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The Age of Criminal Responsibility

Gregor Urbas

One of the most difficult areas of criminal justice policy lies in providing appropriate legal mechanisms to reflect the transition from the age of childhood innocence through to maturity and full responsibility under the criminal law. Along with specialised institutions such as Children's Courts and juvenile detention centres, specific legal rules have been developed which differentiate the position of children and young people within the general criminal justice system. Considerable recent attention has been directed towards rules governing the minimum age of criminal responsibility, and the imposition of criminal responsibility above that age depending on a young offender's appreciation of the wrongness of his or her act. This Trends and Issues paper examines the operation of these rules, along with criticisms and prospects for reform.

Adam Graycar
Director

In all Australian jurisdictions the statutory minimum age of criminal responsibility is now 10 years. Between the ages of 10 and 14 years, a further rebuttable presumption (known in common law as *doli incapax*) operates to deem a child between the ages of 10 and 14 incapable of committing a criminal act. Only if the prosecution can rebut this presumption, by showing that the accused child was able at the relevant time adequately to distinguish between right and wrong, can a contested trial result in conviction. From 14 to either 17 or 18 years (depending on jurisdiction), young offenders may be held fully responsible for their criminal acts but are subject to a different range of criminal sanctions than adults committing the same offences (Warner 1997). Even without criminal liability, children may still be subject to court-ordered welfare measures such as "care and control" orders, along with a range of other orders in relation to residence, contact, supervision and assessment.

Criminal prosecution is thus only part of the range of societal responses to youthful wrongdoing, and usually invoked only when misbehaviour is sufficiently serious or repetitive that responses within the family or educational environment are deemed inadequate. Moreover, the development of specialised institutions and processes for dealing with young offenders, particularly Children's Courts, has been premised as much on child welfare and reform policies as on retributive concerns (Seymour 1988, 1997; Cunneen & White 1995). Accordingly, the preferred approach of the criminal justice system has generally been towards rehabilitation and the prevention of further offending rather than simple punishment (O'Connor 1997; Alder 1998; Carcach & Muscat 1999). It may be argued, however, that there has been some reversion in Australia to juvenile "justice" as opposed to "welfare" policies, particularly with the introduction

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Australian Institute
of Criminology
GPO Box 2944
Canberra ACT 2601
Australia

Tel: 02 6260 9221
Fax: 02 6260 9201

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of mandatory sentencing regimes for specified property offences in the Northern Territory and Western Australia.

For the present, the formal imposition of criminal responsibility remains a significant element of the Australian juvenile justice system. Liability is imposed according to rules intended to take into account the level of maturity of the particular young accused (whether legislatively designated as "child", "juvenile", "youth" or "young person"). Central to these rules are provisions which govern:

(i) the minimum age of criminal responsibility; and

(ii) the gradual imposition of criminal responsibility depending on a young offender's appreciation of the wrongness of his or her act.

While these rules do not usually attract much public attention, several recent cases involving particularly young children (as both offenders and victims) have resulted in reappraisal of the age of criminal responsibility in a number of jurisdictions.

In the United Kingdom, the 1993 killing of two-year-old James Bulger by a pair of 10-year-olds resulted in unprecedented public debate on child criminality (JUSTICE 1996, pp. 1–2; Heide 1999, p. 25; Turner 1994). The trials, convictions for murder, and sentencing of the (then 11-year-old) boys were the subject of later appeals to the European Court of Human Rights (*T v. United Kingdom* and *V v. United Kingdom*, decided 16 December 1999). The Court held that the minimum age of criminal responsibility applying in England and Wales (10 years) did not in itself deviate so far from European practices as to violate applicable human rights standards. However, the Court went on to find that the boys' right to a fair trial was compromised, with insufficient measures taken to ensure that they could adequately understand and participate in the legal proceedings (Di Martino 2000; Hubble 2000).

In New South Wales, the 1999 manslaughter trial of an 11-year old boy for throwing his six-year-old companion into a river attracted widespread comment from judges, politicians and the public (SMH 1999). The New South Wales Attorney-General's Department has since undertaken a review of the age of criminal responsibility of children (NSW CLRD 1999). More recently still, in March 2000 a six-year-old girl was shot dead by her six-year-old classmate in a Michigan elementary school (Riley 2000).

Disturbing as such cases are, they must be seen in the context of overall levels of juvenile criminality. Most prosecutions of children under 15 in Australia are for property offences (Mukherjee, Carcach & Higgins 1997, p. 12). Killings by children in this age group are relatively rare (Metcalfe 1994; Carcach 1997; Mouzos 2000, pp. 145–54). Children tend to commit crimes in groups (often with older juveniles or adults) rather than alone, and there is anecdotal evidence of the deliberate use of children below the age of criminal responsibility in organised thefts (Bell & Heathcote 1999, p. 4).

Minimum Age of Criminal Responsibility

Article 40 of the United Nations *Convention on the Rights of the Child* (UNCRC) requires signatory states to:

> seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
>
> (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

The UNCRC does not specify any particular minimum age of criminal responsibility, but the United Nations committee responsible for monitoring compliance with it has criticised jurisdictions in which the minimum age is 12 or less (JUSTICE 1996, p. 7). The general philosophy behind this approach is explained in the official commentary to the United Nations' *Standard Minimum Rules for the Administration of Juvenile Justice* (the "Beijing Rules"):

> The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no age limit at all, the notion of responsibility would become meaningless.

Under English common law the minimum age of criminal responsibility was seven years, while *doli incapax* operated as a further safeguard up to the age of 14. The minimum age was raised in the United Kingdom by statute, first to eight and then to 10 years (*Children and Young Persons Act 1933* [UK], s. 50). Similarly in Australia, the Commonwealth, States and Territories have all progressively legislated to set the minimum age at 10 years—the last jurisdictions to come into line being the ACT and Tasmania, in which the minimum ages were until recently eight and seven respectively.

By comparison, the criminal/penal codes of many countries prescribe higher minimum ages of criminal responsibility:

- 12 years—Canada, Greece, Netherlands;
- 13 years—France, Israel, New Zealand (except for murder/manslaughter where the age limit of 10 applies);
- 14 years—Austria, Germany, Italy and many Eastern European countries;
- 15 years—Denmark, Finland, Iceland, Norway, Sweden;
- 16 years—Japan, Portugal, Spain;
- 18 years—Belgium, Luxembourg.

In addition, statutes in many countries prescribe lower maximum penalties for young offenders than those applying to adults, and almost all jurisdictions

have some form of rehabilitative/educative programs (JUSTICE 1996, pp. 31–33; Johnson & Muscroft 1999, chapter 5).

Differences between minimum ages of criminal responsibility are partly explained by differing cultural and societal approaches, including the perceived usefulness of imposing criminal sanctions on children who may have an immature appreciation of the consequences or gravity of their misbehaviour. In this regard, it is noteworthy that a substantial body of psychological research has assessed children's development in "cognitive" (Piaget 1955), "moral" (Kohlberg 1969) and "conative" or impulsive/automative (Holland 1983) terms (see Morash 1981; Dalby 1985). Close attention has also been directed to the relationship between childhood maltreatment and adolescent delinquency (Smith & Thornberry 1995). While the imposition of criminal liability on children in Australia ostensibly has regard to the accused's appreciation of wrongfulness, there is little evidence of the impact of such research on criminal trials and procedures.

Doli Incapax

At common law the minimum age of criminal responsibility, often called the "age of discretion", was seven years. However, the harshness of criminal penalties imposed on convicts made it clear that further protections such as the *doli incapax* presumption were needed (Kean 1937). For example, Blackstone's eighteenth century *Commentaries on the Law of England* document several cases of capital punishment involving children as young as eight (Blazey-Ayoub 1996, p. 35).

The *doli incapax* presumption survives in all Australian jurisdictions, either in statutory form (Commonwealth, ACT, Tasmania, Northern Territory, Western Australia and Queensland) or as part of the common law (New South Wales, South Australia and Victoria) (Table 1). The statutory formulations differ slightly—the Commonwealth *Crimes Act 1914* (s. 4N) and *Criminal Code Act 1995* (s. 7.2), for example, provide:

> (1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.
>
> (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

The other statutory jurisdictions, by contrast, state the presumption not in terms of actual knowledge but in terms of "capacity to know". Section 29(2) of the Queensland *Criminal Code Act 1899* is typical:

> 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 the person had capacity to know that the person ought not to do the act or make the omission.

Table 1: *Ages of criminal responsibility by Australian jurisdiction*

Jurisdiction	No criminal responsibility	Presumption against criminal responsibility	Treatment as child/juvenile
Commonwealth	**Under 10 years** *Crimes Act 1914*, s. 4M *Criminal Code Act 1995*, s. 7.1	**10 to less than 14 years** *Crimes Act 1914*, s. 4N *Criminal Code Act 1995*, s. 7.2	Not specified
Australian Capital Territory	**Under 10 years** [since 10 May 2000] *Children and Young People Act 1999*, s. 71(1)	**10 to less than 14 years** *Children and Young People Act 1999*, s. 71(2)	**Under 18 years** *Children and Young People Act 1999*, s. 8 ("young person")
Northern Territory	**Under 10 years** *Criminal Code*, s. 38(1)	**10 to less than 14 years** *Criminal Code*, s. 38(2)	**Under 18 years** [since 1 June 2000] *Juvenile Justice Act*, s. 3 ("juvenile")
New South Wales	**Under 10 years** *Children (Criminal Proceedings) Act 1987*, s. 5	**10 to less than 14 years** Common law *doli incapax*	**Under 18 years** *Children (Criminal Proceedings) Act 1987*, s. 3 ("adult")
Victoria	**Under 10 years** *Children and Young Persons Act 1989*, s. 127	**10 to less than 14 years** Common law *doli incapax*	**Under 17 years** *Children and Young Persons Act 1989*, s. 3 ("child")
South Australia	**Under 10 years** *Young Offenders Act 1993*, s. 5	**10 to less than 14 years** Common law *doli incapax*	**Under 18 years** *Young Offenders Act 1993*, s. 4 ("youth")
Western Australia	**Under 10 years** *Criminal Code Act Compilation Act 1913*, s. 29	**10 to less than 14 years** *Criminal Code Act Compilation Act 1913*, s. 29	**Under 18 years** *Young Offenders Act 1994*, s. 3 ("young person")
Queensland	**Under 10 years** *Criminal Code Act 1899*, s. 29(1)	**10 to less than 14 years** [since 1 August 1997] *Criminal Code Act 1899*, s. 29(2)	**Under 17 years** *Juvenile Justice Act 1992*, ss. 5, 6 ("child")
Tasmania	**Under 10 years** [since 1 February 2000] *Criminal Code*, s. 18(1)	**10 to less than 14 years** *Criminal Code*, s. 18(2)	**Under 18 years** [since 1 February 2000] *Youth Justice Act 1997*, s. 3 ("youth")

Note: Table 1 has been revised in the electronic version of this Trends and Issues paper for greater clarity.

Proof of a capacity to know is, particularly in terms of evidence that might be adduced, different from proof of actual knowledge of wrongfulness. Evidence of a general capacity to know particular conduct to be wrong includes evidence relating to different but comparable classes of misconduct. To this extent at least, there would appear to be some divergence from the approach embodied in Commonwealth law. Uniform legislative recognition of the *doli incapax* presumption in line with the Commonwealth approach has been advocated by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission (ALRC 1997, Recommendation 195):

> The principle should be applied consistently throughout Australia and be legislatively based. The legislation should require that to rebut the presumption the prosecution must prove that the child defendant knew that the criminal act for which he or she is charged was wrong at the time it was committed.

At present, there is little indication of a further move towards statutory uniformity on *doli incapax*—except possibly in New South Wales where the common law presumption is currently under review (NSW CLRD 1999). This is despite the fact that the Commonwealth's *Criminal Code Act 1995* is intended to provide a model (the "Model Criminal Code") for principles of criminal liability to be adopted throughout Australia (CLOC 1992).

Operation of the *Doli Incapax* Presumption

Several basic propositions have been recognised by the courts as governing the operation of *doli incapax*. The first is that evidence adduced to show that a child had sufficient appreciation of the wrongness of an act must be "strong and clear beyond all doubt and contradiction". The second is that such evidence must not consist merely of evidence of the acts amounting to the offence itself (Crofts 1998, p. 186). To these may be added the often-repeated requirement that the evidence must show the accused to have appreciated that the act in question was "seriously wrong, as opposed to something merely naughty or mischievous" (Price 1995; Crofts 1998).

While these may seem significant evidentiary obstacles, it has been observed that in attempting to rebut the presumption of *doli incapax* "the prosecution is allowed considerable evidentiary concessions whereby normally inadmissible, highly prejudicial material is deemed admissible" (Blazey-Ayoub 1996, p. 35). Often, this evidence takes the form of admissions by the accused during police interviews, notably including admissions in relation to earlier acts of misconduct (Fisse 1990, p. 476; Berry 1999, p. 19). Evidence of previous criminality is, of course, rarely admissible to prove an issue in a criminal trial. However, in relation to *doli incapax* such evidence is regularly admitted (Blazey-Ayoub 1996, p. 35).

Even where an accused makes no admissions showing a consciousness of wrongdoing, the prosecution may introduce evidence of surrounding circumstances from which such consciousness may be inferred. This may include evidence of attempts to run from police or to hide the facts. In more serious cases, expert psychiatric assessments of a child's mental development may be conducted (Bartholomew 1998; Crofts 1998, pp. 186–8; Turner 1994, pp. 735–6).

Proposals for Reform

Given that Australian jurisdictions have only recently arrived at a uniform minimum age for criminal responsibility (Table 1), further legislative reform of this element is unlikely. However, the age up to which young offenders are dealt with by the criminal justice system as juveniles has been the subject of recent attention. In the arrangement worked out between the Commonwealth and the Northern Territory to address criticisms of the latter's mandatory sentencing laws, this age has been raised in the Territory from 17 to 18. The remaining States in which the upper age is still 17 (Victoria and Queensland) have also been asked by the Commonwealth to review their juvenile justice laws (Howard & Burke 2000).

This leaves the *doli incapax* presumption operating between the ages of 10 and 14 as the main area of further possible reform. The presumption has been subjected to considerable criticism both by courts and legislators. In 1995 in Britain, for example, the House of Lords expressed some sympathy for arguments advanced in a lower Divisional Court that the presumption was illogical, outdated, and tended to produce inconsistent results (Crofts 1998, p. 189):

> The rule is said to be illogical because the presumption can be rebutted by proof that the child was of normal mental capacity for his age; this leads to the conclusion that every child is initially presumed not to be of normal mental capacity for his age, which is absurd.

Given the political dimensions of juvenile justice policy, however, the House of Lords deferred to Parliament to determine whether the common law presumption should remain part of English law. After much parliamentary debate it was abolished by statute some three years later (*Crime and Disorder Act 1998*, s. 34).

In Australia, while *doli incapax* still survives as part of the criminal law, various proposals for its reform have been advanced.

Lowering the age range during which doli incapax *applies—from under 14 to under 12 years*

Under this proposal, the *doli incapax* presumption should apply only up to the age of 12 rather than the current 14 years. The lower age of 12 is roughly in

line with the transition from primary to high school. Such a change in the application of *doli incapax* would have significant consequences as the bulk (around 85%) of children under 14 charged with criminal offences are aged 12–14 rather than 10–12 (NSW CLRD 1999, p. 8).

The reasoning behind this reform proposal is explained thus by the Senior Children's Magistrate of New South Wales, Stephen Scarlett (quoted in Doherty 2000; see also Dean 1999):

> It would seem obvious that children in the final stages of the 20th century are better educated and more sophisticated than their counterparts 200 years ago…A child of 12 in Australia has access to television, radio and the Internet, and has a far greater understanding of the world than a 12-year-old in rural Britain in 1769.

The president of the NSW Law Society has taken a contrary view (quoted in Doherty 2000): "Just because they are bombarded with electronic information [and] the Internet…doesn't mean they have any greater intellectual development".

Further, care must be taken not to equate a general capacity to discern right from wrong with the more rigorous legal test required to rebut the presumption of *doli incapax* (Law Society of New South Wales 2000):

> Whether this makes children more sophisticated or mature enough to know when their actions are very serious or gravely wrong—as opposed to simply knowing the difference between right and wrong—is far from clear.

The NSW Attorney-General's Department, in its review of the law on the age of criminal responsibility (NSW CLRD 1999), has also considered the following options in relation to the burden and onus of proof.

Shifting the burden of proof—from the prosecution to the defence

At present the burden of rebutting the *doli incapax* presumption rests with the prosecution. A proposal sometimes advanced is to shift the burden so that the accused be required to prove (on the balance of probabilities) that he or she did not appreciate the wrongness of the act in question (NSW CLRC, p. 6). What is striking about this proposal is that it appears to compromise the presumption of innocence which is said to constitute a "golden thread" running throughout the criminal law. In particular, it appears to require of child defendants who seek to advance a *doli incapax* argument that they dispense with the right to silence and tender evidence (such as psychological reports) in an attempt to prove a negative mental state—absence of an appreciation of serious wrongness.

Lowering the standard of proof—from the criminal to the civil standard

This proposal would leave the burden of proof in relation to *doli incapax* with the prosecution, but would reduce the standard of proof from the general criminal standard of proof "beyond reasonable doubt" to the civil standard of proof "on the balance of probabilities". While the difference between the two standards may appear elusive in practice, it is a matter of longstanding principle that the Crown must prove every element of the offence charged beyond reasonable doubt. To relax the standard in relation to a part of the prosecution's case threatens to dilute the standard in relation to other parts.

Placing an evidential burden on the accused—so that the issue of lack of criminal responsibility must be raised by the accused

This proposal was advanced by a 1990 review of Commonwealth criminal law undertaken by the Attorney-General's Department (NSW CLRD 1999, p. 7). As with self-defence, insanity and some other defences available to criminal defendants generally, the accused would be under an initial burden to raise the question of criminal capacity in relation to the offence charged. This puts the accused under an obligation to advance sufficient evidence for the court then to require the prosecution to rebut the *doli incapax* presumption so raised.

Restricting the offences to which doli incapax *applies—to those which are dealt with "according to law"*

This proposal would restrict the application of the *doli incapax* presumption to serious offences such as murder, manslaughter or armed robbery (NSW CLRD 1999, p. 7). At present, legislation in several Australian jurisdictions requires or allows trials of children on such charges to be heard in adult courts (such as District or Supreme Courts) rather than the Children's Court. The merits of this proposal lie in simplification of the judicial process for most proceedings against children, while still affording the protection which *doli incapax* has traditionally provided in the remaining, more serious cases.

Conclusion

The legislative uniformity recently achieved across Australian jurisdictions in relation to the minimum age of criminal responsibility is encouraging. Further uniformity is possible in relation to the operation (whether in statutory or common law form) of the *doli incapax* presumption, with Commonwealth legislation providing a model. Whether more radical reform or even abandonment of this mechanism is desirable in the longer term depends to a large extent on future assessments of the value of subjecting children and young people to the formal imposition of criminal liability and penalties.

Note

This paper is an expanded version of a submission to the recent review of the law on the age of criminal responsibility of children undertaken by the Criminal Law Review Division of the NSW Attorney-General's Department.

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Dr Gregor Urbas is a Research Analyst at the Australian Institute of Criminology

General Editor, Trends and Issues in Crime and Criminal Justice series:
Dr Adam Graycar, Director
Australian Institute of Criminology
GPO Box 2944
Canberra ACT 2601 Australia

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