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

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## 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<sup>1</sup> 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.<sup>2</sup> 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,<sup>3</sup> while some set such a minimum age level generally, but allow prosecution below this age for

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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.<sup>4</sup> 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).<sup>5</sup> 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.<sup>6</sup> 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<sup>7</sup> 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).<sup>8</sup>

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).<sup>9</sup> 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*.

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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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> In the case of adults it is

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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](http://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<sup>15</sup> 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'.<sup>16</sup> 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'.<sup>17</sup> 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.<sup>18</sup>

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,<sup>19</sup> 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](http://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.<sup>20</sup> 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 entrapment within that system.<sup>21</sup> 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<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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'.<sup>26</sup> 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](http://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.<sup>27</sup> He notes that: '[I]t is tempting to generalize and say that the test was whether he had the understanding of an adult.'<sup>28</sup> 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.<sup>29</sup>

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<sup>30</sup> and Bracton<sup>31</sup> in the twelfth and thirteenth centuries.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

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.’<sup>36</sup> 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*<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup>

34 It is interesting to note that the 1619 edition of Michael Dalton’s *Country 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, *Country Justice* (1682) 350. Similarly, the first edition of William Lambard’s *Eirenartha* (1581 at 218) does not mention an upper age level, but the third edition mentions 12: William Lambard, *Eirenartha* (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<sup>40</sup> was followed in New South Wales in 1939,<sup>41</sup> South Australia in 1941<sup>42</sup> and Victoria in 1949.<sup>43</sup> The increase to the age of 10 which occurred in England and Wales in 1963<sup>44</sup> also occurred considerably later in Australia, mainly in the late 1980s to early 1990s (New South Wales in 1987,<sup>45</sup> Western Australia in 1988,<sup>46</sup> Victoria in 1989<sup>47</sup> and South Australia in 1993).<sup>48</sup> There were some outliers to this general trend, with Queensland raising the age much earlier in 1976<sup>49</sup> and Tasmania and the Australian Capital Territory much later in 2000.<sup>50</sup>

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.<sup>51</sup> This contrasts, to England and Wales, where the Crime and Disorder Act 1998 abolished the presumption of *doli incapax*.<sup>52</sup> 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.<sup>53</sup>

In order for this presumption to be rebutted, or for the legislative equivalent to be satisfied, the prosecution must bring proof<sup>54</sup> 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.<sup>55</sup> This means that the presumption must be rebutted beyond reasonable doubt.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

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,<sup>60</sup> Australian courts have consistently interpreted the essential understanding in line with that required in cases of insanity.<sup>61</sup> 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.<sup>62</sup> 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'.<sup>63</sup>

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'.<sup>64</sup> 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'.<sup>65</sup> 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'.<sup>66</sup> 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.<sup>67</sup> 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*'.<sup>68</sup> 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.)<sup>69</sup> may be relevant. A major form of evidence comes from what the child says to police or others.<sup>70</sup> Other factors that may be adduced to rebut the presumption include expert testimony from a psychologist or psychiatrist,<sup>71</sup> evidence of family background,<sup>72</sup> educational level,<sup>73</sup> social environment and previous convictions for similar offences.<sup>74</sup>

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.<sup>75</sup>

### 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.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> This is a position that the UN Committee has maintained (not just in relation to Australia)<sup>80</sup> 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](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=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f15%2fAdd.122&Lang=en)>.

responsibility to an internationally acceptable level'.<sup>81</sup> 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'.<sup>82</sup> 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'.<sup>83</sup> 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'.<sup>84</sup> 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.<sup>85</sup> 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'.<sup>86</sup> 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.<sup>87</sup> 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),<sup>88</sup> 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](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](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](http://www.refworld.org/docid/3ae6b38f0.html)>.

83 Rule 4.1, Beijing Rules <[www.refworld.org/docid/3b00f2203c.html](http://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](http://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](http://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](http://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](http://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’.<sup>89</sup> 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.<sup>90</sup>

#### 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,<sup>91</sup> 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.<sup>92</sup> 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<sup>93</sup> 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*.<sup>94</sup> 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.<sup>95</sup> 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* (Cmd 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 McGillivray (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'.<sup>96</sup> 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.<sup>97</sup>

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.<sup>98</sup>

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'.<sup>99</sup>

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'.<sup>100</sup> 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.<sup>101</sup>

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.<sup>102</sup>

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

<sup>96</sup> Criminal Code Amendment Bill No 3 2003 (WA).

<sup>97</sup> *R v GW* [2015] NSWDC 52, [41]–[46].

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

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

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

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

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

<sup>103</sup> *Ibid* recommendation 195.



relatively easily rebutted.<sup>104</sup> 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'.<sup>105</sup> 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'.<sup>106</sup> Even more concerning is the comment that in Victoria, in rural and regional areas, many practitioners are not even familiar with the principle.<sup>107</sup> 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.<sup>108</sup> 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<sup>109</sup> 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

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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 (Matthew 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](http://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'.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup>

Research is also increasingly showing that young people 'are less psychosocially mature than adults in ways that affect their decision-making in antisocial situations'.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup>

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](http://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](http://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<sup>116</sup> 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.'<sup>117</sup> 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'.<sup>118</sup> 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'.<sup>119</sup>

### Conclusion

The age of criminal responsibility is a fundamental legal gatekeeper<sup>120</sup> 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

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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*.