the Legal System and when Do They Know It? First Steps Down a Less Travelled Path in Child Witness Research' in Stephen J Ceci, David F Ross and Michael P Toglia (eds), *Perspectives on Children's Testimony* (Springer-Verlag 1989) 158–83; Rhona Flin, Yvonne Stevenson and Graham Davies, 'Children's Knowledge of Court Proceedings' (1989) 80 British Journal of Psychology 285–97.

6 Flin et al (n 5) 290.

7 Karen Barnes and Clare Wilson, 'Young People's Knowledge of the UK Criminal Justice System and their Human Rights' (2008) 10(2) International Journal of Police Science and Management 214–21, 219.

> *Because yesterday the police came in and they said at the age of 10, you might get a criminal record.* (Boy, Year 5)[8]

On following this up with staff from school XX, they were able to recall that there had at some point been an assembly for Key Stage 2 (years 3, 4, 5 and 6) in which the police gave a talk to the children, but they were unable to provide any further information.[9] Similarly, staff from the three other schools in which ACR accuracy was over 70 per cent were unable to volunteer any specific explanation for this.

As Table 1 demonstrates, where children identified ACR as an age other than 10, most gave an answer that was between 11 and 18; and indeed the second most common answer to this question was 18, with 9.8% (n = 62) of children giving this answer. This tendency for children to associate legal competency with older age groups, and especially adulthood, is in line with children's views expressed elsewhere in our study.

Children's understanding of ACR

As explained earlier, we were able to analyse children's knowledge and understanding of ACR further by assessing how many children referred to the possible relevance of ACR in their qualitative responses to the question: 'What happens to a child who is caught stealing?' As explained in more detail in Table 2, although 63.9 per cent of children (n = 405) demonstrated awareness that ACR is 10, just 17.5 per cent of children (n = 111) volunteered that age could be relevant to the outcome for a child who is caught stealing. Arguably, this indicates that, whilst a large number of children possess accurate knowledge concerning ACR, far fewer possess an understanding of its potential, practical implications.

	School ID								Total
	AA	FF	HH	JJ	PP	TT	WW	XX	
ACR < 10	4 (6%)	0 (0%)	5 (5%)	5 (6%)	2 (4%)	5 (7%)	3 (4%)	5 (6%)	29 (4.6%)
ACR = 10	23 (32%)	84 (82%)	56 (55%)	39 (50%)	47 (87%)	56 (76%)	45 (60%)	55 (71%)	405 (63.9%)
ACR > 10	45 (62%)	17 (17%)	39 (39%)	27 (35%)	4 (8%)	13 (17%)	24 (32%)	17 (22%)	186 (29.3%)
ACR = DK	0 (0%)	1 (1%)	1 (1%)	7 (9%)	1 (1%)	0 (0%)	3 (4%)	1 (1%)	14 (2.2%)
Total per school	72	102	101	78	54	74	75	78	634

Table 1: Knowledge of ACR by school

	Qualitative responses			Total
	ACR 10 volunteered	ACR other than 10 volunteered	ACR not volunteered	
ACR aware	98	13	294	405
ACR unaware[1]	3	11	215	229

Table 2: Relationship between quantitative and qualitative responses concerning ACR

8 This information was given in the context of the child's explanation of his choice concerning what ACR should be, discussed later in this paper. This particular child correctly identified ACR as 10 and also chose 10 as his preferred age.

9 A change in the school's email and calendar system had resulted in the log of the visit being lost.

From the six categories identified above, we anticipated that the category of children who demonstrated awareness that ACR is 10 in their quantitative answer and made reference to ACR as 10 in their qualitative answer (n = 98) would demonstrate the highest levels of knowledge and understanding. However, through our thematic analysis of the qualitative data relating only to this apparently 'strongest' category, we identified a strong tendency for children to associate ACR with imprisonment, with 52 per cent (n = 51) of the 98 children in this category making reference to this. As demonstrated in the following extracts, this was expressed by some as a possibility:

> *If they're over ten they could go to prison for under eighteens.* (Boy, Year 4)
>
> *They get in custody so they might go in jail because if they are at the age of like 10 and over then you get to go jail for like stealing and anything that is irresponsible.* (Girl, Year 5)
>
> *If they are under 10, the police ring their parents but if they are over 10 that means they could go in jail.* (Girl, Year 5)

Others expressed this as a more probable or likely outcome:

> *. . . if he's over ten he will get sent to jail* (Boy, Year 4)
>
> *They can go to a child prison if they are not 10 or over but if they are 10 or over they go to prison.* (Boy, Year 5)
>
> *Well if they're ten or over they get, like, put in prison for a little tiny bit, like a kids' prison. But if they're, like, under the age of ten they'll just get a really bad telling off by a policeman or something.* (Girl, Year 5)

The theme of imprisonment features significantly also in the responses of children (n = 13) who were ACR-aware and made reference to age or ACR as other than 10 in their qualitative responses, with 46 per cent (n = 6) of these children making reference to this. Again, children expressed this variously as a possibility or a more certain outcome:

> *They'll go to prison if they're a certain age.* (Girl, Year 6)
>
> *Depending on his age, he could go to prison or . . . yes . . .because it is stealing and it is a bad thing to do.* (Girl, Year 5)
>
> *Depending on what age, he could be put to jail.* (Boy, Year 5)

Imprisonment again features strongly in the responses from children in the two 'outlier' categories; all of the children (n = 3) who did not identify ACR as 10 in their quantitative answers, but nevertheless volunteered ACR as 10 in their qualitative responses, made some reference to imprisonment; and of the 11 children who did not identify ACR as 10 yet indicated that age could be relevant in their qualitative responses, 7 referred to imprisonment. For example:

> *It depends if they are teenagers or not. If they are teenagers, they get to go to jail and a warning.* (Boy, Year 4) and
>
> *If they are old enough, they will be taken to prison but if they are not, they will be badly punished.* (Girl, Year 5)

The theme of imprisonment is still present but markedly less prominent within the large category of children (n = 294) who, although they correctly identified ACR as 10, did not refer to the relevance of ACR in their qualitative responses, with 19.7 per cent (n = 58) making some reference to this as a likely or probable outcome:

> *They get sent to jail.* (Boy, Year 6)
>
> *They will get throwed in child prison.* (Girl, Year 5)
>
> *They could get put in prison or child care, something like that. So you shouldn't do stuff like that and they were responsible for stealing that women's purse.* (Girl, Year 4)

Similarly, the theme of imprisonment is still present but not so prominent among those children (n = 215) who did not correctly identify ACR and did not refer to ACR in their qualitative responses, with 22.8 per cent (n = 49) of these children making some reference to this:

> *He will be going to the prison.* (Boy, Year 4)
>
> *Jail, that's what.* (Boy, Year 4)
>
> *They go to youth detention.* (Girl, Year 5)

In conclusion then, it is clear that the theme of imprisonment features across the whole dataset, but that children who seemingly possess the highest levels of knowledge concerning ACR tend to strongly associate this with the possibility or likelihood of imprisonment.

Children as the passive recipients of justice

Turning now to our analysis of children's qualitative responses to the question as a whole, we identified that children tend to describe 'what happens to a child who is caught stealing' in terms that characterise the child as the passive and deserving recipient of justice.[10] As well as being sent to prison (Boy, Year 5), children anticipated that the child could be 'sent' to places described variously as: *child prison*; *juvie*; *juvenile offenders*; *a home for robbers' kids*; *a correctional facility which corrects children*; *young people's jail*; and p*unishment school.* In addition, some children suggested that:

> *They would get sent to the police because that is illegal.* (Girl, Year 5)
>
> *He gets sent to . . . a children's home.* (Boy, Year 5)
>
> *They get put in child care.* (Boy, Year 6)

The child is by no means perceived as a social actor who has the capacity to engage meaningfully in the criminal justice process; nor was he identified by any child in the study as a rights-holder under the UN Convention on the Rights of the Child (UNCRC), or under any other international instrument or domestic law. Although, exceptionally, it was anticipated that the child could be asked questions, this tended to be perceived along the lines of a police interrogation and there was no sense in which it was anticipated that the child's explanations could or would be influential in determining the potential consequences of his or her actions. For example:

> *He can be asked questions like why and probably be put in a cell for about an hour.* (Boy, Year 5)
>
> *The police will find out and arrest that child – only if they are under 10 will they take them into a cell and ask them questions why they did it.* (Girl, Year 5)
>
> *They go to the police and they ask them why they have done that and they give them the answer and if it is for no reason, they could go to . . . if they are 10 or over, they can go to child prison.* (Girl, Year 5)

The findings in this element of the study concerning children's lack of knowledge of their rights under the UNCRC and their minimal expectations concerning children's participation echo those found elsewhere in the LICL study. Notably, they concur also with Barnes and Wilson's finding that even young offenders who had significant, first-hand experience of imprisonment demonstrated low levels of understanding and

10 The word 'justice' is used here in its non-legal sense; defined in the Oxford English Dictionary as 'Maintenance of what is just or right by the exercise of authority or power; assignment of deserved reward or punishment; giving of due deserts' and as 'Punishment of an offender; retribution deemed appropriate for a crime'.

knowledge concerning the criminal justice system, as well as possessing a lack of knowledge concerning their human rights. Although, as referred to earlier in the paper, Barnes and Wilson found that young people's knowledge of the criminal justice system does increase with age; remarkably (and as they acknowledge, counterintuitively), they also found that direct experience of the criminal justice system 'did not lead to an increase in knowledge' among young people.[11] Barnes and Wilson's study involved an older population than those involved in our study, but it is nevertheless relevant since in light of their findings, we can argue that children's lack of knowledge concerning their rights, and especially their right to participate even when accused of wrong-doing, is most likely due to their lack of education on these issues and not necessarily (or even at all) due to their lack of direct experience of the criminal justice system.

Perceived forms of justice

As well as referring to the likelihood of imprisonment, children anticipated that a range of outcomes, both formal and informal, were possible for a child who is caught stealing. There were a number of references to the child being arrested; with some but not all children indicating that the child's age could be significant here:

> *They get arrested.* (Boy, Year 5)
>
> *The police will find out and get them arrested if they have been naughty.* (Boy, Year 4)
>
> *You can get a criminal record if you're ten years old, or you can get arrested* . . . (Boy, Year).

As the last comment shows, some children anticipated that a child who is caught stealing might get a criminal record and we found that responses that referred to this were clustered within particular schools. For example, in school TT, 24 per cent of children referred to the possibility that the child *could get a criminal record* (Boy, Year 6), as did 12 per cent of children in schools FF and XX. By contrast, no children in schools AA and HH made reference to this and the percentages of children referring to 'criminal record' in schools PP, JJ and WW were 6 per cent, 3 per cent and 1 per cent respectively.

Some children predicted that a child who is caught stealing would receive a warning from, or be cautioned by, the police and, as demonstrated in the extracts below, children again tend to perceive the child's role as entirely passive here, whereas in fact a formal warning would be given to a child only where he or she had admitted the offence; making the child's participation crucial to the outcome:

> *They get cautioned by the police.* (Girl, Year 5)
>
> *They could get a warning and they could be sent to prison about it because you shouldn't really steal things off people because it is way bad.* (Girl, Year 5)

Here, and in their comments more widely, children demonstrate a very limited understanding that the determination of what happens to a child who is caught stealing will depend on a range of factors and that the range of possible outcomes will be (or should be) determined in accordance with due process. And although children are sometimes adopting relevant terminology, it appears that they possess a very limited understanding of its meaning; for example, one child states:

---

11 Barnes and Wilson (n 7) 219. The authors report that their findings coincide with an earlier study: Thomas Grisso, *Juvenile's Waiver of Rights: Legal and Psychological Competence* (Plenum Press 1981). They hypothesise that the lack of knowledge may be due to the fact that very few young offenders are being helped to understand the system, but are subsequently assumed to have gathered knowledge by experience. On this, see further Stephen J Ceci, Faith A Markle and Yoo Jin Chae, 'Children's Understanding of the Law and Legal Processes' in Martyn Barrett and Eithne Buchanan-Barrow (eds), *Children's Understanding of Society* (Psychology Press 2005) 105–34.

> *He'll get a warning, or, if it's the third time he does it he might, like, not [be]allowed to go out or play without the criminal record.* (Girl, Year 6)

Finally, in response to this question, children commonly stated that a child who is caught stealing would incur some type of informal punishment, sometimes phrased as the sole predicted outcome. For example:

> *They will get told off.* (Boy, Year 4) or
>
> *You get in big, big trouble.* (Boy, Year 4)

But also sometimes in association with another possible outcome. For example:

> *They will get badly told off or if they are old enough, they might get put in prison.* (Girl, Year 5)
>
> or
>
> *They get grounded and they get told off and they'll be in trouble but if they're ten they might get arrested.* (Boy, Year 5)

Parents feature commonly as the source of such informal punishments, but the police are also frequently associated with this role:

> *The child gets told off. He either gets told off by his parents or the police.* (Girl, Year 5)

Whilst they may appear simplistic, it is arguable that such descriptions of an informal reprimand come close to describing what would actually happen if a child was caught stealing, provided that there were no aggravating factors.

The role of the police as the arbiters of justice

Children made frequent references to the police in their answers; and in our analysis of these data, we found that the role of the police tends to be understood, either explicitly or impliedly, as a punitive one:

> *They get sorted out by the police so they don't do it again.* (Boy, Year 5)

Because of the context in which our question was framed, this is perhaps not surprising. Nevertheless, broader-based studies concerning children's perceptions of the police have also found that children tend to focus on and emphasise the 'punitive role of the police in apprehending and punishing people, rather than other ways police assist people in times of need',[12] and it is a matter of some concern to us that elsewhere in the LICL study we found that a significant number of children considered that the police are allowed to hit them.[13]

As stated above, it is realistic to suppose that, if a theft of the type depicted in our scenario did occur, then this could be dealt with informally, and perhaps by the police. Therefore, it is somewhat appropriate here for children to consider that the police might act as the arbiters of justice (in both the non-legal and legal sense of the word). However, as we have discussed elsewhere, we also found that many children hold unrealistic views concerning the formal punishments that a child may suffer when accused of wrong-doing and, when the police are discussed in this context, they tend to be perceived as possessing extremely high levels of power:

12 Martine Powell, Clare Wilson, Carl Gibbons and Catherine Croft, 'Children's Conception of Police Authority When Responding to Requests for Assistance' (2008) 9(1) Police Practice and Research: An International Journal 5–16, 5. See also Martine Powell, Helen Skouteris and Romana Murfett, 'Children's Perceptions of the Role of Police: A Qualitative Study' (2008) 10(4) International Journal of Police Science and Management 464–73.

13 16.4 per cent of children expressed the view that the police are allowed to hit children and 23.2 per cent of children were unsure whether or not the police are allowed to hit them.

> *That's illegal and they get thrown in jail and then the police will come and when the police come, he can chase them or he can send them to jail at the age of 10.* (Girl, Year 5)
>
> *It will be displayed on the CCTV camera and the policeman will come and get you.* (Boy, Year 6)
>
> *I don't know for certain but I think if you're eighteen or over you go to the police and the police decide if you're guilty or not.* (Girl, Year 4)[14]

An investigation into the reasons for children's tendency to perceive the police in this way is beyond the scope of this study. However, research carried out elsewhere offers possible explanations. In an engaging discussion of his findings concerning young people's perceptions of the police, Nick Hopkins maintains that the tendency for young people to view the police as all-powerful stems from 'the highly visible power asymmetry'[15] that exists between young people and police in the context of the street. Here, he argues 'the police officer is not simply seen as "representing" authority, but in an important sense, "is" authority'.[16] This is certainly one possible explanation; in a recent briefing, the National Association for Youth Justice (NAYJ) reports that between 2009 and 2013, over one million children were stopped and searched by police and they express concern that a significant number of those children were below the age of 10.[17] Elsewhere and alternatively, Jason Low and Kevin Durkin have demonstrated that children's conceptualisation of the police can be influenced by unrealistic representations of police activities on television.[18] Importantly, Hopkins argues that young peoples' views concerning the police are strongly entrenched and unlikely to be transformed by occasional 'police liaison' visits to schools.[19] Likewise, Martine Powell et al conclude that: 'Changing children's perceptions is . . . likely to require global acknowledgment among *all* officers who come into contact with children of the importance of portraying an image that does not necessarily overemphasise the punitive role.'[20]

Children's views on what ACR should be

In this part of the paper, we discuss our findings concerning the age that children think ACR should be. We begin with a descriptive analysis of the quantitative data, informed subsequently by our thematic analysis of the qualitative data that we gathered from children's explanations of their choices. For the purposes of this analysis, we again ordered children's responses into four sub-groups; children who chose an age between 0–9 years (ACR<10); children who chose age 10 (ACR=10); children who chose an age between 11 and 18 years (ACR>10); and children who responded 'don't know' (ACR=DK). Within this discussion, the relationship between children's choices for what ACR is (ACR-is) and their choice for what it should be (ACR-should be) is also considered. Finally, considering the responses of children across all of the sub-categories,

14 The tendency for children to confuse the role of the police with those of other legal actors has been found in other studies, but predominantly with younger children. See further Warren-Leubecker et al (n 5); and Karen Saywitz, 'Children's Conceptions of the Legal System: "Court is a Place to Play Basketball"' in Ceci et al (n 5) 131–57.

15 Nick Hopkins, 'School Pupils' Perceptions of the Police that Visit Schools: Not All Police are Pigs' (1994) 4 Journal of Community and Applied Social Psychology 189–207, 190.

16 Ibid.

17 Tim Bateman, *The State of Youth Justice 2015: An Overview of Trends and Developments* (NAYJ 2015) 26.

18 Jason Low and Kevin Durkin, 'Children's Conceptualization of Law Enforcement on Television and in Real Life' (2001) 6 Legal and Criminological Psychology 197–214.

19 Hopkins found that young people commonly categorise police officers who visit schools as 'atypical' – so limiting the extent to which they can challenge existing stereotypes.

20 Powell et al (n 12) 471.

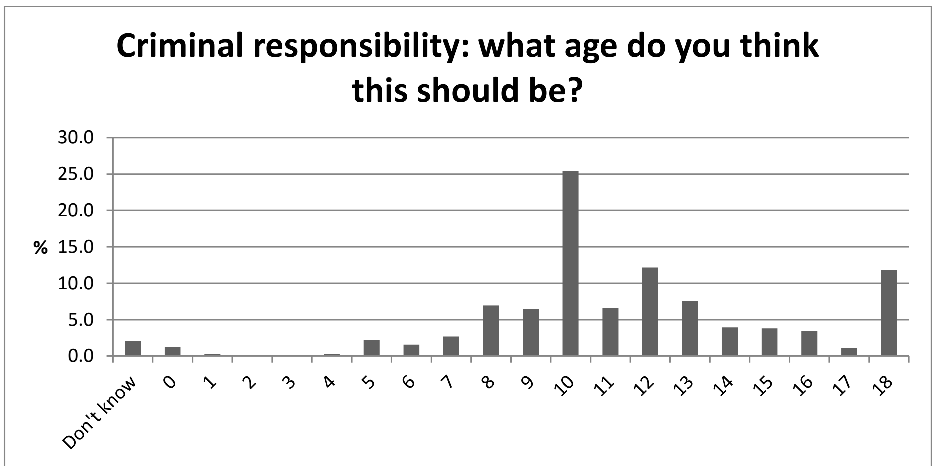

Figure 3: Children's views on what the age of criminal responsibility should be

we demonstrate how children's reasoning appears again to be influenced by the association of ACR with imprisonment.

The mean average for children's views on what ACR should be was 11.5 years old (SD = 3.67). As demonstrated in Figure 3, the most common answer was 10 (25.4 per cent) followed by 12 (12.1 per cent) and 18 (11.8 per cent). Otherwise, children's views varied considerably in response to this question, but 50.5 per cent of the children who participated in the study would prefer ACR to be over 10; 22.1 per cent of children expressed the view that ACR should be under 10; and 2.1 per cent answered 'don't know'.

ACR should be over 10

Considering first the explanations of the 50.5 per cent of children (n = 320) who answered that ACR should be over 10, many felt that children lacked the competence to deal with criminal responsibility at a young age. As demonstrated in the extracts below, this was sometimes stated with express reference to the current ACR, and sometimes more generally:

> *Because you are 10 – you are still a little kid – you don't know what you are doing.* (Girl, Year 5) (ACR-is 10; ACR-should be 12)

> *Because 10 year olds are not really responsible for their actions and stuff like that.* (Boy, Year 5) (ACR-is 10; ACR-should be 18)

> *Because you have to be a bit older because you don't know which law it is.* (Boy, Year 4) (ACR-is 12; ACR-should be 13)

Related to this, children also anticipated that their capability to cope with the implications of assuming criminal responsibility would, or should, evolve and develop with age:

> *Because over ten people are still learning how to be an adult. But over twelve they should know, and their parents should have taught them properly, and if they don't, their parents should have got the blame as well.* (Girl, Year 5) (ACR-is 11; ACR-should be 12)

> *Because when you are a teenager, that is when you get more responsible and you need to learn your own way.* (Boy, Year 4) (ACR-is 10; ACR-should be 13)

> *Because you're not fully grown, you're not a teenager, so you don't really understand what the meaning is, and you don't really care about much stuff about the law. So I think you should be fourteen. Then you'll be responsible because you know more* . . . (Boy, Year 5) (ACR-is 10; ACR-should be 14)

ACR should be under 10

By contrast, a prevalent theme among the views of the 22.1 per cent of children (n = 140) who chose an age under 10 is the opinion that, even at a reasonably young age, children could and should be considered responsible for their actions:

> *Just because they are younger doesn't mean they can't be responsible.* (Boy, Year 5) (ACR-is 10; ACR-should be 9)

> *Well, because, when you say 10, you are responsible for what you're doing, but so are you when you're 8. Because, when you're 1, 2, 3, 4 or 5 you don't know what you're doing, to be honest, do you? When you're 6 or 7 you get to really know a bit more what you're doing. But 8, you're kind of responsible, so. . . Because it's not like, if you go and steal something, it's not, like, your parents' fault because they've not just gone and made you do it.* (Girl, Year 5) (ACR-is 10; ACR-should be 8)

> *Because . . . just because you're under the age they should be, doesn't mean they have an excuse.* (Girl, Year 5) (ACR-is 10; ACR-should be 8)

ACR should be 10

This view, that children could and should be considered responsible for their actions, is a theme that prevails within the explanations of the 25.4 per cent of children (n = 161) who answered that ACR should be 10:

> *Because then you're double digits and you're responsible for yourself and you know you have the right brain to do things properly.* (Girl, Year 5) (ACR-is 10; ACR-should be 10)

> *Well, it should be 10 because you know a lot more than you did when you are 5 or 6 and you are responsible for what you have done so I think it should be 10.* (Girl, Year 4) (ACR-is 10; ACR-should be 10)

> *Because when you are 10, you should be responsible for the things that you do.* (Boy, Year 5) (ACR-is 11; ACR-should be 10)

Don't know answers

Just 2 per cent (n =13) of children responded 'don't know' in response to the ACR-should be question. Of these, perhaps the most poignant explanation is:

> *Because I don't know what law means.* (Boy, Year 4) (ACR-is DK; ACR-should be DK)

However, our analysis of the explanations overall indicates that, for a variety of reasons (and sometimes for no expressed reason), these children were simply and genuinely unsure of their view on this issue, despite giving it careful thought;

> *I actually don't know.* (Boy , Year 4) (ACR-is DK; ACR-should be DK)

> *I said I don't know because I don't know what age. I think it should be young but I don't think . . . I just don't know.* (Girl, Year 4) (ACR-is DK; ACR-should be DK)

Exploring the relationship between ACR-is and ACR-should be

We can see from the preceding discussion that, of the children who answered that ACR should be 10, some of them had already answered that ACR is 10. At first sight this would seem to indicate that, where a child is already aware of the current ACR, then he or she is likely to remain resolute in the view that ACR should be 10 years old. However, further

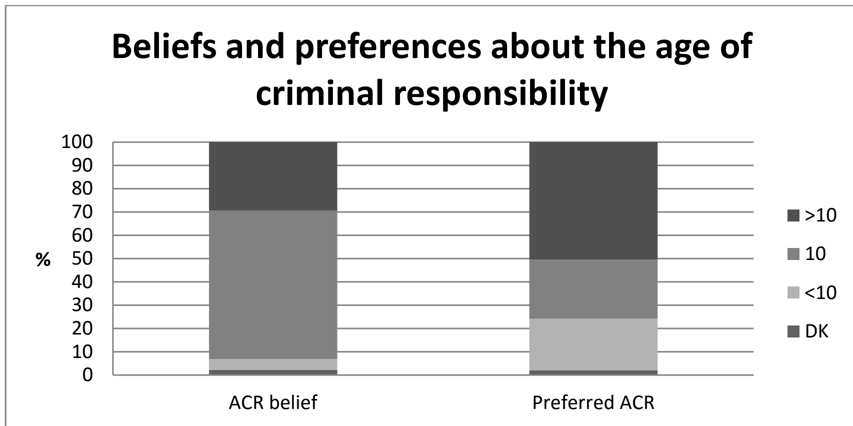

Figure 4: Comparison in beliefs and preferences concerning the age of criminal responsibility

analysis reveals that this is not the case. Of the 63.9 per cent of children (n = 405) who knew that ACR is 10, just 35 per cent (n = 142) opted again for age 10 as their preferred ACR. Some 65 per cent (n = 263) opted for a different age for their preferred ACR, with most preferring an age over 10.[21] This tendency or willingness for children who are aware of ACR to choose another age as their preferred ACR goes some way to explaining the difference in 'ACR belief' and 'preferred ACR' across the whole dataset, as demonstrated in Figure 4.

Further analysis of the relationship between children's responses to the ACR-is and ACR-should be questions indicates that there is a strong correlation between the ages that children think or believe they are responsible for breaking the law and the age they think this should be.[22] This implies that children tended to respond to the two questions in a similar manner. So, for example, where a child identified ACR as age above 10, he or she was very likely also to choose an age above 10 for his or her preferred ACR. But further analyses of these data reveals some interesting patterns within each of the three categories. For children who identified ACR correctly as 10 (n = 403), the mean average of their answers increases from 10.0 for ACR-is to 10.7 for ACR-should be (SD=2.92), indicating that children think that ACR should be higher than it presently is, but with a small degree of variance. Again, for children who identified ACR<10 (n = 28), the mean average increases from ACR-is 7.1 (SD = 3.15) to 8.7 (SD = 4.67) for ACR-should be, indicating again that these children also think that ACR should be higher than they think it presently is, with a greater degree of variance. However, within the category of children who believed ACR to be older than 10, the mean average *decreases*; from 14.7 for ACR-is (SD = 2.76) to 13.7 for ACR-should be (SD=4.08), implying that, where a child believes that ACR is over 10, he or she is likely to think that the age that ACR should be is lower than his or her original choice.

21 41.5 per cent of these children (n = 168) chose an age over 10; 23 per cent (n = 93) chose an age under 10; and there were two 'don't know' answers.

22 Pearson's bivariate correlation: n = 611 (removed DKs), r = 0.496, p<.001. Note that, where a child has given a 'don't know' answer to either the ACR-is or the ACR-should be question, their responses are necessarily excluded from the analysis; hence the slight difference in reported numbers across categories. In total 23 children responded 'don't know' to one or both questions.

Children in this category gave strongly varied explanations for their choices and we did not identify in the qualitative data any over-arching explanation for this finding. However, it was apparent that, for some children who responded in this way, there was a concern that setting ACR at an age close to adulthood would mean that younger people could 'get away' with wrong-doing. For example:

> *Because they probably know that 18 is the age so they will probably do something really bad and not get punished for it.* (Girl, Year 6) (ACR-is 18; ACR-should be 15)
>
> *Because people can still do mean stuff so they should get arrested for it as well.* (Boy, Year 5) (ACR-is 18; ACR-should-be 16)

Factors influencing children's responses

There was no significant difference between the answers given by girls and boys in response to both the ACR-is and the ACR-should be questions.[23] However, children's year group was a significant factor in determining their responses to both. As we have already shown, children in Year 4 were far less likely than children in Year 5 and Year 6 to know that ACR is 10; therefore it is not surprising that there were highly significant differences between Year 4 and the other two year groups when their responses to the ACR-is and ACR-should be questions were compared. The mean averages of Year 4s' responses were significantly higher than Years 5 and 6 for both questions.[24] There was again no significant difference between Year 5 and Year 6. Similarly, since we have already demonstrated significant differences among the eight schools concerning children's ACR awareness, it is not surprising that there are significant differences also across all schools in the mean averages for children's answers to both questions.[25] Following on from this study, we intend to carry out further multidimensional analysis of the data that we have gathered, allowing for the examination of random variation by school.[26] This form of analysis will also facilitate further exploration of the data at individual child level; so allowing us to examine in further detail how a child's responses to these (and other) questions relate to his or her other responses to different scenarios across the game.

The recurring theme of imprisonment

Across all of the qualitative data relating to children's explanations of their ACR-should be responses, our analysis indicates that children's reasoning here, just as in their

---

23 Results of t-tests show that there is no significant differences between girls (n = 322, mean = 11.32, SD = 2.83) and boys (n = 289, mean = 11.17, SD = 2.85) in the age that they think children become responsible for breaking the law (ACR-is; t = -.653, $p>0.05$). Similarly, there is also no significant difference between girls (n = 322, mean = 11.72, SD = 3.31) and boys (n = 289, mean = 11.21, SD = 4.02) in the age they think it should be (ACR-should be; t = -1.693, $p>0.05$).

24 For Year 4 (n = 222) the mean average for ACR-is was 12.36 (SD = 3.62) and 12.30 (SD = 4.18) for ACR-should be; for Year 5 the mean average for ACR-is (n = 292) was 10.62 (SD = 2.08) and 11.03 (SD = 3.30) for ACR should-be (n = 293); and for Year 6 (n = 106) the mean average for ACR-is was 10.84 (SD = 2.23) and 11.07 (SD = 3.22) for ACR-should be.

25 Results of ANOVA shows that there are significant differences among the eight schools (F (7, 603) = 5.60,$p<.001$). Specifically, with regard to ACR-is responses, school AA has the highest mean at 12.77 (n = 69, SD = 3.32), and five out of the seven differences between AA and the other schools are significant. With regard to ACR-should be responses, results of ANOVA shows that there are significant differences among the eight schools, though to a lesser extent than in ACR-is (F (7,603) = 2.25, $p<0.05$).'

26 This form of analysis is facilitated by the use of MLwiN multilevel modelling software; see further Jon Rasbash, Fiona Steele, William Browne and Harvey Goldstein, *A User's Guide to MLwiN*, v2.31 (Centre for Multilevel Modelling, University of Bristol 2014). For an example of how this method has been adopted elsewhere, see Pascoe Pleasence, Nigel Balmer and Catrina Denvir, *How People Understand and Interact with the Law* (Legal Education Foundation 2015).

responses to the 'what happens to a child who is caught stealing?' question, tends to be influenced by their perceived association between ACR and imprisonment:

> *Because, um, when you're responsible for breaking the law you have to go to jail . . .* (Boy, Year 4) (ACR is 10; ACR-should be DK).

As demonstrated in the extracts below, some children reason that ACR needs to be older than 10 because young children could (or should) not be expected to cope with being sent away to prison. By contrast, others reasoned that by the age of 10, children would be able to deal with this:

> *Because I don't think it's fair if when you're ten years of age you have to go to prison.* (Girl, Year 4) (ACR-is 10; ACR-should be: 14)
>
> *Because if you are 10, then you will still miss your family.* (Girl, Year 5) (ACR-is 10; ACR-should be 12)
>
> *Because if you are 9 then maybe you haven't learnt enough stuff. 10 is better because you are more responsible and you are like much bigger – to stay on your own in a place like a prison . . .* (Girl, Year 5) (ACR-is 10; ACR-should be 10).

For other children, breaking the law justifies imprisonment:

> *. . . if they're old enough to steal it then they're old enough to go to jail.* (Girl, Year 4) (ACR-is 11; ACR-should be 12)

And people who commit crimes must be held accountable for their actions, regardless of age:

> *Because if you're any age you need to go to prison.* (Boy, Year 5) (ACR is 10; ACR-should be 0)

Conclusion

Arguably, one of the most important features of the LICL research project has been the gathering of children's views on matters that affect them in their everyday lives; in accordance with their right under Article 12 of the UNCRC. In the context of this paper, we now know that children consider it appropriate that the age of criminal responsibility should be older than the current ACR – with the mean average of their responses being 11.5 years old – and it is our hope that children's views, both individually and collectively, will both inform and influence the further development of policy in this area.

In addition, our research has shown that some 63.9 per cent of children know that currently the age at which they become responsible for breaking the law is 10 years old. It has shown also that children take this responsibility very seriously. We have found that knowledge of ACR varies and is strongly influenced by year group and school environment, but this is only part of the story. Across all schools and across all year groups we have found that children have no understanding of how the criminal justice system works; no concept of the rule of law; and no knowledge of children's rights in the context of wrong-doing. This suggests that, whilst the information that some children are currently receiving concerning ACR can help to increase their formal knowledge of ACR, it is not helping them to understand what this means in the context of their own and other children's lives. Article 40 of the UNCRC requires that any child who is accused of or recognised as breaking the law is 'treated in a manner consistent with the promotion of the child's sense of dignity and worth' and Article 42 requires that both adults and children should know this.

Drawing on research published elsewhere, we have argued in this paper that children's lack of knowledge cannot and should not be attributed to a lack of direct experience of the criminal justice system. Rather, we suggest that it can be attributed to a lack of

education on these issues. Currently, children in Key Stage 2 are not required to learn about the English legal system as a part of the national curriculum. Rather, educational activities that seek to develop children's legal understanding fall under the non-statutory Personal, Social and Health Education (PSHE) National Framework; particularly, the framework for Citizenship at Key Stage 2. Optional activities developed by organisations, such as the Citizenship Foundation, represent welcome interventions in this field,[27]as does UNICEF's work in developing the Rights Respecting Schools agenda.[28] Nevertheless, we suggest that increasing children's awareness of the English legal system (and especially the criminal justice system) should be afforded much greater priority in the education system, in light of children's widespread misunderstanding and lack of knowledge in this area.

At first sight it is encouraging that, since 2014, all schools have been required specifically to increase children's understanding of the rule of law as part of their 'spiritual, moral, cultural, mental and physical development'.[29] However, it is unfortunate that this requirement is situated within the wider context of schools' duty to 'promote British values'.[30] Guidance issued by the Department for Education states: 'It is expected that pupils should understand that while different people may hold different views about what is "right" and "wrong", all people living in England are subject to its law.'[31] As noted by the Citizenship Foundation, the language used in such guidance creates an expectation that young people will 'accept' and 'respect' these values unquestionably, rather than be helped and encouraged to 'understand how things work and how to challenge and change them for the better'.[32] It is notable also that there is no reference to children's rights in this guidance.

If we had limited our research to gathering quantitative data from children concerning ACR, we would know that a good number of children know that ACR is 10 and that most children think that ACR should be older than this. However, we would not have discovered the strong association that children make between ACR and imprisonment, which was revealed through our analysis of the qualitative data relating to children's explanations of their choices. We consider that this represents just one example of the insights that can be gathered through the adoption of a mixed-methods approach, facilitated by the use of digital gaming. Because this innovative method facilitates the gathering and analysis of both quantitative and qualitative data from a large number of research participants, it meets the qualitative researcher's concern to gain understanding of research participants' views and experiences, at the same time as addressing the quantitative researcher's concerns for measurement and scalability. As such, we consider that there is scope to further develop this approach in the field of socio-legal research and other areas.

27 See, for example, the cross-curricular PSHE and citizenship programme for primary schools provided by the Citizenship Foundation at <www.gogivers.org/>.

28 See <www.unicef.org.uk/rights-respecting-schools/>.

29 Department for Education, 'Promoting Fundamental British Values as Part of SMSC in Schools: Departmental Advice for Maintained Schools' (November 2014) 3.

30 Department for Education and Lord Nash, 'Press Release: Guidance on Promoting British Values in Schools' November 2014 <www.gov.uk/government/news/guidance-on-promoting-british-values-in-schools-published>.

31 Department for Education (n 29) 4.

32 Citizenship Foundation, 'What are British Values?' <www.doingsmsc.org.uk/british-values/>.

NILQ 67(3): 327–41

After the age of criminal responsibility: a defence for children who offend

CLAIRE MCDIARMID*

University of Strathclyde

Abstract

In Scotland, the age of criminal responsibility is 8, although children cannot be prosecuted until they are 12. In England and Wales, for all purposes, the age is 10. This article argues that a further mechanism is needed to protect the young who do wrong within the criminal process and it argues for a new, bespoke defence, to be available to young people from the age of criminal responsibility until they attain the age of 18. It 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.*

Keywords: age of criminal responsibility; defence; criminal law; young offenders; youth justice; juvenile justice; criminal capacity; developmental immaturity.

1 Introduction

Throughout history, the criminal law has made concessions to children. It is reported that, in 924 AD, King Aethelstan allowed them a defence to charges of capital theft unless they had resisted or fled.[1] In the eighteenth and nineteenth centuries, Blackstone,[2] in relation to English law, and Hume,[3] in Scotland, were concerned that capital punishment should not be inflicted on those who, by virtue of being young, could not understand fully what they had done. Today, these practices have crystallised, in both jurisdictions, into the provision of a minimum age of criminal responsibility (MACR) below which children are

* The author would like particularly to thank Dr Enys Delmage and Dr Michael Barnes for informed, stimulating and generous discussion of issues raised in this paper.

1 See Wiley B Sanders (ed), *Juvenile Offenders for a Thousand Years* (University of North Carolina Press 1970) 3–4.

2 Sir William Blackstone, *Commentaries on the Laws of England* Book 4 (1765) (Cavendish 2001) ch 2.

3 Baron D Hume, *Commentaries on the Law of Scotland Respecting Crimes* (1844) (Law Society of Scotland 1989) 30–37.

deemed incapable of criminal guilt[4] but, beyond that, the criminal law makes no further special provision. In Scotland the MACR is 8,[5] but children cannot be prosecuted until they are 12[6] (though the Scottish government is consulting on raising the MACR to 12).[7] In England and Wales the age is 10 for all purposes.[8] This paper argues that a further mechanism is needed to protect the young within the criminal process. In this respect, it enters the debate[9] generated by the Law Commission, initially in its report on *Murder, Manslaughter and Infanticide*[10] and latterly, more generally, in its discussion paper on *Criminal Liability: Insanity and Automatism,*[11] and argues for the provision of a bespoke defence of 'developmental immaturity'. This would be available to be pled by young defendants, in appropriate circumstances, at any time from the MACR until they attain the age of 18.

The criminal process brings children accused of crime under the aegis of its balancing role between their own right to a fair trial, now enshrined in Article 6 of the European Convention on Human Rights (ECHR), and the public interest in conviction of those who have committed criminal offences. Crimes committed by the young are inherently newsworthy as can be illustrated by the recent case of the murder, on 8 December 2014, in Hartlepool of a 39-year old woman, Angela Wrightson by two girls then aged 13 and 14.[12] The case was extensively covered by nine national newspapers,[13] BBC News and Sky News as well as by social media. Where a crime is serious, the facts are widely publicised and there is little or no doubt that the correct perpetrator has been identified, lack of capacity defences may encounter public opposition.[14] The article considers this issue in the context of the over-arching need for fairness to all.

The article argues that a defence is indicated because children's understanding of criminal behaviour may be limited in comparison with (or different from) that of their adult counterparts[15] and/or children may be unable, or impaired in their ability, to

4 Children are also referred to different systems than adults in relation to some offending behaviour – i.e. children's hearings in Scotland; youth courts in England, though some continue to be prosecuted in the 'adult' court (Crown Court in England and Wales; Sheriff or High Court in Scotland).

5 Criminal Procedure (Scotland) Act 1995, s 41.

6 Ibid s 41A.

7 See <https://consult.scotland.gov.uk/youth-justice/minimum-age-of-criminal-responsibility>. In England and Wales, Lord Dholakia's Bill to raise the age to 12 had a second reading, but was not allocated for its committee stage and cannot progress. See <http://services.parliament.uk/bills/2015–16/ageofcriminalresponsibility.html>.

8 Children and Young Persons Act 1933, s 50, as amended by Children and Young Persons Act 1963, s 16(1).

9 See also Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' (2011) 75 Journal of Criminal Law 289; Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective' (2013) 13 Youth Justice 102.

10 Law Com No 304 (TSO 2006), paras 5.125–37 (in relation only to the defence of diminished responsibility).

11 Law Commission (2013) ch 9.

12 Andrew Norfolk, 'Killer Girls Stifled Yawns as They Were Jailed for 15 years' *The Times* (London 8 April 2016) 16.

13 *Star*, *Mirror*, *Telegraph*, *Express*, *i*, *Independent*, *Sun*, *Times*, and *Guardian*. For illustrative purposes, a search on the Nexis database of newspaper articles for 'Angela Wrightson' returned 397 hits in national British newspapers,

14 See, for example, Ralph Slovenko, 'The Insanity Defense in the Wake of the Hinckley Trial' (1983) 14 Rutgers Law Journal 373.

15 See Elizabeth S Scott and Laurence Steinberg, *Rethinking Juvenile Justice* (Harvard University Press 2008) 37–38; also Daniel P Keating, 'Adolescent Thinking' in S Shirley Feldman and Glen R Elliott (eds), *At the Threshold: The Developing Adolescent* (Harvard University Press 1990) 54–89, particularly on the shift between children's and adolescent thought.

exercise rational control over their behaviour.[16] A defence would make it easier to ensure that, where it is relevant, evidence supporting a claim of lack of capacity, arising as a result of developmental immaturity, is available to the court. These issues also partly constitute the basis of children's vulnerability as defendants which is assumed throughout.[17]

In part 2, the article considers the meaning of criminal capacity – or what it is that needs to be understood in order to be held criminally responsible. It draws on material from developmental psychology and neuro-science, as well as the significance of the child's life experiences, in identifying reasons why children may lack the necessary understanding and abilities. In part 3, it considers the current use of age in law generally and the role of the MACR in particular, seeking to show that, while the law finds the kind of bright line which chronological age draws easy to manage, these lines are somewhat arbitrary. A defence which would apply across an age range would therefore have advantages. Part 4 considers the existing provision made by the law to accommodate claims of lack of capacity and their shortcomings if pled on behalf of children. Finally, part 5 turns its attention to the possible form of a defence and its operation within the criminal process.

'Children' are defined, in line with the definition in Article 1 of the UN Convention on the Rights of the Child (1989) (UNCRC) as 'every human being below the age of eighteen years'.[18] While the paper draws primarily on Scots law to exemplify points, a defence of developmental immaturity is proposed for both Scotland and England and Wales.

2 Why should children have a defence? A deficit in criminal capacity

In order to be found guilty of (most) criminal offences, the accused person must have carried out the proscribed behaviour (the *actus reus*) with the accompanying mental attitude specified in the crime's definition (the *mens rea*) *and* s/he must have criminal capacity.[19] It is self-evident that very young children do, on occasion, carry out acts which could constitute the behavioural element of offences. For example, toddlers might draw on walls (vandalism).[20] Newspapers quite frequently report 'offences' by so-called 'underage' offenders.[21] As will be discussed more fully below, if it is defined (excessively) narrowly, some very young children might even be considered to have carried out these acts with the requisite *mens rea*. The key issue, then, is criminal capacity defined, applying H L A Hart's classic exposition,[22] as understanding of the act in its context and its consequences and having a fair opportunity *not* to carry it out. Nicola Lacey has defined it in these terms:

16 See Elizabeth Cauffman and Laurence Steinberg, '(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults' (2000) 18 Behavioral Sciences and the Law 741.

17 In Scotland, child witnesses are currently defined as 'vulnerable' (Criminal Procedure (Scotland) Act 1995, s 271(1)(a).

18 'unless under the law applicable to the child, majority is attained earlier'.

19 See, for example, Andrew Ashworth and Jeremy Horder. *Principles of Criminal Law* 7th edn (OUP 2013) para 5.1; Elliott (n 9).

20 Criminal Law (Consolidation) (Scotland) Act 1995, s 52.

21 For example, 'Kids Named in £10K Blaze' *Daily Mirror* (London 10 October 2015), 33 (two children aged 6 and 9 alleged to have started a fire at a branch of Asda in Bolton, Greater Manchester); Matthew Davis, 'Rise in Criminals as Young as Two' *Express Online* (London July 7 2013) (2-year-old at centre of police probe into criminal damage in Bedfordshire, three 5-year-olds recorded as racially abusing people in Greater Manchester; 4-year-old accused of shoplifting in West Mercia).

22 Herbert L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 2nd edn (OUP 2008) ch 1.

> [t]his conception of responsibility consists in both a cognitive and a volitional element: a person must both understand the nature of her actions, knowing the relevant circumstances and being aware of possible consequences, and have a genuine opportunity to do otherwise than she does – to exercise control over her actions, by means of choice.[23]

The Law Commission takes the view that anyone who completely lacks criminal capacity should not be found criminally responsible.[24] It draws out three particular capacities needed for the fair imposition of criminal responsibility: 'the ability rationally to form a judgment, the ability to understand wrongfulness, and the ability to control one's physical actions'.[25] Children and young people may not be able to conform to some or all of these requirements because of immaturity and it is in such a situation that the proposed defence could be pled. The next section will consider some of the attributes of childhood recognised by developmental psychology, neuro-science and arising from life experience which help to substantiate the possibility of a lack of capacity in (some) young people.

For more than a century,[26] developmental psychology has provided an evidence base for the observable phenomenon that children develop in a number of respects – physical, mental, intellectual, emotional and moral – simultaneously,[27] but at different rates. Recent advances in the field of neuro-science, particularly in functional magnetic resonance imaging, have 'provided a neurological explanation for much of the research describing adolescents' behavioral [sic] immaturities'.[28] Thus, neuro-science might be said to offer a 'harder' science complement to psychological perspectives.

In terms of intellectual development, it is widely accepted that '[c]hildren's thinking is not the same as adult thinking. As a child develops their thinking changes.'[29] Thus,

> [w]hen children think they are constrained by their current cognitive structure. Some distorting of experience is inevitable as children attempt to incorporate, understand, or interpret this experience. A child's mind is not like a camera; experience is always filtered through the child's current ways of understanding.[30]

Cognition, on Jean Piaget's theory, is a central organising concept which makes it possible for children to 'assimilate' existing skills and discoveries so that they can be applied in novel contexts and to 'adapt' to new experiences.[31] This has been explained as the '"pure sensory input" [being] "transformed" by some form of "mental work"'.[32] In psychoanalytic theory, the ego performs much the same rationalising, controlling and centralising function over the id (the individual's baser instincts) and the superego, which can be loosely described as the conscience.[33] '[T]he central organising tendency of ego

23 See Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1988) 63.

24 Law Commission (n 11) para 1.20.

25 Ibid paras 3.4, 4.4–4.54.

26 Carol Brown, *Developmental Psychology* (Sage 2008) 8–10.

27 See, for example, Natarjan Sukumar Gowda, *Learning and the Learner: Insights into the Processes of Learning and Teaching* 2nd edn (PHI Learning Private 2015) 50–52.

28 Cheryl B Preston and Brandon T Crowther, 'Legal Osmosis: The Role of Brain Science in Protecting Adolescents' (2014) 43 Hofstra Law Review 447, 460.

29 Lisa Oakley, *Cognitive Development* (Routledge 2004) 2.

30 Patricia H Miller, 'Piaget's Theory: Past, Present and Future' in Usha Goswami (ed), *The Wiley-Blackwell Handbook of Childhood Cognitive Development* (Wiley-Blackwell 2011) 649, 653.

31 For a summary, see John H Flavell, 'Piaget's Legacy' (1996) 7 Psychological Science 200.

32 Howard Leventhal and Klaus Scherer, 'The Relationship of Emotion to Cognition: A Functional Approach to a Semantic Controversy' (1987) 1 Cognition and Emotion 3, 6 (quotes in original).

33 Erik H Erikson, *Childhood and Society* 2nd edn (WW Norton & Co 1963) 192–94, 415.

development [has been defined] as the progressive differentiation between "subject" and "object" – the aspects of self one controls and those one is controlled by.'[34] The key point is that to be criminally responsible, with its requirement to exercise rational control over action, these central organising concepts must be well developed. Erik Erikson identifies the period between the ages of 12 and 18 as one of frenetic ego activity;[35] Piaget has been regarded as considering that intellectual development (which includes the development of cognition) is still ongoing until around 15.[36] Psychological development thus seems to be a continuing – even intensive – process well into adolescence.

Neuro-science also offers arguments in favour of giving some leeway to young people at the outer limits of childhood and even beyond. These arguments rest particularly on three areas of observed development in the brain, which is itself possible through progress in brain scan technology[37] in recent years, allowing 'unique access to visualizing the brain in transition'.[38] There is agreement in both medical literature and legal academic discourse which relies upon it that the development of the amygdala, growing and pruning of white and grey matter and frontal lobe (prefrontal cortex) development are all of relevance.[39] In essence, the amygdala, is more developed in adolescents than the prefrontal cortex. This means that their decision-making tends to be more instinctive and directed by emotion (these being amygdale properties) than rational and considered (these belonging to the prefrontal cortex).[40] The ratios of white and grey matter relate to the speed and efficiency of message-carrying pathways in the brain. Until the white matter (myelin) is properly distributed, transmission of signals within the brain can, on occasion, be erratic.[41] All of this is of importance because it provides a basis from which to argue that even young people whose development is advanced in areas such as intellect and morality may still have difficulty exercising rational control over reckless impulses.

Finally, in considering why children should have a defence, it is necessary to look at their lived experience. The criminal law rests on a notion of free will[42] – that it is appropriate for the state to impose punishment because the wrong-doer exercised a choice to commit an act known to be wrongful in a situation where s/he could equally have refrained from so doing. Children's ability to choose in this way may be more constrained by, for example, lifestyle choices made by their parents, the culture in which they live and a lack of experience of positive alternatives. This is well explained by Elliott:

> . . . research has shown such a close co-relation between negative elements of the external environment in which a child is living and criminal conduct that it is clear that it is these external factors that have been determinative of the child's criminal conduct rather than the child acting as an autonomous individual

34 P Michiel Westenberg, Augusto Blasi and Lawrence D Cohn, 'Introduction: Contributions and Controversies' in P Michiel Westenberg, Augusto Blasi and Lawrence D Cohn (eds), *Personality Development: Theoretical, Empirical and Clinical Investigations of Loevinger's Conception of Ego Development* (Lawrence Ehrlbaum Associates 1998) 1, 3.

35 Erikson (n 33) 261–63.

36 See Larry Cunningham, 'A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and their Status under Law' (2006) 10 UC Davis Journal of Juvenile Law and Policy 275, 282.

37 Preston and Crowther (n 28) 458.

38 Megan Moreno and Meaghan E Trainor, 'Adolescence Extended: Implications of New Brain Research on Medicine and Policy' (2013) 102 Acta Paediatrica 226, 227.

39 Ibid, 227.

40 See Charlotte Walsh, 'Youth Justice and Neuroscience: A Dual-Use Dilemma' (2011) 51 British Journal of Criminology 21, 23.

41 Preston and Crowther (n 28) 458.

42 Ashworth and Horder (n 19), para 2.1, which also discusses theoretical challenges to this 'choice theory'.

> exercising a choice. Perhaps focusing on issues of morality and ignoring personal responsibility was historically understandable, but as social research techniques have become more advanced and the resulting statistical evidence has become clearer regarding the impact of such issues as poor parenting and poverty on a child's criminal behaviour, it is now blatantly unjust simply to ignore the social reality.[43]

An example is found in a case study on restorative justice. The mother of a victim attending a restorative conference gave her impression of the young offender:

> I didn't think he could see where the harm was in all he'd done. I asked him why he went into the hall and he said: 'I was looking for something to steal'. He said it so openly like it was, 'What else would I be doing?'
>
> It turned out he was the oldest of six children and the mother just sent him out to steal and that was his way of being brought up.[44]

From an economic perspective, Jens Qvortrup has commented that 'children are accounted for in terms of their parents' economic situation, and they are thus split up in accordance with criteria that do not characterize their own life conditions'.[45]

The key point is that children's ability to make lifestyle choices and their understanding of the moral norms of the culture in which they grow up will be heavily constrained by those of their parents and, indeed, their peers[46] to an extent which is much greater than for adults. This affects the argument that all crime is committed with free will and through the exercise of informed choice. The Law Commission has also recognised all of these issues: 'a defendant may wish to rely on either biological factors or social or environmental influences, or all of these to support a claim of developmental immaturity'.[47]

The material from developmental psychology, in particular, additionally suggests that, currently, the MACR is set at a point where a significant proportion of those *deemed* to have criminal responsibility may, in fact be relatively *im*mature intellectually, emotionally and morally. The neuro-science leads to a similar conclusion about mental development. Setting the MACR requires a clear policy choice as to whether to use a young age so that the likelihood of failing to impose criminal responsibility on precocious children of early maturity is diminished or setting it further through the lifespan so that a higher proportion of those deemed criminally responsible will be sufficiently mature developmentally to have criminal capacity in fact. The choice currently taken is the former and this is highlighted through part 3's analysis of the way in which the law uses age generally.

3 The use of age in law generally and the deployment of the MACR

Chronological age is used in law to draw bright lines so that the issue of whether an individual has acquired a particular age-defined right or taken on such a responsibility can be formulated as a clear unambiguous yes/no binary.[48] Such line-drawing offers certainty

---

43 Elliott (n 9) 300.

44 *Time for a Fresh Start: Report of the Independent Commission on Youth Crime and Antisocial Behaviour* (Police Foundation 2010) 63.

45 Jens Qvortrup, 'Childhood Matters: An Introduction' in Jens Qvortrup, Marjatta Bardy, Giovanni Sgritta and Helmut Wintersberger (eds), *Childhood Matters: Social Theory, Practice and Politics* (Avebury 1994) 1, 16.

46 Preston and Crowther (n 28) 454, 456.

47 Law Commission (n 11) para 9.12.

48 See, also, Kathryn Hollingsworth, 'Responsibility and Rights: Children and their Parents in the Youth Justice System' (2007) 21 International Journal of Law, Policy and the Family 190, 196–97.

but, in view of the individualised way in which children develop, the lines drawn are bound to be somewhat arbitrary. For example, body piercing is legal at 16;[49] tattoos not until 18.[50] Young people can join the army[51] and get married[52] at 16. The UK parliamentary election voting age is 18,[53] but in Scotland (for elections relating to Scotland) it has been lowered to 16.[54] Films are certificated for viewing at various points throughout childhood. In 2009, the Scottish government published a leaflet for children entitled *What Can I Do at My Age?*.[55] Its only entry under the age of 8 is 'be held responsible for crimes'.[56] There are no entries at all for ages 9, 10 and 11. At 12, according to the leaflet,[57] children can, inter alia, register as an organ donor without parental consent[58] and be the subject of an anti-social behaviour order.[59] Tellingly, jury membership is only possible at 18.[60]

Legally imposed and conferred responsibilities and rights for children, then, arrive with them in an unsystematic fashion throughout the period of childhood. As Jonathan Todres has commented: '. . . the law's approach to . . . the concept of maturity [has been to consider it] in a piecemeal and issue-specific fashion. The result is a legal construct of maturity that is anything but consistent or coherent.'[61] While a defence would also use age to determine the limits of the period of the lifespan during which it could be pled, it would be available across a range of ages thereby making better provision for the individual nature of children's development.

The way in which the MACR currently fits into the matrix of chronological ages in law is also of relevance in the argument for a defence. It is an outlier, conferred without most of the other rights which maturity otherwise brings (for example, to vote;[62] to marry; to have sex; to work; to adorn the body permanently).[63] The Commentary to the Beijing Rules[64] suggests that the MACR *should* be better aligned: 'In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).'[65] By allocating only the responsibility for wrong-doing at this early stage, the law misses the opportunity to facilitate more rounded development through the acquisition

49 Without parental consent in terms of licences issued to premises under the Civic Government (Scotland) Act 1982, Parts I and II.

50 Tattooing of Minors Act 1969, s 1 (the offence is committed by the tattooist).

51 Armed Forces (Enlistment) Regulations 2009/2057, reg 4.

52 Marriage (Scotland) Act 1977, s 1(1).

53 Representation of the People Act 1983, s 1(1)(d).

54 Ibid s 2(1)(d) and (1A).

55 Cl@n Childlaw, *What Can I Do At My Age?* (Scottish Government 2009) <http://www.gov.scot/Resource/Doc/268906/0079936.pdf>.

56 Ibid 05.

57 Ibid 06–07.

58 Human Tissue (Scotland) Act 2006, s 8.

59 Antisocial Behaviour etc (Scotland) Act 2004, s 4(2)(a).

60 Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s 1(1)(b).

61 Jonathan Todres, 'Maturity' (2011–2012) 48 Houston Law Review 1107, 1107.

62 Another way of bringing the ages of significant rights acquisition into better mutual alignment would be to lower the voting age. See discussion in Aoife Nolan, 'The Child as "Democratic Citizen": Challenging the "Participation Gap"' (2010) Public Law 767, 777–78.

63 For discussion of certain markers of adulthood, particularly in the US, see Todres (n 61).

64 UN Standard Minimum Rules for the Administration of Juvenile Justice (1985).

65 Ibid Commentary on rule 4. Note that civil majority is not conferred until 18: Age of Majority (Scotland) Act 1969, s 1.

and refining of rights and responsibilities together, which would be more likely to happen naturally if the MACR was higher.[66] The current arrangement would, however, matter less if, on attainment of the MACR, a defence was available, since it could operate to bridge the gap between the acquisition of criminal responsibility and other attributes of adulthood.

In certain respects, the criminal law's proscriptions serve a directive function in telling citizens what to do.[67] For example, the fact that possession of controlled substances is a crime[68] is an indication to individuals not to take possession of prohibited drugs. The MACR makes a similarly definite provision of the point in the lifespan at which a child will become criminally responsible, but it cannot order, in the same way, that s/he simultaneously acquires the abilities, understandings, emotional responses and moral decision-making capability which ought to underpin this.[69] This remains a matter of individual development. In some cases then, it imposes on a child a responsibility which, due to developmental immaturity, it is, factually, impossible for him/her to shoulder. The provision of a defence immediately after the MACR would also help to address this concern.

4 Existing lack of capacity defences

Despite these perceived shortcomings, the provision of a MACR is considered to be necessary and important because, without one, children of all ages, even the very youngest, become potentially liable to prosecution for their criminal acts.[70] The MACR is also significant as the only defence available specifically to children. As well as the protection provided by the MACR, this part will discuss other, generalised, lack of capacity defences (diminished responsibility; insanity or mental disorder; and absence of *mens rea*) to gauge their suitability to be pled by children.

The MACR provision is framed around the young child's deemed inability, through lack of criminal capacity,[71] to be guilty of crime. The statutory wording is identical in both Scotland and England and Wales: '[i]t shall be conclusively presumed that no child under the age of eight/ten years can be guilty of any offence'.[72] This is a conclusive presumption. There is no test or discretion. Thus, in England and Wales, a child aged 9 and 364 days has no criminal responsibility. On his/her 10th birthday s/he acquires the same responsibility (albeit with different sanctions) as an adult.[73]

Any young child charged with an offence would plead 'nonage'[74] – i.e. that s/he is below the MACR. This is a complete defence resulting in automatic acquittal or it could be pled definitively in bar of trial.[75] While this may sound promising, in a country like the

66 On this point about the need for responsibility to go hand-in-hand with rights. See Hollingsworth (n 48) and Nolan (n 62) 773–74.

67 See Winnie Chan and Andrew P Simester, 'Four Functions of *Mens Rea*' (2011) 70 Cambridge Law Journal 381, especially 388–93.

68 Misuse of Drugs Act 1971, s 5(1).

69 On a similar point, see Hollingsworth (n 48) 195.

70 See Elaine E Sutherland, 'The Age of Reason or the Reasons for an Age? The Age of Criminal Responsibility' (2002) Scots Law Times 1, 4–5.

71 See *Merrin v S* 1987 SLT 193.

72 Criminal Procedure (Scotland) Act 1995, s 41/Children and Young Persons Act 1933, s 50, as amended by Children and Young Persons Act 1963, s 16(1).

73 See Heather Keating, 'The "Responsibility" of Children in the Criminal Law' (2007) 19 Child and Family Law Quarterly 183, 191.

74 See Hume (n 3) 30; Blackstone (n 2) 22.

75 See James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (W Green 2006) paras 1.01 and 2.17.

UK where birth registration has been in existence since the nineteenth century,[76] it is likely that few children ever have the opportunity to use the plea since the issue of age can be easily established.

Beyond nonage, the criminal law offers slim pickings to anyone, of any age, who seeks to plead that his/her understanding or appreciation of the criminal act is different, or impaired, by comparison with the (adult) norm or that his/her mental state rendered it impossible for him/her to avoid committing the offence. Perhaps the best option for the young would be diminished responsibility[77] because it recognises a deficit – or even merely a difference from the 'norm' – in mental functioning which is not total. It also allows *some* responsibility to be taken for the offence. It can, however, only be pled to a charge of murder as a partial defence so that, if successful, the defendant would be convicted on the reduced charge of manslaughter or culpable homicide. In its Scottish formulation, it applies where 'the [accused's] ability to determine or control conduct' was 'substantially impaired by reason of abnormality of mind'.[78] The English defence rests on 'an abnormality of mental functioning which – (a) arose from a recognised medical condition'.[79] Lack of neurological, and/or psychological development in a child is not usually abnormal and to have to claim that it is, for the purposes simply of being able to use the defence in the first place, might be stigmatising.[80] Also, the criminal law can only easily accommodate the operation of diminished responsibility to 'reduce' the crime in relation to murder where a lesser charge on the same facts can readily be substituted. What is it to do where, say, the conviction is for theft? A person of lesser capacity could receive a lesser sentence but s/he is still criminally responsible for the 'full' crime of theft. Outwith the context of homicide, the criminal law is ill-equipped to respond to partial criminal capacity at the initial stage of determining guilt.

Where the defendant suffers a more complete form of mental disorder, resulting in an overarching inability to understand his/her criminal act, then s/he can plead insanity[81] (in England and Wales) or mental disorder[82] (in Scotland). Each requires something 'wrong' with the accused person's mind. In Scotland the defence is pled where 'the person was at the time of the conduct unable *by reason of mental disorder* to appreciate the nature or wrongfulness of the conduct';[83] in England the defence is available where 'the party accused was labouring under such a defect of reason, *from disease of the mind*, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong'.[84]

A child-defendant could, similarly to an adult and regardless of his/her age, suffer from a form of mental illness or disorder which would trigger this defence. If not, however, then the defence has some of the shortcomings attributed above to diminished responsibility, particularly stigma, but does not readily accommodate a lack of developed understanding or impulse control which could be 'normal' in young people. Though it

76 Births and Deaths Registration Act 1836 made registration compulsory in England and Wales; Registration of Births, Deaths and Marriages (Scotland) Act 1854 did the same for Scotland.

77 Coroners and Justice Act 2009, s 52 (England and Wales); Criminal Procedure (Scotland) Act 1995, s 51B

78 1995 Act, s 51B(1).

79 Homicide Act 1957, s 2(1)(a) (as amended by the Coroners and Justice Act 2009, s 52(1)).

80 On the stigma attaching to being labelled 'criminally insane', see Claire Hogg, 'The Insanity Defence: An Argument for Abolition' (2015) 79 Journal of Criminal Law 250, 252–53.

81 See David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* 14th edn (OUP 2015) para 11.2.2.

82 Criminal Procedure (Scotland) Act 1995, s 51A.

83 Ibid s 51A(1) (emphasis added).

84 From the M'Naghten Rules – (1843) 19 Cl & Fin 200, 210 (emphasis added).

may be that children could plead this defence – in England and Wales it has been regarded as at least potentially available to those in a temporary hypoglycaemic state caused by diabetes,[85] that is to someone suffering from an illness usually categorised as physical rather than mental – the grounds on which a child would be likely to offer it are different from the severe forms of abnormal mental state which it is designed to cover. It is not a good fit,[86] which suggests that something more tailored is needed for children.

Perhaps the most promising existing mechanism is a plea of absence of *mens rea*.[87] However, this immediately raises a question of definition, given that it has been suggested that '[t]he term "*mens rea*" is rivalled only by the term "jurisdiction" for the varieties of senses in which it has been used and for the quantity of obfuscation it has created'.[88] It is axiomatic that criminal offences have both a physical element or *actus reus* – the proscribed act, state of affairs or omission – and a mental element.[89] On one definition, the latter could incorporate all aspects of the criminal charge which relate to the defendant's mental state which would encompass both his/her attitude to the criminal act and his/her criminal capacity. Alternatively, it could be defined narrowly to represent only the specific mental attitude comprised in the crime's definition which has a direct relationship with the defined *actus reus*.[90] In this second sense, then, the *mens rea* of theft in English law is, in summary, the intention permanently to deprive the owner of the item taken.[91] Even a toddler might be able to take a thing (a toy belonging to another say) and *mean* to keep it, thus satisfying the *mens rea* if it is defined as the thinnest possible concept. If, however, the mental element is taken to include broader issues of understanding and, indeed, development, then the *mens rea* is more likely to be deemed absent. This might involve matters such as the ability to exercise rational control over the act and the understanding of the legal concepts of appropriation and permanent deprivation. For an 'absence of *mens rea*' argument to operate to protect children, it would have to examine these broader understandings. It is, however, possible to establish 'thin' *mens rea* without doing so. At the least, then, pleading absence of *mens rea* may have uneven results depending on the over-arching view of the *mens rea* concept applied by the court.[92]

Other problems with relying on absence of *mens rea* are that the approach would be fruitless if the crime charged was of strict liability and therefore had no *mens re*a. Also, there are occasions when it difficult to distinguish between the *actus reus* and the *mens rea*, for example, in theft where the thing initially comes into the thief's possession lawfully but his/her decision to keep it turns the transaction into an offence.

Overall, then, it is not impossible for a child-defendant to plead insanity (or mental disorder), absence of *mens rea* or, where the charge is murder, diminished responsibility. It

85 See *R v Quick* [1973] QB 910, though here, on appeal, a distinction was drawn on the basis that it was the defendant's failure to use insulin properly (he had not eaten as he was required to) which had caused the hypoglycaemia and that, as this was an external factor, automatism was the requisite defence.

86 For a discussion of issues arising where a child used the (now amended) Scottish 'insanity' plea in bar of trial, see Clare Connelly and Claire McDiarmid, 'Children, Mental Impairment and the Plea in Bar of Trial' (2000) 5 Scottish Law and Practice Quarterly 157.

87 In this respect, the Scottish Law Commission took the view that there might be 'formidable difficulties in proving the criminal capacity of the child': Scottish Law Commission, *Report on Age of Criminal Responsibility* (Scot Law Com No 185 TSO 2002) para 3.8(a).

88 Sanford H Kadish, 'The Decline of Innocence' (1968) 26 Cambridge Law Journal 273, 273.

89 Encapsulated in the Latin maxim *actus non facit reum nisi mens sit rea*. See, for example, Jeremy Horder, 'Two Histories and Four Hidden Principles of *Mens Rea*' (1997) 113 Law Quarterly Review 95.

90 Chan and Simester (n 67) 381–82.

91 From the Theft Act 1968, s 1.

92 For a fuller discussion, see Claire McDiarmid, *Childhood and Crime* (Dundee University Press 2007) ch 3.

is, nonetheless, clear that each has shortcomings when applied to children such that the case which they seek to make to exculpate from the crime charged might require to be shoe-horned into an ill-fitting legal framework.

5 The form of the defence

It appears, then, that there are good reasons for seeking to protect young people within the criminal process, that the conferment of rights and responsibilities by reference to a single, chronological age can be too arbitrary, that the MACR, whilst vital, may not be sufficient fully to protect children and that other lack of capacity defences are not entirely appropriate for children. Some grounds for the provision of a bespoke defence are thus emerging. Before considering aspects of the form this might take, however, the issue of the public interest in conviction of those who, often manifestly, carried out certainly the *actus reus* of serious crimes now needs to be taken into account.

The Law Commission 'acknowledged that the recommendation [for a new defence for the young in relation to diminished responsibility] was potentially controversial',[93] because some of its consultees took the view that mitigating murder on the grounds of developmental immaturity was 'too generous to those who had killed with the fault element for first degree murder'.[94] It is clear that there is resistance in some spheres to allowing criminal responsibility to be mitigated or removed on grounds of incapacity. A classic example is the case of John Hinckley Jr who, in 1981, was found not guilty by reason of insanity in relation to the attempted assassination of the then US president, Ronald Reagan. There was considerable public opposition to the not guilty verdict to the extent that a number of states sought to abolish their laws on insanity.[95] Lauran G Johansen commented that, the 'public outcry was deafening' such that '[m]ultiple jurisdictions rewrote statutory insanity defenses that had been carefully crafted over years using the emerging bio-medical understanding of mental illnesses'.[96]

Closer to home, the recommendations of a recent report on the youth justice system in England and Wales are tempered by an underlying anxiety about public opinion in relation to children who commit serious crimes. It recommended that (in the immediate term) the MACR should be raised to 12 'for all but the most grave offences (murder, attempted murder, rape, manslaughter and aggravated sexual assault)'.[97] Public opinion[98] was one of the main reasons for the 'grave crimes' exception despite the report's acknowledgment of 'the contradictions implicit in such a recommendation: that is, in continuing to hold children who have committed the most heinous crimes responsible for their behaviour one likely criminalises those most in need of help'.[99] Equally, the murder of Angela Wrightson in Hartlepool indicates that, on occasion, public opinion may also have to be reined in. It has emerged that the original trial in 2015 was halted because the nature of the comment on social media was so extreme and abusive that it affected the

93 Law Commission (n 11) para 9.7.

94 Law Commission (n 10) para 5.129.

95 Montana, Utah, Idaho and Kansas have done so. See Fatma Marouf, 'Assumed Sane' (2015–2016) 101 Cornell Law Review Online 25, 32.

96 Lauren G Johansen, 'Guilty but Mentally Ill: The Ethical Dilemma of Mental Illness as a Tool of the Prosecution' (2015) 32 Alaska Law Review 1, 5.

97 Centre for Social Justice, Youth Justice Working Group, *Rules of Engagement: Changing the Heart of Youth Justice* (Centre for Social Justice 2012) 21.

98 Ibid 207–08, para 8.6.2.1

99 Ibid 211.

chances of a fair trial. The judge is reported to have referred to it as an "'avalanche of prejudicial material" posted on [Facebook] by a "virtual lynch mob"'.[100]

The provision of a defence would not exempt a young person over the MACR from the trial process in the way that the MACR does. S/he would still be prosecuted. It would thus resolve the immediate issue identified in relation to public opinion and grave crimes – that raising the MACR would prevent any calling to account of the young defendant. The key point here is, however, more about the balancing required by the criminal process between fairness to child-accuseds and the public interest in conviction of those who carry out seriously harmful acts. Unlike a MACR, a defence is not a blanket exemption from criminal liability. No child defendant would have to plead it and, indeed, making the plea is no guarantee of success, which depends on the evidence. It would, nonetheless, ensure that a person who was developmentally immature, and therefore lacked criminal capacity, had a clear mechanism by which to bring this before the court. In principle, this seems unobjectionable, provided that the defence itself is cast in appropriate terms. This will now be considered.

A defence is normally set up as a test. The question arising is: what is it that would require to be established to acquit on the grounds of developmental immaturity? For around 1000 years, from Aethelstan's law in the tenth century until s 34 of the Crime and Disorder Act 1998, English law operated a form of a test in the shape of the *doli incapax* presumption. This required the prosecution to lead evidence in rebuttal that a child-defendant knew that his/her act was seriously wrong as opposed to merely naughty.[101] Latterly, it was applied to children aged between 10 and 14. While this provided a buffer between children just over the MACR and the full rigours of criminal responsibility, it in no way reflected the complexity of the issue of criminal responsibility.[102] Elliott criticises it for focusing narrowly on 'the moral awareness of the child',[103] noting that:

> . . . [m]oral awareness might be symptomatic of children's capacity in terms of their intellectual development, but is only one aspect of it. There will be other consequences of a child's mental immaturity which the concept of *doli incapax* totally ignores.[104]

Indeed, the presumption had previously been criticised in the Court of Appeal's judgment in *C (A Minor) v DPP*[105] on the basis that 'if "seriously wrong" means neither "legally wrong" nor "morally wrong," what other yardstick remains?'[106] *Doli incapax*, then, captured only one facet of the complex of understandings required for the fair imputation of criminal responsibility. That facet – knowledge of the difference between right and wrong – is, nonetheless, clearly important in this context, but in both of these possible senses: the moral and the legal. In other words, understanding of the general, innate unacceptability of the conduct (moral) *and* that it contravenes the law thereby engendering particular consequences which do not apply to other types of wrong-doing (legal) are both required. The nature of the child's life experiences may be of importance in this respect.

100 Martin Evans, 'Judge's Threat to Haul Facebook into Court' *Daily Telegraph* (London 8 April 2016) 11.

101 *R v Gorrie* (1918) 83 JP 136; *JM (A Minor) v Runeckles* (1984) 79 Cr App R 255; *C (A Minor) v DPP* [1996] AC 1.

102 See Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2013) 13 Youth Justice 145.

103 Elliott (n 9) 295.

104 Ibid (footnote omitted).

105 [1996] AC 1.

106 Ibid 10, quoting Laws J in the Divisional Court.

Equally fundamental is the requirement that the child's development is such that s/he has the ability to exercise rational control over action. This may incorporate consideration of a number of issues. First, the central organising concepts discussed before – cognition and the ego – need to be sufficiently developed so that the child is able to apply them to determine rationally how to act and to bring action into line with these determinations. Even if Piaget's view that intellectual development is complete by about the age of 15 is accepted, this is still well above the existing MACRs. Indeed, it has been said that Piaget's conclusions 'fail to account for the complete picture of adolescent abilities, including the changes that happen in the adolescent brain'.[107] The evidence from neuro-science of impaired impulse control – of instinct, emotion and peer pressure being dominant, on occasion over acceding to rational direction – should also be taken into account.

Exercising rational control also requires the 'ability to use reasons in acting, thinking, choosing, wanting, etc.'[108] Thus, criminal capacity includes the ability to bring reason(s) to bear in directing and constraining action. A young person who has developed this ability could still say 'I don't know why I did it' or 'I did it for no reason', but this would not affect his/her criminal capacity.

An understanding of causation is also required. An example can be found in an examination of facts following a successful plea in bar of trial in Scotland on the (then) ground of insanity[109] put forward on the basis of the developmental delay suffered by a 13-year-old. The decision partly turned on his probable lack of understanding of the effects of setting light to a pool of petrol. Its vapour ignited causing fatal injuries to another child. The judge took the view, on the basis of expert evidence from a senior fire officer, a forensic witness and a consultant psychiatrist that, while the accused child would have understood the flammability of the physical pool of petrol which he could see, he would not have known about the (more) flammable qualities of the invisible vapour.[110] Part of having criminal capacity is the ability to understand the consequences of the (allegedly) criminal act. This is dependent on an acceptable knowledge of causation.

There is a fine line to be drawn between ignorance of the law, which is not a defence and the inability, through lack of development, to understand the legal concepts on which that law is based. The latter is also different from unfamiliarity with legal terminology. The examination of facts provides an example of what is meant here with regard to the concept of recklessness.

> In relation to a child, [the judge said that he] would agree [with defence counsel] that if a child of a certain age would not have the capacity or experience to foresee a certain danger then the standard of conduct expected of him may have to be reduced . . . Certainly, children can act recklessly (and it may be that they are even more prone to do so than adults) but their capacity to appreciate the dangers they are creating may not always be sufficient to attach criminality to their conduct.

It is the inability to appreciate the building blocks of criminal offences, rather than the lack of understanding of technical legal language, which is relevant to criminal capacity. (Linguistic difficulties may, however, be relevant to a plea in bar of trial.)

107 Preston and Crowther (n 28) 455.

108 John Gardner 'The Mark of Responsibility' (2003) 23 Oxford Journal of Legal Studies 157, 164.

109 See, now, Criminal Procedure (Scotland) Act 1995, ss 53F and 55.

110 *HMA v S* (High Court, Glasgow) (unreported) 15 October 1999 <www.scotcourts.gov.uk/search-judgments/judgment?id=57c686a6–8980–69d2-b500-ff0000d74aa7>.

Overall, then, what is sought is a test for a defence which can encompass all of these elements but which is not (necessarily) restricted to them. The wording below gives at least a flavour of how such a defence might be rendered in legislation. It is, in some respects, almost a generic lack of capacity defence but it is tied in to children by the concept of developmental immaturity. Its structure is drawn from the Scottish defence of mental disorder.[111]

> A child [or young person] is not criminally responsible for conduct which would otherwise constitute an offence and should be acquitted if, due to developmental immaturity,
>
> (a) s/he was unable sufficiently to know the full implications of, to understand, and/or to appreciate the nature of, that conduct, its criminality, its wrongfulness and/or its consequences (legal and/or physical); and/or
>
> (b) s/he was severely restricted in his/her ability to judge whether to carry out the conduct, to exercise rational control over the conduct and/or to refrain from carrying it out.

This is very comprehensive and could allow a child who is developmentally immature in only one of the areas covered potentially to be acquitted. The use of 'sufficiently' and 'severely restricted' leave scope for a court to determine that the child's developmental immaturity was such that s/he lacked criminal responsibility even if criminal capacity was not completely absent. To make the defence more restricted, these could, of course, be replaced with more absolute terminology and it would be possible to cut down the list of types of circumstance in which the defence could be pled. In terms of balancing the child-defendant's rights against the public interest, the proposed formulation would offer considerable leeway to the child. Equally, it is constrained by the need for all or any of these inabilities to stem directly from developmental immaturity and also by the upper age limit which, in accordance with the UNCRC's definition of child, should be 18.[112]

Following a successful plea, it is proposed that the trial judge should have a power (but not an obligation) to refer the child to the relevant family proceedings court (or, in Scotland, to the children's hearings system) for intervention on welfare grounds, if this is appropriate in all the circumstances. This could also apply, exceptionally, where it is clear that the child-accused did *not* commit the offence but evidence emerges which would warrant such a referral. In either case, it should be made clear that such a referral is *not* on the grounds of criminal behaviour.

6 Conclusion

The Prison Reform Trust reported in 2010[113] that children in custody are among the most vulnerable group in society. The Howard League reported earlier this year that children who are looked after in children's homes are being criminalised at excessively high rates.[114] A high number of children with mental health problems are present in the

111 See Criminal Procedure (Scotland) Act 1995, s 51A.

112 In fact, the Royal College of Psychiatrists' evidence to the Law Commission indicated that it should remain possible to consider developmental immaturity as relevant to diminished responsibility up to the age of 21. Law Commission (2006) (n 10) para 5.129.

113 Jessica Jacobson, Bina Bhardwa, Tracey Gyateng, Gillian Hunter and Mike Hough, *Punishing Disadvantage: A Profile of Children in Custody* (Prison Reform Trust 2010).

114 Howard League, *Criminal Care: Children's Homes and Criminalising Children* (Howard League 2016) <http://howardleague.org/wp-content/uploads/2016/02/Criminal-Care.pdf>.

youth justice system.[115] The provision of a bespoke defence for children aged between the MACR and 18 charged with a crime may be a mechanism which keeps those young people who lack criminal capacity because of developmental immaturity from progressing too far through the system. It has the benefit over an increase in the age of criminal responsibility of differentiating between individuals in terms of their actual understanding so that child-defendants neither 'get away with it' nor, more importantly, are criminalised where they lack capacity. It would allow information on issues of maturity and capacity into the criminal process at the stage of determining guilt where, otherwise, these might only be heard in mitigation of sentence. Because it could only be pled in circumstances of developmental immaturity it should not upset the balance between the rights of the accused and the public interest in conviction of the guilty. For all of these reasons, it is commended as a humane and necessary step to protect the young who do wrong.

115 Prathiba Chitsabesan, Leo Kroll, Sue Bailey, Casandra Kenning, Stephanie Sneider, Wendy MacDonald and Louise Theodosiou, 'Mental Health Needs of Young Offenders in Custody and the Community' (2006) 188 British Journal of Psychiatry 534; Robert Newman, Jenny Talbot, Roger Catchpole and Lucie Russell, *Turning Young Lives Around: How Health and Justice Services Can Respond to Children with Mental Health Problems and Learning Disabilities who Offend* (Prison Reform Trust and Young Minds 2013).

NILQ 67(3): 343–56

The age of criminal responsibility and the age of consent: should they be any different?

JONATHAN HERRING*

University of Oxford

Abstract

This article considers the connection between the age of criminal responsibility and the age at which a person is able to give effective consent. It argues that there a 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.

Introduction

Bill and Ben, both aged 12, have been friends since they met in the reception class of primary school. One sunny afternoon they kiss. They have committed a criminal offence.[1] Under the law in Northern Ireland and England both are over the age of criminal responsibility but under the age at which they can consent to a sexual activity. To many commentators that is bizarre. How can a person be mature enough to be responsible in the criminal law for their actions, but not mature enough to be able to give an effective consent to an otherwise criminal act?

Lyons has argued that the age of criminal responsibility should match the age at which children have capacity to make decisions in other contexts. Using the example of making medical decisions, he argues that if 'children are to be held accountable by the criminal justice system then it seems that we should recognize their capacity to make their own healthcare decisions'.[2] He goes on to suggest it is incoherent for the law to 'perceive the views and actions of minors as reflective of immaturity for some legal purposes but of full agency for others'.[3] He refers to the Standard Minimum Rules for the Administration

* Professor of Law, DM Wolfe-Clarendon Fellow in Law, Exeter College.

1 Sexual Offences Act 2003, s 7. It is true they may well not be prosecuted: Home Office, *Guidance on the Sexual Offences Act 2003* (Home Office 2003) para 72, states: 'Although the age of consent remains at 16, the law is not intended to prosecute mutually agreed sexual activity between two young people of a similar age, unless it involves abuse or exploitation.' For a detailed discussion and criticism of the child sex offences in the Sexual Offences Act 2003, see John Spencer, 'Child and Family Offences' [2004] Criminal Law Review 347.

2 Barry Lyons, 'Dying to be Responsible: Adolescence, Autonomy and Responsibility' (2010) 30 Legal Studies 257, 278.

3 Ibid 276.

of Juvenile Justice (the Beijing Rules)[4] which state that there is 'a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities'.[5]

To similar effect, Cipriani has argued that criminal responsibility should be seen as an aspect of children's rights:

> Children's criminal responsibility is indeed an integral and necessary part of children's rights – a logical extension of the concept of children's evolving capacities insofar as it is an appropriate step in respecting children's progression from lesser to greater competence, which gradually prepares them for adult rights and responsibilities.[6]

Such academic arguments[7] are reflected in parliamentary debates. For example, Lord Dholakia claimed, during a debate in the House of Lords on raising the age of criminal responsibility:

> It cannot be right to deal with such young children in a criminal process based on ideas of culpability which assume a capacity for mature, adult-like decision-making. There is no other area of law – whether it is the age for buying a pet, the age for paid employment, the age of consent to sexual activity or the age for smoking and drinking – where we regard children as fully competent to take informed decisions until later in adolescence. The age of criminal responsibility is an anomalous exception.[8]

In this article, I will respond to such arguments and attempt to justify why the law might, quite properly, have a different age for criminal responsibility from the age for capacity to consent to something that would otherwise be a criminal offence. I will focus on the capacity to consent to sex as an example because, as the hypothetical of Bill and Ben demonstrates, that illustrates particularly well the apparent inconsistency in the law.

I will not seek to justify the particular ages used in the current law. In fact, I believe the current age for criminal responsibility is much too low, but it is not the purpose of this article to make that particular argument.[9] Nor is it my argument that the age of criminal responsibility and the age of capacity to consent to sex must necessarily be different. I fully accept that, taking into account the factors referred to in this article, a reasonable person might conclude that the same age should be used for both. Rather, my purpose in this article is to demonstrate that the factors that should be considered in determining an age for criminal responsibility are very different from those that are relevant in fixing the age at which a person can give legal effective consent. These could, quite reasonably, lead someone to conclude that there be markedly different ages for criminal responsibility and for capacity to consent.

---

4 Ibid 276.

5 UN, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (UN 1985).

6 Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Ashgate 2009) 34.

7 Niklas Juth and Frank Lorentzon, 'The Concept of Free Will and Forensic Psychiatry' (2010) 33 International Journal of Law and Psychiatry 1.

8 HL Deb 8 November 2013, vol 749, col 477.

9 I explore issues around the age of consent in detail in Jonathan Herring, 'Age of Consent in an Age of Consent' in Chris Ashford, Alan Reed and Nicola Wake (eds), *Consent and Control: Legal Perspectives on State Power* (Cambridge Scholars 2016).

The current position on age of consent and age of responsibility

The age for criminal responsibility in Northern Ireland and England is 10. In Scotland it is 8, although for those under the age of 12 there are special children's hearings. According to Keating, the average age of criminal responsibility around Europe is 14, with Denmark, Finland, Norway and Sweden opting for an age of criminal responsibility at 15.[10] Among academic writers there is widespread agreement that the current law of criminal responsibility in the UK is too low.[11] I have not found a single academic lawyer's writing which seeks to support the current age of 10. It is certainly out of kilter with the general approach taken worldwide.[12] The UN Committee on the Rights of the Child[13] states: 'a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable'. It goes on to recommend, however, that states that have already set a higher minimum age should not lower it to 12 because a higher minimum age of around 14–16 years is preferable.[14]

Historically, the age of consent to sex has varied significantly. It was 10 in 1576, but increased to 14 in the late nineteenth century. The late Victorian age, with the concerns about child prostitution, saw the Criminal Law Amendment Act 1885 raise the age for girls to 16. The age for male same-sex behaviour was lowered from 21 to 18 in 1994 and from 18 to 16 to produce equality between homosexual and heterosexual sex in the Sexual Offences (Amendment) Act 2000.[15] The Sexual Offences Act 2003, includes a wide range of offences in relation to children. Generally, it relies on 16 as the age at which children can give effective consent to sexual behaviour. There is much more that could be said about the details in this area of the law, but that is not the primary focus of this article.[16]

Key argument

The article argues that questions about criminal responsibility are fundamentally different from questions about capacity to consent. Criminal responsibility is about determining the extent to which a person is responsible for their own actions before a criminal court and is a suitable candidate for punishment. It is no requirement of a criminal law that an individual be wholly responsible for the harm to the victim, otherwise prisons would be largely empty. It is sufficient if a person is responsible enough to be held accountable for their actions.

By contrast, consent is giving another person justification to do an act which is otherwise wrongful. The law understandably is reluctant to allow a person (D) to do an act which is *prima facie* wrongful to another (V), unless there are sufficiently good reasons for doing so. Consent, in some cases, can provide that good reason. However, flaws in V's consent may well render that consent insufficient to justify D's act. D, in the face of an inadequate consent, should not proceed to harm V.

So, the key point is that asking whether an individual with impaired capacity is responsible for their own action is very different from asking whether the consent of an

10 Heather Keating, 'Children's Rights and Children's Criminal Responsibility' in A Diduck, N Peleg and H Reece (eds), *Law in Society* (Brill 2015).

11 Ibid 295.

12 Neal Hazel, *Cross-National Comparison of Youth Justice* (Youth Justice Board 2008).

13 UN Committee on the Rights of the Child, *General Comment No 10* (UN 2007) para 32.

14 Ibid para 33.

15 See Sarah Beresford, 'The Age of Consent and the Ending of Queer Theory' (2014) 4 Laws 759, for further discussion.

16 Herring (n 9).

individual with impaired capacity is able to give effective justification to another for a wrong done against them. Before exploring that further we need to discuss the ways in which children's capabilities may be said to be different from those of adults.

Children's inabilities

It is widely accepted that there are significant differences generally speaking in the capabilities of children and adults. The Beijing Rules state that the minimum age 'shall not be fixed at too low an age level bearing in mind the facts of emotional, mental and intellectual maturity'.[17] The Royal College of Psychiatrists[18] and Royal Society[19] agree that the age of 10 is too low for criminal responsibility:

> . . . it is clear that at the age of ten the brain is developmentally immature and continues to undergo important changes linked to regulating one's own behaviour.

There is ample evidence to show that children, as compared with adults, generally have limited understanding of facts, are impressionable and suggestible, and have more limited powers of reasoning.[20] Vilojoen, Penner and Roesch argue[21] that adolescents have lower abilities to appreciate the long-term consequences of their decisions. Indeed, they claim that, although it used to be assumed that the cognitive functioning of people in mid-adolescence was comparable to adults, in fact brain development continues until one's early twenties. There is also good evidence of adolescence indicating a time of increased impulsivity and sensation-seeking.[22]

Adolescents, generally, have a more limited ability to empathise than adults and are more vulnerable to peer influence.[23] Elliott[24] highlights the ways in which children are impacted by external factors to a far greater extent than adults:

> . . . in looking at criminal responsibility we need to be prepared to take into account the social reality of a child's personal experiences, including bad parenting, poverty and violence, rather than trying artificially to ignore these factors. These factors can reasonably be taken into account with regard to children's liability because with their limited capacity they do not have a genuine opportunity to make a choice as to how they behave; the impact of these external factors becomes determinative of their behaviour since children are not autonomous individuals. This lack of autonomy is reflected in the striking research results showing the strong correlation between poor parenting, poverty, abuse and youth offending.

For the purposes of this article, I will take it that such claims are well made and that in these various ways children's understanding and reasoning abilities are more limited than

---

17 UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (A/RES/40/33 UN 2005).

18 *Children Defendants* (Occasional Paper No 56 2996 Royal College of Physicians 2006).

19 Royal Society, *Neuroscience and the Law* (Royal Society 2011) 14.

20 Jodi Viljoen, Erika Penner and Ronald Roesch, 'Competence and Criminal Responsibility in Adolescent Defendants: The Roles of Mental Illness and Adolescent Development' in Donna Bishop and Barry Feld (eds), *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (OUP 2011).

21 Ibid.

22 Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective' (2013) 13 Youth Justice 102.

23 Jennifer Drobac and Leslie Hulvershorn, 'The Neurobiology of Decision Making in High-Risk Youth and the Law of Consent to Sex' (2014) New Criminal Law Review 502.

24 Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' (2011) 75 Journal of Criminal Law 289, 297.

those of adults.[25] What is the significance of that for matters of criminal responsibility and age of consent?

The essence of criminal responsibility

What is the basis upon which children are given an exemption from criminal liability? McDiarmid's summary captures the views of many on what state of mind generally is required before criminal responsibility can attach to an act:

> . . . fair imputation of criminal responsibility requires understanding of a number of interlinked concepts, including knowledge of wrongfulness, understanding of criminality and its consequences and an internalized moral appreciation of the quality of the conduct.[26]

This needs some unpacking. First, note that criminal capacity is not simply about understanding facts; it is about being able to use those facts to make decisions. Hart explained:

> What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities. Where these capacities and opportunities are absent . . . the moral protest is that it's morally wrong to punish because 'he could not have helped it', or 'he could not have done otherwise' or 'he had no real choice'.[27]

Second, there is more to criminal responsibility than understanding and using the information to make a decision. The individual must have a set of beliefs and values they can apply to assess the decision made. Tadros explains:

> First, she must have a coherent set of beliefs and, for the most part, those beliefs must be true. Second, she must recognise a reasonably broad range of forms. She must recognise the value of at least a broad range of things that are valuable, such as liberty, equality, personal security, truth, knowledge, and so on. Third, the agent must be capable of realising her beliefs and evaluations in action. And this includes the capacity to develop and execute reasonably complex plans of actions.[28]

These requirements are not, however, meant to set a very high standard. Even though a person may be somewhat mistaken about their actions or have a mild intellectual impairment, they may legitimately be held to account for what they have done. We can see this by the fact that the defendant had 'lost their self-control' at the time of the offence is not generally a defence and, when it is, it remains only a defence to murder in limited circumstances.[29]

The general criminal law, however, recognises that, even with the bar of responsibility set relatively low, some defendants will lack the necessary capabilities. That is why we have the *mens rea* requirements and defences in the criminal law. Are these not adequate for children? Horder explains why they are:

---

25 Although see Jonathan Herring, 'Vulnerability, Children and the Law' in Michael Freeman (ed), *Law and Childhood Studies* (OUP 2012).

26 Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2013) 13 Youth Justice 145.

27 Herbert Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press 1968) 152.

28 Victor Tadros, *Criminal Responsibility* (OUP 2005) 137.

29 Coroners and Justice Act 2009, ss 54–55.

> . . . in a civilised legal system, only those who have the intellectual and moral capacity to understand the significance of their conduct will fall to be judged under its rules of criminal responsibility. Lacking such a capacity, under-age children and the insane are excluded from judgement and these rules, and the law's commands are not addressed to them . . .[30]

This indicates that in relation to children it is not a claim that at the time of the offence they were not criminally responsible, in the way an adult who raises a defence argues. Rather in the case of children their status is such that they are not generally subject to the supervision of the criminal law. To justify criminal responsibility not only must there be the act of a will, that act must be an 'expressions of characters that come from us or that at any rate are acknowledged and affirmed by us', as Wolf puts it.[31] This is something that children have not yet developed the capacity to do. For most adults their behaviour can legitimately be said to reflect their character, although excuses can be appropriate for the unusual circumstances in which it does not. For children, generally their behaviour does not reflect their character.

To be the proper subject of the criminal law requires not just intellectual capacity, but a moral capacity to understand and engage with the legal rules. Tadros explains:

> Exemptions have commonly been understood in relation to the communicative aspect of the criminal justice system. The criminal law aims to communicate through its norms. But there are those who do not understand the norms of the criminal law. The criminal law, it might be argued, does not communicate with those who do not understand it. And consequently those who do not understand the criminal law cannot be held responsible by the criminal justice system. The norms of the criminal law, it is argued, are not addressed to them.[32]

It should be seen from this brief discussion that the exemption of the criminal law in relation to children is about more than assessment of capacity. It is about whether children are properly the subject of the criminal law: whether they are able to understand the norms promoted by the criminal law; be held to account for breach them; and engage in the criminal trial. As we shall see this is very different from what we are looking at in terms of the age of consent.

The essence of consent

What are we looking for when determining age of consent? Key to answering that question is an assessment of 'how consent works'. The model of consent I will adopt here is that propounded by Madden Dempsey.[33] In outline the approach is as follows: consent is only needed when D's act is wrongfully harming another person's well-being, thereby rendering the act a *prima facie* wrong. That means that D must provide a justifying reason for acting in the way they did. Consent can provide that justifying reason. It does this by allowing D (if they wish) to assume that if V consents that the act is not all things considered contrary to V's well-being. That is because D is permitted to rely on V's assessment of their own best interests. In effect where consent is effective Madden Dempsey claims that D is entitled to say:

30 Jeremy Horder, 'Criminal Law: Between Determinism, Liberalism and Criminal Law' (2006) 49 Current Legal Problems 159, 167–68.

31 Susan Wolf, 'Sanity and the Metaphysics of Responsibility' in Ferdinand Schoeman (ed), *Responsibility, Character and the Emotions* (CUP 1987) 50

32 Tadros (n 28) 136.

33 Michelle Madden Dempsey, 'Victimless Conduct and the *Volenti* Maxim: How Consent Works' (2013) 7 Criminal Law and Philosophy 11.

> This is [V]'s decision. He's an adult and can decide for himself whether he thinks the risk is worth it. In considering what to do, I will assume that his decision is the right one for him. After all, he is in a better position than I to judge his own well-being. And so, I will not take it upon myself to reconsider those reasons. Instead, I will base my decision of whether to [harm] him on the other relevant reasons.[34]

This model provides a helpful explanation of what we are looking for with consent: that it gives D sufficient reason to rely on V's assessment of V's well-being. Where D knows that V's apparent consent is flawed, for example, it is based on a mistake, or is a result of significant pressure, then D cannot rely on it. Further, D has a responsibility to ensure that V is in the position to make a proper assessment of their own well-being.

Differences

We can now start to see some of the reasons why there might be a difference between the features of criminal responsibility and age of consent. These include the following:

Issue-specific capacity versus general capacity

The first point to emphasise is that the criminal law age of responsibility is making a general assessment of responsibility for all crimes. Once one has reached the age of 10, one can be convicted of any offence. Capacity to consent is, however, issue specific. That is true for adults, as well as children. Someone may have the understanding and maturity to choose what to eat for dinner, but lack the abilities to sign a will. Hence, it is not surprising that the law grants children the capacity to engage in different activities at different times. True, this leads to some bizarre outcomes: a 16-year-old can consent to sex with their MP before they are legally entitled to vote for him; but that probably indicates the voting age is set too high, rather than there is some fundamentally problematic notion with different ages of consent being used for different activities.

It is, therefore, perfectly sensible for the law to have one age at which a person is generally responsible for all crimes and a different one at which a person has capacity to consent to a particular activity, such as sex. That argument is likely to mean one would have a higher age of criminal responsibility than an age of consent for some activities, especially more straightforward ones.

Mistakes

Second, generally in the criminal law a mistake about the factual situation in which one is acting will only impede responsibility insofar as it relates to an aspect of the *mens rea* of a crime. For example, if someone is charged with criminal damage of property belonging to another and relies on a claim that they thought they were breaking a pen and did not realise that in fact it was an electronic gadget, they will have no kind of a defence. Only a mistake which related to the elements of the *actus reus* would be relevant: for example, whether the thing was property; whether the thing belonged to another. This is because it is for the state to define the essential aspects of the wrong of an offence. It is not for the offender to decide what they think is important about a crime. To them, for example, breaking a pen might be very different to breaking an electronic gadget, but for the state that is not a difference of significance to the definition of criminal damage; and they are properly convicted regardless of their mistake.

34 Ibid 20.

By contrast, in the case of consent, we are, as argued earlier, focusing on V's assessment of their well-being. So if V believes a fact is of central significance to their decision to consent, then there will be no consent if that is not provided because V will not have made an effective assessment of whether the act is in their best interests. If, to use an example from the case law, V consented to sex as long as D wore a condom and D did not; D could not rely on V's consent, because V had not determined that sex without a condom was in their best interests.[35] It is not for the state to determine what issues are important to consent, V can determine that for herself.

An example may clarify this point. If there is an Islamophobic 13-year-old who believes all people who wear turbans are Muslims and assaults a non-Muslim turban-wearing victim, believing him to be a Muslim, he can readily be convicted of having committed a crime. His mistake is irrelevant to what the state believes is significant about the wrong of an assault. By contrast if the Islamophobic 13-year-old consents to sex with a Muslim man who promises he is not Muslim (when she would not have consented had she known he was Muslim), that mistake is key. It is for her to decide what is important about sex and, if to her the religion of her partner is key, her mistake negates consent. As these scenarios show, the mistake in relation to conviction would be irrelevant, but for the consent case it could be crucial.

The role of values

Third, as mentioned earlier, for criminal responsibility the defendant must be able to engage with the criminal law and the values it seeks to promote.[36] The whole aim of the criminal law is to set standards which are sufficiently clear and can direct a defendant's behaviour. The justification for punishment by the criminal law is that the defendant should have known what was expected of the criminal law and amended their behaviour accordingly. By contrast, for age of consent the issue is rather whether an individual is able to develop their own values and be in a position to determine what is in their well-being. One must have values, values which one has adopted as one's own, and be able to apply the information one has to these values.[37]

The distinction I am drawing here is about being in a position to understand the norms of society (which is essential to be responsible under criminal law) and being in a position to develop one's own values, in order to have the ability to make an assessment of one's well-being to be able to consent.[38] It may well be that children, through the education system, will develop more quickly an awareness of the rules of society, than the kind of self-knowledge needed to adopt their own values.

Responsibility for limits in responsibility

Fourth, a person may be responsible in the criminal law if they lack responsibility through their own fault, for example, through drunkenness. Even if a defendant lacks full responsibility at the time of committing the crime, if they are to be blamed for putting themselves in that position, criminal liability might justifiably be attached. But, the situation is very different in a case of consent. If D wishes to harm a drunken V, D cannot say 'it is V's fault she is unable to consent'. D must simply refrain from harming

35 *Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

36 Thomas Crofts, 'Catching up with Europe: Taking the Age of Criminal Responsibility Seriously in England' (2009) 17 European Journal of Crime, Criminal Law and Criminal Justice 267.

37 Jonathan Herring and Jesse Wall, 'Capacity to Consent to Sex' (2015) 22 Medical Law Review 620.

38 Jillian Craigie, 'Against a Singular Understanding of Legal Capacity: Criminal Responsibility and the Convention on the Rights of Persons with Disabilities' (2015) 40 International Journal of Law and Psychiatry 6.

V, or find a justification other than consent. In short, a drunken D can be held responsible for their limitations in their capacity for which they are responsible; but they cannot rely on the consent of V who lacks capacity, even if V may be blamed for that.

Engagement in trial

Fifth, a central aspect of capacity required for criminal responsibility is that the individual may be able to participate in the trial. Duff argues that this requires, at least, that the person can reason to the degree that we can address them as fellow participants in the trial.[39] For Duff, and other criminal theorists, this potential to engage with the trial (and arguably with the punishment that follows) is an essential aspect of criminal responsibility. This may require skills and maturity that differ from issues relating to capacity to consent.

So far we have been looking at the kind of factors which the law might take into account in determining whether a child has capacity to have criminal responsibility or consent and we have seen these are very different and so it would be unsurprising if they led to different ages being selected. However, we have been assuming that we should be selecting an age. This assumption must be questioned.

Bright lines and the use of age

The criminal law inevitably draws bright lines. That is, in part, because the rule of law requires that the criminal law be clearly defined so that a person can know in advance whether their proposed conduct will be a criminal offence or not.[40] Imagine a law which said it was an offence 'to drive at too fast a speed'. This would clearly seem to breach the rule of law requirement. A driver would not know in advance what speed a court might deem to be fast. A clearly set speed limit, say 30mph, offers clear guidance as to what speed is regarded too fast. That example provides us with another clear benefit of such a bright line which is ease of proof. A court can easily resolve a case about whether a car was driving over 30mph with appropriate technology. A case of 'driving at too fast a speed' could take a considerable amount of time to resolve.

Of course, such bright-line rules have a serious drawback. They can operate in a way which in some cases may seem over-protective. Imagine a person is driving at 35mph in a 30mph zone and can show that given their extraordinary driving abilities, the weather conditions and lack of other vehicles or pedestrians their driving was, in fact, safe. They would nevertheless have committed the offence. Perhaps more plausible, a driver may be driving at 26mph, and so commit no offence, but might in all the circumstances not be driving at a safe speed. They would, nevertheless, be entitled to be acquitted of the speeding offence. In short, the clarity and efficiency of the bright line comes with 'errors' on either side of it.[41]

These arguments apply too in relation to age of consent. No one will pretend that at, say, midnight on their 16th birthday the teenager magically acquires the knowledge and maturity to be treated as an adult. Rather the age of consent provides a bright-line determination. Baroness Hale in *R v G* explained:

---

39 Antony Duff, 'Law, Language and Community: Some Preconditions of Criminal Liability' (1989) 18 Oxford Journal of Legal Studies 189.

40 Joseph Raz, *The Authority of Law* (OUP 1979) ch 1.

41 Jonathan Herring, 'Children's Rights for Grown Ups' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue* (Hart 2003).

> Even if a child is fully capable of understanding and freely agreeing to such sexual activity, which may often be doubted, especially with a child under 13, the law says that it makes no difference. He or she is legally disabled from consenting.[42]

As she emphasises, with such a legal presumption there is no claim that every child under a particular age in fact has capacity to consent (although she may well), but rather that there are sound policy reasons for conclusively presuming that not to be so. Similarly, in relation to the age of criminal responsibility, the current law draws a bright line. However, are age of consent and age of criminal responsibility good examples of where a bright line is needed?

I suggest that line-drawing of this kind with age requires us to consider the following:

1. Is this a situation which is better resolved by individual assessment in the particular circumstance, rather than drawing a line?
2. At what age should the line be drawn?

It is in response to the two questions outlined that there is a clear difference in the issues raised by age of consent and age of criminal responsibility.

Individual assessment or bright line?

Consider, first, age to consent to sexual offences. In English law, for example, a child who is below the age of 16 can give effective consent to receive medical treatment, if she is able to persuade a doctor that she has sufficient maturity to understand the issues raised (Gillick competence, as it is known).[43] Fairly obviously, we could not take the same approach to a defendant wishing to have sex with a child. While a doctor may have the expertise, detachment and time to make such an assessment, a would-be sexual partner does not. Duff[44] explains that there are certain dangerous activities where people cannot be trusted and should not trust themselves to decide whether the activity is safe. He writes:

> A man excited at the prospect of sex with a young woman is ill placed to judge her maturity; a driver in a hurry is ill placed to judge how fast it is safe for her to drive; and someone relaxing in a pub is ill placed to judge whether another drink might impair his capacity to drive safely. We recognise the need for some kind of regulation in these spheres, because we cannot trust each other, or ourselves, to decide in these contexts whether we can safely engage in a proposed action (having sexual intercourse with this young person; driving at this speed, or after having this many drinks).[45]

He says of a defendant who insists that their underage partner has capacity: 'he does not know that he knows this' and if he goes ahead based on his own judgement he takes an unjustified risk, he is wrong, and:

> . . . arrogantly claims the right to decide for himself on matters which he, like the rest of us, should not trust himself to decide. His claim is arrogant because it is unjustified – but also because it seeks to set him above his fellow citizens, in matters which affect their legally protected interests; and that is what merits the censure of the criminal law.[46]

---

42 *R v G* [2008] UKHL 37 (HL), [44].

43 Ibid.

44 Antony Duff, 'Crime, Prohibition, and Punishment' (2002) 19 Journal of Applied Philosophy 97.

45 Ibid 103.

46 Ibid.

These arguments point strongly in favour of having a bright-line age, chosen by the law.

Can we make the same argument about the age of criminal responsibility? I would argue not. We have an opportunity to assess the capacity of the child in the courtroom and use expert evidence to assist the court in that assessment. This was regularly done when we had the defence of *doli incapax*. A child between the age of 10 and 14 was presumed to be *doli incapax*,[47] but that could be rebutted if it was shown at trial that the child knew the difference between something being seriously wrong or merely 'naughty'.[48] That may or may not be the right question, but it shows that the court could make this kind of independent assessment. The grounds for using an individualised assessment are particularly strong given that the consequences of the decision are serious.

Factors in assessing the appropriate age

If we assume for the moment that a bright line of age is required for both age of consent and criminal responsibility (so that the arguments just made are rejected), how do we select the appropriate age? Of course, the factors we have discussed earlier about when children generally have the kinds of capacity needed for criminal responsibility or to give effective consent will be considered. However, there is another relevant issue and that is the severity of the errors where the age is wrongly placed.

Let us imagine (and these figures are simply hypothetical) that we are persuaded that at the age of 13: 25 per cent of children have capacity to consent to sex and to be held accountable for criminal acts and 75 per cent do not; at 14, 45 per cent do and 55 per cent do not; at 15, 75 per cent do and 25 per cent do not; and at 16, 98 per cent do and 2 per cent do not.[49] Which proxy should be selected? Should we choose (on my figures) 15 because by then it will be correct in the majority of cases?

I argue that the balance of the arguments could, potentially, fall differently for the capacity to consent to sex and for the responsibility argument. Choosing the appropriate age requires weighing up the wrong done to those deemed to have capacity to consent/have responsibility for criminal law, who in reality do not; and the wrong done to those deemed not to have capacity to consent/be criminally responsible, who in reality do. They are not equal.

Take, first, the issue of consent to sex. Consider those deemed not to have capacity, but in fact do. There will, then, be an interference in their private life. Anyone who has sex with them will be treated as committing a criminal offence. This may mean that there will be people who will not be able lawfully to have the sexual encounter they wish, because of the legal provision. Of course, this will not be true for all those with capacity under the designated age. They may not wish to engage in sex, or may not be able to find a partner. So not all those with capacity will have their rights effectively interfered with. Even for those who do, the interference is limited in that it will cease once they reach the age of consent.[50]

Consider, next, those who might be deemed to have capacity, but in reality will lack it. The law will be failing to protect their rights in a major way. In part this is an

47 The *doli incapax* defence was abolished in 1998 by the Crime and Disorder Act 1998, s 34 (*R v JBT* [2009] 1 AC 1310).

48 *R v Gorrie* (1919) 83 JP 136.

49 Of course, it is highly simplistic to suggest capacity is straightforwardly something you do or do not have.

50 See *E v DPP* [2005] EWHC 147, where a law prohibiting two 15-year-olds from engaging in sexual relations with each other was not seen as a breach of their human rights. For further discussion, see Diane Richardson, 'Constructing Sexual Citizenship: Theorizing Sexual Rights' (2000) 62 Critical Social Policy 105.

acknowledgment that the law of rape, generally, is not efficient in protecting victims from rape and an age-based statute will provide a stronger deterrent and easier route for prosecution of those who have sex with the non-consenting child under the age of consent.

The harm done to a group assessed as having capacity when in fact they do not is far greater than the group assessed as lacking capacity when in fact they do. The former are put at risk of rape, the latter at risk having to put off lawful sexual experiences for a short time. We should be far happier to err on the side of deeming the competent incompetent than of deeming the incompetent competent.[51]

What about a similar analysis in terms of age of responsibility? The arguments above do not play out in the same way. That is because in the case of 'errors' both ways the balancing is different. First, the issue of 'waiting' to acquire their legal responsibility is not relevant in this context. Second, because where a child in fact has the capacity to be criminally responsible, but is not treated as criminally liable, it is hard to see how there is any interference in their rights at all. Hollingsworth states: 'conferring criminal responsibility on the child, even where he may lack actual capacity, can be seen as giving effect to the child's autonomy rights'.[52] While at a theoretical level one might see acknowledging responsibility as a way of respecting autonomy, it is a problematic view in two ways. First, respecting the decisions of a person who lacks capacity is not promoting their autonomy.[53] Second, subjecting a child to the ministrations of the criminal justice rarely promotes autonomy. At least, it is hard to see how it is likely to do so more than other social interventions concerning behaviour might do. There is no reason why, considering the consequences of these errors, the arguments over where to pitch the age of consent and age of criminal responsibility could be placed at different places.

Social factors

So far much of the discussion has been in terms of the issues relating to the individual child. However, the issues at hand have broader social impact. Yet again, these play out differently in relation to the two questions.

Several points can be made. The first is that social factors have impact based upon the kind of values that we as a broader society seek to promote. As Craigie argues:

> Rather, the boundary between mental capacity and incapacity in the private sphere is drawn in part on the basis of moral and political commitments such as the value of liberty, well-being and life. These considerations shape what is considered minimally necessary in terms of mental functioning for the legal capacity to make one's own personal decisions. As a result, different societies, or the one society at different times, will draw this line in different places on the basis of divergent evaluative commitments.[54]

She goes on to explain:

> In law concerning personal decisions, a choice must be made between prioritizing liberty by recognizing legal capacity, or protecting well-being. But in law concerning criminal responsibility there is a different choice to be made. In this context, by erring on the side of recognizing legal capacity one avoids the

51 For a broader examination of this argument, see Stephen Gilmore and Jonathan Herring, 'No is the Hardest Word: Consent and Children's Autonomy' (2011) 23 Child and Family Law Quarterly 3.

52 Katherine Hollingsworth, 'Responsibility and Rights: Children and their Parents in the Youth Justice System' (2007) 21 International Journal of Law, Policy and the Family 190.

53 Jonathan Herring and J Wall, 'Autonomy, Capacity and Vulnerable Adults: Filling the Gaps in the Mental Capacity Act' (2015) Legal Studies 698.

54 Craigie (n 38) 12.

> risk of excusing someone and diverting them out of the criminal justice system (or holding them responsible for a less serious offence) when they should in fact be held fully responsible. The risk that is preferred is the punishment of people who should be diverted out of the criminal justice system. Whether this seems like the right risk to choose rests on a judgement about the relative seriousness of these outcomes.[55]

Second, there are clearly different public policy factors at play. An obvious example might be that, if children were causing serious harms to others in society, there would be a public interest in ensuring victims were protected from these harms. One response could be by using criminal liability. We might alternatively believe that subjecting young people to the criminal process at a young age will increase the chance of their offending in the future and therefore the age of responsibility should be increased.[56] Similarly, in relation to age of consent laws, it might be argued that the social costs of teenage pregnancy would justify a higher age of consent. Baroness Hale in *Re G*[57] commented:

> In view of all the dangers resulting from under-age sexual activity, it cannot be wrong for the law to apply that label [rape] even if it cannot be proved that the child was in fact unwilling.

I do not suggest these arguments should be persuasive (there is, for example, no evidence that reducing age reduces youth-offending), simply that societal interests will impact on the setting of the age of responsibility and age for consent and they may not push in the same direction.

Too often the gendered aspect of the age of consent debate is not emphasised. The first point to make is that the societal and relational pressures within which autonomy is exercised are fundamentally different from boys and girls.[58] Second, heterosexual intercourse carries with it far more risks for women than men, especially given the relatively low use of contraception typically during first intercourse (around 10 per cent of young people used no contraception when the parties first had sex).[59] As Beresford points out:

> . . . the medical risks attendant for young teenage pregnancy includes low birth weight, premature labor, anemia, and pre-eclampsia. World Health Organization (WHO) research demonstrates that girls giving birth aged 14 or younger are five times as likely to die, and that stillbirths and new-born deaths are 50% higher among infants of adolescent mothers than among infants of women aged 20–29 years.[60]

Beresford also highlights the social and economic risks of early sexual pregnancy including impacts on education and socio-economic well-being. This means that the dangers of setting the age of consent too low would fall disproportionately on girls. Third, the vast majority of young people who interact with the criminal justice system are men. So considering the impact on the lives of young people caused by the setting of the age of criminal responsibility also has significant gender dimensions.

---

55 Ibid 13.

56 Ray Arthur, 'Rethinking the Criminal Responsibility of Young People in England and Wales' (2012) 20 European Journal of Crime, Criminal Law and Criminal Justice 13.

57 *Re G* [2008] UKHL 37 [55].

58 Herring (n 9).

59 Kaye Wellings, Kiran Nanchahal, Wendy Macdowall, Sally McManus, Bob Erens, Catherine H Mercer, Anne M Johnson, Andrew J Copas, Christos Korovessis, Kevin A Fenton and Julia Field, 'Sexual Behaviour in Britain: Early Heterosexual Experience' (2001) 358 The Lancet 1843.

60 Beresford (n 15).

Conclusion

This article has sought to highlight how very different are the issues which should be considered when determining the age of criminal responsibility and the age of consent. It has, therefore, argued against the views of those who claim that if a child is sufficiently mature to give consent to sex it follows she is sufficiently mature to be criminally responsible for engaging in sexual activity. I have drawn on three primary arguments. The first is that consent is giving another person permission to do an act which is otherwise unjustified. While the age of criminal responsibility is determining when a person is *prima facie* sufficiently responsible for their acts to be answerable to them in the criminal law. These are very different matters and the law, quite properly, may put the two at different points of the age scale. The second is that a good case can be used for not using a bright-line criterion based on age in relation to criminal responsibility, while such a bright-line criterion is appropriate for age to consent. Finally, I have argued that the social consequences of setting the appropriate age for consent and criminal responsibility are very different.

NILQ 67(3): 357–71

The age of criminal responsibility and juvenile justice in mainland China: a case study

ANQI SHEN*
Teesside University

Abstract

This article is about the rules on age and crime in relation to juveniles in mainland China. It starts with an outline of the Chinese law on age and crime in relation to children and young people. This is followed by a brief analysis of the international legal framework – norms, standards, rules and guidelines – pertaining to global child protection and juvenile justice policies. It then moves on to examine juvenile justice policy and practice in China, the reality of juvenile offending in the country and, accordingly, the calls for reform of the age of criminal responsibility. Finally, it 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. From a comparative perspective, it utilises China as a case study to claim that attention in 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 the legal institutions and the disproportionate punitive interventions.

Introduction

The minimum age when children may be held criminally liable for serious wrong-doing diverges considerably across jurisdictions: the lowest crime age in the world is 7; the minimum age of criminal responsibility is 10 in England, 15 in the Nordic countries, and 18 in Belgium and Luxembourg. Like the majority of European countries, it is 14 in the mainland of the People's Republic of China (PRC).

The rules on age and crime in mainland China are two-tiered under s 17 of the Chinese Criminal Law 1997 (CCL 1997):

> A person of 16 years of age who commits crime shall be criminally responsible; a person of 14 years of age but below 16 shall be criminally responsible for murder, assault causing death(s) or grievous bodily harm, rape, robbery, drug trafficking/drug dealing, arson, bombing, and/or poisoning.

* Reader in Law, School of Social Sciences, Business and Law. Email: anqi.shen@tees.ac.uk. I would like to thank Jiangsu Collaborative Innovation Centre for Development of Regional Rule of Law (China) for funding. An earlier version of this paper was presented at the International Symposium on Regional Governance and Development of the Rule of Law held in Nanjing, China in April 2016.

Therefore, in Chinese law, 14 is the age of *relative* criminal responsibility[1] and relevant to juveniles at ages 14 and 15 who commit eight grave offences; but 16 is the age of *full* criminal responsibility. Chinese law provides that a young person of age 14 but below 18 shall receive a lighter or mitigated sentence for criminal acting. Those under 18 at the time of offending shall not be liable to the death penalty.[2] In this sense, 'juvenile offenders' refers to juveniles who have reached the age of criminal responsibility, but are below 18, commit crime, and are treated differently from adult offenders in the Chinese criminal justice system. Juveniles of 14 and 15 years of age who commit less serious offences and thus are immune from the penal law may appear before a judge at the trial division for juveniles. Their parents or guardians may be ordered to exercise supervision; where necessary the juveniles may be subject to 'shelter for rehabilitation' by the state.[3] It appears that Chinese law regulates the age of criminal responsibility along with how children and young people should be dealt with once they come to be in contact with the criminal law.

The rules on age and crime are fairly consistent in mainland China. Prior to 1997, similar rules were adopted in the PRC's first criminal code.[4] It stated:

> A person of 14 years of age but below 16 who commits crime shall be criminally responsible for homicide, causing grievous bodily harm, robbery, arson, habitual theft, and *other crimes of seriously undermining the social order*. (emphasis added)

Compared with the rules in the CCL 1979, the scope of offences relevant to the age of relative criminal responsibility is narrowed significantly in the current law which covers eight specified offences that reflect the seriousness of criminal acts, the crime reality in relation to juveniles and also the official emphasis of care for children. Apart from this, the general principles remain.

The Supreme People's Court Criminal Law Revision Office explained the rationale for the rules in the 1979 law:

> The vast majority of juvenile offenders are in the age range of 16 and 25; children below age 14 are rarely involved in serious criminality. While some children today do mature earlier than before, it is not the case among over 80 per cent of the rural child population. Lowering the minimum crime age would be in contrary to our juvenile justice policy – education first; punishment second. Also, the majority of jurisdictions have fixed their age of criminal responsibility at 14.[5]

There is no similar information for the current law. Given that there have been no radical policy shifts in this area, it is reasonable to believe that the same factors were considered to rationalise the current rules. Several interpretations can be offered. First, a combination of factors seems to have been taken into account when the age of criminal responsibility was settled in China. These include the relationship between children's involvement in crime and their age, the facts of physical and cognitive maturity, the juvenile justice policy in China and the policy and practice in other jurisdictions. China appears to have taken a rather balanced approach to determining the age of criminal responsibility, several years prior to the 'Beijing Rules'[6] that were adopted by the UN General Assembly in 1985 as

1 Gerrard Maher, 'Age and Criminal Responsibility' (2005) 2 Ohio State Journal of Criminal Law 493.

2 CCL 1997, s 49.

3 Ibid s 17.

4 CCL 1979, s 14 (2).

5 Mingxuan Gao and Bingzhi Zhao (eds), *Collection of New China Criminal Legislation Source Materials* (Xia) (China People's Security University 1997) 2233–34.

6 UN Standard Minimum Rules for the Administration of Juvenile Justice 1985, known as the Beijing Rules.

the first international guidelines concerning the development of separate and specialist juvenile justice systems for the purpose of protection for children.

Second, as in other countries, the age of criminal responsibility is recognised in China where the law deems that at a certain age children should know the difference between right and wrong and thus it is necessary to hold these children accountable for criminal actions. However, since there was no conclusive neuro-psychological evidence for child development, the minimum crime age was arbitrarily fixed in Chinese law, as it has been in many other jurisdictions, resulting in continuous debate as to whether the minimum age ought to be increased or decreased.

Third, the age of criminal responsibility in China is largely in line with international law that is contained in a range of international conventions, treaties, standards, rules and guidelines concerning children's interests and rights.[7] Chinese law in this respect appears to be a step ahead of that of several Western, developed systems, some neighbouring countries and many other nation states across the rest of the world. Consequently, unlike Britain,[8] China is under no pressure in terms of compliance with international law for fixing the minimum crime age for juveniles.

Comparatively speaking, China does not have a low age of criminal responsibility. However, once the minimum crime age is reached, the juvenile can be arrested, prosecuted and punished. It is true that substantive criminal law in China differentiates juveniles from adults when defining crime and punishment and procedural law and laws concerning child protection recognise a need to use special measures for juveniles,[9] but it is not difficult to find gaps in law, policy and practice in terms of how offending children should be treated as far as international law is concerned. This article sets out to discuss the rules on age and crime in China and also examines how juvenile law-breakers – essentially children who are typically from disadvantaged backgrounds in society[10] – are dealt with in the Chinese system.

It starts with an outline of the Chinese law on age and crime in relation to children and young people. This is followed by a brief analysis of the international legal framework – norms, standards, rules and guidelines – pertaining to global child protection and juvenile justice policies. It then examines juvenile justice policy and practice in China, the reality of juvenile offending in the country and recommendations for reform to the age of criminal responsibility. It concludes that China's problem is not the low age of criminal responsibility or resistance to international law, but the understanding and implementation of the law. From a comparative perspective, China is utilised as a case study to claim that attention in juvenile justice in any given jurisdiction should be shifted away from (re)setting the minimum crime age to the acceptance and development of child-centred juvenile justice that should be research-informed and aligned with the international human rights framework. This would engage a departure from current legal institutions and disproportionate punitive interventions.

7 For example, the Beijing Rules; the UNCRC; the *UN Guidelines for the Prevention of Juvenile Delinquency*, adopted by the General Assembly Resolution 45/112 of 14 December 1990 (the Riyadh Guidelines); the *UN Rules for the Protection of Juveniles Deprived of their Liberty*, adopted by the General Assembly Resolution 45/113 of 14 December 1990 (the JDLs); the *General Comment No 10: Children's Rights in Juvenile Justice* CRC/C/GC/10, Geneva (CRC 2007).

8 John Muncie, 'The United Nations, Children's Rights and Juvenile Justice' in Wayne Taylor, Rod Earle and Richard Hester (eds), *Youth Justice Handbook: Theory, Policy and Practice* (Willan 2009) 200–11.

9 Anqi Shen, 'The Role of the Study-Work School: A Chinese Case Study on Early Intervention and Child-Centred Juvenile Justice' (2016) 16(2) Youth Justice 95.

10 Muncie (n 8).

International legal framework: safeguarding juveniles in conflict with the law

In the following pages, the international legal framework is outlined to illustrate the global benchmarks for examining policy and practice in China as regards the protection of children who offend.

Scholarly literature on the minimum age of criminal responsibility often makes reference to the capacity responsibility of children.[11] It is assumed that 'an age' should, and can, be found to 'appropriately' hold child law-breakers accountable. Over the years, efforts have been made to advance the legal norm of the age of criminal responsibility by seeking support from neuro-psychological findings in respect of the moral development of children.[12] So far, no consensus has been reached in this area of psychology.

International law, however, takes a rather different approach and provides the rules and guidelines in rights discourses, which seek to safeguard children's rights and interests in juvenile justice. There are a range of human rights treaties, for example, the UN Convention on the Rights of the Child (UNCRC), as well as non-binding international instruments that seek to provide a 'unifying legal framework' for juvenile justice policy on a global scale.[13] Together, they help identify international norms and standards that guide how contracting states determine approaches in consonance with international agreements. These rules and guidelines direct the level at which the minimum age of criminal responsibility should be set and safeguard the appropriate treatment for juveniles in conflict with the law. The term 'international law' is used broadly in this article to include both the binding agreements and the official guidelines associated with them.

International law on the age of criminal responsibility

The starting point lies in the Beijing Rules – a non-binding official document providing recommendations on the protection of juveniles who offend:

> In the legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.[14]

International law provides general guidance and it appears to accept national variations, recognising that childhood maturity may differ across jurisdictions due to political, social, cultural and historical conditions.

The UNCRC, which recognises children's rights worldwide, offers detailed rules on the age of criminal responsibility for juveniles. Article 40.3(a) provides that states parties shall seek to promote 'the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law'. Below the minimum crime age children have absolute immunity from the penal system. For Maher, legal systems in the world tend to use the age of criminal responsibility in two discrete ways: one concerns the capacity of a child to commit a crime; the other relates to exemption of a child from the 'full' or adult system of prosecution and punishment.[15] International law seems to

11 Maher (n 1) 512.

12 Nuno Ferreira, 'Putting the Age of Criminal and Tort Liability into Context: A Dialogue between Law and Psychology' (2008) 16 International Journal of Children's Rights 29.

13 Barry Goldson and Gordon Hughes, 'Sociological Criminology and Youth Justice: Comparative Policy Analysis and Academic Intervention' (2010) 10(2) Criminology and Criminal Justice 211, 212.

14 Rule 4.1.

15 Maher (n 1) 493.

define the age of criminal responsibility in the latter sense. The UNCRC does not specify a minimum crime age.

The UN Committee on the Rights of the Children (UN Committee) – the executive body that administers the UNCRC – sets 12 as the 'absolute minimum age' of criminal responsibility. For children below age 12, 'the irrefutable assumption is that they cannot be formally charged and held responsible in the penal law procedure'. The UN Committee clarifies that: 'States Parties are encouraged to continue to increase their minimum age of criminal responsibility to a higher age level' – but not to lower it, if it is currently above 12.[16]

In parallel, international law stipulates a minimum age below which it should not be permitted to deprive children of their liberty[17] – perhaps termed the 'minimum age of freedom penalty' – and, accordingly, the 'absolute minimum age' may be termed as the 'minimum age of entry' (to the penal system). This combination provides a narrow definition of the age of criminal responsibility in international law.

The 17th Congress of the International Association of Penal Law (International Congress of Penal Law)[18] specifies that, to a child below age 14, only *educational* measures may be applied. This means that, whilst for children at or above 12 (the minimum age of entry) at the time of offending, but younger than age 14 (the minimum age of freedom penalty), penal law procedures can be applicable,[19] but only educational measures may be applied as a means of disposal for their wrong-doing.

The international law appears to allow a gap between the two age limits to recognise the variations of juvenile justice practices: in some jurisdictions, such as Scotland, the age of entry is very low, but only educational and welfare-based measures, as opposed to penal penalties and freedom penalties in particular, are permitted for offending juveniles below a higher age.[20] This illustrates that international law is primarily concerned with the best interests of children in conflict with the law[21] and prevents them being incarcerated at young ages.

In addition to the age rules, international law also provides the general principles and specific requirements which govern the way in which offending juveniles should be dealt with in state systems.

International law: the treatment of juveniles in conflict with the law

The Beijing Rules suggest that conventional, punitive measures are not appropriate and their use should be minimised; alternatives should be developed, focused upon the well-being of the juvenile.[22] This recommendation is incorporated into the UNCRC. Article 40.3(b) specifies 'whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected'. This provision essentially imposes an obligation on

---

16 Comments 31–33.

17 Rule 11(a), JDLs.

18 It resolved the 'Justification of the Principle of Criminal Liability and the Different Categories of Age' in José Luis De La Cuesta (ed), *Resolutions of the Congress of the International Association of Penal Law* (1926–2004) <www.penal.org/sites/default/files/files/RICPL.pdf> 156–58.

19 Comments 31–33, CRC 2007.

20 Howard League for Penal Reform, 'Punishing Children: A Survey of Criminal Responsibility and Approaches across Europe' (Howard League for Penal Reform 2008) 7; Maher (n 1).

21 UNCRC, Article 3.

22 Rule 17.

contracting states to minimise the use of penal law measures so as to reduce the harm that may be caused to juveniles by criminalisation and punitive disposals, such as custody.[23] International law is clearly informed by research findings and is evidence-based.[24]

In addition to justifying a separate juvenile justice system from that of adult offenders which requires different treatment for children, the CRC 2007 stresses:

> The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.[25]

Alternatives, such as educational measures, that focus on the rehabilitation of the individual child offender are specifically promoted under the International Congress of Penal Law. [26]

These international instruments require national governments to adopt welfare-based approaches that are 'rooted in inquisitorial, adaptable, informal, needs-oriented and child-special processes'[27] and, wherever possible, to avoid conventional justice measures.

It appears that the broad definition of the age of criminal responsibility in the context of international law is presented in two sets of rules: the first safeguards offending juveniles by ensuring they are not brought into the penal system; the second prevents juveniles from being dealt with by punitive measures that are proven as harmful to them. It is worth noting that, in practice, the international law often serves only as 'useful campaign tools for those with an interest in juvenile justice'.[28] Ultimately, it is the responsibility of nation states to determine whether or not, and if so, how to translate those instruments into national policy and practice. Apart from the willingness of national governments, there are also technical difficulties in identifying a global understanding of international law: there are 'substantial translational disjunctures between *international* standards and *national* policies' and this has rendered 'multitudinous and widely varying forms' of juvenile justice policies in the world.[29] Consequently, the CRC 2007 concludes that 'many States Parties still have a long way to go in achieving full compliance with the UNCRC',[30] although this might not be the result of intentional failure to comply with international norms and standards, which may be interpreted differently across diverse national perspectives.

Breach of the minimum age rules is easy to identify, highlight and criticise,[31] whereas violation of the second set of requirements is not so obvious and is often overlooked, especially in the areas of 'procedural rights, the development and implementation of

23 UNCRC, Article 1.

24 For example, Uberto Gatti, Richard E Tremblay and Frank Vitaro, 'Iatrogenic Effect of Juvenile Justice' (2009) 50(8) Journal of Child Psychology and Psychiatry 991; Lesley McAra and Susan McVie, 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) European Journal of Criminology 315.

25 Comment 10.

26 Recommendation 3, see De La Cuesta (n 18).

27 Goldson and Hughes (n 13) 212.

28 Howard League for Penal Reform (n 20) 5.

29 Goldson and Hughes (n 13) 213.

30 Comment 1, CRC 2007.

31 See, for example, Muncie (n 8) 6; Barry Goldson, '"Unsafe, Unjust and Harmful to Wider Society": Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales' (2013) 13(2) Youth Justice 111; Howard League for Penal Reform (n 20).

measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort'.[32]

Admittedly, other factors also need to be considered while determining national rules on age and crime for juveniles. The Beijing Rules, for example, bring the notion of responsibility for criminal behaviour of children along with 'other social rights and responsibility' and 'civil majority'.[33] Likewise, the CRC 2007 suggests that, while responding to children who offend, states parties should serve 'not only the best interests of these children but also the short- and long-term interest of the society at large'.[34] The interests of society, specifically in the context of public protection, need to be considered along with the interests of children who offend.

For policymakers in China, public opinion is an additional matter of concern. China adopts 'authoritarian populist justice',[35] where radical shifts in public policy, such as incorporating the international norm of juvenile justice into the national system, usually require a high level of public support before the policy can be made and then implemented.

Undoubtedly, international law has had an impact on law, policy and practice in juvenile justice in many jurisdictions, including China. Whilst the international requirements are still violated by states parties,[36] so far no evidence suggests that China has been singled out for poor compliance. This is perhaps owing to the fact that Chinese law is largely in line with international norms and standards in terms of the age of criminal responsibility and it continues to make efforts, slowly, to improve its system and practice to afford further protection for juvenile offenders. For example, since 2011 the eighth revised criminal law prohibits classifying juveniles below the age of 18 who have been convicted previously as 'repeat offenders' so that aggravated sentences cannot be imposed on them. However, so far much attention has been paid to compliance with the first set of requirements, whilst implementation of the second set of rules, which embodies the principles of diversion, minimum necessary intervention, proportionality and decarceration, is not strongly demonstrated in juvenile justice policies and practices in China.

Law, policy and practice in juvenile justice in China

While the adult criminal justice system in China remains largely punitive, juvenile justice is an exception.[37] With the influence of international law and practices in other regulatory domains, the Chinese system increasingly operates on core principles of the international agreements on the protection of children and young people.

As noted above, apart from recognising the minimum age of criminal responsibility, the PRC has long had special rules to differentiate juveniles from adult offenders in terms of their treatment in criminal justice processes. Since the 1990s, the idea of child protection has been strengthened in China and the starting point is the two child-specific enactments – the Law on the Protection of Minors 1991 (LPM 1991) and the Law on Prevention of Juvenile Offending 1999 (LPJO 1999) – both are applicable to children

32 Comment 1, CRC 2007.

33 Commentary to rule 41.

34 Comments 3 and 10.

35 Benjamin L Liebman, 'A Populist Threat to China's Courts?' in Margaret Y K Woo and Mary E Gallagher (eds), *Chinese Justice: Civil Dispute Resolution in Contemporary China* (CUP 2011) 269, 270.

36 Muncie (n 8).

37 Anqi Shen and Steve Hall, 'The Same the Whole World Over? A Review Essay on Youth Offending and Youth Justice in China' (2014) 43 International Journal of Law, Crime and Justice 273.

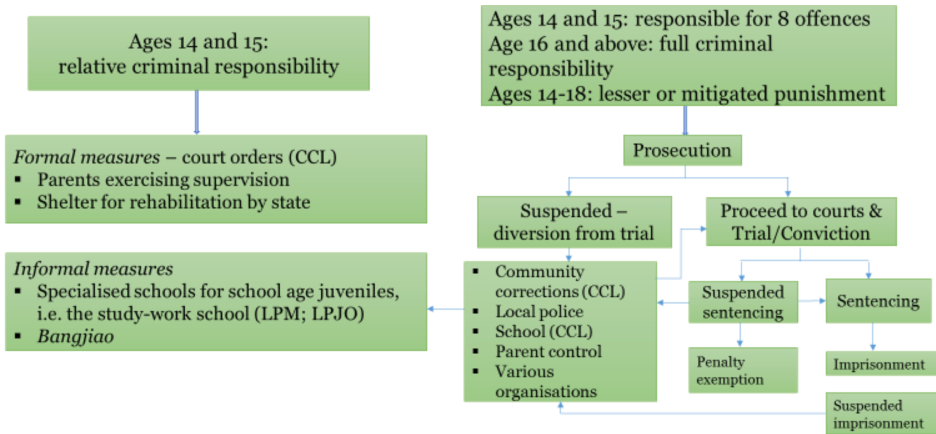

Figure 1: The rules on age and crime: procredures and measures for juvenile offenders in China

below the age of 18. International law, the Beijing Rules in particular, appears to underpin this positive move.

Both statutes address the underlying principles in response to juvenile delinquency and crime in China. One positions education as the primary measure of intervention over punishment, which should only be used as a supplementary means; the other provides that 'measures dealing with offending juveniles shall combine education, *ganhua* and rescue'.[38] The term *ganhua* is hard to define in solid terms but can be thought of as a concept or a method in the context of early intervention and offender rehabilitation. The notion of *ganhua* is based on the Mencian belief which broadly means using informal measures to persuade and influence behaviour change of a (young) person.[39] These principles were inserted into the Criminal Procedural Law when it was revised in 2012.[40]

It is well acknowledged that there is a strong emphasis in the Chinese system on rehabilitation through education, the use of informal mechanisms and the crucial role of the society as the initial means to reintegrate children and young people who offend. This national practice is supported by traditional Chinese beliefs and is also consistent with core principles expressed in the international legal framework that seeks to unify global policymaking in juvenile justice. Figure 1 illustrates current juvenile justice policy and practice in China and, in addition, shows where informal measures are positioned in the system.

As Figure 1 shows, both formal and informal measures are available for children who have reached the age of relative criminal responsibility, committed offences outside the eight grave crimes and are therefore immune from penal law. These children may be subject to two formal measures – the parental supervision order and the order of shelter for rehabilitation by the state – both are intended to be educational, as distinct from justice, disposals. Although the law offers no implementation details for these measures, it recognises a need for special treatment for these children. There are also informal measures which I will return to below.

38 LPM 1991, s 54; LPJO 1999, s 44.

39 Shen (n 9) 13.

40 S 266.

Formal disposals in Chinese law for juveniles who have reached the age of full criminal responsibility are essentially the same as those for adult offenders, with the exception of the death penalty. The principal punishments available for juvenile offenders include public surveillance, criminal detention, fixed-term imprisonment and the life sentence, among which public surveillance is the only non-custodial sentence. Given its specified legal requirements, this form of criminal penalty is not commonly used for juveniles.

Currently, community sentences are unavailable in China. Juvenile law-breakers may have their custodial sentences suspended, but all of the criteria must be met.[41] Since the rules governing suspension of prison sentences are strict, in reality, incarceration may be inevitable for a significant number of juvenile offenders, once they are brought into criminal justice processes.[42]

Along with formal procedures, there are informal measures for juvenile offenders in China. In fact, informal crime control has been a key feature of the Chinese criminal justice system, especially in response to juvenile offending[43] and *bangjiao* and the study-work schools are the most renowned informal mechanisms for juveniles.[44]

Bangjiao is a broad term covering varied forms of community crime control programmes which are educational and run on a voluntary basis by communities and social institutions in partnership with state agencies, for example, designated local police officers. It aims at monitoring, assisting and rehabilitating offenders. *Bangjiao* started from the early days of the PRC as an informal crime prevention mechanism for those involved in minor offending. The Comprehensive Treatment Strategy, which started in 1990, requires the cooperative participation of all agencies and the use of coordinated multiple educational measures in response to crime.[45] For years, community care through *bangjiao* was recognised as successful in crime control for juveniles.[46] However, with the change of socio-economic circumstances and a more mobile population, the measure came to be regarded as a helpful embellishment rather than an effective measure in itself.[47] Today, *bangjiao* is often used as a supplementary corrective facility to provide community support for juveniles serving prison sentences and even after their release, in addition to those subjected to community corrections.[48]

There are two principal problems with *bangjiao*. First, as an informal measure, it is not clearly defined. It relies largely on voluntary work from various agencies, with no

41 See CCL 1997, s 72.

42 Shun'an Wang and Bin Han, 'Achievement, Problems and Solutions of Juvenile Justice in China' (2014) 6 Juvenile Justice 50, 54.

43 Dennis S W Wong, 'Changes in Juvenile Justice in China' (2001) 32 Youth and Society 492.

44 Bong-ho Mok, 'Community Care for Delinquent Youth: The Chinese Approaches of Rehabilitating Young Offenders' (1990) 15(2) Journal of Offender Community Service Rehabilitation 5; Jianhong Liu and George B Palemo, 'Restorative Justice and Chinese Traditional Culture in the Context of Contemporary Chinese Criminal Justice System' (2009) 7(1) Asian Pacific Journal of Police and Criminal Justice 49; Shen (n 9); Anqi Shen and Georgios A Antonopoulos, 'Restorative Justice or What? Restorative Justice in the Chinese Youth Justice System' (2013) 21 European Journal of Law and Criminal Justice 291.

45 Dawei Wang, 'The Study of Juvenile Delinquency and Juvenile Protection in the People's Republic of China' (2006) 22(94) Crime and Justice International 4.

46 Lening Zhang, Dengke Zhou, Steven F Messner, Allen E Liska, Marvin D Krohn, Jianhong Liu and Zhou Lu, 'Crime Prevention in a Communitarian Society: Bangjiao and Tiaojie in the People's Republic of China' (1996) 13 Justice Quarterly 199.

47 Chang Liu, 'The Theoretical Reconstruction of China's Juvenile Justice System and Future Directions: With Particular Reference to the British Youth Justice System' (2011) 15(293) Forward Position 94.

48 Lirong Wang, 'An Important Attempt for Crime Prevention: The First Community Services Order in China' (2003) 3(29) People's Procuratorate 12. See detailed discussion in Shen and Hall (n 37).

identifiable procedure and resources to guarantee consistency, availability and achievement of the intended outcomes; and, second, there is no clear evidence to show its effectiveness. Therefore, it may be said that the use of bangjiao is institutionally promoted, rather than evidence-supported.

The study-work school is an informal early intervention measure exclusively available for school-age juveniles who are considered 'at risk' of law-breaking and who have already come to be in contact with the law for minor offences. The study-work school was designed with clear reformative and educative goals and was previously recognised as a successful welfare-based intervention for juveniles. However, its use has declined in recent decades due to a combination of factors, including, inter alia, the shortage of evidence to indicate the impact of the operation of early intervention in this context. Thus, like *bangjiao*, the study-work school has not been used in a systematic manner across the country and currently does not appear to be a frequently used disposal for juvenile law-breakers.[49]

Restorative justice was introduced to China in the early 2000s, offering an innovative alternative mechanism to conventional punitive justice for juveniles. A number of programmes have been attempted under the name of restorative justice which aim at diversion and minimum intervention by seeking to deal with juvenile wrong-doers outside legal institutions, thereby diverting them from criminalisation and punishment.[50] Among these newly developed programmes, 'suspended prosecution' and 'suspended sentencing' are pioneering. These align with restorative justice principles and exemplify China's effort to embrace the ideas of integration, restoration and protection in its juvenile justice practices.

Suspended prosecution, also known as 'delay in prosecution', has been adopted as a pilot scheme in several regions in China. It enables prosecutors to temporarily have their cases involving juvenile suspects who admit wrong-doing to be placed on hold. Rather than being prosecuted, the juveniles are placed within the community and subject to educational programmes through *bangjiao*. It is hoped that during the probationary periods various agencies will work together to achieve the best results for the juveniles concerned and ultimately enable them to be diverted from the judicial process.

Similarly, suspended sentencing started as a pilot scheme at the Changning District Court in Shanghai. Under the scheme, judges are allowed to exercise discretion and have the sentencing stage suspended in cases involving juvenile offenders who admit guilt of the offences that are charged against them. During the pre-sentencing periods, juveniles are subject to the *bangjiao* programmes and some are expected to attend school. If they perform well and refrain from further criminal engagement during the probationary periods, sentencing is deemed no longer necessary.[51] The purpose is to divert these juveniles from criminal punishment and represents an ostensible attempt by the Chinese judiciary to depart from conventional justice practices.

Both pilot schemes are intended to encourage behaviour change, integration and confidence-building of juvenile law-breakers outside formal procedures and work towards the direction of lifting juveniles out of the criminal justice system – an approach to child-centred juvenile justice promoted by international law. However, they share several problems. Firstly, both schemes primarily involve personnel from legal institutions – prosecutors and members of the judiciary – and therefore are part of formal criminal justice processes. Juvenile offenders are not, therefore, entirely immune from the penal

49 See detailed discussion in Shen (n 9).

50 Shen and Antonopoulos (n 44).

51 Xiaorong Gu and Xiang Guo, 'China Criminal Responsibility of Minors in National and International Legal Order' (2004) 1(75) International Review of Penal Law 660, 670.

system, thus rendering harmful consequences – labelling, criminalisation, negative social reaction and stigma[52] – inevitable. Secondly, a lack of solid legal basis for these innovative measures has raised the issue of legality and prevented them being widely applied. Currently, suspended prosecution is mainly operated locally often on a small scale, under the internal regulations of the procuratorate.[53] The use of suspended sentencing is also restrained. Thirdly, the effectiveness of these newly developed measures has not been evaluated in a robust manner perhaps due to methodological difficulties and other factors. According to Changning District Court, its pilot scheme was successful as none of the 29 juvenile delinquents who were part of it re-offended during the pre-sentencing probationary periods.[54] Other than that, no further evidence appears to be available.

Similar attempts have been made in juvenile justice practices in China to improve the system. However, as Figure 1 illustrates, informal and welfare-based measures, although available, are limited and, as previously pointed out, there are fundamental problems that hinder the development of innovative, divergent and non-punitive measures for juveniles in need.

China does have institutional arrangements and operational practices that, if running as they are designed, are capable of achieving the goal of the international law as regards juvenile justice. However, China's problem is arguably the slow development of welfare-based, non-criminal measures for juvenile offenders. In addition, some practices, such as the range of sentences available, are at odds with the core principles underpinning international law that aim to divert the majority of offending juveniles from legal institutions, formal processes and criminal sanctions. Admittedly, as many jurisdictions in the world, China faces tension between the international norm of child protection and public and government's long-standing concerns over security and social order.[55] With the seemingly worsened reality of juvenile delinquency and crime, there are calls for reforms to toughen policy and practice as a public reaction – a sign of a worrying turn towards punitiveness in juvenile justice.

The reality of juvenile offending and calls for reform

It is observed that rapid economic growth over the past four decades has brought with it an increase in crime; statistically there seems to be an upsurge in juvenile offending in China.[56] Chinese writers have intensively expressed their concerns over these upswinging trends, new patterns and alarmingly sophisticated characteristics of juvenile criminality.[57] Children are found to offend at very young ages,[58] they use the same methods as those typically employed by adult offenders, and their criminal actions often result in very

52 Howard S Becker, *Outsiders: Studies in the Sociology of Deviance* (Macmillan 1963); Edwin M Lemert, *Human Deviance, Social Problems and Social Control* (Englewood Cliffs 1967); Franklin E Zimring, *American Juvenile Justice* (OUP 2005); Barry Goldson (ed), *Youth in Crisis? 'Gangs', Territoriality and Violence* (Routledge 2011).

53 Shen and Antonopoulos (n 44).

54 Gu and Guo (n 51) 670.

55 Guoling Zhao, 'Juvenile Criminal Justice System in China' in Liqun Cao, Ivan Y Sun and Bill Hebenton (eds), *Routledge Handbook of Chinese Criminology* (Routledge 2014) 103.

56 Shen and Hall (n 37).

57 Jianlong Yao, 'Juvenile Delinquency Control in Transitional Societies: A Study on the National Pilot Scheme on the Juvenile Risk Groups and the Prevention of Crime' (2012) 4 Social Sciences 63.

58 Qing Ju, 'A Quantitative Analysis on the Trend of Chinese Youth Offending' (2007) 5 Issues of Youth Offending 15; Yi Han, 'Rethinking to Legislate on Juvenile Offending: With a Particular reference to the Age of Quasi-Criminal Liability' (2006) 1 Legal Studies 65, 67.

serious consequences.[59] The public reaction is typically a general call for tougher policies on crime control against offending children and young people.

Public debate became heated in 2013 after an atypical tragedy involving the torture of an 18-month-old baby boy in a lift by a 10-year old girl, who later took him home and threw him out of a building from her balcony on the 25th floor.[60] In reaction to this serious incident involving the child 'offender' and to juvenile crime in general, a widespread belief arose that children mentally and socially mature earlier today than their counterparts in the past when the law was created. Therefore, the argument goes, it is reasonable now to hold younger children accountable for serious wrong-doing. It is thought that reducing the age of criminal responsibility, thereby placing offending children in the criminal justice system, might deter potential child law-breakers[61] although claiming children develop quicker in contemporary China is not supported by any solid evidence.

Some commentators[62] have observed a lack of effective measures in dealing with 'offending' children below the age of criminal responsibility. They claim that shelter for rehabilitation is not frequently ordered due to a shortage of facilities; the parental supervision order is also hardly used as it is thought that juvenile law-breaking is often a result of poor parenting and those parents lack capacity to supervise their children effectively and to help them with behaviour change. Moreover, it is argued that detailed procedural law is not available to guide the use of existing mechanisms. Rather than calling for creating new, effective mechanisms, they propose lowering the minimum crime age so as to place younger age children in the formal criminal justice system.[63] It is true that doing nothing cannot be accepted as a responsive state reaction that 'primarily takes into account the best interests of these juveniles', according to international standards.[64] However, lowering the minimum crime age is certainly unhelpful as it serves to remove these juveniles 'from the category of "child" altogether'[65] and exposes them to the substantive criminal law as adults.[66]

There are academic writers in China who seek support from international law for lowering the age of criminal responsibility. For example, Zhong and Lin turn to rule 4.1 of the Beijing Rules and interpret it as follows:

> The Rule says that the facts of emotional, mental and intellectual maturity of children should be considered. This is to say that it is children's actual capacity to understand the wrongfulness of their actions and actual capacity to control their actions that matters. Given the current social circumstances in China, lowering

59 Han (n 58) 67.

60 *Xinhua News*, 5 December 2013 <http://news.xinhuanet.com/politics/2013–12/05/c_125808871.htm>.

61 See Rongrong Zheng and Yuchi Liu, 'An Analysis of the Feasibility of Lowering the Age of Criminal Responsibility in China' (2015) 3 (Zhong) Law and Society 246, 246; Xiaoying Li, 'Considering the Issue of Lowering the Age of Criminal Responsibility' (2006) 6 Academic Journal of Henan Institute of Cadres for Legal and Political Administration 137, 138; Liuying Ma, *Research on the Criminal Justice Treatment for Juveniles* (Intellectual Property Press 2009) 111–12; Xun Zhang, 'New Ideas on Fixing the Age of Criminal Responsibility' (2010) 22(4) Journal of Sichuan Police College 17; Jun Zhong and Xiaomei Lin, 'Crime Increasingly Involving Juveniles of Very Young Ages and the Reform of the Age of Criminal Responsibility' (2009) 22(2) Journal of Shanxi College for Youth Administrators 73, 73, 75.

62 For example, Gu and Guo (n 51) 666; Zhong and Lin (n 61).

63 Zhong and Lin (n 61) 75.

64 UNCRC, Article 3.

65 Chris Jenks, *Childhood* 2nd edn (Routledge 2005) 128.

66 Goldson (n 52).

> the minimum crime age should be acceptable and would be supported by the general public.[67]

This interpretation is problematic for two reasons. First, no evidence is available to affirm the social circumstances in China that justify lowering the age of criminal responsibility; second, rule 4.1 is taken out of the international legal framework as a whole and misinterpreted, irrespective of the core principles embodied in international law that promote the best interests of children in conflict with the law.[68]

Some Chinese scholars[69] search for evidence through comparative law. Typically, the laws of foreign jurisdictions which adopt low ages of criminal responsibility are cited in support of the lowering of the minimum crime age in China. However, often the 'intrinsic intricacies and overarching complexities' of comparative law are overlooked.[70] More seriously, factual errors are found in comparative articles 'citing' foreign law, policy and practices. One scholar,[71] for example, called for urgently lowering the age of criminal responsibility in China as was the case – it is claimed with no referencing details – in the UK where the Home Office was working on a proposal to lower the age of 'problem children' from 13 to 8. The claim ignores the fact that, in response to the UN Committee's criticisms, raising the minimum crime age has been strongly advocated across jurisdictions in Britain.[72] This exemplifies the 'methodological hazards'[73] of comparative law: one is the possibility of misreading or simplifying local context and reading foreign law, policy and practice uncritically.[74] Linguistic incompetence may be another problem,[75] as anything less than complete fluency may leave one vulnerable to misinterpretation.[76] The Chinese case illustrates problems in comparative academic research and, in this instance, the authors have rendered the reading of foreign laws unhelpful.

There are also Chinese scholars who support the existing rules on age and crime but argue that the law should be refined.[77] Yao, for example, contends that setting 14 as the minimum age of criminal responsibility is appropriate because it not only reflects the

---

67 Zhong and Lin (n 61) 76.

68 UNCRC, Article 3; Comments 31–33, CRC 2007.

69 For example, Jibao Zhang, 'Discuss Necessity of Lowering the Age of Full Criminal Responsibility' (2012) 8 (Zhong) Law and Society 247; Yao Yao, 'Preliminary Discussion on Lowering the Minimum Age of Criminal Responsibility in China' (2012) 7 Products and Quality 213; Zhong and Lin (n 61).

70 Goldson and Hughes (n 13) 214.

71 Li (n 61) 138.

72 For England and Wales, see, for example, Rob Allen, *From Punishment to Problem Solving: A new Approach to Children in Trouble* (Centre for Crime and Justice Studies 2006); Muncie (n 8). For Scotland, see, for example, Maher (n 1). For Northern Ireland, see Northern Ireland Department of Justice, *A Review of the Youth Justice System in Northern Ireland* (Northern Ireland Department of Justice 2011).

73 Francis Pakes, *Comparative Criminal Justice* 2nd edn (Willan 2010) 22.

74 Lucia Zedner, 'Comparative Research in Criminal Justice' in Lesley Noaks, Michael Levi and Mike Maguire (eds), *Contemporary Issues in Criminology* (University of Wales Press 1995) 8.

75 Frank Leishman, 'Policing in Japan: East Asian Archetype?' in Rob I Mawby (ed), *Policing across the World: Issue for the Twenty-first Century* (Routledge 1999) 109.

76 Zedner (n 74).

77 For example, Xingwang Chen and Juanjuan Chen, 'Problems of the Minimum Age of Criminal Responsibility in Chinese law and Restructure' (2006) 15(2) Journal of Beijing Youth Politics College 43; Jianlong Yao, 'Theoretical Examination of Criminal Responsibility in Relation to Juveniles in China' (2006) 3 Journal of Northwest China College of Law and Political Science 147; Mingxuan Gao, *Specialised Discussions on the Criminal Law*, 1st Section (Higher Education Press 2002).

circumstances in China but is consistent with international law, in addition to the policy and practice of many other countries.[78] However, the scope of grave offences relevant to the age of relative criminal responsibility needs to be reconsidered to include only very serious crimes that are commonly identified across cultures.[79] Han, in contrast, argues that the current scope of grave offences is too narrow, considering the aims of penal policy and the policy concerning juveniles' well-being and their protection in China.[80] Echoing Han, Gao suggests that, for the purpose of crime prevention and public protection, juveniles who have reached 14 years of age should be held criminally liable for offences that may not be very serious but are clearly harmful and prevalent among juveniles, such as theft, snatching, fraud and sexual assault.[81] Apparently, the latter views represent an effective lowering of the age of full criminal responsibility from 16 to 14 and therefore represent a departure from the international standards.

China, like other state parties, continues to face a balancing exercise between 'care' and 'control' in juvenile justice and the tension between the protection of children who offend and the safety of the public at large. Often, when juvenile crime becomes an issue of great public concern, criminalisation tends to be favoured over diversions. Concerns over crime control and community safety trigger calls for lowering the age of criminal responsibility,[82] meaning that the further development of needs-based measures to tackle the structural problems of juvenile offending are put on hold.

Conclusion

Although international law, the CRC in particular, has not been incorporated into domestic legislation in China, its age of criminal responsibility is not too low, as far as international benchmarks are concerned. China accepts that children and young people deserve particular protection and offending juveniles are treated differently from adult criminals in the Chinese system. Following the global trend, child-centred juvenile justice strategies continue to be developed in China where criminal justice processes are typically perceived to have a punitive tradition. Despite various difficulties and challenges, a series of developments have been made in recent years, as this article illustrates. However, like many other systems, much needs to be done in China to fully accord with the core principles of international law as regards juvenile justice: securing immunity from prosecution, developing welfare-based measures, and minimising the use of incarceration for juvenile offenders.

Clearly, China's problem is not so much about settling the age of criminal responsibility, nor is about its resistance to international law, but more to do with a lack of 'sympathetic understanding' necessary for compliance with it – a problem shared with other states parties.[83] For China, there is an urgent need to develop a comprehensive and accurate knowledge of international law in order to address issues, such as: what should a welfare-based system for juveniles look like? What can be done to develop diversional

78 Yao (n 77) 152.

79 Ibid 156.

80 Han (n 58) 69, 70.

81 Gao (n 77) 212.

82 David Smith and Kiyoko Sueda, 'The Killing of Children by Children as a Symptom of National Crisis: Reactions in Britain and Japan' (2008) 8(1) Criminology and Criminal Justice 5.

83 Bruce Abramson, *Juvenile Justice: The 'Unwanted Child' of State Responsibilities – An Analysis of the Concluding Observations of the UN Committee on the Rights of the Child, in Regard to Juvenile Justice from 1993 to 2000* (International Network on Juvenile Justice/Defence for Children International 2000).

disposals and other alternatives to incarceration? What are disproportionate sentences? And what amounts to excessive use of custody?

The second area of development for China is the implementation of law and policy. The first step should be to provide detailed procedural laws and designated resources to better develop the aforementioned welfare-based system. It is also essential that new and existing strategies are supported by 'research-based knowledge and practice-based evidence'.[84] This type of evidence-based approach must be adopted when utilising existing non-punitive mechanisms and creating new measures to remove juveniles from the reach of the penal system. The law must be updated to afford legislative support for new and innovative, welfare-based measures.

International law as regards juvenile justice is primarily concerned with how children who offend should be dealt with by states. It provides a framework for the development of global child-friendly juvenile justice[85] that pays attention to the special needs of those juveniles and promotes their rehabilitation. It is important that nation states do not simply determine the age at which it is necessary to hold juveniles criminally responsible for their serious wrong-doing, but to assess 'the age at which it is appropriate to draw children into the penal system at all'.[86]

This article, which details law, policy and practice in juvenile justice in China, serves as a case study in the context of comparative law. It shows that comparative research is useful in exploring the widely varied approaches towards juvenile justice in different countries, helping to identify developing trends that appear to reflect the global approach to juvenile offending and punishment.[87] Comparative juvenile justice offers a unique opportunity to 'examine critically and theorise the contradictions and inconsistencies that underpin both the global trends and the manifest counter movement' that characterise contemporary international juvenile justice.[88] It is useful, for China, to learn and possibly transfer policy and practices from other jurisdictions,[89] whilst continuing with existing and developing new innovative juvenile justice measures of its own.

84 Goldson and Hughes (n 13) 213.

85 Barry Goldson and John Muncie, 'Towards A Global "Child Friendly" Juvenile Justice' (2011) 40 International Journal of Law, Crime and Justice 47.

86 Thomas Crofts, 'Catching up with Europe: Taking the Age of Criminal Responsibility Seriously in England' (2009) 17(4) European Journal of Crime, Criminal Law and Criminal Justice 267; 269.

87 Howard League for Penal Reform (n 20).

88 Goldson and Hughes (n 13) 214.

89 Neal Hazel, *Cross-National Comparison of Youth Justice* (Youth Justice Board 2008).

NILQ 67(3): 373–86

Raising the age of criminal responsibility in the Republic of Ireland: a legacy of vested interests and political expediency

DERMOT WALSH*

University of Kent

Abstract

Throughout much of its history, juvenile justice in the Republic of Ireland has been oriented towards a justice as distinct from a welfare model. In the twenty-first century this was heavily amended pursuant to a justice agenda that emphasised criminalisation and punishment for offenders as young as 10 years of age. The treatment of the age of criminal responsibility has been an integral part of this trajectory. Raising the age of criminal responsibility from the common law low of 7 years in the Republic of Ireland has proved a surprisingly difficult endeavour. This article examines why the age of criminal responsibility in the Republic of Ireland was maintained at the common law age of 7 years, why there should have been such dithering over the reform when it eventually did come, and why the current law still criminalises children of a very young age. It argues that 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.

Introduction

Throughout much of its history, juvenile justice in the Republic of Ireland has been oriented towards a justice as distinct from a welfare model.[1] It was not until 2001 that the Children Act 1908 was finally replaced by a new statutory framework. It offered the promise of a more holistic model in which the welfare needs of young offenders could be managed without unduly depriving them of due process protections, or exposing them inappropriately to the stigmatisation and effects of criminalisation and punishment.[2] Only five years later, before several of the key measures were even put into effect, it was heavily amended pursuant to a justice agenda that emphasised criminalisation and punishment for

* Professor of Law MRIA, Kent Law School.

1 For discussion of these models, see, for example, Anthony Doob and Michael Tonry, 'Varieties of Youth Justice' (2004) 31 Crime and Justice 1; Roger Smith, 'Welfare Versus Justice – Again!' (2005) 5(1) Youth Justice 3; Chris Cunneen and Rob White, *Juvenile Justice: An Australian Perspective* (OUP 1995) 190.

2 See, for example, Ursula Kilkelly, *Youth Justice in Ireland: Tough Lives, Rough Justice* (Irish Academic Press 2006) ch 2; Therese Lyne, 'Finding a Place for Juveniles in the Irish Criminal Justice System: Easy Question, Impossible Answer!' (2005) 4 Cork Online Law Review 11; Diarmuid Griffin, 'The Juvenile Conundrum: Ireland's Response to Youth Offending' (2003) Cork Online Law Review 12; Dermot P J Walsh, 'Balancing Due Process Values with Welfare Objectives in Juvenile Justice Procedure: Some Strengths and Weaknesses in the Irish Approach' (2008) 3(2) Youth Studies Ireland 3.

offenders as young as 10 years of age. The treatment of the age of criminal responsibility has been an integral part of this trajectory. Indeed, the common law exposure of children as young as 7 years of age to the risk of punishment under the criminal law survived in independent Ireland for no less than 85 years.

Drawing heavily on the parliamentary record, this article examines why the age of criminal responsibility should have remained untouched for so long, why there should have been such dithering over the reform when it eventually did come, and why the current law still criminalises children of a very young age. It argues that 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. Before that, however, it is necessary to outline the relevant common law and statutory contexts.

Common law background

The common law system is generally believed to have supplanted the ancient Irish Brehon law system in Ireland by the seventeenth century.[3] By that time, 7 years of age was taking root as the threshold for criminal responsibility at common law.[4] A child older than 6 years and less than 14 years was deemed to lack the capacity to commit crime, but that presumption could be rebutted by proof that the child knew what he or she was doing was wrong.[5] Holdsworth associated the emergence of a common law defence of infancy with the early development of the *mens rea* concept, in the sense of intent incorporating an element of moral wrong-doing.[6] Equally, at that time, it began to be accepted that a child under 7 did not have the capacity to form the *mens rea* necessary to be guilty of a felony. Blackstone linked this more directly to the age when the child acquires a natural capacity to understand the difference between right and wrong. As Blackstone himself put it, the age 'when first the understanding might open'.[7] Accordingly, he considered that for children under 7 years of age 'a felonious discretion is almost an impossibility in nature'. It would be tempting, therefore, to link the 7-year threshold for criminal liability with the Christian or Catholic doctrine that teaches that a child reaches the age of reason at 7 years and as such is deemed to have a sufficient understanding to commit sin and to be subject to ecclesiastical law. It is difficult, however, to find any explicit linkage between the two. Indeed, the Code of Canon Law does not refer to the age of reason at all. Instead, it refers to the use of reason. It was not until 1910 that Pope St Pius X issued the decree Quam Singulari which said that children reached the age of reason around the age of 7, with discretion left to the family and priest. While 7 years of age was also recognised as having significance in terms of natural understanding and legal capacity in some other religions, there does not seem to have been any scientific, philosophical or cultural basis for the choice. Nevertheless, it seems that the common law also eventually settled on 7 years of age as the threshold at which a child acquired sufficient reason to ground criminal capacity.

3 Fergus Kelly, *A Guide to Early Irish Law* vol III (Institute of Advance Studies, Early Irish Law Series 1988) 260–61; and, more generally, J Sinder, 'Irish Legal History: An Overview and Guide to the Sources' (2001) 93:2 Law Library Journal 231.

4 See, generally, William Blackstone, *Commentaries on the Laws of England* book 4 9th edn (Strahan and Cadell 1783) ch 2, 22–23; William S Holdsworth, *A History of English Law* vol 8 (Methuen & Co/Sweet and Maxwell 1966) 438–39.

5 Glanville Williams, 'The Criminal Responsibility of Children' [1954] Crim LR 493.

6 Holdsworth (n 4) vol 3, 372–75.

7 Blackstone (n 4) 23.

The common law on the age of criminal responsibility was retained without question in Ireland post-independence.[8] Indeed, much of the law and legal process in the old state generally was incorporated largely unchanged in the new state.[9] This was especially so in the area of juvenile justice.[10] Surprisingly, perhaps, the low 7-year threshold for criminal capacity was never challenged on constitutional grounds. At the very least, it might be considered that the expansive interpretation that has been given to the Article 38.1 concept of a trial in due course of law would provide a basis for challenging the notion that a child of 7 years of age could be criminally liable and punished for his or her actions. It may be, of course, that suitable opportunities for challenge rarely if ever arose due to a combination of the rebuttable presumption of incapacity for those over 6 years of age and less than 14 years of age and the reluctance of the state to prosecute children as young as 7 or 8 years of age.

Statutory intervention

The Children Act 2001, as originally enacted, stipulated that there was a conclusive presumption that no child under 12 years of age was capable of committing a criminal offence.[11] This was complemented by a rebuttable presumption that a child who is not less than 12 years of age but under 14 years of age was incapable of committing a criminal offence because the child did not have the capacity to know that the act or omission concerned was wrong.[12] These provisions retained the general common law approach to incapacity, but raised the age threshold for it by a very substantial five years. This meant that a child below the age of 12 years would be immune from criminalisation and the criminal process for his or her 'offending', although there was provision for the public Health Boards to intervene compulsorily in certain circumstances in the interests of his or her welfare. The rebuttable presumption in favour of a child's incapacity was retained for children of 12 and 13 years of age, but could be rebutted by proof that the child knew his or her act or omission was wrong, as distinct from the higher common law requirement of seriously wrong.

Without ever having been brought into effect, these reforms were replaced in 2006 by the current provisions which take a distinctly different approach to the age of criminal responsibility. In contrast to their predecessor and the common law, they do not set an age threshold below which a child is deemed wholly incapable of committing a criminal offence. Instead, they stipulate that, subject to specified exceptions, a child less than 12 years of age shall not be charged with a criminal offence.[13] The exceptions are: murder, manslaughter, rape, rape under s 4 of the Criminal Law (Rape) (Amendment) Act 1990, or aggravated sexual assault. The protection against being charged with any of these offences only applies to a child less than 10 years of age.[14] The net effect is that a child of 10 years of age can be charged, prosecuted, convicted and punished for any of these

8 See *Green v Cavan County Council* (1959) Ir Jur Rep 75; *Monagle v Donegal County Council* (1961) Ir Jur Rep 37; *KM v DPP* [1994] 1 IR 514; Summary Jurisdiction Over Children (Ireland) Act 1884, s 4. For discussion, see Nial Osborough, 'Rebutting the Presumption of *Doli Incapax*' (1975) X Irish Jurist 48; Conor Hanly, 'The Defence of Infancy' (1996) Irish Criminal Law Journal 72; Conor Hanly, 'Child Offenders: The Changing Response of Irish Law' (1997) 19 Dublin University Law Journal 113.

9 See Raymond Byrne and Paul McCutcheon, *Byrne and McCutcheon on the Irish Legal System* 5th edn (Bloomsbury Professional 2009) 2.64–65.

10 See Dermot P J Walsh, *Juvenile Justice* (Thomson Round Hall 2005) 1–01–08.

11 Children Act 2001, s 52(1), as originally enacted.

12 Ibid s 52(2).

13 Children Act 2001, s 52(1), as substituted by Criminal Justice Act 2006, s 129.

14 Ibid s 52(2).

serious offences, while a child less than 12 years of age cannot be charged with any other offence. Critically, the old rebuttable presumption that had applied between the ages of 7 and 14 years is abolished.[15] In its place is a general provision to the effect that in any case where a child below the age of 14 years is charged with an offence, no further proceedings in the matter, apart from remand in custody or on bail, can be taken except by or with the consent of the Director of Public Prosecutions.[16]

The wording of the current statutory provisions is striking. For the first time in the history of Irish law, it dispenses with a clear statement of principle that a child below a specified age is deemed incapable of committing a criminal offence. This ancient precept is replaced by a functional stipulation to the effect that a child below a certain age cannot be charged with an offence. In other words, it adopts the formulation familiar to Scottish law and many European civilian procedures that operate in a different context.[17] What is not so clear is whether the conclusive common law presumption of incapacity for children below the age of 7 years is also abolished. The wording in the 2001 Act, as originally enacted, left no doubt that the intention was simply to raise the common law age threshold to 12 years; the automatic implication being that a child below the age of 12 years lacked the capacity to commit a criminal offence. The wording of its 2006 replacement, however, is more ambiguous. Not only does it introduce the concept of different age thresholds for different offences, but it also drops the language of criminal incapacity in favour of the language of protection against being charged. The common law incapacity attaching to children below the age of 7 years is not expressly abolished. It is just ignored. It can be argued, of course, that it is implicitly replaced by the introduction of the statutory provisions. It can equally be argued, however, that there is no inherent incongruity in saying that a child below the age of 7 years lacks capacity to commit a criminal offence while, at the same time, stipulating that a child below the age of 12 years (or 10 years, as the case may be) cannot be charged with a criminal offence. The latter does not necessarily entail the demise of the former.

Even if the common law capacity threshold has not been abolished, it seems clear that Irish criminal law has at least retreated from express recognition of a concept of childhood innocence, in the sense of a child of a very young age lacking the inherent capacity to commit crime. Instead, such children are viewed as the equivalent of adults in terms of criminal capacity and their distinctive status and vulnerability are catered for merely by a procedural bar on their being charged with a criminal offence so long as they are below the age of 10 or 12 years depending on the 'offence'. The net effect is that, where a child of, for example, 7 or 8 years of age (or even younger if the common law threshold has been implicitly abolished) acts in a manner that could constitute a criminal offence, the unseemly spectacle of the child being prosecuted and punished through the criminal law is avoided only on account of the procedural bar on being charged. The child's behaviour, however, can still be classified as 'criminal' for other official record purposes, with all the consequences that that can have for the status of the child. Indeed, the change effected in 2006 expressly provides for children of 10 and 11 years of age to be admitted to the Garda Juvenile Diversion Programme for young offenders. Similarly, children in these age categories can be referred to the Garda Diversion Programme for 'offending' and antisocial behaviour. Moreover, it is now expressly provided that evidence of a child's involvement in the Diversion Programme is admissible for sentencing

15 Ibid s 52(3).

16 Children Act 2001, s 52(4), as substituted by Criminal Justice Act 2006, s 129.

17 See Frieder Dünkel, Joanna Grzywa, Philip Horsfield and Ineke Pruin, *Juvenile Justice Systems in Europe: Current Situation and Reform Development* vols 1–4 (Forum Verlag Godesberg 2010).

purposes in the event of subsequent criminal proceedings against the child.[18] It is difficult to avoid the conclusion that, under the current regime, the age-old acceptance that children below a certain age are simply too innocent to be associated with the tag 'criminal', has given way to a popular demand that they should at least be stigmatised for their 'criminality', even if it is not appropriate to prosecute and punish them for it through the criminal process. This aspect is pursued further below.

A further devious twist in the wording of the current law is that it does not actually provide a child, no matter how young, with an explicit and absolute protection against being charged, prosecuted and punished in respect of a criminal offence. The statutory provision in question states that a child under the age of 12 years, or 10 years (as the case may be), shall not be charged with a criminal offence. Clearly, it is framed in terms of the age of the child when charged, as distinct from the age of the child when he or she committed the 'offence'. In other words, it does no more than protect a child against being charged with an offence while the child is below the age of 12 (or 10) years. It does not positively protect a child who has reached his or her 12th (or 10th) birthday from being charged, convicted and punished for a criminal offence committed when that child was less than 12 (or 10) years of age.

The current provisions clearly reflect a less tolerant view of offending by young children than their predecessors which had never actually been brought into force. The factors that produced this result were also active in sustaining the common law threshold on the age of criminal responsibility for 85 years.

Religious, social and economic factors sustaining the common law threshold

The fact that the common law threshold survived in Ireland until 2006 is surprising given that it had been raised to 10 in England and Wales in 1963 and in Northern Ireland in 1968. The regular practice of criminal law reforms in these neighbouring jurisdictions being adopted some years later in the Republic of Ireland clearly did not extend to the age of criminal responsibility. This suggests that the low common law threshold was deeply rooted in the indigenous social and cultural values. Significantly, when the Children Act 1934 was introduced to extend supervisory safeguards for orphaned children in private care homes from 7-year-olds to 9-year-olds, there was no mention in the parliamentary debates of raising the age of criminal responsibility in line with the recent increase to 8 in England and Wales in 1933. This is despite the fact that the 1934 Act had clearly been lifted from a part of the UK Act that also raised the age of criminal responsibility. The silence is even more striking given that, when introducing the measure in Parliament, the parliamentary secretary to the Minister for Health actually said that the age for local supervisory control was being raised from 7 years to 9 because 7 'was a rather tender age to release the child from the protective provisions of the Act'.[19]

With respect to Ireland of the 1920s through to at least the 1970s, it is easy to draw a correlation between this unquestioning acceptance of the 7-year threshold with Catholic teaching and religious practice. Not only was the religious affiliation and identity of the populace overwhelmingly Catholic,[20] but the management of mainstream schooling was

18 Children Act 2001, s 48(2), as substituted by Criminal Justice Act 2006, s 126. For criticisms of these aspects, see Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Tottel 2008) 13.017–19.

19 *Seanad Debates* 11 April 1934, vol 8, no 14, 970.

20 On the influential role of the Catholic Church on social and political life in the state up to and including the 1970s, see John H Whyte, *Church and State in Modern Ireland 1923–1979* (Gill & Macmillan 1980); Tom Inglis, *Moral Monopoly: The Rise and Fall of the Catholic Church in Modern Ireland* 2nd edn (UCD Press 1998); Brian Fallon, *The Age of Innocence: Irish Culture 1930–1960* (Gill & Macmillan 1960) ch 14.

also dominated by the Catholic Church and Catholic religious orders.[21] These factors combined potently in admission to the Catholic sacrament of the Eucharist. Known generally as the 'First Communion', it had a central place in the lives of most young children throughout the country, as well as for their families and primary schools. Critically, the 'First Communion' was synonymous with acquiring the capacity to reason, in the sense of being able to distinguish between right and wrong (often taught in the schools as reaching the age of reason). So universal and familiar was this teaching and practice at all levels of Irish society and parts of the country that it is easy to see how the age of 7 would have been accepted unquestioningly as the natural threshold for exposing children to punishment not just for sin, but also for crime.

It can also be argued that there were certain religious-based vested interests in maintaining a low age of criminal responsibility in Ireland, at least throughout the early decades of the state's existence. Industrial (and reformatory) schools which provided accommodation and education, and generally stood *in loco parentis* for certain categories of vulnerable young children, were almost wholly owned and managed by religious orders.[22] The children committed to them were orphaned or destitute or were convicted and sentenced in criminal matters. Critically, the school owners were paid a subvention for each child detained in their school. Accordingly, the children were a valuable and necessary source of income for the religious orders in respect of their own maintenance and that of the properties concerned. A rare estimates debate on the annual subvention revealed a concern that the financial viability of the schools, and by extension, the religious orders who owned and managed them, was threatened by the courts not sentencing enough young children to be detained in them. This was reflected starkly in the following contribution from one member:

> I know that the number of boys that should be in Glencree [Reformatory], and in other schools, should not be 76, but should be 700. It would be better to have them there for the reason that they would be taken away from their present surroundings, where they have little but bad example before them. Their parents, perhaps, may be people who are sent to jail occasionally, or it may be that their parents are drunkards, as unfortunately too often is the case. It is unfortunate that magistrates should take the view that so many of them do take in dealing with boys of this class. If you had 700 pupils in those schools you would not be faced with the financial position that you are in to-day. That financial position has largely been brought about by the unfortunate attitude of mind of both parents and magistrates to these schools, which are really very estimable schools.[23]

More than 10 years later, a member of the Dail, speaking in the debates on the Children Bill 1940, observed more bluntly:

> I have heard it said by responsible people at meetings of public bodies in this city [Dublin] that children were very often committed to these institutions not so much because it was felt that it was in their own interest to commit them, but because it was very good for the institutions in question.[24]

21 See, for example, Whyte (n 20) 16–21.

22 For accounts of the establishment, management and operation of these schools, see Jane Barnes, *Irish Industrial Schools 1868–1908* (Irish Academic Press 1989); *Report of the Commission to Inquire into Child Abuse* (the Ryan Report) (Stationery Office 2009); Dermot P J Walsh, *Juvenile Justice* (Thomson Round Hall 2005) ch 9. See Walsh for further sources on life for some children in them.

23 *Dail Debates* 18 June 1925, vol 12, no 11, 1278.

24 *Dail Debates* 11 November 1940, vol 81, no 7, 1125.

Obviously, the lower the age of criminal responsibility, the greater the flow of child 'offenders', and associated income, to the industrial schools. Disturbingly, criminal law and practice seemed to bend too readily in favour of fuelling a steady supply of both from the state to the religious orders. The law afforded District Court judges very broad discretion in ordering young offenders to be detained in these schools for very long periods.[25] Despite some of the concerns expressed in the 1925 estimates debate, too many judges were too willing to commit young children convicted of minor offences to detention in the schools for very long periods, purportedly in the interests of their educational, moral and social development. In the course of the debate, for example, one member raised the case of a 10-year-old child from a stable family who was ordered to be detained until he was 16 after being convicted of breaking into a paper shop with others to get fuel for a bonfire to celebrate a local election victory.[26] Another case highlighted in the Dail during these years concerned the sentencing of four children for a minor act of vandalism in which electrical insulators worth about £2 each were broken. For these offences, two 14-year-old children were ordered to be detained in a reformatory for 5 years, while an 11-year-old and a 9-year-old were each ordered to be detained in an industrial school for 3 years. An appeal for intervention from the minister met with a cold and dismissive response to the effect that such action was necessary to deter boys from engaging in breaking insulators in the area.[27]

It would be unfair, however, to paint a picture of church and state conspiring to use the criminal law and justice system as a source of financial maintenance for the religious orders. The sad reality is that in the early decades of the state, some families were so desperate that they coveted the consignment of one or more of their young children to an industrial school. They considered that the food, accommodation and education on offer there would far outweigh the life-threatening destitution that would be their lot within the family. Accordingly, it was not uncommon for parents to engineer the conviction of their own children for petty offences, such as begging, in the hope that they would be convicted and sentenced to detention in an industrial school.[28]

Emergence of voices for reform

It was not until the 1960s and 1970s that disparate voices in favour of raising the age of criminal responsibility began to surface in Ireland. For the most part, these were confined primarily to academics, practitioners and individuals or bodies commissioned to carry out research on the juvenile justice system. The most substantial of these was surely the Kennedy Committee which was established in 1967 by the Minister for Education to examine the industrial and reformatory school system. It reported in 1970 with wide-ranging reforms based on extensive research and rigorous reasoning,[29] as befits its able and experienced membership.[30] Among its many weighty recommendations, which have stood the test of time, is that the age of criminal responsibility should be increased to 12 years and that a civil, welfare-based procedure should be introduced to address the needs

25 Walsh (n 22) 7–26–77.

26 *Dail Debates* 18 June 1925, vol 12, no 11, 1279.

27 See *Dail Debates* 28 March 1928, vol 22, no 7, 706.

28 See Dail and Seanad debates on the Children (Amendment) Bill 1928; *Dail Debates* 28 February 1929, vol 28, no 5, and *Seanad Debates* 20 June 1928, vol 10, no 18.

29 *Report of the Committee on Reformatory and Industrial Schools Systems* (Stationery Office 1970).

30 See Anthony Keating, 'A Contested Legacy: The Kennedy Committee Revisited' (2013) 22(3) Irish Studies Review 304, for insights into the composition and approach of the Committee and on why its recommendations were not implemented.

of children who 'offend' below that age.[31] Significantly, this recommendation was not based on a simple linkage with thresholds in neighbouring and many other European jurisdictions where the minimum age had been significantly higher than that in Ireland for many years. Instead, the Committee conducted a thorough and sophisticated analysis into the causes of juvenile delinquency. It concluded that the most important causal factors were the personality and emotional development of the individual juvenile. Sadly, as will be seen later, this is the vital aspect that seems to have been lost when the state finally managed to reform the law on the age of criminal responsibility.

The case for an increase in the age of criminal responsibility was also made in various other reports, studies and papers over the next few decades.[32] The elected members of Parliament, however, were initially more reticent in highlighting the issue, preferring to follow rather than lead. The first significant Dail debate was triggered accidentally in 1984 by a misunderstanding on the part of some members with respect to the likely application to young children of what was to become the Criminal Justice Act 1984. This Act introduced, for the first time in Ireland, a general police power to detain arrested suspects for the investigation for crime – along the lines of the Police and Criminal Evidence Act 1984 in Britain. Unnerved by the prospects of children of 7 and 8 years of age being detained for investigation in Garda custody, some members forced a debate on an amendment seeking to raise the age of criminal responsibility to at least 12 years of age. While the amendment was lost, the debate did seem to reflect a broad consensus among the members that the age of criminal responsibility was too low at 7 years of age. Perhaps more significant, in light of future developments, were the implicit indications of a lack of consensus on what the age should be and on how it should be achieved. As will be seen below, many members voiced concerns about what they viewed as the criminal behaviour of children of 9, 10 and 11 years of age and strongly favoured the application of harsh punitive measures to deal with it. In 1986, the Dail Select Committee on Crime, Lawlessness and Vandalism displayed a lack of conviction on raising the age of criminal responsibility when it opted not to make recommendations after having reviewed the law on it.[33] Similarly, in 1988, on the first occasion that a concrete legislative proposal was put before the Dail, it generated protestations of consensus on the need to raise the age, but no political will to deliver on it.[34]

It was not until 1992 that a Dail Select Committee on Crime felt sufficiently confident to recommend raising the age of criminal responsibility.[35] By that time, however, there was a general expectation that the government was set to bring forward legislative proposals to raise the age. In the event, those proposals did not see the light of day until 1996 and, as indicated above, it was a full 10 years later in 2006 before the age was raised in effect. Clearly, underneath the apparent consensus among the experts and parliamentarians, there were strong undercurrents moving in the opposite direction.

---

31 The report was reviewed favourably by Nial Osborough in 'Reformatory and Industrial Schools' (1970) Irish Jurist 294.

32 See, for example, *Report of the Commission of Enquiry into the Irish Penal System* (Michael MacGreil 1980); Helen Burke, Claire Carney and Geoffrey Cooke (eds), Y*outh and Justice: Young Offenders in Ireland* (Turoe Press 1981); John Farrelly, *Crime, Custody and Community: Juvenile Justice and Crime with Particular Relevance to Sean McDermott Street* (Voluntary and Statutory Bodies 1989); Eoin O'Sullivan, 'Juvenile Justice in the Republic of Ireland: Future Priorities' (1996) Irish Social Worker 14; National Youth Federation, Policy for Juvenile Justice: Justice for Young People (Irish Youth Work Press 1996); National Crime Forum, *Report of the National Crime Forum 1998* (IPA 1998).

33 *Thirteenth Report of the Select Committee on Crime, Lawlessness and Vandalism* (Dublin PL 4506, 1986).

34 Special Committee Child Care Bill 1988 Debate (31 May 1990) 3.

35 *First Report of the Select Committee on Crime* (Dublin 1992).

Latent forces impeding reform

Although the age of criminal responsibility was eventually raised in 2006, initial attempts within government to formulate legislative proposals to that end actually commenced 25 years earlier in 1981. The apparent consensus on the need for reform that emerged in the course of the 1980s concealed an underlying lack of agreement on the shape that that reform should take. Permeating the latter was a volatile combination of religious, social, economic and political forces that were not conducive to a simple raising of the incapacity to commit crime from 7 years to a significantly higher level. These forces were not always visible or consistent. It may also be no exaggeration to say that some powerful political sources maintained a hypocritical public image of support for raising the age, while privately working to frustrate it. Ultimately, the net effect of these negative forces was not just a delay for more than two decades, but also a significant dilution of the substance of the initial proposals.

Much of the initial delay in bringing forward concrete legislative proposals on raising the age of criminal responsibility can be attributed directly to a mixture of old-fashioned 'turf' wars and administrative disharmony behind the scenes within the relevant government departments. Traditionally, juvenile justice entailed overlap between the Departments of Justice and Education, while the Department of Health dealt with the care needs of children outside of the criminal justice system. Raising the age of criminal responsibility to 10 or 12 or higher would present difficult questions of how to deal with the significant numbers of such children who were engaged in serious and, in some cases, persistent offending. Some means of facilitating compulsory intervention for the care and welfare of these children would have to be provided. This, in turn, raised issues of whether and, if so, how Ireland should implement mechanisms such as the civil judicial hearings applicable to young offenders of 8 to 12 years of age in Scotland,[36] or equivalent mechanisms familiar in many European continental jurisdictions.[37] The three government departments failed to reach a coherent position on how these aspects should be addressed and managed. The net result was that legislative proposals on child care and juvenile justice were separated. The former were introduced in Parliament in the form of a Child Care and Protection Bill 1985, which was not actually enacted until 1991. It took another 5 years, and the establishment of a single coordinating Minister of State with responsibility for children's affairs in each of the three departments, before legislative proposals on juvenile justice first appeared in Parliament.[38]

The pervasive, albeit indirect, influence of the Catholic Church can be detected in the obstructionism faced by the Child Care and Protection Bill. Critically, the Bill included provision for the essential welfare-based measures needed to cope with young offenders who would be put beyond the reach of the criminal justice system by a significant raising of the age of criminal responsibility. This entailed conferring civil powers on the state to take children away from families in situations where the child was not at risk or orphaned or destitute. Just how controversial that would prove to be is indicated by the special status afforded the sanctity of the family by the Constitution. Reflecting the influence of the Catholic Church,[39] Article 41.1 of the Constitution stipulates that '[t]he State recognises the Family as the natural primary and fundamental unit group of Society, and

36 See Claire MacDiarmid, 'Age of Criminal Responsibility: Raise it or Remove it?' (2001) 5 Juridical Review 243.

37 Frieder Dünkel et al (n 17).

38 See *Dail Debates* 12 February 1997, vol 474, no 7, 1308.

39 See Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937* (Mercier Press 1997) especially chs 3 and 4.

as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law'. Faced with such powerful, absolute and trenchant language, it was always going to be difficult for the state to secure the powers and establish the civil process necessary to override parental authority to the extent of removing a child from the family in the interests of his or her own welfare and development. It is no surprise, therefore, that it took 6 years and several diversions before the 1985 child-care measures even made it to the statute book.

The potential economic costs of the welfare supports that would have to be provided to manage the increase in underage child offenders also proved a potent factor in shaping the content and progress of the legislative proposals. Ireland in the 1980s lacked the infrastructure and resources necessary to provide the appropriate facilities and services. As noted above, it had always relied heavily on the resources of the church and the voluntary private sector to provide the accommodation, social and educational needs of children sentenced to detention or committed to care. Raising the age of criminal responsibility was likely to force the state to invest heavily in providing the necessary supports. This was a prospect that many in the political establishment were loathe to entertain.

The other potent factor affecting the progress and content of the proposals to raise the age of criminal responsibility was public opinion. The nature and extent of offending by children as young as 10 years of age was an issue of acute public concern throughout the 1980s and 1990s and beyond. While it may not have reached the levels necessary to satisfy all of the criteria for a 'moral panic', there was a deep sense of public alarm and anger at the prevalence of joyriding, glue-sniffing, vandalism and antisocial behaviour, all of which were associated in the public mind with children out of control in parts of the urban centres. The media reporting of such activities produced an effect similar to that generated in the UK in the wake of the killing of toddler Jamie Bolger by two 10-year-old boys.[40] Indeed, in Ireland there was also a spill-over effect of the media reporting of that killing. Not surprisingly, in this toxic environment, suggestions to increase the age of criminal responsibility were always likely to provoke fears among the communities affected that they would be left powerless and abandoned in the face of young criminals who would be above and beyond the reach of the law.[41] These fears were reflected in the content and tone of the contributions from their elected representatives to the debates from the mid-1980s through the 1990s and beyond on each occasion that proposals were tabled to increase the age of criminal responsibility. While they generally accepted the argument that 7 was too low, they needed reassurance that any move to increase it would be marginal and/or would be accompanied by alternative control mechanisms. This position was captured neatly by the Minister of State at the Department of Health when, in responding to a proposal to raise the age of criminal responsibility to 12 years in the course of the debates in the Child Care Bill 1988, he said:

> If we agree to provide in law that children under 14 years are not capable of committing crimes, there would be widespread public concern at the prospect of youngsters committing anti-social acts and not being subject to any form of punishment or sanction.[42]

40 See, for example, Eleanor T Leane, 'The Principles of Juvenile Justice No Longer Apply when Children Commit Serious or Violent Crime' (2007) Cork Online Law Review 3; Lyne (n 2).

41 See Diarmuid Griffin, 'The Juvenile Conundrum: Ireland's Response to Juvenile Offending' (2003) Cork Online Law Review 12. The Kennedy Report adverted to this risk as far back as 1970; Task Force on Child Care Services, *Final Report* (Stationery Office 1980).

42 Special Committee (n 34) 3.

And later:

> I think that the man in the street would be appalled at the suggestion that such youngsters could not be prosecuted.[43]

The minister's comments indicate that it would not be acceptable for child offenders between the ages of 7 and 14 years to be managed solely through a civil, welfare-based process. There also had to be an element of just desserts and overt punishment. This reflected a strong current of Irish public opinion that was intolerant of childhood offending and wedded to the need to discipline children severely in order to steer them away from wrong-doing (and its close association with sin) at a young and impressionable age. The emphasis was very much on discipline through corporal punishment coupled with the application of a rigorous education and lifestyle regime aimed at self-improvement and the production of obedient children in the image of the traditional Irish Catholic model of the child. Once again, the dominant influence of Catholic religious forces within the family and the state was both apparent and real. As noted above, the state relied heavily on the religious orders, through their industrial (and reformatory) schools, to shoulder the burden of rehabilitating very young offenders and steer them away from criminal and antisocial behaviour. Corporal punishment was a regular instrument for imposing discipline in those schools and in the mainstream schools, most of which were either owned by religious orders or managed by the church.[44] It was not formally prohibited by law in the detention schools until 2007.

These values came to the surface in the parliamentary process in debates on juvenile crime and justice in the 1990s. In an adjournment debate on the lack of secure accommodation for young offenders, for example, a future Minister for Justice, who would later oversee the enactment of the Children Act 2001, said:

> [The] time has come for us to provide adequate detention facilities for young offenders. They are now getting the same simple and lucid message as hardened criminals: if one commits a serious criminal offence, the punishment will not fit the crime. I believe that, not only in this case but in the case of virtually everybody who has the use of reason, there is a crying and desperate need for this State to tell those who commit serious crimes that the punishment will fit the crime and that if they commit a serious criminal offence, not only will they go to prison or a place of detention but they will stay there until they have served their debt to society or be made an example of to others who might be of like mind.[45]

Previously, in the debates on the Criminal Justice Bill 1983, several members attributed juvenile crime to the demise of corporal punishment in the schools, and called for the return of birching and the introduction of army-type detention camps because 'young people need discipline'.[46]

This public opinion context helps to explain why it took so long for concrete legislative proposals on raising the age of criminal responsibility to be brought forward by the government in Ireland. It also helps explain the slow and torturous journey of those proposals into law at a time when, at least superficially, it appeared that there was a general consensus on the need to raise the low age threshold. This journey was further

---

43 Ibid.

44 For insights into life in these schools for some children, see Mary Raftery and Eoin O'Sullivan, *Suffer the Little Children: The Inside Story of Ireland's Industrial Schools* (New Island 1999); Harry Ferguson, 'States of Fear, Child Abuse and Irish Society' (2000) 50(1) Doctrine and Life 20; Ryan Report (n 22).

45 *Dail Debates* 12 March 1996, vol 462, no 8.

46 *Dail Debates* 10 and 15 November 1983, vol 345, nos 10 and 11.

complicated by the arguably duplicitous approach of the largest political party and its allies in Parliament.

Political expediency

The remarkable legislative journey that eventually culminated in a raising of the age of criminal responsibility began with the Children Bill 1996 introduced by a Fine Gael and Labour coalition government. Constrained by public opinion and the limited financial resources of the Health Boards to cope with the extra offenders outside of the criminal justice system, it adopted 10 years of age as the threshold for criminal responsibility.[47] Critically, it did this simply by extending to 10 years of age the existing conclusive presumption that children below 7 years of age lacked the capacity to commit crime.[48] Offenders below 10 years of age would be dealt with by the Health Boards wholly outside the criminal justice system on an exclusively welfare basis. The conclusive presumption was accompanied by a rebuttable presumption that a child from 10 years to 13 years of age inclusive was incapable of committing a criminal offence because he or she did not know the act or omission concerned was wrong.

Although the proposal was generally welcomed as a long overdue step in the right direction, underneath the superficial consensus lurked an embedded, but largely unspoken, resistance within the Fianna Fail and Progressive Democrat opposition parties. Fianna Fail failed to cooperate with the government in moving the Bill on to the Committee stage and so it had progressed no further when the government collapsed in June 1997. Under pressure from the UN Committee on the Rights of the Child,[49] the Bill was reintroduced by the new Fianna Fail–Progressive Democrat coalition in February 1998 with an actual increase in the age of criminal responsibility to 12 years. Nevertheless, the government continued to drag its heels in the matter and debate on the Bill did not resume until February 2001. When introducing the Bill on second stage in the Seanad on 20 June 2001, the Minister of State at the Department of Health and Children explained that children under the age of 12 will no longer have the capacity to commit a criminal offence. This, she said, 'was based on the belief that as a society we should not criminalise children under 12 years of age; that the alternative policy for intervening with such children, that is, by the health boards, often in concert with other agencies, was credible; and that health board personnel would deal with these children in their usual professional manner'. Nevertheless, these sentiments were to prove false as the provisions were never brought into effect, purportedly because of their financial costs and public intolerance of serious crime being committed by 10- and 11-year-olds.[50] As explained above, they were replaced in 2006 by another Fianna Fail–Progressive Democrat coalition with a version that resonated an overtly justice-oriented approach to the management of very young child offenders.

The manner in which the current provisions were introduced can only be described as extraordinary and bordering on the undemocratic. It seems that the superficial consensus

47 While Hanly generally welcomed the Bill as a whole, he viewed it as much less revolutionary in its time than the Children Act that it was intended to replace; see Hanly, 'Child Offenders' (n 8).

48 It also included provision to keep the age threshold under review with a view to raising it to 12 years when economic resources would allow.

49 The UN Committee considered Ireland's first report in January 1998. It was highly critical of the proposed 10-year-old threshold and emphasised a preference for a minimum of 12 years of age; UN Committee on the Rights of the Child, *Concluding Observations: Ireland* (CRC/C/15/Add 85) para 23. In 2005, the Minister of State for Children openly acknowledged that the 12-year threshold in the 2001 Act was adopted to appease the UN Committee; *Seanad Debates* 16 November 2005, vol 181, no 70, 1516.

50 See debate on juvenile offenders motion; *Seanad Debates* 16 November 2005, vol 181, no 70.

that produced the 2001 Act was swept aside in an underhand manner by those latent reactionary forces that were never fully supportive of the 2001 consensus.[51] The vehicle was a Criminal Justice Bill from 2004 that was still making its way through the legislative process in 2006. After that Bill had completed its second reading, the Minister for Justice stunned the Dail by announcing his intention to introduce a whole raft of substantive amendments at committee stage. These were so substantive and voluminous that they dwarfed the original Bill. Critically, they embraced major innovatory and draconian measures to tackle organised crime, violent offences, drug-trafficking and firearms offences, as well as major changes and additions to the Children Act 2001. As seen above, the changes included a significant rewriting of the provision in the 2001 Act on the age of criminal responsibility. In any normal democratic process, these changes to the children legislation would have been introduced and debated as a separate Bill. Lumping them in with the draconian provisions on gangland crime ensured that they would largely escape parliamentary scrutiny as attention would focus on the other measures, given that there was something of a media-driven 'moral panic' over gangland crime at the time. Not surprisingly, that is exactly what happened as, in the debate that followed the minister's introduction of the amendments, only one member highlighted the government's retreat from the juvenile justice principles in the 2001 Act.

The undemocratic effects of this strategy were compounded by the manner in which the ministerial team obscured, and even distorted, the substance of the changes in the age of criminal responsibility. The 'Jamie Bolger' case was called in aid of the reduction in the age of criminal responsibility from 12 years in the 2001 Act to 10 years in respect of certain of the most serious offences (see below). When challenged on the relevance of the case in Ireland, the minister resorted to grossly exaggerated scenarios which simply would not occur under the measures enshrined in the 2001 Act as originally enacted. He said:

> There have been a few cases of sexual offences involving minors. A solid citizen could wake up one morning to realise that the young boy who had raped his or her daughter was going back to school that day and there would be a conference, or that a person who pushed his or her child under a train or into a canal was back at school, or that a person had bullied and tortured a person. If our law was such that these people would be given a mere slap on the wrist and told to get on with the rest of their lives, public opinion would be outraged.[52]

Moreover, no mention was made of the significant shift from replacing the conclusive presumption that a child under 12 years of age lacked the capacity to commit an offence with protection against being charged with an offence (see below). No explanation was given for the abolition of the rebuttable presumption. Most cynically, these changes were presented as being motivated by a desire to raise the age of criminal responsibility without delay.

Conclusion

Raising the age of criminal responsibility in the Republic of Ireland has proved a surprisingly difficult endeavour. The view of criminalisation and punishment as essential, even natural, tools for dealing with offending by young children was so deeply rooted in Irish society that it was the 1980s before a consensus began to emerge on the need to raise the age from the common law low of 7 years. The laboured attempts to implement that consensus over the next 25 years are a testament to the strength and depth, and ultimate

51 For a critique of the disappointing implementation of other key aspects of the 2001 Act, see Ursula Kilkelly 'Diverging or Emerging from Law? The Practice of Youth Justice in Ireland' (2014) 14(3) Youth Justice 212.

52 *Dail Debates* 29 March 2006, vol 617, no 48, 610.

success, of forces wedded to the more traditional view of childhood and punishment. Contrary to the threshold promoted as a minimum by the UN Committee on the Rights of the Child, children from 10 years of age in Ireland are subject fully to the criminal law and punishment for the most serious crimes. While it may appear that children below 12 years of age are beyond the reach of the criminal law, the reality is that they too are not fully immune from its effects.

A disappointing feature of the policy debates on the subject in Ireland over the past 30 years is that they have not embraced, or even engaged with, the body of expert knowledge on the development of cognitive reasoning in children that has come to the fore over that period. Advances in the behavioural and neuro-sciences show that setting an arbitrary age for attaching criminal liability is likely to penalise many children unfairly. Reviewing the literature, McDiarmid explains that the cognitive development necessary to integrate rational control over functioning with the level of skills and functional ability acquired are individual to the child.[53] Not only does this argue against the universal application of a fixed age, but it also suggests that even 12 years of age may be too low as a generalisation.[54] Although the Kennedy Report back in 1980 raised these issues in its analysis of juvenile crime, they have not had any impact on the ensuing debate, which has been dominated variously by the need to bring the law into line with standards in the neighbouring jurisdictions, the benefits of diverting the child from the criminal process, placating the UN Committee on the Rights of the Child and, ultimately, a perceived need for strict discipline as a primary tool to combat childhood offending. It would appear, therefore, that the case for reform is still as pressing in the Republic of Ireland as it is in its neighbouring jurisdictions.

53 See Claire MacDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2013) 13(2) Youth Justice 145.

54 The Royal Society, *Brain Waves Module 4: Neuroscience and the Law* (Royal Society Policy Document 5/11 2011) 3.2. Delmage suggests that it points in favour of a minimum age of 14 years; see Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective' (2013) 13(2) Youth Justice 102.

NILQ 67(3): 387–406

Raising the minimum age of criminal responsibility in Scotland: law reform at last?

ELAINE E SUTHERLAND*

University of Stirling, Scotland, and Lewis and Clark Law School, Portland, Oregon

Abstract

Children in Scotland are held criminally responsible from the age of 8, something that has attracted wholly justified criticism within the country and from international organisations, including the UN Committee on the Rights of the Child. Despite the fact that this puts Scots law in the same camp as some of the world's least progressive regimes, proposals to raise the minimum age of criminal responsibility have, to date, been rejected. For the second time this century, a government-appointed advisory group recently recommended raising the age to 12.

Setting the minimum age of criminal responsibility in Scotland in the context of historical, international and comparative developments and the burgeoning contemporary literature, this article argues that the climate for change has never been better. It predicts that, this time, the advisory group's recommendation will result in legislative reform and highlights the challenges that will result.

Introduction

Any discussion of juvenile justice in Scotland tends to focus on the children's hearings system, an approach that was regarded as particularly ground-breaking when it was introduced in 1971 and continues to attract approval. The hearings system takes a holistic approach to the needs of both victimised and troublesome children and young people, offering supportive, non-punitive measures, premised on what will serve the welfare of the child, where intervention is required. While the hearings system has undergone reform over the years, safeguarding and promoting the child's welfare remains at its core.

Yet, alongside this picture of enlightenment, the minimum age of criminal responsibility in Scotland remains 8 years old, often described as being the lowest in Europe,[1] putting Scotland in the same camp as some of the world's least progressive legal systems. It is no surprise that this has attracted criticism within the country and from bodies no less august than the UN Committee on the Rights of the Child and the UN Committee on Human Rights.

* Professor of Child and Family Law, Stirling Law School, and Distinguished Professor of Law, Lewis and Clark Law School.

1 This description is not wholly accurate since a number of European countries, including France and Luxembourg, have no stated minimum age. See, Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Ashgate 2009) ch 5.

In its most recent *Concluding Observations*, the UN Committee on the Rights of the Child again criticised the low age of criminal responsibility throughout the UK but, this time, it emphasised the positive, with the words:

> The Committee notes that the Scottish government is open to raising the minimum age of criminal responsibility and that an Advisory Group was established to explore these issues and develop recommendations for consultation.[2]

That advisory group recommended raising the age of criminal responsibility to 12[3] and, in response, the Scottish government undertook a public consultation on the matter. There has been widespread support for the recommendation, certainly from the legal profession, children's rights groups and academics. But we have been here before, only to find the prospect of reform coming to nought. This article examines the minimum age of criminal responsibility in Scotland in the context of historical, international and comparative developments and the burgeoning contemporary literature. It argues that the climate for change has never been better and predicts that, this time, the law will be reformed, but warns that there are consequential challenges still to be addressed.

The story so far

When viewed from a contemporary perspective, the adult criminal justice system of previous ages, with its emphasis on physical punishment, transportation and capital sentences, seems barbaric. Indeed, it was. Yet, that system provides the context in which juvenile justice of the time must be understood. Thus, it is somewhat heartening to find that, when the Scottish institutional writers from the seventeenth century onwards explored the different treatment of juveniles, they addressed issues that the modern reader would recognise as being at the heart of the current debate on criminal responsibility: the capacity of children to understand the wrongfulness of the act;[4] their opportunity to make choices; their ability to instruct a defence and, thus, secure a fair trial; and the relevance of age in sentencing. The fascinating nuances of their deliberations are discussed elsewhere and need not detain us.[5] For our present purpose, it is enough to know that, in Scotland, children below the age of 7 years old were regarded as 'incapable of crime'.[6] Minor children, being those between the ages of 7 and 14, were generally thought to be exempt from capital punishment[7] and there are numerous examples of 'leniency' being shown in sentencing on account of the minority of the offender.[8]

---

2 UN Committee on the Rights of the Child, *Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and Northern Ireland* CRC/C/GBR/CO/5, 3 June 2016, para 77.

3 *The Report of the Advisory Group on the Minimum Age of Criminal Responsibility* (The Scottish Government 2016) 11.

4 Sir George Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (first published 1678, 2nd edn 1699, Lawbook Exchange 2005)) I, I, 7.

5 For an excellent discussion, see Claire McDiarmid, *Childhood and Crime* (Dundee University Press 2007) ch 5.

6 Archibald Alison, *Principles of the Criminal Law of Scotland* (first published 1832, Law Society of Scotland and Butterworths 1989) 666. David Hume made the same point in his *Commentaries on the Law of Scotland Respecting Crimes* (first published 1819: Law Society of Scotland 1986) i, 35.

7 Hume was unwilling to elevate this idea to one of general principle irrespective of 'how deliberate soever the wickedness, or how incorrigible the obstinacy, or how cunning the malice of the offender': Hume (n 6) i, 34.

8 'Leniency' too must be understood in the context of the time and Hume (n 6), 32–34, includes the following examples: *Duff and Millar*, March 1701 (two boys aged 14 and 12, convicted of housebreaking along with an adult, were sentenced to be scourged at the gibbet while the adult was sentenced to death); *Alexander Livingston*, 1749 (a 12-year-old boy convicted of killing another boy by stabbing him was sentenced to transportation); and *Mair and Atchieson*, 25 March 1818 (two boys of 15 who were convicted of housebreaking and sentenced to death had their sentences reduced to transportation).

While separate juvenile courts were established by the Children Act 1908, the minimum age of criminal responsibility remained untouched until 1928, when the first separate Scottish inquiry into the care and protection of children and the treatment of juvenile offenders reported.[9] It recommended raising the minimum age of criminal responsibility to 8.[10] The report gives only a brief explanation for this very minor change and one is left with the impression that the Committee would have liked to raise the age further. It may have been that it, like so many similar bodies since, was conscious of what would be politically acceptable. In any event, its recommendation was implemented.[11] Parallel developments took place in England and Wales,[12] with the minimum age of criminal responsibility there being raised further, to 10 years old, in 1963.[13] There was no equivalent development in Scotland and it was at this time that the juvenile justice systems in the two jurisdictions began to diverge.

The children's hearings system was introduced in Scotland in 1971[14] and was based on the recommendations of the Kilbrandon Report of 1964.[15] Fundamental to these recommendations was a belief that the needs of children who offended were much the same as those of abused or neglected children since, in each case, 'the normal up-bringing process' had 'fallen short'.[16] Thus, it was appropriate to deal with them in the same tribunal. A second strand of the Kilbrandon philosophy was that, while courts were the appropriate place to determine disputed facts, decisions about what should happen to the child thereafter could be dealt with by panels of trained lay people. In all of this, the goal of the hearings system was (and remains) to find a positive way forward on the basis that the child's welfare is the paramount consideration.[17]

In contrast to the adult criminal justice system, the Kilbrandon approach to juvenile offenders prioritised prevention, education and treatment and that goes a long way to explaining the Committee's views on the age of criminal responsibility.[18] It emphasised the function of the minimum age, in the past, as a device that protected the young from harsh punishment, including the death penalty. However, if offenders were to be treated rather than punished, then the whole notion of criminal responsibility became less important.[19] The Committee was also troubled by the lack of scientific evidence on when

9 *Report of the Departmental Committee on Protection and Training* (HMSO 1928) (Morton Committee).

10 Ibid 48.

11 Children and Young Persons (Scotland) Act 1932, s 14.

12 *Report on the Treatment of Young Offenders* (Cmnd 2831 HMSO 1927) (Molony Committee), leading to the Children and Young Persons Act 1932, s 19.

13 Children and Young Persons Act 1963, s 16.

14 Social Work (Scotland) Act 1968. A brief explanation of the system can be found in Elaine E Sutherland, *Family Law Basics* 3rd edn (W Green 2014) ch 7. For a more detailed treatment, see Kenneth McKNorrie, *Children's Hearings* 3rd edn (W Green 2013).

15 *Report of the Committee on Children and Young Persons, Scotland* (Cmnd 2306 HMSO 1964) (Kilbrandon Committee), known as the 'Kilbrandon Report' or simply 'Kilbrandon'.

16 Ibid para 15.

17 The hearings system is now governed by the Children's Hearings (Scotland) Act 2011 (the 2011 Act) and s 25 ascribes paramountcy to safeguarding and promoting the welfare of the child throughout childhood. While taking account of any views the child wishes to express was always inherent in children's hearings, the obligation to do so is now articulated expressly in the statute: 2011 Act, s 27.

18 Kilbrandon Report (n 15) para 54.

19 Ibid para 64.

responsibility could be ascribed to the young.[20] All of that led it to conclude that '"the age of criminal responsibility" is largely a meaningless term'.[21]

Like all such exercises, the Kilbrandon Report was a product of its time. While the 'treatment' or 'welfare' model of juvenile justice has been subject to later criticism,[22] it passed largely unremarked at the time in Scotland.[23] As we shall see, there is now solid neuro-scientific evidence that provides valuable insights into the capacity of young people for impulse control and decision-making.[24] It is also worth bearing in mind that the Kilbrandon Committee's deliberations took place before the International Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child (UNCRC) created international obligations in terms of the minimum age of criminal responsibility.[25]

In the event, the Kilbrandon Committee's antipathy towards a minimum age of criminal responsibility had no impact. The concept remained part of Scots law, the relevant age continued to be 8 and the distinction between civil and criminal law was retained within the hearings system when it came to proving the facts on which a referral was based. Before a child can be referred to a children's hearing, two criteria must be satisfied: there must be a *prima facie* case indicating that the child comes within the scope of at least one of the 17 grounds listed in the statute[26] and it must be determined that a compulsory supervision order is necessary.[27] Most of the grounds for referring a child to a hearing focus on protecting children from abuse or neglect or from adults who may pose a threat to them, while several address behaviour by the child that is cause for concern.[28] Where the child is 8 or older, he or she may be referred to a children's hearing on the ground that 'the child has committed an offence'.[29] If the child or any of the 'relevant persons' (usually the child's parents) do not accept that the allegations supporting the ground on which the child has been referred to a hearing are true,[30] the matter must be proven in court. Proof is on the balance of probabilities in all cases except for the offence ground, when proof beyond reasonable doubt is required, as is the norm in criminal cases in Scotland.[31]

---

20 Ibid.

21 Ibid para 65.

22 Anthony M Platt, *The Child Savers: The Invention of Delinquency* (University of Chicago Press 1977). For a discussion of the unfounded promises of the welfare approach, see *Gault v United States* 387 US 1 (1976).

23 For an early exception, see John P Grant, 'The Children's Hearings System in Scotland: Its Strengths and Weaknesses' (1975) 10 Irish Jurist 23.

24 See nn 109–12 and the accompanying text below.

25 See nn 52–65 and the accompanying text below.

26 Children's Hearings (Scotland) Act 2011, s 67(2).

27 Ibid s 66(2).

28 These include: 'the child has misused' alcohol or drugs; 'the child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person'; 'the child is beyond the control of a relevant person' (usually, a parent); and 'the child has failed without a reasonable excuse to attend at school regularly'.

29 2011 Act, s 67(2)(j).

30 While legal aid is available to children in limited circumstances, most children are not represented at hearings and it is not known how often a child accepts the grounds for any number of very poor reasons: to please the panel members, to please his or her parents or simply to get the whole thing over with.

31 2011 Act, s 101(3).

The minimum age of criminal responsibility was not revisited until after the creation of the Scottish Parliament[32] when an advisory group established to examine the matter recommended raising the age to 12.[33] The timing of that recommendation could not have been worse since it coincided with the emergence of a 'tough on crime' agenda throughout the UK and further afield. In the USA, an increase in juvenile crime during the 1980s and a series of highly publicised school shootings prompted John DiIulio to introduce the world to the notion of the 'juvenile super-predator'.[34] The 1993 murder of James Bulger by two 10-year-olds, in England, had a significant impact on public perceptions of juvenile offending throughout the UK.[35] The dominant thinking is indicated by the title of the Home Office report that heralded the abolition of the *doli incapax* presumption in England and Wales:[36] *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales*.[37]

The rhetoric in Scotland was similar and, while the children's hearings system remained intact, mandatory parenting classes and antisocial behaviour orders were introduced.[38] The political climate was simply not conducive to raising the minimum age of criminal responsibility and the Labour administration of the day diverted calls to implement the recommendation of the advisory group it had established by referring the matter to the Scottish Law Commission. The Commission attributed two distinct meanings to the term 'minimum age of criminal responsibility'. The first meaning – and, it must be said, the way the term was at the time and remains generally understood in Scotland[39] – denotes the age below which a child could not be regarded as capable of offending. The second meaning – and the one the Commission preferred – is the age below which a child is immune from prosecution in a criminal court.[40]

Having shifted the focus from capacity to process, the Commission made only passing reference to the emerging scientific evidence, indicating that it was 'not in any sense making any judgment on the validity or importance of work done by experts in the field

32 Scotland Act 1998.

33 *Report of Advisory Group on Youth Crime* (Scottish Executive 2000).

34 John J DiIulio Jr, 'The Coming of the Super-Predators' *Weekly Standard* (Washington DC 27 November 1995) 24: 'On the horizon . . . are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons . . . They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality.' He later expressed regret over his predictions and their impact: Elizabeth Becker, 'As Ex-Theorist on Young "Superpredators," Bush Aide Has Regrets' *New York Times* (New York 9 February 2001).

35 Thomas Crofts, 'Catching up with Europe: Taking the Age of Criminal Responsibility Seriously in England' (2009) 17(4) European Journal of Crime, Criminal Law and Criminal Justice 267, 274; Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective' (2013) 13(2) Youth Justice 102, 103; Heather Keating, 'The "Responsibility' of Children in the Criminal Law' (2007) 19(2) Child and Family Law Quarterly 183, 198; Alex Newbury, 'Very Young Offenders and the Criminal Justice System: Are We Asking the Right Questions?' (2011) 23(1) Child and Family Law Quarterly 94, 94.

36 Crime and Disorder Act 1998, s 34. The presumption placed the burden on the prosecution to prove that a young person between the ages of 10 (the minimum age of criminal responsibility) and 14 understood the difference between right and wrong at the time of the offence.

37 White Paper (Cm 3809 Home Office 1997).

38 Claire McDiarmid, 'Juvenile Offending: Welfare or Toughness' in Elaine E Sutherland, Kay E Goodall, Gavin F M Little and Fraser P Davidson, *Law Making and the Scottish Parliament: The Early Years* (Edinburgh University Press 2011).

39 Gerald H Gordon, *The Criminal Law of Scotland* 3rd edn, Michael G A Christie (ed) (W Green 2000) para 8.28: a 'person under the age of criminal responsibility cannot commit any offence'.

40 Scottish Law Commission, *Discussion Paper on the Age of Criminal Responsibility* (Discussion Paper 115 Scottish Law Commission 2001) para 2.2.

of child development and educational psychology'.[41] It recommended that, 'any rule (whether at common law or statutory) on the age at which children cannot be found guilty of an offence should be abolished'[42] and that children below the age of 12 should be exempt from prosecution, with it being competent to refer their cases to a children's hearing instead.[43]

Meanwhile, a group of respected scholars produced *A Draft Criminal Code for Scotland*, which contained the provision: 'A person is not guilty of an offence by reason of anything done when the person is or was a child under twelve years of age.'[44] In the commentary portion of the *Draft Code*, they explain that this 'is a matter of criminal responsibility rather than just a matter of temporary protection from prosecution'.[45]

In the event, the legislation that emerged favoured the Commission's position, but did not follow its recommendations in full. First, the minimum age of criminal responsibility was not abolished and remains 8 years old.[46] Secondly, while statute now prohibits the prosecution of anyone below the age of 12, it makes clear (unlike the Commission's version and taking the views of the drafters of the *Code* on board) that a person may not be prosecuted in respect of anything done before reaching that age.[47] Thus, a prosecutor cannot simply wait until the child's 12th birthday and then prosecute him or her for something that the child did as a 10-year-old.

Lobbying for reform of the minimum age of criminal responsibility continued, with the issue being raised during the passage of the Children's Hearings (Scotland) Act 2011 and the Children and Young People (Scotland) Act 2014 – all to no effect. That, then, is the background: a catalogue of varied approaches to the minimum age of criminal responsibility in Scotland with recommendations for reform being largely ignored by legislators.

There was another moment of false hope when a Liberal-Democrat Member of the Scottish Parliament proposed an amendment to what became the Criminal Justice (Scotland) Act 2016 that would have raised the minimum age of criminal responsibility to 12.[48] The amendment failed but, with an election in prospect, the majority Scottish Nationalist Party (SNP) administration was keen to demonstrate that it was 'listening' and it set up another advisory group to review the matter. That advisory group, like its 2000 predecessor, recommended raising the minimum age of criminal responsibility to 12.[49]

At the time of writing, the SNP administration (now, a minority government) has just completed a public consultation on the recommendation.[50] The Faculty of Advocates and the Law Society of Scotland, representing the two branches of the legal profession

41 Ibid para 3.27.

42 Scottish Law Commission, *Report on the Age of Criminal Responsibility* (Scot Law Com No 185, 2002) rec 1.

43 Ibid recs 2 and 3.

44 Eric Clive, Pamela Fergusson, Christopher Gane and Alexander McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (Scottish Law Commission 2003) s 15.

45 Ibid 42.

46 Criminal Procedure (Scotland) Act 1995, s 41.

47 Criminal Procedure (Scotland) Act 1995, s 41A, added by the Criminal Justice and Licensing (Scotland) Act 2010, s 52(2).

48 Elaine E Sutherland, 'Time to Raise the Age of Criminal Responsibility' (2015) Journal of the Law Society of Scotland Online (uploaded 14 September 2015) <www.journalonline.co.uk/Magazine/60–9/1020694.aspx>.

49 *Report of the Advisory Group on the Minimum Age of Criminal Responsibility* (n 3) 11.

50 *Consultation on the Minimum Age of Criminal Responsibility* (Scottish Government 2016): <https://consult.scotland.gov.uk/youth-justice/minimum-age-of-criminal-responsibility>.

in Scotland, have expressed their support for raising the minimum age of criminal responsibility in Scotland to 12, as have numerous children's rights groups and academics.[51] Thus, the stage is set, once again, for legislation to implement the recommendation. The desirability of this course of action becomes all the more apparent when one examines the international norms, comparative position and scholarly research on the issue.

International norms and the comparative position

The last 30 years have seen enormous strides in international recognition of the special position of children and of their rights. Numerous international and regional instruments address juvenile justice, often dealing expressly with the minimum age of criminal responsibility,[52] and a number of instruments are of particular significance in Scotland.

While the International Covenant on Civil and Political Rights[53] does not mandate the provision of a minimum age of criminal responsibility, its monitoring body, the UN Human Rights Committee, proceeds on the basis that such an obligation exists. Thus, in its most recent *Concluding Observations* on the UK, it criticised the low age throughout the country, mentioning Scotland expressly, and urged raising the minimum age of criminal responsibility 'in accordance with international standards and . . . [ensuring] . . . the full implementation of international standards for juvenile justice'.[54]

As might be expected, the UNCRC[55] addresses the minimum age of criminal responsibility, but it is rather less directive on this issue than it is on many others. In contrast to numerous articles providing that 'States Parties shall [do X]', Article 40(3) is in the following terms:

> States Parties *shall seek to promote the establishment* of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
>
> (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.[56]

The explanation for this rather insipid provision lies in its history. While juvenile justice was discussed early on during the 10-year process of drafting the UNCRC, there was initially no mention of a minimum age of criminal responsibility.[57] It was not until the Technical Review, in 1988, that the issue was addressed at all when the Centre for Social

51 At the time of writing, the responses are available only in anonymised, uncollated form: <https://consult.scotland.gov.uk/youth-justice/minimum-age-of-criminal-responsibility>. The response of the Faculty of Advocates can be found on its website: <www.advocates.org.uk/news-and-responses/responses/2016/jun/the-minimum-age-of-criminal-responsibility>; with that of the Law Society of Scotland being on its website: <www.lawscot.org.uk/media/860539/crim-fam-minimum-age-of-criminal-responsibility-consultation-response-final-.pdf>.

52 For a discussion of the various instruments, see, Cipriani (n 1) ch 3.

53 International Convention on Civil and Political Rights, 999 UNTS 171, adopted 16 December 1966, entered into force 3 January 1976.

54 UN Human Rights Committee, *Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and Northern Ireland* CCPR/C/GBR/CO/7, 17 August 2015, para 23.

55 UNCRC, 1577 UNTS 3, adopted 20 November 1989, entered into force 2 September 1990.

56 Emphasis added.

57 Save the Children Sweden and the Office of the UN High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child* vol II (UN High Commissioner for Human Rights 2007) 738–74. What became Articles 37 and 40 started life as a single article, initially Article 20, then Article 19, being bifurcated during the second reading stage.

Development and Humanitarian Affairs called for a number of provisions contained in the Beijing Rules,[58] adopted only three years earlier at the Seventh UN Congress, to be incorporated.[59] Thereafter, the rather equivocal and lacklustre text of rule 4.1[60] of the Beijing Rules was used in the UNCRC deliberations and Article 40 continues its failure to provide for a specific minimum age of criminal responsibility.

In contrast to the drafters of the UNCRC, the UN Committee on the Rights of the Child has taken a more focused and directive approach to the matter. After an abortive attempt in 2002, it produced *General Comment No 10: Children's Rights and Juvenile Justice*,[61] in 2007, where it noted the varied approach of states parties to the minimum age of criminal responsibility. However, it made its own position abundantly clear when it described the ages as ranging 'from a very low level of age 7 or 8 to the *commendably high* level of 14 or 16'[62] and found that setting the age below 12 'not to be internationally acceptable'.[63] Each of the *Concluding Observations on the UK and Northern Ireland* that preceded *General Comment No 10* and those that came later have criticised the low age of criminal responsibility throughout the country,[64] with the UN Committee on the Rights of the Child indicating, yet again, in 2016, that it was 'concerned' that the 'minimum age of criminal responsibility remains 8 years of age in Scotland'.[65]

Given its vintage and history, it is not surprising to find that the European Convention on Human Rights makes no express reference to juvenile offenders, far less to a minimum age of criminal responsibility. However, the European Court of Human Rights has made a significant contribution on the issue of age in the context of the fair hearing requirements of Article 6. In *T v UK and V v UK*[66] it considered the trial, in England, of Robert Thomson and Jon Venables who, it will be remembered, were 10 years old when they killed 2-year-old James Bulger. Special arrangements, designed to accommodate their youth, were made at the trial and they were legally represented. However, the European Court concluded that, by virtue of their ages and states of mind, they were unable to participate effectively in the proceedings and, thus, had been denied the right to a fair

58 UN Standard Minimum Rules for the Administration of Juvenile Justice A/RES/40/33, 29 November 1985, known as the Beijing Rules.

59 In its submission, the Centre's Social Development Division reminded the drafters that 'it should be clearly stated that there should be no criminal responsibility of children until they reach a certain age': *Legislative History of the Convention on the Rights of the Child* (n 57) 753. The Centre's Crime Prevention and Criminal Justice Branch submitted a lengthy note referencing the Beijing Rules and repeated the need for a minimum age of criminal responsibility: ibid 759.

60 Rule 4.1 provides: 'In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.'

61 CRC/C/GC/10, 25 April 2007.

62 Ibid para 30 (emphasis added).

63 Ibid para 32.

64 *Concluding Observation on the UK and Northern Ireland*, 15 February 1995 CRC/C/15/Add 34, paras 40–43; *Concluding Observation on the UK and Northern Ireland* 9 October 2002, CRC/C/15/Add.188, paras 59 and 62; *Concluding Observations of the Committee on the Rights of the Child on the UK of Great Britain and Northern Ireland* CCR/C/GBR/CO/4, 3 October 2008, para 78.

65 *Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and Northern Ireland* CRC/C/GBR/CO/5, 3 June 2016, para 77(a).

66 (2000) 30 EHRR 121.

hearing, in breach of Article 6(1).[67] Similarly, in *SC v UK*,[68] the European Court concluded that an 11-year-old with a mental age of a 6–8 years old was unable to follow, or participate effectively in his trial and, again, it found a breach of Article 6(1).

The direction of international norms is clear: 12 is the minimum acceptable age at which to start attributing criminal responsibility. How, then, are other countries responding to these norms? International comparisons must be approached with a degree of caution, not least due to differences in terminology and the fact that the minimum age of criminal responsibility is only one part of the overall approach to juvenile justice. Nonetheless, insights can be gleaned from Don Cipriani's much-cited review of the minimum age of criminal responsibility in over 200 countries around the world.[69] Published in 2009, his research revealed that some 23 countries had no stated minimum age of criminal responsibility, with the median age being 12 years old.[70] European counties tend to favour 13 or 14, while the Scandinavian norm is 15.

The comparative picture is not static and the Child Rights International Network[71] reports that a small number of states have lowered the minimum age of criminal responsibility over the last few years or are considering doing so, albeit in no case was it actually reduced to below 12.[72] It is heartening to see, then, that a recent expert review of the most pressing issues facing vulnerable young people in New Zealand, commissioned by the Minister for Social Development, recommended raising the age of criminal responsibility from 10 to 12.[73] By any measure, having 8 as the minimum age of criminal responsibility does not sit well alongside international and comparative norms.

When do children acquire the capacity to offend?

The emergence and development of international norms on juvenile justice have coincided with – and, undoubtedly, have prompted – an increase in research and publication in the field and scholars make frequent reference to these international efforts. While there have long been calls to raise the minimum age of criminal responsibility, the last two decades have witnessed a wealth of scholarly literature on the subject. It will be recalled that the Scottish Law Commission offered two interpretations of the term, distinguishing the age at which the capacity to form the necessary intention to offend is attributed to a child from the age below which the child is immune from prosecution. Most academics focus on the capacity of children and young people and the vast majority of academics who have contributed to the debate, both in Scotland and abroad, support a minimum age of criminal responsibility significantly higher than 8 years old.

Two elements must be present for the commission of a crime: the actor must form the requisite intention – the *mens rea* – and that must be accompanied by an act – the *actus reus* – prohibited by the criminal law. Forming the requisite intention requires the capacity

67 Ibid para 89.

68 (2005) 40 EHRR 10.

69 Cipriani (n 1) xiii.

70 Ibid 109. As Cipriani points out, the average age of 10 is not as useful a measure because the calculation is skewed by having to attribute 0 to the 23 countries with no stated age.

71 For updated information, see the Child Rights International Network website, Minimum Ages of Criminal Responsibility around the World <www.crin.org/en/home/ages>.

72 Child Rights International Network, *States Lowering the Age of Criminal Responsibility* <www.crin.org/en/library/publications/juvenile-justice-states-lowering-minimum-age-criminal-responsibility>.

73 *Expert Panel Final Report: Investing in New Zealand's Children and their Families* (Rebstock Report) (Ministry of Social Development 2016) rec 60(g).

to understand the wrongfulness and criminality of the act, combined with a meaningful opportunity and the ability to make choices.

Understanding

Turning first to understanding the wrongfulness of the act, it is accepted that babes in arms have insufficient understanding to form the requisite intention. Thereafter, at what point in the maturation process do children acquire the necessary comprehension? That is a complex question and Claire McDiarmid summarises the various elements as including: knowledge of the difference between right and wrong and that the particular act in question is wrong; understanding that it is criminal and what that means; and the ability to place the act in a moral context.[74]

One way to evaluate a child's comprehension of these various facets is by means of an individual assessment. Indeed, there is a fundamental flaw in using a fixed age to determine capacity across the board since children and young people mature at different rates as a result of a host of genetic and environmental factors. On that basis, any blanket age, whether in the civil or criminal context, can be no more than an approximate – and, sometimes, inaccurate – cypher for meaningful assessment of actual capacity. A number of commentators resist having a fixed age of criminal responsibility for this reason and view a binary notion of capacity – one either has it or one does not – as an over-simplification that fails to embrace the evolving capacity of children.[75] Individualised assessment is time-consuming and, thus, costly, and the attraction of a fixed age limit lies in it being cheap and administratively convenient. The potential for injustice is reduced if, as in Scottish criminal cases, it is open to the defence to show that, despite having reached the benchmark age, the child did not in fact have the requisite capacity to understand.[76]

At the heart of calls to raise the minimum age of criminal responsibility beyond 8 (or 10) years old lies the belief that children of that age simply do not understand the requisite elements of criminal activity sufficiently well for criminal responsibility to be attributed to them.[77] Research by Glen Smith and Nick Winkfield concluded that: 'By the age of seven years, children are able to distinguish between right and wrong and seem to be aware of the criminal implications of their behaviour.'[78] Unfortunately, the only

---

74 Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2013) 13(2) Youth Justice 145, 152.

75 Kate Fitz-Gibbon, 'Protection for Children before the Law: An Empirical Analysis of the Age of Criminal Responsibility, the Abolition of *Doli Incapax* and the Merits of a Developmental Immaturity Defence in England and Wales' (2016) 16(4) Criminology and Criminal Justice 391. See also, the 'capabilities approach' developed in Rosalind Dixon and Martha Nussbaum, 'Children's Rights and the Capability Approach: The Question of Special Priority' (2011–2012) 97 Cornell Law Review 549. See further, Kathryn Hollingsworth, 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' (2013) 76(6) Modern Law Review 1046; Noam Peleg, 'Reconceptualising the Child's Right to Development: Children and the Capability Approach' (2013) 21 International Journal of Children's Rights 523; Dawn Watkins, 'Where Do I Stand? Assessing Children's Capacities under English Law' (2016) 28(1) Child and Family Law 25.

76 The press reported a Scottish case where the prosecutor decided not to proceed where the evidence demonstrated that an 11-year-old boy, originally charged with attempted murder, had a mental age below 8: Shirley English, 'Attempted Murder Dropped against Retarded Boy, 11' *The Times* (London 22 January 2001).

77 McDiarmid (n 74); Catherine Elliot, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' (2011) 74(4) Journal of Criminal Law 289, 308.

78 Glen Smith and Nick Winkfield, *The Development of the Moral Compass: A Study among Children Aged 7 to 16 in the UK* (Youth Research Forum 2011) para 2.3.1. The same research found that 'as they get older they become more thoughtful and nuanced in their attitudes to moral questions'.

report of the research on which these conclusions are based is described as a 'Summary' and, while it indicates that the findings resulted from an online, nationally representative, qualitative survey of 750 7- to 16-year-olds, there is little further information about the research methodology. In particular, the questions put to the children and young people are not disclosed. Distinguishing between right and wrong could mean appreciating, as one would expect of a 7-year-old, that certain behaviour meets with adult disapproval, but that could include anything from 'naughtiness' (being cheeky, telling fibs) to conduct that is actually criminal (stealing, killing and the like). That children '*seem* to be aware' of the criminal implications of conduct is somewhat vague and, again, no information is provided about the depth or range of their comprehension. Thus, it would be a mistake to attach any great weight to this study.

The legal system's use of age limits is not confined to the criminal arena and many scholars point to the glaring inconsistency between the legal system's attribution of criminal responsibility at an early age and its recognition of the child's capacity as an actor or participant in other areas of the law.[79] Heather Keating juxtaposes the capacity to consent to medical treatment and to participate in decision-making in the family law context, in England and Wales,[80] with criminal responsibility, while Barry Goldson highlights the absurdity of regarding a child under 12 as too young to buy an animal companion, yet holding him or her criminally responsible.[81]

In Scotland, there are numerous inconsistent, age-related restrictions on accessing such rights and privileges as voting (16/18 years old),[82] serving on a jury (18),[83] marrying or registering a civil partnership (16)[84] and driving a motor vehicle (16/17/18).[85] The function of many age limits, like those on access to alcohol (18)[86] and gambling (16/18),[87] is primarily protective. The trend with such protective regulation has been to increase the age limit, as occurred in respect of tobacco products when the age was raised from 16 to 18,[88] or to introduce new restrictions, like those on using tanning salons.[89] As is often the case with statutory age limits, they vary, but the striking similarity between them is that they are significantly higher than 8 years old, the age of criminal responsibility. If the legal system regards children below the age of 16, 17 or 18 as being

79 Delmage (n 35).

80 Keating (n 35).

81 Barry Goldson, '"Unsafe, Unjust and Harmful to Wider Society": Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales' (2013) 13(2) Youth Justice 111, 120.

82 Voters in Westminster elections must be 18 years old: Representation of the People Act 1983, s 1. Sixteen-year-olds were first enfranchised across Scotland for the Scottish independence referendum: Scottish Independence Referendum (Franchise) Act 2013, s 2. They can now vote in elections to the Scottish Parliament and local authority elections: Scotland Act 1998, s 11, and the Scottish Local Government Elections Order 2011, SSI 2011/399, as amended most recently by the Scottish Local Government Elections Order 2016, SSI 2016/7.

83 Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s 1.

84 Marriage (Scotland) Act 1977, s 1, and Civil Partnership Act 2004, s 86, respectively.

85 Road Traffic Act 1988, s 101, with the minimum age depending on the type of vehicle.

86 Licensing (Scotland) Act 1976, s 68.

87 The age is generally 18, save when it comes to state-sanctioned gambling, with the age for participating in the National Lottery being 16: Betting Gaming and Lotteries Act 1963, s 21, the National Lottery etc. Act 1993, s 12, and SI 1994/189.

88 Children and Young Persons (Scotland) Act 1937, s 18, as amended by the Smoking, Health and Social Care (Scotland) Act 2005 (Variation of Age Limit for the Sale of Tobacco Purchase and Consequential Modifications) Order 2007, SSI 2007/437.

89 Public Health, etc. (Scotland) Act 2008, ss 95–96.

too immature to exercise the judgement necessary to participate in various activities or be exposed to particular dangers, how can it justify holding them criminally responsible?

This argument should be advanced with a degree of caution, particularly in the political arena, since it can be something of a double-edged sword. It could all too easily be employed to support the removal from children and young people of powers they now have, undermining their human rights.[90] Conversely, demonstrating children's participatory capacity in the civil arena, particularly in Scotland where there is a very real attempt to embrace it, could be used to support a low minimum age of criminal responsibility. If children are capable of participating in decision-making from a young age, so the argument might go, then they can be held accountable in the criminal arena too.

However, a quick trip through the basics of the UNCRC and the relevant Scots law exposes any such argument for the fallacy that it is. At the heart of the UNCRC lies recognition of both the responsibility of the state and the adult world to protect children and young people and of their right to have their views taken into account. Article 3 prioritises the best interests of children, while Article 12 guarantees their participation rights, and both principles underpin the UNCRC as a whole. This is entirely consistent with the notion of the child's evolving capacity as articulated in Article 5.

Scots law provides a good example of real attempts to embrace these principles in the civil arena. Thus, those making decisions about children within the family,[91] in the child protection context[92] and in the courts[93] are required to give the child the opportunity to express his or her views and to take account of these views in the light of the child's age and maturity. There is no minimum age for the exercise of participation rights, albeit that a child of 12 is presumed to have the requisite capacity to form a view.[94] Similarly, children can consent to medical treatment or instruct a solicitor where the relevant professional determines that the child understands what is involved.[95] The point is that children's agency is recognised in all of these situations, but they are not left wholly to their own devices since the safety net of adult involvement is there to mediate the final decision on the basis of the welfare principle.[96]

THE OPPORTUNITY AND ABILITY TO MAKE CHOICES

Forming criminal intent is not confined to comprehension since the actor must not only understand the nature of the conduct; he or she must also choose to act in a particular way. Inherent in that process is having the opportunity to make choices and the ability to exercise judgement. Children are impeded in their ability to make meaningful choices by their very position as children. They are subject to parental and other authority and have little control over their environment.[97] There is an abundance of evidence demonstrating the nexus between offending, on the one hand, and neglect, deprivation and truancy, on

90 Goldson (n 81) 117.

91 Children (Scotland) Act 1995, s 6.

92 Ibid s 16(2) and Children's Hearings (Scotland) Act 2011, s 27.

93 Children (Scotland) Act 1995, s 11(7)(b).

94 Ibid ss 11(10) and 16(2) and Children's Hearings (Scotland) Act 2011, s 27(4).

95 Age of Legal Capacity (Scotland) Act 1991, s 2(4) and (4A).

96 The empowerment of children is arguably even greater in the context of adoption where a child of 12 or over can consent to, or veto, his or her own adoption, the child's consent not being subject to the power of the court to dispense with it as it can in respect of parental consent: Adoption and Children (Scotland) Act 2007, s 32. Again, however, the court applies the welfare principle in approving adoptions.

97 Watkins (n 75) 27.

the other, and the impact of these environmental factors can only undermine the child's autonomy.[98]

Ever since the (then) Minister for Children and Young People, Aileen Campbell, first expressed the Scottish government's 'ambition to make Scotland the best place in the world to grow up in',[99] it has become a stock phrase in all government publications dealing with children. However, that laudable ambition is far from being realised for many children in Scotland. Poverty remains a significant problem.[100] According to the government's most recent figures, in 2014–2015, 22 per cent (220,000) of Scotland's children were living in relative poverty[101] and there are similarly disturbing statistics on children affected by homelessness[102] and food insecurity.[103] As at 31 July 2015, 15,404 children were classified as 'looked after', meaning that their care was subject to formal state oversight.[104] While some 60 per cent of these children were living with their parents, other family members or friends, the remainder were in foster care or residential care. Deprivation impacts overall well-being and leads to social exclusion, poorer academic achievement,[105] particularly for looked after children,[106] and a sense of hopelessness amongst impoverished young people.[107] Thus, it is illusory to suggest that these children have the opportunity to make meaningful choices.

What of the ability to exercise choice? Thomas Crofts analysed this decision-making process in terms of what he called the 'cognitive element', understanding the rules and the consequences of particular acts, and the 'volitional element', the ability to control one's actions.[108] Enormous advances have been made by the neuro-scientific community in

98 Raymond Arthur, 'Rethinking the Criminal Responsibility of Young People in England and Wales' (2012) 20(1) European Journal of Crime, Criminal Law and Criminal Justice 13, 17–21; Elliot (n 77) 297.

99 Education and Culture Committee, *Official Report* 8 October 2013, col 2944 <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8550&mode=pdf>.

100 Peter Kenway, Sabrina Busche, Adam Tinson and Theo Barry Born, *Monitoring Poverty and Social Exclusion in Scotland 2015* (Joseph Rowntree Trust 2015); Jim McCormick, *A Review of Devolved Approaches to Child Poverty* (Joseph Rowntree Trust 2013). See also the Child Poverty Action Group in Scotland website <www.cpag.org.uk/scotland>.

101 *Poverty and Income Inequality in Scotland: 2014/2015* (Scottish Government 2016) 2.

102 In 2015–2016, while the overall number of people experiencing homelessness decreased, the number of households with children living in temporary accommodation rose by 8 per cent (209 households), with the number of children affected increasing by 13 per cent (591 children): *Homelessness in Scotland 2015–2016* (Scottish Government 2016).

103 Filip Sosenko, Nicola Livingstone and Suzanne Fitzpatrick, *Overview of Food Provision in Scotland* (Scottish Government Social Research 2013).

104 *Children's Social Work Statistics Scotland 2014/2015* (Scottish Government 2016).

105 Edward Sosu and Sue Ellis, *Closing the Attainment Gap in Scottish Education* (Joseph Rowntree Trust 2013), reporting that the gap between children from low-income and high-income households starts early and persists throughout childhood.

106 While the position has improved somewhat over the last five years, 'looked after children' (those under state jurisdiction) perform less well in education, are excluded from school more often (218 versus 27 per 1000) and are less likely to have a positive destination 9 months after leaving school (72 per cent versus 92 per cent) than pupils overall: *Education Outcomes for Looked After Children 2014/2015* (Scottish Government 2016).

107 A report, based on interviews with 2311 16- to 24-year-olds from across the UK, found that 25 per cent of those from deprived homes believe that 'few' or 'none' of their career goals to be achievable, compared to 7 per cent of those from affluent families; one quarter of young people from poor homes (26 per cent) felt that 'people like them don't succeed in life'; and young people growing up in poverty are significantly less likely to imagine themselves buying a nice house or even finding a job in the future. See Prince's Trust, *Broke, Not Broken* (Prince's Trust and RBS 2011).

108 Thomas Crofts, 'Catching up with Europe' (2009) 17(4) European Journal of Crime, Criminal Law & Criminal Justice 267, 286.

understanding brain development, particularly in children and young people, and its impact on the decision-making process. In 2006, the Royal College of Psychiatrists reported:

> Biological factors such as the functioning of the frontal lobes of the brain play an important role in the development of self-control and of other abilities. The frontal lobes are involved in an individual's ability to manage the large amount of information entering consciousness from many sources, in changing behaviour, in using acquired information, in planning actions and in controlling impulsivity. Generally the frontal lobes are felt to mature at approximately 14 years of age.[109]

A few years later, as part of an initiative to promote understanding of developments in neuro-science and their implications for society and public policy, the Royal Society published a number of well-referenced and accessible reports, including one dealing with *Neuroscience and the Law*. While warning that there is 'huge individual variability in the timing and pattern of brain development', it reported that changes in important neural circuits underpinning behaviour continue until at least the age of 20.[110] Furthermore, rates of development for different regions of the brain impact the ability to moderate and regulate behaviour and 'may account for heightened emotional responses and the risky behaviour characteristic of adolescence'.[111] Addressing the age of criminal responsibility in England and Wales, the Royal Society noted that, at the age of 10, the brain is developmentally immature and continues to undergo important changes linked to the regulation of behaviour, concluding that, from a neuro-scientific perspective, with regard to criminal responsibility, an arbitrary cut-off age may not be justifiable.[112]

In contrast to the scientific evidence, there is the realm of 'what everyone knows'. There is a view, in some quarters, that children are more mature now than in times past and that the minimum age of criminal responsibility should reflect the maturity of these savvy youngsters. This (mis)perception contributed to the abolition of the *doli incapax* presumption in England and Wales[113] and played into the Scottish Law Commission recommendations in 2001.[114] Most scholars refute this assertion[115] and something of a lone voice amongst academics (but, sadly, not politicians and sections of the media) is that of Gerry Maher. It is worth remembering that he was a commissioner at the Scottish Law Commission when it recommended abandoning the concept of a minimum age of criminal responsibility altogether and his words echo the position taken there: essentially, that because children today understand technology in a way that was not open to children in centuries past, there may be a case for lowering the age of criminal responsibility.[116]

---

109 Royal College of Psychiatrists, *Child Defendants* Occasional Paper 56 (Royal College of Psychiatrists 2006) 38.

110 *Brainwaves 4: Neuroscience and the Law* (Royal Society 2012), 13 <https://royalsociety.org/~/media/Royal_Society_Content/policy/projects/brain-waves/Brain-Waves-4.pdf>.

111 Ibid 14. In terms of different regions of the brain developing at different times, it explained: 'The prefrontal cortex (which is especially important in relation to judgement, decision-making and impulse control) is the slowest to mature. By contrast, the amygdala, an area of the brain responsible for reward and emotional processing, develops during early adolescence.'

112 Ibid 14.

113 *No More Excuses* (n 37).

114 Scottish Law Commission (n 40) para 3.27: 'It could therefore be argued that there is a case for *lowering* the age of criminal responsibility to reflect the earlier maturity and understanding of children today as compared with children in 1932 [when the age was raised from 7 to 8].'

115 Arthur (n 98) 17–19; Keating (n 35) 195.

116 Gerry Maher, 'Age and Criminal Responsibility' (2004–2005) 2 Ohio State Journal on Criminal Law 493, 496. Compare with n 114, above.

Yet, we live in a world of 'helicopter parents' and the sub-set, 'tiger moms'.[117] Given the nexus between neglect, deprivation and offending, children who engage in criminal conduct may be less afflicted by this modern scourge than their more affluent peers. Nonetheless, it would be a mistake to confuse access to the internet and the attendant exposure to information (and misinformation) with the ability to make a considered judgement.[118] Spending hours playing computer games, tweeting one's latest thoughts and believing that 'friends' are people who have clicked the requisite button on a Facebook page will not necessarily enhance the ability to function in the real world. More significantly, perhaps, 'what everyone knows' hardly compares with the neuro-scientific evidence on child development.

Consequential challenges

Raising the minimum age of criminal responsibility to 12 would be a welcome step, of course, but it is illusory to think that is an end of the matter because there are consequential challenges to be addressed. The reform, by itself, would not alter the conduct of children and young people and some 8 to 11-year-olds would continue to engage in behaviour that was previously criminal. In Scotland, the first issue, then, is whether the legal system has the tools necessary to address the behaviour. Rather more challenging is a second issue: how this, now non-criminal, conduct should be treated by the state when it gathers and retains information about individuals and subsequently discloses that information to third parties.

Supporters of raising the minimum age of criminal responsibility have never suggested that what was previously criminal conduct – what the 2016 advisory group called 'harmful behaviour' – by 8 to 11-year-olds should simply be ignored. Indeed, if the child's actions suggest that there is cause for concern, then prioritising the child's welfare, as required by the UNCRC, mandates that it should be addressed.

Given the nexus between offending, on the one hand, and neglect, deprivation and truancy, on the other,[119] it might be expected that a child referred to a children's hearing on offence grounds might just as easily be referred on care and protection or truancy grounds. Recent research bears out that expectation.[120] A study of 100 8 to 11-year-olds alleged offenders in 2013–2014 found that only six of the cases resulted in a children's hearing. Of the six, four of the children were also referred on care and protection grounds, so their needs would have been addressed without the offence referral. Of the remaining two cases, one child denied the offence and, in the event, it was not established at proof. Thus, in only one case out of the 100 reviewed did the use of the offence ground prove crucial. Applying that result to all 215 of the 8 to 11-year-old alleged offenders identified in the same year suggests that two or three such cases might arise annually.[121]

Even that figure may be an overestimate because it is possible that the children could be brought to a hearing on a care and protection ground. In recommending no change to

117 David Pimentel, 'Criminal Child Neglect and the "Free Range Kid": Is Overprotective Parenting the New Standard of Care?' 2012 Utah Law Review 947.

118 June Ahn, 'The Effect of Social Network Sites on Adolescents' Social and Academic Development: Current Theories and Controversies' (2011) 62(8) Journal of the Association for Information Science and Technology 1435.

119 See the discussion at nn 98–107 and accompanying text, above.

120 Gillian Henderson, Indiya Kurlus and Gwen McNiven, *Backgrounds and Outcomes for Children aged 8 to 11 Years Old Who Have Been Referred to the Children's Reporter for Offending* (Scottish Children's Reporter Administration 2016).

121 *SCRA Annual Report 2014/2015* (Scottish Children's Reporter Administration 2015).

the grounds for referring a child to a children's hearing, the 2016 advisory group highlighted two of the existing grounds that might be particularly applicable to conduct that is currently treated as an offence:[122] that 'the child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person' or that 'the child is beyond the control of a relevant person'.[123]

Was the advisory group correct in reaching this conclusion? One way to answer that question is by using a hypothetical example. Let us suppose that a 10-year-old child, X, burns down a school, causing the closure of the school and millions of pounds of damage. X is well cared for in a loving family and her parents had no reason to suspect that she would do this. While the school closure will create inconvenience and disadvantage to the other pupils, it is doubtful that it reaches the level of having the 'serious adverse effect' on them required to satisfy that ground of referral. Unless we are to interpret being 'beyond the control of a relevant person' as applying to all instances of a child doing something of which her parents disapprove, that ground would be ruled out as well.

Under the current system, X's conduct might well be addressed by voluntary measures short of a referral to a children's hearing and that could continue to be the case. However, what if X's parents are not willing to cooperate with any intervention? Another ground of referral – that 'the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care'[124] – might apply. But what if the refusal of X's parents to cooperate is due to their belief that, as her parents, they are better placed to handle the situation? Arguably, it would be dangerously intrusive to treat any parental disagreement with a course of action suggested by the authorities as an indicator of neglect, a point highlighted recently by the Supreme Court.[125] What if X's parents are willing to cooperate with voluntary measures, but X is not? In these circumstances, it would seem that nothing could be done to address the risk of X repeating her behaviour and compelling her to engage with intervention and support.

That example suggests that there may be a gap in the grounds of referral and that some 8 to 11-year-olds whose conduct would currently be treated as criminal, bringing them within the ambit of the hearings system, might fall through the cracks if the minimum age of criminal responsibility is raised to 12. Doubtless, there are other examples.[126] Happily, the problem can be remedied very easily by adding a ground along the lines that 'the child has caused serious damage to, or destruction of, property,' something that does not even require legislation since it can be done by Ministerial Order.[127]

The second issue arising from raising the minimum age of criminal responsibility – gathering, retention and disclosure of information – presents rather more of a challenge in both conceptual and practical terms. Police Scotland, the single police authority created for the country when the various regional forces were unified,[128] gathers rather a lot of

122 *Report of the Advisory Group on the Minimum Age of Criminal Responsibility* (n 3) paras 23–24.

123 Children's Hearings (Scotland) Act 2011, s 67(2)(m) and (n), respectively.

124 Ibid s 67(2)(a).

125 *Christian Institute v Scottish Ministers* [2016] UKSC 51, [95]. In the context of the named person service, Lady Hale highlighted the risk, in individual cases, of parents being given the impression that they have to accept the advice or services which they are offered and that failure to cooperate will be regarded as evidence of risk of harm. She observed: 'An assertion of such compulsion, whether express or implied, and an assessment of non-cooperation as evidence of such a risk could well amount to an interference with the right to respect for family life which would require justification under article 8(2).'

126 Since animals are treated as property in Scotland, a child who harmed animals might, again, be beyond the reach of the hearings system should the child or the parents prove uncooperative.

127 Children's Hearings (Scotland) Act 2011, s 67(4).

128 Police and Fire Reform (Scotland) Act 2012.

information about individuals. In addition to details of criminal convictions, it retains 'other relevant information' and operates a Vulnerable Persons Database where 'concerns about vulnerable people', including children, are recorded.

After a period of time, individuals are generally freed from the obligation to disclose criminal convictions in job applications and the like.[129] However, the Scottish rules on non-disclosure of past offences do not apply in all circumstances and so, for example, reference may be made to them in civil proceedings. In addition, disclosure may occur under a range of statutory schemes – basic, standard, enhanced and the various Protection of Vulnerable Groups schemes – run by Disclosure Scotland on behalf of the Scottish Ministers,[130] when a person is applying for certain educational courses, volunteer opportunities or employment.[131] For this purpose, an offence accepted or established in the context of a children's hearing is treated in the same way as a criminal conviction. Participation in these schemes is 'voluntary' in so far as the individual seeking to participate in a regulated activity applies to join the scheme. While the law governing the schemes was amended to take account of its incompatibility with Article 8 of the European Convention on Human Rights,[132] it continues be a source of concern, particularly in respect of past wrong-doing by young people.[133]

In Scotland, there is no system of the kind, found in some other jurisdictions, for general public notification of the presence of particular kinds of offenders in the neighbourhood.[134] However, in addition to the statutory schemes, there is an informal system that gives parents and guardians the opportunity to ask Police Scotland if there is any reason for them to be concerned about a person who has contact with their child.[135] Disclosure of both conviction and non-conviction information is at the discretion of the police and it is conceivable that information relating to an offence referral could be revealed.

The reason for disclosure as outlined above is obvious. If a person has behaved in a way that endangered others in the past, there is concern that he or she may repeat the conduct. To put it another way, if those working or volunteering with vulnerable people were not vetted in advance, there is a risk that those least able to protect themselves might be exposed to unsuitable or dangerous individuals. Were harm to come to a vulnerable person, in the absence of vetting, there would be a public outcry. Yet, the whole disclosure process is premised on the notion of 'once bad, always bad'. Quite apart from the danger of errors in gathering (particularly non-conviction) information, the potential for disclosure of past criminality has serious implications for compliance with the requirement of the UNCRC that measures for dealing with children who offend should take into account the desirability of promoting their reintegration into society.[136]

---

129 Rehabilitation of Offenders Act 1974.

130 See the Disclosure Scotland website: <www.disclosurescotland.co.uk/index.htm>.

131 Protection of Vulnerable Groups (Scotland) Act 2007, s 95, defines 'work' very broadly.

132 Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No 2) Order 2015, SSI 2015/330, enacted in the wake of the Supreme Court decision in R *(on the Application of T) v Secretary of State for the Home Department and the Chief Constable of Greater Manchester Police* [2015] AC 49.

133 R *(on the Application of G) v Secretary of State for the Home Department and the Chief Constable of Surrey* [2016] 4 WLR 94.

134 For the history of such laws in the USA, see Maureen S Hopbell, 'Balancing the Protection of Children against the Protection of Constitutional Rights: The Past, Present and Future of Megan's Law' 42 Duquesne Law Review 331 (2004).

135 *Keeping Children Safe: Information Disclosure about Child Sex Offenders* (Scottish Government 2015). See further, Sex Offender Community Disclosure Scheme: <www.scotland.police.uk/keep-safe/young-people/supporting-children-and-young-people/child-protection-keeping-children-safe>.

136 UNCRC, Article 40(1).

Of particular relevance for our present purpose is how information about harmful behaviour by 8 to 11-year-olds will be treated in the future if the minimum age of criminal responsibility is raised to 12.[137] In the context of ensuring that the child receives the necessary intervention and support, it was clear that there was no question of simply ignoring such behaviour. Should the same principle apply to information-gathering and disclosure? On the one hand, this would run counter to the whole notion that the child lacks the capacity to be held criminally responsible and disclosure could only obstruct the young person in securing future educational opportunities or employment, impeding his or her reintegration into society. On the other hand, it would be absurd to pretend that the behaviour had not occurred if it poses a threat to the safety of others.

The 2016 advisory group was alert to this dilemma and sought to steer a middle course.[138] It recommended that information about children under 12 submitted by the police under the statutory schemes should only be disclosed in exceptional circumstances and that this should apply retrospectively to information about past criminal conduct by the under-12s. Crucially, it also recommended the introduction of independent mediation, by ‘a party with expertise or knowledge in risk management’, of the decision to disclose.[139] It did not consider the informal scheme that relies wholly on police discretion and it would certainly be desirable that any additional safeguards should apply there too.

Concluding thoughts: why the recommended reform may succeed this time

The most recent advisory group to examine the minimum age of criminal responsibility in Scotland has recommended that it be raised from 8 to 12 years old. That recommendation comes as no surprise. An abundance of modern academic literature, supported by evidence from neuro-scientists, makes an overwhelming case for raising the age. International bodies, not least the UN Committee on the Rights of the Child, have been urging this course of action for many years. Other jurisdictions, particularly those in Europe and the rest of the developed world, have adopted ages higher – sometimes significantly higher – than 8.

At the outset, it was suggested that there is a very real prospect that the recommendation will lead to law reform in the near future. Given that we have been here before, as recently as 2000, that prediction may seem unduly optimistic, even foolhardy. Why might the outcome be different this time? Any law reform proposal will have the optimum chance of success if it is supported by government. Politicians have many reasons – ideological, fiscal, diplomatic, pragmatic – for supporting a particular measure and are undoubtedly influenced by how well they anticipate it being received by stakeholders and the public. As we have seen, there is widespread support amongst the legal profession, children’s rights groups and academics for raising the age of criminal responsibility. What, then, of the general public?

There is little doubt that the recommendation of the 2000 advisory group suffered from unfortunate timing since it coincided with a ‘tough on crime’ rhetoric that reflected something of an antipathy towards children and young people, generally, and those who offended, in particular. In its *Concluding Observations on the UK*, in 2008, the UN Committee on the Rights of the Child expressed concern over the negative stereotyping of young

137 Parallel questions arise in respect of the taking and retention of forensic samples from 8 to 11-year-olds and these were addressed by the 2016 advisory group: *Report of the Advisory Group on the Minimum Age of Criminal Responsibility* (n 3) 32–35.

138 Ibid ch 5.

139 Ibid para 5.14.

people across society, particularly in the media.[140] While it mentioned that concern again in its most recent *Concluding Observations*,[141] it did not elaborate. In the interim, the Scottish government has developed various strategies designed to combat negative images of young people and has expressed its continuing commitment on that score.[142] To be fair, public perceptions of young people were probably never as negative as those presented in sections of the media and, in truth, there is no single perception.[143] Nonetheless, efforts to create a more positive image of children and young people may make the public more open to the idea of raising the minimum age of criminal responsibility.

Perhaps the most significant development, in Scotland, is a heightened government awareness of children's rights and a more sophisticated understanding of what is required for their implementation.[144] Successive administrations have been keen to demonstrate their commitment to children's rights[145] and there are examples of the fundamental principles of the UNCRC being articulated in pre-devolution legislation on family law, child protection and the children's hearings system.[146] While it would be grossly premature to suggest that children's rights are as fully integrated into the Scottish legal system as they ought to be, there is a sense of making some progress towards that end.

The Scottish government's (irritating) attachment to repeating the mantra of Scotland becoming 'the best place in the world to grow up in' has been noted as have continuing problems associated with poverty. There is evidence, however, of very real governmental efforts to move beyond sloganising. That those efforts can sometimes be ill-conceived or badly executed is illustrated by the debacle surrounding the named person scheme.[147] Rather less contentious have been the more comprehensive reforms designed to address the needs of the most vulnerable children. Some of these efforts have been directed at preventing offending and at diverting offenders from the formal system.[148] As a result, the number of 8 to 11-year-olds referred to a children's hearing on the basis of their own alleged offending has fallen by 73 per cent in the last 5 years, with a drop from 799 cases,

---

140 UN Committee on the Rights of the Child, *Concluding Observations: UK of Great Britain and Northern Ireland* CRC/C/GBR/CO/4, 3 October 2008, para 25(a).

141 UN Committee on the Rights of the Child, *Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and Northern Ireland*, CRC/C/GBR/CO/5, 3 June 2016, para 22.

142 *Do the Right Thing: A Progress Report on the Scottish Government's Response to the 2008 Concluding Observations from the UN Committee on the Rights of the Child* (Scottish Government 2012) 15–16.

143 *Scottish Social Attitudes Survey 2009* (Scottish Government 2010): 'Adults tend to display concern both *for* and *about* young people' (para 5.3) and '67% [of those surveyed] agreed that "most young people in this area are responsible and well behaved"' (para 5.4).

144 In a recent appeal in Scotland's highest criminal court in a case involving a relatively rare example of prosecution of a juvenile, there was an encouraging reference from the bench to the UN Convention principles on juvenile justice. See *Adam McCormick v HM Advocate* [2016] HCJAC 50 [4].

145 *Report on the Implementation of the UN Convention on the Rights of the Child in Scotland 1999–2007* (Scottish Executive 2007); *Do the Right Thing* (Scottish Government 2009); *Do the Right Thing: A Progress Report* (n 142).

146 Children (Scotland) Act 1995, addressing the child in the family setting, originally governed child protection and the children's hearings system as well. It was drafted with the CRC in mind and articulated some of the fundamental principles. Regulation of child protection and children's hearings is now addressed largely in other statutes, but the CRC principles remain present.

147 *Christian Institute v Scottish Ministers* [2016] UKSC 51.

148 Claire Lightower, David Orr and Nina Vaswani, *Youth Justice in Scotland: Fixed in the Past or Fit for the Future?* (Centre for Youth and Criminal Justice 2014) and *Preventing Youth Offending: Getting It Right for Children and Young People* (Scottish Government 2015). For a current overview, see the 'Whole System Approach to Young People who Offend' section of the Scottish Government website: <www.gov.scot/Topics/Justice/policies/young-offending/whole-system-approach>.

in 2010–2011, to 215, in 2014–2015.[149] While these figures are, in large part, a product of systemic changes, the statistics can only assist in making any increase in the minimum age of criminal responsibility more publicly palatable.

The Scottish government itself has something of an incentive to make progress on raising the minimum age of criminal responsibility. When what became the Children and Young People (Scotland) Act 2014 was making its way through the Scottish Parliament, the government resisted calls to include a provision incorporating the UNCRC into Scots law,[150] something that would have given that instrument the same legal status in Scotland as attaches to the European Convention on Human Rights throughout the UK.[151] Instead, the Act places Scottish ministers under statutory obligations to promote awareness of children's rights; to 'keep under consideration' whether there is more they could do to give effect to the UNCRC; and to report on their progress every three years.[152] For those seeking incorporation, that was a poor alternative, but the reporting obligation does present an opportunity to hold Scottish ministers to account on the issue of the minimum age of criminal responsibility. Their first report is due in 2018 and it may be that they would like to be able to report progress at that time.[153]

The country is currently governed by a minority SNP administration that relies on other parities for support in its legislative efforts. The 'law and order' lobby, while less vocal at the moment, is ever present. It would only take an equivalent of the *Bulger* case to occur in the country for the political climate to change and the momentum that has gathered behind calls for reform to vanish.

Assuming, *arguendo*, that the minimum age of criminal responsibility in Scotland is raised to 12, Scots law would have reached a significant landmark in attributing criminal responsibility to children and young people in a manner that is more consistent with all the evidence on their capacity to make decisions about their behaviour. For many, this landmark would be no more than a staging post on a much longer journey. When Thomas Hammarberg, the (then) Council of Europe's Commissioner for Human Rights, expressed support for raising the age of criminal responsibility, it was 'with the aim of progressively reaching 18'.[154] In that, he was reflecting the view of many children's rights advocates: that meaningful realisation of children's rights is an incremental process. But we are getting ahead of ourselves. For the present, the focus must be on bringing to fruition the goal of raising the minimum age of criminal responsibility to 12.

149 *SCRA Annual Report 2014/2015* (n 121).

150 Education and Culture Committee of the Scottish Parliament, *11th Report, 2013 (Session 4): Stage 1 Report on the Children and Young People (Scotland) Bill*, paras 27–31 <www.parliament.scot/S4_EducationandCultureCommittee/Reports/edR-13–11w.pdf>.

151 Human Rights Act 1998.

152 Children and Young People (Scotland) Act 2014, s 1. The awkward phraseology is found in the statute. Public authorities are subject to a similar reporting requirement in respect of the steps they have taken, within their areas of responsibility, to 'secure better or further effect' of the UN Convention: 2014 Act, s 2 and Schedule 1.

153 S 1, creating the reporting obligation, was brought into force on 15 June 2015: Children and Young People (Scotland) Act 2014 (Commencement No 7) Order 2015, SSI 2016/61, Article 2(3).

154 Thomas Hammarberg, 'The Human Rights Dimension of Juvenile Justice' CommDH/Speech (2006) 12.