Contemporary Comment

A Brighter Tomorrow: Raise the Age of Criminal Responsibility

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Abstract

A report released by Amnesty International in May 2015 highlights the alarming overrepresentation of Indigenous young people in detention in Australia. It calls on the Australian Commonwealth Government to make a number of legislative changes to address this issue, which the report argues are necessary to ensure Australia's compliance with its obligations under the United Nations *Convention on the Rights of the Child*. The foremost area in need of reform identified in the report is the low age of criminal responsibility in Australia. This note examines Amnesty International's arguments for an increase in the minimum age of criminal responsibility and agrees that the age should be raised to at least 12.

Keywords: age of criminal responsibility – *doli incapax* – youth justice – Indigenous young people – UN *Convention on the Rights of the Child*

Introduction

The Amnesty International report, 'A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia' released by in May 2015 brings attention to the national crisis that is the overrepresentation of Indigenous young people in detention in Australia. It finds that rates of detention have increased significantly since the Royal Commission into Aboriginal Deaths in Custody in 1991 and that Indigenous youth are now 26 times more likely to be in detention than non-Indigenous youth (Amnesty International 2015:5, referring to Australian Institute of Health and Welfare ('AIHW') 2014b). While the overall rate of young people in detention is relatively low (951 young people aged between 10 and 17 were in detention on an average day in 2012–13: AIHW 2014a) Amnesty International notes that the rate of overrepresentation is particularly bleak for younger Indigenous children. This cohort make up 'more than 60 percent of all 10-year-olds and 11-year-olds in detention in Australia in 2012–13' (Amnesty International 2015:5). To halt the rising rate of Indigenous youth in detention the report calls on the Australian Government to make a number of legislative changes to fulfill its obligations under the United Nations ('UN') *Convention on the Rights of the Child* ('CRC').

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This comment focuses on the first of those areas the report identifies as conflicting with the CRC: holding children criminally responsible from the age of ten. It briefly explains the situation across Australia in relation to the age of criminal responsibility, before assessing the arguments in favour of raising the minimum age and in favour of retaining the presumption of *doli incapax*. It will support the arguments made by Amnesty International that the age of criminal responsibility must be raised throughout Australia to at least 12. Alongside police practice and use of diversionary measures, the age of criminal responsibility is the main legal barrier to the criminal justice system; it is therefore a primary point at which the Indigenous youth can be kept out of this system.

Criminal jurisdiction in Australia

First, it is important to note that criminal law in Australia is mainly a matter for the states and territories, given that criminal law is not one of the powers awarded to the Commonwealth Government under the *Australian Constitution*. While acknowledging this, Amnesty International notes that, as the Commonwealth Government is a signatory to the CRC, it has ultimate responsibility for fulfilling obligations under the CRC throughout Australia (2015:5). On this basis, it calls on the Commonwealth Government to override state and territory laws that are incompatible with its international obligations under its external affairs jurisdiction in s 51(xxix) of the *Australian Constitution*. This is something the Commonwealth Government has done in the past — for instance, it passed the *Human Rights (Sexual Conduct) Act 1994* (Cth) to override provisions of the Tasmanian *Criminal Code*, which criminalised various consensual sexual acts between men in private. This followed the finding of the UN Human Rights Committee in *Toonen v Australia* that these provisions were in breach of Australia's obligations under the *International Covenant on Civil and Political Rights*.[1]

The current position on criminal responsibility in Australia?

Despite the fact that the age of criminal responsibility is a matter for each state and territory to determine, there is uniformity among all Australian jurisdictions in following the traditional common law approach of two age levels of criminal responsibility. Historically, up to the age of seven years there was an absolute — that is, irrebuttable — presumption that a child is incapable of forming a guilty mind (often called the 'minimum age of criminal responsibility').[2] Therefore, only civil law care and welfare measures can be used to address offending by those under the age of ten. From this age until the age of 14 there is a rebuttable presumption that a child is *doli incapax* (incapable of guilt). This presumption can be rebutted if the prosecution brings proof, alongside proof of all elements of an offence, that the child understood that what he or she did (or omitted to do) was seriously wrong as opposed to merely naughty (*R v BP* at [27]).[3] This requires that the child understood that the act (or

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1 In *Commonwealth v Tasmania* (1983) 158 CLR 1 the High Court found that the Commonwealth Government did have the power under *Australian Constitution* s 51(xxix) to legislate to comply with its international obligations and thus could override incompatible state laws (in this case passing the *World Heritage Properties Conservation Act 1983* (Cth) to comply with obligations under the UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*); see also *Victoria v Commonwealth* (1996) 187 CLR 416.

2 For a history of the criminal responsibility of children, see Crofts 2002.

3 There is some variation in the terminology in the traditional Code jurisdictions which refer to the capacity to know rather than actual knowledge: see *Criminal Code* (Qld) s 29(2); *Tasmanian Criminal Code* s 18(2); *Criminal Code* (WA) s 29, para 2.

omission) was wrong according to the ordinary standards of reasonable people (*R v M*; for further discussion see Crofts 2008).

While this upper conditional age level has remained stable throughout history, the traditional minimum age of criminal responsibility of seven has gradually been raised in all Australian jurisdictions to its current level of ten, with Tasmania and the Australian Capital Territory being the last to do so in 2000. These latter changes were made following Recommendation 194 of the Australian Law Reform Commission ('ALRC') in its 1997 report 'Seen and Heard'. Recommending ten as the minimum age of criminal responsibility, the ALRC noted that this was consistent with the standard in other common law countries and was the obvious choice given that most Australian jurisdictions had already set the minimum age at that level (ALRC 1997:[18.13],[18.16]). While acknowledging some difficulties with the rebuttable presumption of *doli incapax* for those aged ten but not yet 14, the ALRC also called on all jurisdictions that had not already done so to retain and anchor the presumption in legislation (1997:Recommendation 195). Despite this, the presumption remains a matter of common law in New South Wales, South Australia and Victoria.

There have been ongoing calls for changes to both these age levels in Australia for around two decades, ranging from support to increase the minimum age level to arguments in favour of lowering the conditional age level, reversing the presumption of *doli incapax* or changing the burden of proof to the balance of probabilities (see Crofts 2008; Urbas 2000 with further references). Despite this, no changes have been made to either age level since 2000. This may indicate that the question of what age is the right age to hold a young person accountable for criminal acts raises a vexed and controversial issue. There has been much more discussion and reform activity regarding diversionary methods for addressing offending by young people (see, for example, Richards 2011). Although measures such as warnings, cautions and youth justice conferencing provide an important alternative to prosecution, they do not prevent prosecution, and they can still have criminal justice consequences. Raising the age of criminal responsibility ensures that young people are kept out of the criminal justice system and that only civil law measures are used to address offending by those under that age level. It is also acknowledged that using civil law measures can mean that a young person is not provided the level of safeguards that are guaranteed in the criminal process. The following therefore examines the basis for Amnesty International's argument for reform before briefly discussing the likelihood of legislative change.

Raising the minimum age of criminal responsibility

Amnesty International calls on the Commonwealth Government to raise the minimum age of criminal responsibility to 12 in order to combat the rate of overrepresentation of Indigenous young people in detention (2015:5). In support of this call, it argues that holding a child criminally responsible from the age of ten is not compatible with Australia's obligations under the CRC. The CRC requires that States establish a minimum age 'below which children shall be presumed not to have the capacity to infringe penal law'. The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('Beijing Rules') explain this further in Rule 4.1: 'In those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.'

Neither the CRC nor the Beijing Rules determine an appropriate minimum age for criminal responsibility. However, the Commentary on Rule 4.1 does state that:

> If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

Despite not setting a minimum age level, the UN Committee on the Rights of the Child commented in 1997, in response to Australia's 1995 report on the measures that it had taken to recognise the rights enshrined in the CRC, that it considered the age of ten to be too low (1997:[29]). The UN Committee repeated this comment in its 'Concluding Observations: Australia' in 2005 and in 2012, again recommending that Australia '[c]onsider raising the minimum age of criminal responsibility to an internationally acceptable level' (2005:[74a]; see also 2012:[84(a)]).

By 2012, the UN Committee had reached a stage where it felt that given that there are wide differences in age levels across State parties, with some States 'having very low ages of 7 or 8 to the commendable high level of 14 or 16', it needed to give 'clear guidance and recommendations regarding the minimum age of criminal responsibility' (2007:[30]). The UN Committee was now willing to fix an international standard minimum age of criminal responsibility as called for in the Commentary on Rule 4.1, and concluded that an age level below 12 years is not internationally acceptable (2007:[32]). In making this statement the Committee emphasised that States should not lower the age level to 12; rather, they should see this as the absolute minimum and work towards higher age levels. A higher minimum age level of, for example, 14 or 16 was regarded to be important because this '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' (2007:[33]). This highlights the importance of raising the minimum age level so that only civil law educational and welfare measures can be used to address offending, rather than measures of the criminal justice system.

Raising the minimum age level to 12 would be the minimum increase necessary to bring Australia into line with both its obligations under the CRC and changes in other common law jurisdictions. While Canada has raised the minimum age level to 12, it has removed the rebuttable presumption of *doli incapax* for those aged 12 and 13. This in effect reduced the protection available to young people and went against the recommendations of the UN Committee. This contrasts with the approach taken in Ireland of raising the minimum age to 12, but retaining the rebuttable presumption of *doli incapax* from this age up to the age of 14.[4] This raises the question of whether it is enough to simply raise the minimum age of criminal responsibility or whether the presumption of *doli incapax* should also be retained beyond this minimum age level.

Retaining the presumption of *doli incapax*

The presumption of *doli incapax* has existed for centuries but in recent decades it has been subject to a degree of criticism both in Australia and overseas. In 1998, the presumption was abolished by the Labour Government in England and Wales following criticism by the House of Lords in *C v DPP* that, among other things, it was outdated to presume that children of the

[4] Scotland has taken the unusual step of not raising the age of criminal responsibility from eight, but instead increasing the age of criminal prosecution to 12. However, it should be noted that young people under 16 cannot be prosecuted except on instruction of the Lord Advocate. Thus prosecution of those under 16 years of age is very rare in Scotland and most young persons are dealt with through the civil Children's Hearing System (see Maher 2005).

age of ten and above could not tell the difference between right and wrong and that the presumption was standing in the way of appropriately dealing with young delinquents (for discussion and further references, see Crofts 2002). This criticism was fueled by a perception that youth crime was out of control, particularly following the media outcry and ensuing public panic over the killing of two-year-old James Bulger by two ten-year-old boys (see Freeman 1997).

In contrast, rather than criticise the presumption for being overly protective of the young, the ALRC noted in its 1997 report 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 (1997:[18.20]).

The UN Committee was also not convinced of the value of the presumption. In its Comment No 10 in 2007 it stated that '[t]he system of two minimum ages is often not only confusing, but leaves much to the discretion of the court/judge and may result in discriminatory practices' (2007:[30]).

While there are indeed some practical difficulties with the presumption, it is important to note that the presumption of *doli incapax* aligns with the fundamental principle of criminal law that 'unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him' (Hart 1968:181). A further advantage is, as the ALRC notes, that: 'the principle of *doli incapax* [is] a practical way of acknowledging young people's developing capacities. It allows for a gradual transition to full criminal responsibility' (1997:[18.20]) .

The purpose and effect of the presumption is to protect children between 10 and 14 from the full force of the criminal law. By making prosecution less straightforward, the presumption should ideally cause police and prosecutors to pause and consider whether there are more appropriate alternative diversionary responses that could be used, rather than pursuing prosecution. The challenge is therefore getting police, prosecutors and the courts to take the presumption seriously and to really investigate whether a child did understand the wrongfulness of what he or she did.

There is evidence that while younger children might generally be able to make moral judgments about right and wrong in an abstract criminal context, when put in a personal context those most likely to commit crime 'showed the lowest levels of decision competency about criminal acts, and higher levels of moral disengagement' (Lennings and Lennings 2014:794, referring to a study by Newton and Bussey 2012). Research is increasingly showing that young people 'are less pyschosocially mature than adults in ways that affect their decision-making in antisocial situations' (Cauffman and Steinberg 2000:759). As the Sentencing Advisory Council of Victoria notes, they are less able to see things in long-term perspective, look at things from other perspectives and less able to control impulses (2012:11, referring particularly to research of Scott and Steinberg 2008). Furthermore, research shows that the process of developing the capacities necessary for criminal responsibility does not take place at a consistent pace and there can be vast differences at the same biological age (see, for instance, Cauffman and Steinberg 2000). The presumption is, as Blackstone noted in the 18th century, an acknowledgment of this by providing that the 'capacity of doing ill, or contracting guilt, is not so much measured in years and days, as by the strength of the

delinquent's understanding and judgment' (1765-1769:V, 23). The presumption therefore allows the conviction of children who are developed enough to be held criminally responsible while protecting those who are not so developed. It is clear that there are children aged 12 and over who might not be sufficiently developed to be held criminally responsible. Therefore, unless the minimum age level is raised to the level at which it can be safely assumed that all children have the capacity to be criminally responsible (an unlikely prospect in the current political climate), it is important to retain the presumption of *doli incapax* to provide at least conditional protection for 12- and 13-year-olds.

Conclusion

The age of criminal responsibility is the main legal hurdle to young people entering the criminal justice system — it is therefore vital that it is not set too low. It is well known that contact with the criminal justice system at a young age means that young people are 'more likely to offend for longer, more frequently and go on to receive a custodial sentence' (New South Wales Government 2015). This contact increases social exclusion and can have a high social cost for the offender, particularly for Indigenous youth (AIHW 2013:4, citing Morgan and Louis 2010). These proven negative impacts combined with the alarming rate of overrepresentation of Indigenous youth in detention should be all the evidence that a government needs to be persuaded that the minimum age of criminal responsibility must be raised. The question is: will this call by Amnesty International spur the Commonwealth Government to act and legislate to raise the minimum age of criminal responsibility?

Until now, previous Australian governments have not taken notice of the repeated recommendations of the UN Committee to raise the age of criminal responsibility. While the Commonwealth Government has in the past stepped in to override state laws which were incompatible with its obligations under international conventions, it is highly unlikely that the present Government will act. It is abundantly evident that the Abbott Government has a particular disdain for human rights bodies. This is shown by the Prime Minister's controversial statement that Australians are 'sick of being lectured to by the United Nations' (see Cox 2015) as well as the Commonwealth Government's ongoing attack on the President of the Human Rights Commission, Gillian Triggs (see Cavill 2015). In this climate, it might therefore be more fruitful to seek to persuade individual states and territories to raise the minimum age levels, starting with Western Australia and the Northern Territory, which have the highest rate of overrepresentation of Indigenous young people in custody.

However, even if state and territories could be convinced to raise the minimum age level, it is unlikely that they would feel compelled to raise the age level above 12. Those common law jurisdictions that have raised the minimum age level (Canada and Ireland) have only raised it to the minimum internationally acceptable level of 12, while others (England and Wales, New Zealand, Hong Kong) still adhere to the unacceptably low level of ten. If a minimum age level of 12 is all that can be achieved in the current punitive climate, it is important that the protection currently provided, however weakly, by the presumption of *doli incapax* (or its legislative equivalents) is retained for young people of this age until the age of 14. This should be seen as a temporary step on a journey to a minimum age level of at least 14, but preferably 16. This is in line with the age at which young people take on other social rights and responsibilities as commented in the Beijing Rules (Commentary on Rule 4.1) and it would lead to improve consistency in the conceptualisation of young people's rights and responsibilities across civil and criminal law.

Cases

C v DPP [1996] AC 1

Commonwealth v Tasmania (1983) 158 CLR 1

R v BP [2006] NSWCCA 172 (1 June 2006)

R v M (1977) 16 SASR 589

Toonen v Australia, United Nations Human Rights Committee, Communication No 488/1992 (31 March 1994), UN Doc CCPR/C/50/D/488 (1992)

Victoria v Commonwealth (1996) 187 CLR 416

Legislation

Commonwealth of Australia Constitution Act 1900 (Cth) ('*Australian Constitution*')

Criminal Code Act 1899 (Qld) Sch 1 (*Criminal Code*)

Criminal Code Act 1924 (Tas) Sch 1 (*Criminal Code*)

Criminal Code Act Compilation Act 1913 (WA) Sch 1 (*Criminal Code*)

Human Rights (Sexual Conduct) Act 1994 (Cth)

World Heritage Properties Conservation Act 1983 (Cth)

Conventions

Convention Concerning the Protection of the World Cultural and Natural Heritage, UNESCO General Conference, 17th sess (16 November 1972)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

United Nations Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990

United Nations Standard Minimum Rules for the Administration of Juvenile Justice, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/Res/40/33 (29 November 1985)

References

Amnesty International (2015) *A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia* <http://www.amnesty.org.au/images/uploads/aus/A_brighter_future_National_report.pdf>

Australian Institute of Health and Welfare (2013) 'Diverting Indigenous Offenders from the Criminal Justice System', Resource Sheet No 24 produced for the Closing the Gap Clearinghouse <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545614>

Australian Institute of Health and Welfare ('AIHW') (2014a) 'Youth Detention Population in Australia', Juvenile Justice Series No 16 <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675>

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

Australian Law Reform Commission (1997) *Seen and Heard: Priority for Children in the Legal Process*, ALRC Report 84

Cauffman E and Steinberg L (2000) '(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults', *Behavioral Sciences and the Law*, 18, 741–60

Cavill A (2015) 'Government Piles Pressure on Human Rights Chief', *SBS News* (online), 9 June 2015 <http://www.sbs.com.au/news/article/2015/06/09/government-piles-pressure-human-rights-chief>

Cox L (2015) 'Tony Abbott: Australians "Sick of Being Lectured to" by United Nations, after Report Finds Anti-torture Breach', *The Sydney Morning Herald* (online), 10 March 2015 <http://www.smh.com.au/federal-politics/political-news/tony-abbott-australians-sick-of-being-lectured-to-by-united-nations-after-report-finds-antitorture-breach-20150309-13z3j0.html>

Crofts T (2002) *The Criminal Responsibility of Children and Young People: A Comparison of English and German Law*, Ashgate

Crofts T (2008) 'The Criminal Responsibility of Children' in G Monahan and L Young, *Children and the Law in Australia*, LexisNexis Butterworths, 167–86

Freeman M (1997) 'The James Bulger Tragedy: Childish Innocence and the Construction of Guilt' in A McGillivary (ed), *Governing Childhood*, Ashgate, 115–34

Lennings N and Lennings C (2014) 'Assessing Serious Harm under the Doctrine of Doli Incapax: A Case Study', *Psychiatry, Psychology and Law*, 21(5), 791–800

Maher G (2005) 'Age and Criminal Responsibility', *Ohio State Journal of Criminal Law*, 2, 493–512

Morgan A and Louis E (2010) *Evaluation of the Queensland Murri Court: Final Report*, Technical and Background Paper No 39, Australian Institute of Criminology <http://www.aic.gov.au/publications/current%20series/tbp/21-40/tbp039.html>

New South Wales Government (2015), *Youth on Track and the Criminal Justice System* <http://www.youthontrack.justice.nsw.gov.au/Pages/yot/about_us/yot_cjs.aspx>

Newton NC and Bussey K (2012) 'The Age of Reason: An Examination of Psychosocial Factors Involved in Delinquent Behaviour', *Legal and Criminological Psychology*, 17, 75–88

Richards K (2011) 'What Makes Juvenile Offenders Different from Adult Offenders?', *Trends and Issues in Crime and Criminal Justice*, No 409, Australian Institute of Criminology

Scott E and Steinberg L (2008) *Rethinking Juvenile Justice*, Harvard University Press

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

United Nations Committee on the Rights of the Child (1997) *Concluding Observations of the Committee on the Rights of the Child: Australia*, 16th sess, UN Doc CRC/C/15/Add.79 (21 October 1997)

United Nations Committee on the Rights of the Child (2005) *Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2005)

United Nations Committee on the Rights of the Child (2007) *General Comment No 10 (2007): Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007)

United Nations Committee on the Rights of the Child (2012) *Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012)

Urbas G (2000) 'The Age of Criminal Responsibility', *Trends and Issues in Crime and Criminal Justice*, No 181, Australian Institute of Criminology