Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation

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Introduction

Section 45 of the Modern Slavery Act 2015 (MSA) introduced separate defences for adult and child victims of modern slavery who commit offences consequent on slavery and/or exploitation. In particular it provides a defence to those over the minimum age of criminal responsibility (10 years) and under 18 years of age. Section 45 represents a significant new development in the context of children who offend. Statutory recognition of the vulnerabilities of trafficked children provides a new and compelling argument for those vulnerabilities to be recognised in relation to all children who offend, and not just to those who have been victims of trafficking and slavery.

There are clear similarities across the vulnerabilities of trafficked children and children who engage in offending behaviour but are not recognised as child victims of human trafficking. Emphasising vulnerability in this way allows us to challenge the de-contextualised and unreflective base upon which much child criminal law, policy and debate is built. Specifically, we argue that the very low age of criminal responsibility in England and Wales (at 10 years) fails to account for the vulnerabilities of children; instead it hinges on a conception of children as rational agents carrying full responsibility. Challenging the (neo)liberal legal frameworks that have been built around, and shaped, an ideal of an individualistic and rationalistic legal subject opens up new ways to critically re-imagine the young legal subject as vulnerable (situationally and innately) and the ways in which this vulnerability is constituted and limited by their social and familial environment and experiences.

This article begins by examining section 45 of the MSA and how it provides statutory recognition that the vulnerability of children who engage in offending behaviour needs to be recognised. The importance of section 45 in addressing young people's innate and situational vulnerability highlights starkly the absence of such considerations more broadly within the youth criminal justice system. This inconsistency is illustrative of Dehaghani's characterisation of the nature of child and youth vulnerability as a "precarious space", where children and young people are recognised as being vulnerable in some contexts (eg where they are victims of trafficking) but in others considered "as autonomous free-willed agents".[1] Challenging the inevitability of the boundaries of this "precarious space" and the legal and conceptual frameworks, the article re-imagines how we can more carefully expose the role of the state and its institutions as part of the complex intra-actions which underpin much youth offending. In this context, we examine the role of the media in the politicisation of debates about youth crime and the minimum age of criminal responsibility. We argue that despite this politicisation, one of the most compelling ways of recognising both the innate and situational vulnerabilities (for example, neurodevelopmental immaturity, and chaotic home lives, etc., respectively) of children who engage in offending behaviour would be to raise the low minimum age of criminal responsibility (MACR) to 18. Having acknowledged 'vulnerability' in the MSA, Parliament has arguably opened the door to adopting a similar approach in relation to all child offenders. Recent legislative support for raising the MACR can be found in the Parliamentary debates in the Age of Criminal Responsibility Bill (England and Wales) 2019-2021, and the Age of Criminal Responsibility (Scotland) Act 2019 which provides statutory recognition that the innate vulnerability of children needs to be recognised when considering the MACR. It is submitted that the MACR should be raised in addition to the introduction of a developmental

[1] R. Dehaghani, "'Vulnerable by law (but not by nature)': examining perceptions of youth and childhood 'vulnerability' in the context of police custody" (2017) 39 Journal of Social Welfare and Family Law 4, 454, 458-459.

immaturity defence modelled on section 45 of the MSA. This dual approach would ensure that vulnerable children in conflict with the law will be shielded from the long-term negative impact of involvement with the criminal justice system, including an increased likelihood of re-offending, labelling,stigma, and potentially the impairment of their future life chances.[2]

The Modern Slavery Act 2015 - A statutory defence for young victims who offend

The MSA introduced a bespoke defence for under 18s who commit some offences as a direct consequence of being, or having been, a victim of slavery/exploitation, where a reasonable person in the same situation as the young person and having the young person's relevant characteristics would do that act.[3] Exploitation may include, *inter alia*, "domestic servitude; labour exploitation; criminal activity (e.g. cannabis cultivation, petty street crime, illegal street trade, etc.); sexual exploitation (brothels, closed community, for child abuse images); application of residence; benefit fraud; forced begging; illegal adoption; and sham marriage".[4] The MSA section 45 defence rests on explicit recognition of the situational vulnerability (the trafficked situation) of children, with, arguably, a more implicit recognition of the innate vulnerabilities of children (e.g. (in)ability to decide between alternatives, resist compulsion, etc), evidenced through the application of a lower threshold test than that applied to adults. The defence differs from the adult variation of the defence in that there is no requirement that the child was compelled to commit the index offence, nor is there a need for the child to explore "realistic alternatives" to committing the offence.[5] "Compulsion" does not form an "explicit" element of the under-18 version of the section 45 defence as the government were of the view

[2] House of Commons Justice Committee *Disclosure of Youth Criminal Records First Report of Session 2017–19*. (House of Commons Justice Committee, 2017):. L. McAra and S. McVie "Youth justice?: The impact of system contact on patterns of desistance from offending" (2007) 4(3) European Journal of Criminology 315–345.

[3] Modern Slavery Act 2015, section 45(4).

[4] CPS, *Legal guidance: Human trafficking, smuggling and slavery* available <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>

[5] Modern Slavery Act 2015, section 45(1).

that since "compulsion" is irrelevant to the assessment of whether a child has been trafficked, it would be "simply wrong to put such an onus on a victim who has been turned into a potential defendant by the situation".[6] The section 45 defence also aligns with "increasingly strong research showing that the impact of [adults] on a child's potentially criminal conduct continues well beyond the age of 10 when the current defence of being a minor disappears,"[7] but only in the context of modern day slavery, and not in the multitude of other circumstances where a child may be compelled to act. In cases where there is uncertainty regarding age, the court must presume that the individual is a child until their age is otherwise determined.[8]

The s.45 defence also recognises children's inability, or reduced capacity, to assess alternatives.[9] Neurodevelopmental immaturity means that children tend to be impulsive and engage in risky, sensation-seeking behaviour while lacking the capacity to consider longer term consequences of actions.[10] The innate vulnerability of children is amplified by the trafficking situation, such that, innate vulnerability and situational vulnerability coalesce.[11] The particular vulnerabilities of children in such contexts was highlighted in the recent conjoined appeal of *MK and Persida Gega*[12] where the Court of Appeal refused to accept that a reverse burden of proof applied to the MSA defence(s), and to establishing age in cases involving a dispute as to which version of the defence applied. The Court of Appeal explained that in such contexts, a reverse burden could have the effect of imposing "on a child defendant the more onerous elements of the section 45 defence that Parliament intended should only apply to adults."[13] The

[6] PBC Deb, *Modern Slavery Bill* 11 Sept 2014, c379.
[7] C. Elliott, "Criminal Responsibility and Children: A new Defence Required to Acknowledge the Lack of Capacity and Choice" (2011) 75(4) Journal of Criminal Law 289, 296.
[8] Modern Slavery Act 2015, section 51.
[9] P. Bowen, "Trafficking-related Criminal Legislation in the UK, Special Measures for Victims and Sentencing Guidelines" in P. Chandran (ed) *The Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK* (LexisNexis, 2011) 399.
[10] T. Crofts, "Will Australia Raise the Minimum Age of Criminal Responsibility?" (2019) 43 Criminal Law Journal 26-40, 30-31.
[11] M. Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20(1) Yale Journal of Law & Feminism, 10.
[12] [2018] EWCA Crim 667.
[13] ibid [41].

recent Independent Review of the MSA, advocated that the burden of proof ought to remain on the prosecution.[14]

The importance of section 45 in addressing young people's situational vulnerability highlights starkly the absence of such considerations more broadly within the youth criminal justice system. A more general defence, based on section 45 but not limited to victims of trafficking and slavery, together with an increase in the MACR, would help to acknowledge the limitations of the criminal justice system as a means of preventing and dealing with youth crime and antisocial behaviour and instead consider whether the child's needs would best be met by non-criminal methods of social intervention.

Despite this important statutory recognition that a different approach ought to apply to children compared with adults, the section 45(4) provision is not without problems and could be improved. The requirement that the offence is committed as a direct consequence of the child being a victim of slavery/exploitation is likely to engage an assessment of the influence of the trafficker/exploiter over the victim. Though not defined in statute or elaborated upon in the statutory notes, "direct consequence" requires (at the very least) a nexus between the trafficking/exploitation and the index offence. The Modern Slavery Act Review recommended that the term should be "enhanced" or "clarified."[15] An overly strict causative requirement could make the defence difficult to establish, particularly since ostensible signs of autonomy, for example, owning a mobile telephone, may actually represent another means of control exercised by the trafficker in terms of monitoring and/or contacting the child.[16]

[14] Independent Review of the Modern Slavery Act 2015 *Final report* (May 2019) para 4.24 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf> accessed 10 July 2019.

[15] C. Haughey, *The Modern Slavery Act Review* (2016) available: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/542047/2016_07_31_Haughey_Review_of_Modern_Slavery_Act_-_final_1.0.pdf> accessed 21 May 2019

[16] *R. v O; R. v N [2019] EWCA Crim 752*

Concern was also expressed that the "reasonable person" test was "too high for children".[17] Baroness Kennedy of Cradley explained:

> "I think it is very hard – if not impossible – for a person to place themselves in the mind of an enslaved or trafficked child. (...) A person would need to understand the cultural, supernatural and psychological impact a trafficker can have on a child as well as the fear they feel."[18]

Assessing the situation is also likely to engage an analysis of the compulsion experienced by the child, and, as such, it is questionable whether the under-18 version of the defence is devoid of the compulsion requirement or whether compulsion manifests itself under a different guise.[20] Expert advisors to the Independent Review of the MSA, however, did not agree that the "reasonable person test" introduces an element of compulsion in this context.[21] The courts have held that "compulsion" is intended in "a general sense…and is not limited to circumstances in which the English common law defences would be established".[22] The threshold for establishing "compulsion" is, therefore, ostensibly lower than that required to establish the common law defence of duress.[23]

Over 100 offences are excluded from the parameters of both iterations of the defence; some of which "victims of modern slavery [may] become embroiled in".[24] During parliamentary debate, it was questioned whether the exclusion of assault with intent to resist

[17] HL Deb, *Modern Slavery Bill* 8 Dec 2014, c1652.
[18] HL Deb, *Modern Slavery Bill* 8 Dec 2014, c1652.
[20] UK Human Trafficking Law, "Section 45 Modern Slavery Act: Direct Consequence" available <https://ukhumantraffickinglaw.wordpress.com/2017/08/04/section-45-modern-slavery-act-direct-consequence/#_ftn3> accessed 17 May 2019.
[21] Independent Review of the Modern Slavery Act 2015 *Final report* (May 2019) para 4.24 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf> accessed 10 July 2019.
[22] *LM and Ors* [2010] EWCA 2327.
[23] *Hasan* [2005] UKHL 22.
[24] PBC Deb, *Modern Slavery Bill* 11 Sept 2014, c387.

arrest was appropriate, since "[w]e know that children especially…are suspicious of authority, because the traffickers have made them that way; they are scared and do not understand the language."[25] It remains questionable whether the exclusions are necessary, and, unsurprisingly the schedule has been described as "a recipe for disaster and confusion."[26] MSA, Despite stakeholders concerns that sch.4 is "too restrictive, containing many offences that could be committed by victims of slavery or trafficking"[27] the recent Independent Review of the MSA advocated that no change be made.

The most significant issue, however, is that children continue to be convicted of crimes committed as a direct result of trafficking/exploitation. A variety of factors contribute to this outcome includingdelays or failure to identify victims, failure to refer to the national referral mechanism, and significant delays by the competent authorities in making reasonable and conclusive grounds decisions regarding victim status. [28] The U.S. Department of State *Trafficking in Persons* report identified that in England and Wales "courts allowed victims during hearings to testify by video, behind a screen, or with the public removed from the courtroom" and that "Courts could…compensate victims through a reparation order, but only after conviction of the trafficker."[29] Nevertheless, "NGOs noted victims found this remedy difficult to access given the small number of legal aid providers available to file such claims."[30] For these, and other, reasons Currie concluded that the frameworks and decision-making

[25] HL Deb, *Modern Slavery Bill* 8 Dec 2014, 1658; Modern Slavery Act 2015, schedule 4.
[26] PBC Deb, *Modern Slavery Bill* 21 July 2014, col36 (Peter Carter).
[27] Independent Review of the Modern Slavery Act 2015 *Final report* (May 2019) para 4.43 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf> accessed 10 July 2019. See, generally, UK Government Response to the Independent Review of the Modern Slavery Act 2015 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815410/Government_Response_to_Independent_Review_of_MS_Act.pdf> 10 July 2019.
[28] Youth Justice Legal Centre, "Statutory defence for child victims of trafficking and slavery – section 45 Modern Slavery Act 2015" (2016) available < https://yjlc.uk/statutory-defence-for-child-victims-of-trafficking-and-slavery-the-modern-slavery-act-2015/> accessed 17 May 2019.
[29] US Department of State, *Trafficking in Persons Report* (2019) available <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> pp.481-483 accessed March 2020.
[30] ibid, 483.

procedures enshrined in the MSA fail to effectively recognise and respond to vulnerability and to provide trafficking victims with appropriate structures to build resilience in support of their recovery.[31] Arguably, a more holistic approach to dealing with situationally and innately vulnerable young people encompassing raising the MACR and a capacity-based defence would address many of the concerns raised. Such an approach would beneficially apply to all vulnerable young people engaging in offending behaviour regardless of whether or not they are victims of trafficking and slavery.

Notwithstanding the legitimate concerns regarding section 45, the provision, unlike the general approach to young people in the criminal justice system, recognises that young people are invariably subject to some form of compulsion and that their capacity to assess a situation to determine "realistic alternatives" is reduced, minimal, or non-existent.[32] Victim status provides the gateway to the MSA 2015 defence, recognising the situational vulnerability of trafficking victims generally.[33] It is the innate vulnerability, the age of the child, and what that means in terms of neurodevelopmental capacities that arguably drives an alternative threshold level for these vulnerable offenders in terms of the section 45 defence. It cannot be situational vulnerability alone which provides the theoretical underpinning for the separate defence, otherwise the same provision would apply to both adult and child victims. The EU Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, (the EU Directive) (effective 6 April 2013) highlights this position:

> *Children are more vulnerable than adults* and therefore at greater risk of becoming victims of trafficking in human beings. In the application

[31] S. Currie "Compounding vulnerability and concealing unfairness: decision-making processes in the UK's anti-trafficking framework" (2019) Public Law 495-516, 496.
[32] K. Laird, "Evaluating the Relationship Between Section 45 of the Modern Slavery Act 2015 and the Defence of Duress: An Opportunity Missed?" [2016] Criminal Law Review 395, 396–397.
[33] M. Fineman "Vulnerability and Inevitable Inequality" (2017) 4 Oslo Law Review 133.

> of this Directive, the child's best interest must be of primary consideration …[34]

The Scottish position regarding prosecution of child victims of trafficking further supports the argument that a more "child appropriate" approach should be taken in relation to young people in the criminal justice system. The approach in Scotland is, arguably, preferable to the position in England and Wales. Scotland does not have an equivalent defence for trafficked victims who are compelled to commit criminal offences; rather, the Lord Advocate's instructions outline "a strong presumption against prosecution"[35] of a child where there is "credible and reliable"[36] information that the child is a victim of human trafficking and that the offending took place either in the course of, or as a consequence of, being a victim. The Instructions for Prosecutors adopt an approach that appears to be compatible with the MSA in that it similarly lacks the requirement that the accused child was compelled to commit the index offence; it is sufficient for the child to be a victim of trafficking and for the offence to be committed in the course of, or as a consequence of, being a victim. The burden for establishing whether the child is a victim of human trafficking or exploitation is placed fully on the Prosecutor, who must be satisfied on the balance of probabilities that the accused (whether an adult or a child) is a victim of human trafficking or exploitation. The Instructions for Prosecutors arguably impose a further burden on the Prosecutor to undertake a "proper investigation…of the circumstances surrounding the accused"[37] even if the accused does not raise the issue of being a victim of human trafficking. The Scottish policy sensibly acknowledges that some victims of human trafficking will not identify as such for a variety of external factors and that "this is particularly true of children".[38]

[34] Authors' emphasis added
[35] F. Mullholland "Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation" (Edinburgh, 2015), para7.
[36] ibid.
[37] ibid., para 12
[38] ibid.

In Scotland, as in England and Wales, the recognition of the vulnerability of young people who have engaged in offending behaviour as a consequence of their experience of being trafficked has shaped provisions within the justice system. In England and Wales, however, the relationship between youth and vulnerability becomes obscured when young people, who are not deemed to be victims of slavery or trafficking, engage in offending behaviour. In this context young people are considered autonomous deviants who should accept the consequences of their actions and choices.

The age of criminal responsibility

England and Wales has one of the lowest ages of criminal responsibility in Europe at 10 years. This means that a child aged 10 years of age or above is presumed capable of understanding the nature of criminal conduct and can be considered as legally responsible for their actions as an adult. The conditional age period of criminal responsibility, where the rebuttable presumption of *doli incapax* applied to children aged between 10 and 14 years was abolished by s.34 of the Crime and Disorder Act 1998 ("1998 Act"). The rebuttable presumption of *doli incapax* meant that children aged between 10-14 years would only be held criminally responsible if in addition to committing the *actus reus* and *mens rea* of a criminal offence, the prosecution could also provethat when doing the act, the child knew that what they were doing was seriously wrong, not merely naughty or mischievous. The presumption recognised the possibility that some children aged between 10 and 14 years of age were incapable of understanding the gravity of their criminal actions because they did not have the prerequisite normal capacities akin to an adult offender. During the 1990s, however, this presumption was considered "contrary to common sense" and "not in the interests of justice, or victims or of

the young people themselves".[39] The presumption was said to be "wholly out of date"[40] as it allowed young offenders "to run rings around the court system, and to avoid proper sanctions".[41] Instead "the child is, and must be, capable of being held to account".[42] Accordingly, section 34 of the 1998 Act stated that: "The rebuttable presumption of criminal law that a child aged ten or over is incapable of committing an offence is hereby abolished." In *DPP v P*[43] the court questioned whether or not the defence of *doli incapax* still existed in law for 10-14 year olds. Smith LJ took the view in this case that although the 1998 Act abolished the presumption of *doli incapax*, the defence of *doli incapax* remained. Any comments made by Smith LJ were, by her own admission, *obiter dicta* as the "court had not had the benefit of full argument on the issue". The Court of Appeal specifically addressed this issue in *R v T* in which Latham LJ was emphatic that the defence of *doli incapax* had been abolished. Latham LJ concluded that:

> Parliament must be taken to have intended 'the presumption' to encompass the concept of *doli incapax* when it was abolished in Section 34.[44]

This Court of Appeal ruling was upheld by the House of Lords in *R v JTB*[45] in which the House of Lords pointed out that section 34 of the 1998 Act was a response to growing concerns about the extent to which the presumption of *doli incapax* placed an unfair burden on the prosecution. The House of Lords interpreted the original meaning of *doli incapax* as a "privilege to infancy" which was now "an anachronism" that was "contrary to common sense"[46].

[39] Home Office *No More Excuses: A new approach to tackling youth crime* (TSO, 1997), [4.4].
[40] HL Deb, vol 585, col 1323 (12 February 1998), per Lord Williams of Mostyn
[41] HC Deb, vol 294 col 390 (19 May 1997), per Jack Straw
[42] ibid.
[43] [2007] EWHC 946
[44] [2008] EWCA Crim 815 [20].
[45] [2009] UKHL 20
[46] Per Lord Phillips, para 20.

Section 34 was notable in statutorily demarcating a shift away from viewing "children as victims in need of 'welfare' protection within the law" in favour of "a politically inspired conception of children which encompassed a promise to be 'tough on crime, tough on the causes of crime.'"[47] On a practical level it is questionable how much protection the presumption provided young people as it was rarely used due to the high proportion of guilty pleas by young people.[48] When used, the presumption was easily rebutted as evidence that the child understood the act was seriously wrong could be inferred from the surrounding circumstances of the offending or evidence that the child was of normal mental capacity for their age.[49] It was only in exceptional cases that expert evidence would be required.[50] Nevertheless prior to the 1998 Act the rebuttable presumption of *doli incapax* created the potential for some consideration of the mental capacity, competence, autonomy and maturity of the child in order to prove that the child knew that what they were doing was seriously wrong as opposed to being merely mischievous or naughty. As Gelsthorpe and Morris stated about the presumption: "it was a statement about the nature of childhood, the vulnerability of children and the appropriateness of criminal justice sanctions for children."[51] Similarly, Bandalli stressed that the presumption of *doli incapax* operated in a protective manner and lamented that its removal rendered childhood irrelevant to criminalisation.[52]

[47] H. Wishart, "Was the abolition of the doctrine of *doli incapax* necessary?" (2013) 1 (2) UK Law Student Review 50-63, 50.
[48] *C (A Minor) v DPP*[1996] 1AC 1 at 39; R. Evans. *The Conduct of Police Interviews with Juveniles*, The Royal Commission on Criminal Justice Research, Study 8, London: HMSO
[49] T Crofts "Rebutting the presumption of doli incapax" (1998) 62(2) Journal of Criminal Law 185; E Stokes, "Abolishing the Presumption of Doli Incapax: Reflections on the Death of a Doctrine" in J Pickford (ed), Youth Justice: Theory and Practice (Cavendish, 2000), 57-58.
[50] *L and others v DPP* [1996] 2 Cr App R 501.
[51] L. Gelsthorpe & A. Morris "Much ado about nothing: A critical comment on key provisions relating to children in the Crime and Disorder Act 1998" (1998) 11(3) Child and Family Law Quarterly 213
[52] S. Bandalli "Abolition of the presumption of *doli incapax* and the criminalisation of children" [1998] 37(2) Howard Journal of Criminal Justice 114; S. Bandalli "Children, responsibility and the new youth justice" in B. Goldson (ed.), *The New Youth Justice* (Russell House, 2000) 94.

The result is that the MACR in England and Wales is embarrassingly the lowest "in Europe and one of the lowest in the world"[53]; an approach which the United Nations Committee on the Rights of the Child have labelled "not internationally acceptable".[54] In its report in 2002 the UN Committee expressed that it was "particularly concerned" about "the abolition of the principle of *doli incapax*" and recommended that the age of criminal responsibility should be raised considerably.[55] Yet successive governments continue to assert that ten is the appropriate MACR in England and Wales: "[v]ictims of serious crimes committed by 10 and 11-year-olds must feel assured that those responsible can be proceeded against by the courts."[57] This begs the question, articulated by Baroness Massey of Darwen:

> During my time in your Lordships' House … no Governments have grasped the nettle of the age of criminal responsibility. What does the Minister think needs to happen before this outmoded law is changed? What are the obstacles to changing it?[58]

As Goldson explains, "[t]he 'politicisation' of juvenile crime has now taken such a hold (in England and Wales in particular) that it is difficult to imagine how [the] government can break clear."[59]

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[53] P. Brown, "Reviewing the age of criminal responsibility" [2018] Criminal Law Review, 11, 904-909, 906.
[54] I. Weijers, "The minimum age of criminal responsibility in continental Europe has a solid rational base" in N. Wake, R. Arthur & T. Crofts (eds) *The Age of Criminal Responsibility* (2016) 67(3) Northern Ireland Legal Quarterly 301-310.
[55] United Nations Committee on the Rights of the Child *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Concluding observations: United Kingdom of Great Britain and Northern Ireland.* (United Nations Committee on the Rights of the Child, 2002).
[57] HL Deb, *Age of Criminal Responsibility Bill* 8 Sept 2017, Vol 783, Col 2211 (Baroness Vere of Norbiton (Con)).
[58] HL Deb, *Age of Criminal Responsibility Bill* 8 Sept 2017, Vol 783, Col 2198 (Baroness Massey of Darwen).
[59] B. Goldson, "A Just Measure of Pain? From Bulger to Medway – the contemporary politics of child punishment. What is to be done?" (1999) 155, ChildRight 5-6.

The 'politicisation' youth criminal justice

The killing of two-year-old James Bulger by ten-year-olds Robert Thompson and Jon Venables in 1993 is regarded as a critical point at which "perceptions…and the atmosphere" towards children changed in England and Wales.[60] The crime "profoundly shocked the nation" and is indelibly etched on the minds of the public, in addition to being "well known to [a] generation who were not even born at the time".[61] As Byrne and Brooks explain, the killing took place "amidst a more fundamental shift towards a neo-liberal form of governance which encouraged greater individual responsibility and was less tolerant of indiscipline".[62] In response to the killing the Prime Minister at the time, John Major, declared that "society needs to condemn a little more and understand a little less".[63] Subsequently Michael Howard, as Home Secretary, argued that young people needed to feel the force of the law and be treated like adults and face adult punishments. This harsh political stance set the tone for refocusing policy and practice in relation to children in trouble upon punishment, retribution and incarceration which would continue under the subsequent New Labour government. Soon after forming a government in 1997 a White Paper entitled "No More Excuses: A New Approach to Tackling Youth Crime in England and Wales" was published, leading to a harsher environment for young people, for example, "[d]iscretion for police to divert young people from the formal system was curtailed, the courts' powers to use custodial remands were extended and custodial sentences were made more readily available to a younger age group"[64], thereby providing an unforgiving landscape for children who offend.

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[60] HL Deb, *Age of Criminal Responsibility Bill* 8 Sept 2017, Vol 783, Col 2202 (Lord Thomas of Gresford (LD)). Also, M. Freeman "The Bulger Tragedy: Childish Innocence and the Construction of Guilt" in A. Mc Gillivray (ed.) *Governing Childhood* (Aldershot, 1997).

[61] *Jon Venables, Robert Thompson v News Group Papers Limited, Associated Newspapers Limited MGN Limited, Ralph Stephen Bulger, James Patrick Bulger* [2019] EWHC 494 [1].

[62] B. Byrne & K. Brooks, *Post YOT Youth Justice* (Howard League What is Justice? Working Papers 19/2015) 4 available <https://howardleague.org/wp-content/uploads/2016/04/HLWP_19_2015.pdf> accessed 16th April 2019

[63] J. Major *Mail on Sunday*, February 21st, 1993, p.8.

[64] Home Office *No More Excuses: A new approach to tackling youth crime* (TSO, 1997).

The Bulger case, set against a backdrop of unease regarding youth offending, notably perpetuated by the media, fuelled public anger that would continue to burn fiercely over quarter of a century later. Images, purported to be those of Venables and Thompson, continue to be circulated via social media despite a global injunction prohibiting such distribution. Recent documentaries, such as, "Unforgiven: The Boys Who Killed James Bulger", the short 2019 Oscar nominated film, "Detainment"[65], and drama series "The Victim"[66] with eerie echoes of the case, ensure that the killing is relived in the minds of the general public, and the controversy surrounding any sympathy shown to Venables and Thompson highlight that the public anger which followed the killing has not dissipated. In March 2019, actress Tina Malone was added to the list of people who have been issued with a suspended custodial sentence for sharing an image online in breach of a "wide-ranging", non-time barred, injunction prohibiting:

> a) any depiction, image, photograph, film or voice recording of John Venables or Robert Thompson or any description of their physical appearance, voices or accents; b) (in the event that they assumed a new identity) any information likely to lead to their identification; c) any information likely to lead to the identification of the past, present or future whereabouts of John Venables or Robert Thompson.[67]

Malone was issued with an eight-month suspended prison sentence and ordered to pay £10,000 in legal costs. The severity of the breach was outlined by the court which explained, "[t]he

[65] Ian Youngs, "Oscars 2019: How controversial James Bulger film Detainment was made" BBC News (2019) available <https://www.bbc.co.uk/news/entertainment-arts-46994119> accessed 17 May 2019.
[66]Information available via IMDB <https://www.imdb.com/title/tt8178650/> accessed 11 July 2019.
[67] *Attorney General v Malone* [2019] 3 WLUK 255. See also, *Jon Venables, Robert Thompson v News Group Papers Limited, Associated Newspapers Limited MGN Limited, Ralph Stephen Bulger, James Patrick Bulger* [2019] EWHC 494.

threshold for a custodial sentence had undoubtedly been passed, but her strong personal mitigation led the court to suspend the committal order."[68]

The month before, the Court of Appeal rejected the application of James Bulger's father and uncle that the injunction "be varied/discharged in so far as to permit the reporting of the charges and conviction of the person formally known as Jon Venables".[69] Sir Andrew McFarlane President of the Family Division declined to allow such variation on the basis, *inter alia*, of the "'strong feelings of anger and hatred' of substantial sections of society towards" Venables.[70] The court noted that Venables' more recent child pornography offences would "have done nothing to reduce the risk of future harm" to Venables.[71] In crude terms, Sir Andrew McFarlane explained that "[t]he purpose of the injunction is to protect John Venables from being put to death" by the public.[72] More recently, New Zealand Prime Minister, Jacinda Ardern, advised Jon Venables "not to bother applying" to move there, highlighting the worldwide notoriety of the case.[73] Unsurprisingly, in light of public anger and perceptions on youth justice, the case continues to influence the rationale underpinning the low age of criminal responsibility. Despite successive governments' "tough on justice" approach, the research and evidence overwhelmingly supports the argument that the MACR should serve a critical protective function towards young people, and the level at which it is set provides an important communicative function regarding how we treat the youngest and some of the most vulnerable within our society.[74]

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[68] *Attorney General v Malone* ibid. See also, *Venables v News Group Newspapers Ltd, Attorney General v McKeag Attorney General v Barker* [2019] EWHC 241 (QB); [2019] 1 WLUK 332.
[69] *Jon Venables, Robert Thompson v News Group Papers Limited, Associated Newspapers Limited MGN Limited, Ralph Stephen Bulger, James Patrick Bulger [2019] EWHC 494* [17].
[70] ibid [62].
[71] ibid [63].
[72] ibid [66].
[73] C. Giordiano, "Jacinda Arden tells James Bulger killer Jon Venables, "don't bother applying" for New Zealand move" (2019) < https://www.independent.co.uk/news/uk/home-news/james-bulger-killer-jon-venables-new-zealand-move-prime-minister-warning-a8971911.html> accessed 11 July 2019.
[74] British Medical Association "Young lives behind bars: The health and human rights of children and young people detained in the criminal justice system" (BMA, 2014), p. 6.

Innately and situationally vulnerable

The arguments in favour of raising the MACR are well known and are increasingly science-based.[75] Crofts categorises these arguments into the following themes: "neuroscience"; "neurodevelopmental disability"; "harms associated with the criminal justice system"; "indigenous [or in England and Wales, black and ethnic minority] over-representation"; and "international obligations".[76] The first two can be further demarcated under the heading of innate vulnerabilities, whilst the second two may be categorised as situational vulnerabilities; an additional theme of "background/upbringing", which might encompass abuse and/or a chaotic home life, etc., could also be regarded as situational vulnerabilities. Arguments based upon international obligations can be bolstered by a recalibration of current conceptualisations of young people as innately vulnerable and potentially situationally vulnerable.

Children and many adolescents are "inherently vulnerable" and often "lack capacity and agency to make decisions in their own best interests".[77] Neuroscientific developments demonstrate that children possess "some degree of mental capacity" but have not "reached complete cognitive maturity".[78] The "process of neurodevelopment" renders them "prone to impulsive, sensation-seeking behaviour, with an under-developed capacity to gauge the consequence of actions".[79] This "marked neurodevelopmental immaturity"[81] in adolescence is representative of a temporal period of innate vulnerability.[82] The "age crime curve" suggests

[75] Crofts, (n 10), 30-32.
[76] ibid, 30-35.
[77] R. Arthur "Exploring childhood, criminal responsibility and the evolving capacities of the child" (2016) 67(3) Northern Ireland Legal Quarterly 269-282, 277.
[78] H. Wishart "Young minds, old legal problems: can neuroscience fill the void? Young offenders and the Age of Criminal Responsibility Bill – promise and perils" (2018) 82(4) *Journal of Criminal Law* 311-320, p. 312.
[79] Crofts, (n 10) 30-31; see also The Centre for Social Justice, *Rule of Engagement: Changing the Heart of Youth Justice* (CSJ, 2012) 201.
[81] Lord Dholakia, "Age of Criminal Responsibility" in N. Wake, R. Arthur & T. Crofts (eds) *The Age of Criminal Responsibility* (2016) 67(3) Northern Ireland Legal Quarterly 263-264, 263.
[82] See, generally, M Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" 20(1) (2008) Yale Journal of Law & Feminism 1.

that the majority of adolescents who engage in criminal activity will simply "grow out of it".[83] Neurodevelopmental immaturity may also mask other innate vulnerabilities, such as, neurodevelopmental disorders, which may increase the risk of offending behaviours. It is not possible, however, for neuroscience to pinpoint an age at which neurodevelopmental immaturity and the innate vulnerability of adolescents cease; some individuals mature faster than others whilst some are simply less vulnerable.[85] Accordingly, the dividing line between lacking criminal capacity and being held criminally responsible is arbitrarily drawn.

The remaining arguments, "harms associated with the criminal justice system"; "indigenous [or in England and Wales, black and ethnic minority] over-representation"; and "background/upbringing" all provide potential examples of how young people might become situationally vulnerable to offending behaviours and/or the criminal justice process, more generally. There is some evidence of a link between fluctuating situational vulnerability and child offending behaviours: "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 with families, substance abuse or mental health problems."[86] This situation is often far worse for children from a black and minority ethnic background.[87] In a trafficking context, "[l]ocal authorities highlighted concerns over the high number of children who either left or were missing from care or foster homes and were especially vulnerable to trafficking by gangs. NGOs estimated up to two-thirds of all child victims go missing within 72 hours of placement for care and up to 20 percent remain missing."[88] These children are situationally vulnerable and require support and

[83] Brown, (n 53) 904.
[85] Wishart (n 19) 318.
[86] Lord Dholakia, "Age of Criminal Responsibility" in N. Wake, R. Arthur and T. Crofts (eds) *The Age of Criminal Responsibility* (2016) 67(3) Northern Ireland Legal Quarterly 263-264, 263.
[87] The Lammy Review, *An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (HMSO 2017)
[88] (n 29) p.483.

education. This situational vulnerability may exacerbate existing innate vulnerabilities and/or contribute to the development of additional innate vulnerabilities. The Lammy Review similarly highlighted the extent to which the criminal justice system renders black, Asian and minority ethnic (BAME) populations situationally vulnerable; "[i]n both the youth and adult populations, there is no single explanation for the disproportionate representation of BAME groups."[89] The report revealed "differential treatment", poor relationships between custodial staff and BAME offenders, and factors such as "young BAME offenders are less likely to be recorded as having problems, such as mental health, learning difficulties and troubled family relationships, suggesting many may have unmet needs".[90] As Elliott articulated, "criminal responsibility is not a static concept, but adapts to the social environment in which it is applied". The concept should not just adapt to "the relative status [age in this context]" it must also show a "sensitivity to the vulnerabilities of certain groups in society."[91]

Foregrounding considerations of vulnerability as above presents novel ways of reconceptualising the young person as a legal subject and exposes the role of the state and its institutions as part of the complex life experiences of young people in conflict with the law. Currie defines vulnerability as "a state of high exposure to certain risks and uncertainties, in combination with a reduced ability to protect or defend oneself against those risks and uncertainties and cope with their negative consequences".[92] Currie suggests, similar to Fineman, that "building resilience can provide a solution".[93] Building on the work of Fineman,[94] who emphasises shared, universal vulnerability, vulnerability is posited as the

[89] The Lammy Review, *An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (HMSO 2017) 5.
[90] The Lammy Review, *An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (HMSO 2017) 5.
[91] C. Elliott, "Criminal Responsibility and Children: A new Defence Required to Acknowledge the Lack of Capacity and Choice" (2011) 75(4) Journal of Criminal Law 289, 293.
[92] S. Currie "Compounding vulnerability and concealing unfairness: decision-making processes in the UK's anti-trafficking framework" (2019) Public Law 495-516, 498
[93] ibid., also M. Fineman, "Vulnerability and Inevitable Inequality" (2017) 4 Oslo Law Review 133, 146
[94] M. Fineman, 'The Vulnerable Subject and the Responsive State' 60 (2010) Emory Law Journal 30; M. Fineman, 'Equality and Difference—The Restrained State' (2015) 66(3) Alabama Law Review 609.

characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between the state and the individual child.[95] This transformative understanding of vulnerability as a universal ontological condition of all young people involved in the criminal justice system shifts the focus onto the structural and institutional conditions that exacerbate the life experience of young people in conflict with the law. This basic premise of a universal vulnerable subject forms the foundation for the assertion that the state has a responsibility to implement a comprehensive and just equality regime that ensures access and opportunity for all, consistent with a realistic conception of the human subject.[96]

Changing our ontological starting point in this way can reshape the material and conceptual framework of analysis, potentially changing approaches to law and social justice in radical ways.[97] The low MACR in England and Wales, together with the political debates and media coverage, assumes that young people are autonomous, independent beings capable of exercising individual choice and ignores the realities of their vulnerability. Vulnerability theory challenges this limited and inaccurate vision of legal subjectivity. It suggests that a legal subject that is primarily defined by vulnerability and need, rather than exclusively by rationality and liberty, more fully reflects the human condition.[98] As such, it has the power to disrupt the logic of the liberal stereotype of an independent and autonomous individual.[99] The recent increase of the MACR in Scotland from 8 to 12 years of age contributes to the "mounting pressure for the MACR in England and Wales" to be increased.[100]

Scotland – legislating to protect young people from criminalisation

[95] M. Fineman, "The Vulnerable Subject and the Responsive State" 60 (2010) Emory Law Journal 30
[96] ibid.
[97] B. Clough "New Legal Landscapes: (re)constructing the boundaries of mental capacity law" (2018) 26(2) Medical Law Review, 246-275, p. 266
[98] M. Fineman, "Vulnerability and Inevitable Inequality", (2017) 4 OSLO Law Review. 133, 149.
[99] M. Fineman "Vulnerability and Social Justice" (2019) 53(2) Valparaiso University Law Review, 341-370.
[100] Brown (n 53) 905. See also, Crofts (n 10).

Until recently Scotland had one of the lowest ages of criminal responsibility in Europe at 8 years of age, but the consequences of youth offending were almost always framed within the welfare system. Most cases are dealt with through Children's Hearings which take account of all aspects of a child's conduct, not simply the offence that has been committed, including findings from social workers, school officials, children's homes and psychiatrists. Section 52 of the Criminal Justice and Licensing (Scotland) Act 2010 ("2010 Act") raised the age at which children could be prosecuted in adult criminal courts to 12. This change meant that no child between the ages of 8 and 12 years would be held accountable for any offending behaviour in a criminal court. The gap between the minimum age of prosecution and the minimum age of criminal liability, however, meant that criminal offences committed between the age of 8 and 12 could be included on a child's criminal record, though a prosecution may not take place. Also if grounds of referral containing allegations of criminal offending were not accepted within the Children's Hearing System, a proof would be fixed in the sheriff court. At that proof, the Reporter would lead evidence and seek to prove beyond reasonable doubt that the child committed the offence.[101] The 2010 Act has now been repealed by the Age of Criminal Responsibility (Scotland) Act 2019 which has raised the age of criminal responsibility in Scotland from 8 years to 12. This change in Scottish Law reflects a broader contemporary liberal commitment to the protection of children's human rights[102] and brings Scottish law closer in line with international norms. Article 40 of the UN Convention on the Rights of the Child requires each state to set a reasonable minimum age of criminal responsibility. Recently the United Nations Committee on the Rights of the Child emphasised that in light of recent scientific findings, state parties were encouraged to increase their minimum age of criminal responsibility to at least 14 years of age and commended those states that have a higher

[101] Law Society of Scotland *A consultation on the minimum age of criminal responsibility* (LSS, 2016).
[102] A further example of this commitment is the Children (Equal Protection from Assault)(Scotland) Act 2019 which abolishes the parental defence of reasonable chastisement and consequently provides children with equal protection from assault.

minimum age, for instance 15 or 16.[103] The Scottish Minister for Children and Young People also created an advisory group which will report regularly to the Scottish Parliament about whether the age of criminal responsibility in Scotland should be raised further.

In England and Wales, the Age of Criminal Responsibility Bill (E &W) 2019-2021 raises the age of the conclusive presumption that "no child under the age of ten years can be guilty of an offence" to "twelve" in England and Wales. [104] This Private Member's Bill is the fifth in as many Parliamentary sessions advanced by Lord Dholakia. The Bill in 2017-2019 was due to advance to second reading stage in the House of Commons having been passed by the House of Lords. As the Bill failed to be enacted before the December 2019 General Election it made no further progress.[105] Bills in parliamentary years 2013-2014 and 2015-2016 were rejected at second reading, whilst in 2016-2017, the Bill did not pass first reading stage. Despite these recurrent attempts to raise the MACR, the government is of the view that the current English MACR remains "appropriate and accurately reflects what is required of our justice system."[106] The Parliamentary debates on the Age of Criminal Responsibility Bill, the Age of Criminal Responsibility (Scotland) Act 2019, the MSA 2015, and the Lord Advocate's guidelines provide recognition of the innate vulnerability of children; an innate vulnerability that appears to have been ignored in setting the MACR in England and Wales. That children must be victims in order for the section 45 defence to apply means that they fit the welfare narrative more readily than children who offend in the absence of trafficking/exploitation. Nevertheless, recognition of the innate vulnerability of children in statutory form should call into question the criminal justice system's approach to the MACR, and the lack of bespoke (partial) defences for children involved in offending behaviour.

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[103] United Nations Committee on the Rights of the Child *General Comment No. 24: Children's Rights in the Child Justice System.* (United Nations Committee on the Rights of the Child, 2019), para 39.
[104] *Age of Criminal Responsibility Bill* [HL] (HL Bill 3 of 2017-2019).
[105] The Early Parliamentary General Election Act 2019
[106] HL Deb, *Age of Criminal Responsibility Bill* 8 Sept 2017, Vol 783, Col 2211 (Baroness Vere of Norbiton (Con).

The low age of criminal responsibility fails in both its protective function towards young people, and in its important communicative function regarding how we treat the youngest and some of the most vulnerable within our society.[107] It reflects a punitive model which focusses on the offence alone at the expense of considering the connections between the child's actions and the wider socio-economic and cultural contexts of their lives and their experiences of vulnerability and powerlessness.

No defence for young people

Raising the MACR by itself may not be sufficient to address the situational and innate vulnerabilities of young people in conflict with the law as it would still leave exposed young people who were above the age of criminal responsibility but below 18 years of age. As such, a new capacity-based defence, modelled on section 45 of the MSA, could also provide an additional avenue for reform. Extant criminal law defences are ill-equipped to adequately address the circumstances of young offenders.[108] Capacity related defences, such as, insanity and diminished responsibility rely on the defendant establishing, on the balance of probabilities, that s/he suffered from a "disease of the mind", or "a recognised medical condition", and the diminished responsibility defence applies to murder only.[109] Those defences are not designed to be utilised in cases involving "normal" development.[110] The Law Commission explained, "[t]here is an important difference between a recognised medical condition and developmental immaturity: youth is not a pathological condition equivalent to a

[107] According to Duff the purpose of the criminal law is to 'identify and declare the public wrongfulness of certain kinds of moral wrongdoing, and to provide for an appropriate public response to them' RA Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart, 2007), 47.
[108] C. McDiarmid, "After the age of criminal responsibility: a defence for children who offend" (2016) 67(3) Northern Ireland Legal Quarterly 327-41, 336-337.
[109] ibid. See also, *M'Naghten* (1843) 10 Cl and Fin 200, [1843] 8 ER 718, [1843] UKHL J16, [1843] EngR 875 and s.2(1) of the Homicide Act 1957 (as amended by s.52 Coroners and Justice Act 2009), respectively.
[110] T. Crofts, "The common law influence over the age of criminal responsibility-Australia" (2016) 67(3) Northern Ireland Legal Quarterly 283-300, 298. McDiarmid (n 109, 336). See, also, C. McDiarmid, *Childhood and Crime* (Dundee University Press 2007) Ch 3.

medical condition."[111] The Commission have repeatedly advocated for a "developmental immaturity" defence, most notably in the form of an additional limb to the partial diminished responsibility defence. [112] Developmental immaturity (*per se* or combined with an abnormality of mental functioning arising from a recognised medical condition) which substantially impaired a D's (aged under 18) capacity to understand the nature of their conduct; form a rational judgement; or exercise self-control would reduce first to second degree murder under the proposals. The developmental immaturity (*per se* or combined with the abnormality) must also provide an explanation for the killing.[113] Governmental rejection of this proposal was criticised as failing to address the unrealistic assumption, implicit in the abolition of *doli incapax*, that all young people over the age of ten, and not suffering from a recognised medical condition, appreciate the significance of their actions.[114] The absence of "developmental immaturity" in the diminished responsibility defence also carries the potential to result in contradictory outcomes:

> An adult of 40 years with the emotional maturity of a 10 year old can claim diminished responsibility as they may be diagnosed as having a "recognised medical condition", yet a 'normal' 10 year old cannot succeed with the plea as their development has not been arrested..[115]

[111] Law Commission, *Insanity, Automatism and Intoxication* (Law Com Discussion Paper, 2013) Ch 9.
[112] Law Commission, *Insanity, Automatism and Intoxication* (Law Com Discussion Paper, 2013) para 9.23-9.24; Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 5.112, respectively.
[113] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 5.112.
[114] Ministry of Justice, *Murder, manslaughter and infanticide: Proposals for reform of the law Summary of responses and Government position* (MoJ CP/R 19/08, 2009) para 98 available <https://webarchive.nationalarchives.gov.uk/20100512140907/http://www.justice.gov.uk/consultations/docs/murder-review-response.pdf> accessed 17April 2019.
[115] Ministry of Justice, *Murder, manslaughter and infanticide: Proposals for reform of the law Summary of responses and Government position* (MoJ CP/R 19/08, 2009) para 98 available <https://webarchive.nationalarchives.gov.uk/20100512140907/http://www.justice.gov.uk/consultations/docs/murder-review-response.pdf> accessed 17th April 2019.

A new capacity related defence of developmental immaturity, together with raising the MACR, would help to retain some recognition of the differences in capacity, capabilities and culpability of children. As Lord Diplock acknowledged, in the differing context of the partial defence of provocation to murder, the law must make allowances for youthful immaturity rather than insisting on the impossible, that the young person must at all times demonstrate the same standard of self-control as an adult.[116]

Conclusion

The low age of criminal responsibility in England and Wales fails to account for the innate vulnerabilities of children, instead it hinges on a conception of children as rational agents carrying full responsibility. This conception does not account for the failures of the state, parents, and society which may render children situationally vulnerable, and therefore at greater risk of child offending behaviours.[117] The low age of criminal responsibility is also out of step with other areas of law which adopt a more paternalistic approach. There are numerous examples within the civil and criminal law of protective measures based upon recognition of the innate vulnerabilities of children. For example, the age of individual capacity is set much higher in relation to "buying a pet, the age for paid employment, the age of consent to sexual activity or the age for smoking and drinking" than in relation to criminal responsibility.[119] As Lord Dholakia stated:

[116] *Camplin* [1978] AC 705, 717
[117] Lord Dholakia, "Age of Criminal Responsibility" in N. Wake, R. Arthur and T. Crofts (eds) *The Age of Criminal Responsibility* (2016) 67(3) Northern Ireland Legal Quarterly 263-264, 263.
[119] HL Deb, *Age of Criminal Responsibility Bill* 8 Sept 2017, Vol 783, Col 2188 (Lord Dholakia (LD)).

> There is no other area of law- -where we regard children as fully competent to take informed decisions until later in adolescence. The age of criminal responsibility is an anomalous exception.[120]

Lord Dholakia has confirmed that he will continue his political efforts to raise the age of criminal responsibility in England and Wales, "[t]his is a long process but I will continue to fight."[121] However, despite his Age of Criminal Responsibility Bill having been passed by the House of Lords in 2019, there continues to be very little political support in England and Wales to raise the age of criminal responsibility.[122] Brown and Charles have referred to this political deadlock as an "unmoveable Westminster Parliament".[123] This is in stark contrast with the political, and societal, situation in Scotland where all the main political parties, including the Conservatives, supported raising the age of criminal responsibility. Prior to the Age of Criminal Responsibility (Scotland) Act 2019 being passed the Scottish government consulted on raising the age of criminal responsibility to 12 between March and June 2016. 95% of those who responded to this public consultation agreed with the proposal. The MSA and its principle of non-criminalisation of children was championed by the then Home Secretary, Theresa May, from as early as 2013 when she vowed to keep "the plight of victims at the very heart of our policies and everything we do".[124] In relation to the MACR, in contrast, Baroness Vere of

[120] HL Deb, *Age of Criminal Responsibility Bill* 8 Nov 2013, vol 749, col 477 (Lord Dholakia) Cf., J. Herring, "The age of criminal responsibility and the age of consent: should they be any different?" (2016) 67(3) Northern Ireland Legal Quarterly 343-356.
[121] in J. Fuller "'Children and capable of doing horrible things': how BBC drama Responsible Child explores real-world arguments around age and crime" *iNews* 16th Dec 2019 https://inews.co.uk/news/long-reads/bbc-responsible-child-real-world-arguments-age-crime-responsibility-1341554 last accessed 24/01/20/
[122] The Age of Criminal ResponsibilityBill [HL] 2019-21 had its first reading in the House of Lords on 4th February 2020. A date for the second reading has yet to be announced.
[123] A. Brown and A. Charles "The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach" (2019) *Youth Justice* 1-19.
[124] Home Office, *Draft Modern Slavery Bill* (December, 2013) Cm 8770, Home Secretary Foreword.

Norbiton stated the government's position during the second reading of Lord Dholakia's Bill in 2017:

> "the Government believe that the age of criminal responsibility is appropriate and accurately reflects what is required of our justice system[125]

The stark contrast between the treatment of children who are situationally vulnerable because of trafficking as opposed to those who are situationally vulnerable due to other forms of abusive situations is palpable, and ought to be unsustainable. Unfortunately, the neo-liberal ideology whose slogan became understand a little less, condemn a little more, and which emphasises individual responsibility still has a strong hold in policies relating to children who commit crime in England. The Bulger case became, and continues to be, the paradigm media story to reinforce narratives of young offenders needing to be held accountable and punished for their criminal behaviour. Shifting this narrative from individual accountability to recognition of the innate and situational vulnerability of children has proven to not be easy. However, the MSA has begun to recognise both the situational and innate vulnerabilities of child victims of human trafficking who commit criminal offences.

Section 45 represents a potentially significant new development which would respond to Fineman's call for an alternative responsive state which recognises the universality of vulnerability and responds to it on the basis of more collective values, such as connectedness and interdependence.[126] This should empower the legal, and criminal justice, systems to develop new ideological perspectives in which responses to youth offending recognise vulnerability and respond to it in a way that enables young people to recover from the adverse

[125] HL Deb, *Age of Criminal Responsibility Bill* 8 Sept 2017, Vol 783, Col 2209-2211 (Baroness Vere of Norbiton (Con).
[126] M. Fineman, "Vulnerability and Inevitable Inequality" (2017) 4 Oslo Law Review 133, 147

childhood experiences and multiple disadvantages common to many of the children in the criminal justice system. The higher ages at which children are deemed mature enough to make decisions, combined with statutory recognition of the situational and innate vulnerabilities of children ought to add to the mounting pressure on Parliament to raise the MACR and prevent the unnecessary and damaging criminalisation of vulnerable young people. Not only is the current MACR "barbarous"[127] and "outmoded"[128], it is becoming increasingly difficult to justify when considered alongside other areas of the criminal law.

[127] HL Deb, *Age of Criminal Responsibility Bill* 8 Sept 2017, Vol 783, Col 2205 (Baroness Hamwee (LD)).
[128]HL Deb, *Age of Criminal Responsibility Bill* 8 Sept 2017, Vol 783, Col 2196 (The Earl of Listowel (CB)).