Will Australia Raise the Minimum Age of Criminal Responsibility?

Thomas Crofts*

For many decades there have been calls for an increase in the minimum age of criminal responsibility (MACR) in Australia and in other common law jurisdictions. Despite this the State and Territory governments have largely been resilient to making any change. Such reluctance may, however, be set to change in Australia with the Government of the Northern Territory endorsing 'in principle' an increase in the MACR in the Northern Territory. This article examines the likelihood of the MACR being raised in the Northern Territory and theimpact this may have on the rest of Australia. It also considers what such an increase would mean for the rebuttable presumption of doli incapax which currently applies from the age of 10 until a child's 14th birthday. This article argues that a higher minimum age level of criminal responsibility than 12 would be preferable but that this is a good step that will put the Northern Territory in line with other common law countries which have already made this change. It will also increase pressure on other Australian States and Territories and other countries which follow the traditional common law approach to raise their MACR. Finally, it argues that if the MACR is raised only to 12 the presumption of doli incapax should be retained for those aged 12 and 13.

INTRODUCTION

The recent release of the Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory (Royal Commission)[1] immediately prompted the Government of the Northern Territory to support 'in principle' raising the minimum age of criminal responsibility (MACR) in the Northern Territory to 12 years old.[2] The Royal Commission was set up only days after the airing of video clips on *ABC Four Corners* in July 2016 exposed the cruel treatment of young people in detention in the Northern Territory.[3] As the Royal Commission noted, these images shocked Australia and raised questions about how children could be treated this way by adults charged with looking after them.[4] The ongoing concern about the treatment of young people in the criminal justice system also led the Commonwealth Attorney-General, Christian Porter, to establish a 12-month investigation into raising the MACR.[5] This investigation will involve discussion among the State and Territory Attorney-Generals.

* Professor of Criminal Law, The University of Sydney Law School, The University of Sydney.

[1] Royal Commission into the Protection and Detention of Children in the Northern Territory, *Report* <https://childdetentionnt.royalcommission.gov.au/Pages/Report.aspx>.

[2] Human Rights Law Centre, *Northern Territory Set to Be the First Government in Australia to Raise the Age of Criminal Responsibility* (1 March 2018) <https://www.hrlc.org.au/news/2018/3/1/nt-to-be-the-first-government-to-raise-age-of-criminal-responsibility>; Law Council of Australia, *NT Gov urged to act immediately to raise age of criminal responsibility, other States should follow* (2 March 2018) <https://www.lawcouncil.asn.au/media/media-releases/nt-gov-urged-to-act-immediately-to-raise-age-of-criminal-responsibility-other-states-should-follow>.

[3] Australian Broadcasting Corporation, "Australia's Shame", *Four Corners*, 26 July 2016 <https://www.abc.net.au/4corners/australias-shame-promo/7649462>.

[4] Australian Broadcasting Corporation, n 3. For a discussion of the Australian media coverage of this, see K Fitz-Gibbon, "The Treatment of Australian Children in Detention: A Human Rights Law Analysis of Media Coverage in the Wake of Abuses at the Don Dale Detention Centre" (2018) 41 *University of New South Wales Law Journal* (forthcoming).

[5] "Calls to Raise Age of Criminal Responsibility to 16", *news.com.au*, 26 November 2018 <https://www.news.com.au/national/crime/calls-to-raise-age-of-criminal-responsibility-to-16/news-story/0c51219b6d0c5f57c27541dfde1dfc06>.

This article explores what lies behind this pledge to increase the MACR in the Northern Territory and what this might mean for the other Australian jurisdictions, especially in light of the recent announcement by the Commonwealth Attorney-General. To give context to this discussion, this article begins by examining the changes made throughout history to the MACR in Australia before explaining the current legal position taken in all Australian jurisdictions. The article then reviews the arguments put forward for increasing the MACR from the current age of 10 years old. This is followed by discussion of what such an increase would mean for the rebuttable presumption of *doli incapax* which currently applies from the age of 10 until a child's 14th birthday. Finally, the article discusses the prompt for change, the likelihood of change, and what such a change in the Northern Territory may mean for the rest of Australia and other countries influenced by common law.

This article will argue that raising the minimum age level of criminal responsibility from its current level of 10 to 14 or 16 years of age would be preferable, but that an increase to 12 years of age would be a good step that will put the Northern Territory in line with other common law countries which have already made this change (such as Canada,[6] Ireland,[7] Uganda[8] and Scotland[9]). This would then place pressure on other Australian States and Territories and other common law countries which have a MACR of 10 (such as England and Wales,[10] Hong Kong,[11] New Zealand,[12] South Africa,[13] etc) or lower (Singapore[14]) to raise the MACR in those jurisdictions. Finally, it will also argue that if the MACR is raised only to 12 years then, as recommended in the Royal Commission Report, the presumption of *doli incapax* should be retained at least for those aged 12 and 13 years old.

Background

Age levels have been set from the earliest times to protect children from the full force of the criminal law. Protection takes the form of two age levels: a minimum age under which a child is absolutely presumed incapable of criminal responsibility (MACR) and a higher age level during which there is a rebuttable presumption that they lack such capacity (the so-called presumption of *doli incapax*). The MACR was traditionally set in common law at 7, apparently around the time that Roman Law began to

[6] *Criminal Code of Canada*, s 13.

[7] *Criminal Justice Act 2006* (Ireland) s 52(1). However, a child under 12 but aged 10 or above can be charged with murder, manslaughter or rape (s 52(2)). For prosecutions of children under 14 the permission of the DPP is required, s 52(4).

[8] *Children Act* (Uganda) s 88.

[9] Scotland has a MACR of eight years (*Criminal Procedure (Scotland) Act 1995* (Scotland) s 41) but a minimum age for criminal prosecution of 12 years, see *Criminal Justice and Licensing (Scotland) Act 2010* (Scotland) which inserted s 41A into the *Criminal Procedure (Scotland) Act 1995*, to prohibit the prosecution of any child under the age of 12. Currently there is a Bill before the Scottish Parliament which contains provision to increase the MACR to 12 years, *Age of Criminal Responsibility (Scotland) Bill 2018* (Scotland). There has been some discussion and support for a higher MACR of 14 or 16 in Scotland, see Equalities and Human Rights Committee, *Age of Criminal Responsibility (Scotland) Bill Stage 1 Report*, 5th Report, SP Paper No 411 (2018) Session 5 <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2018/11/7/Age-of-Criminal-Responsibility--Scotland--Bill-Stage-1-Report/EHRiCS052018R05.pdf.

[10] *Children and Young Persons Act 1933* (England and Wales) s 50, as amended by the *Children and Young Persons Act 1963* (England and Wales) s 16(1).

[11] *Juvenile Offenders Ordinance* (Hong Kong) Cap 226, s 3.

[12] In New Zealand the MACR is 10 years (*Crimes Act 1961* (NZ) s 21(1)), and between 10 and 14 a child can only be convicted upon proof that "he or she knew either that the act or omission was wrong or that it was contrary to law": s 22(1). However, a child can only be prosecuted from the age of 10 years for murder or manslaughter and may only be prosecuted from the age of 12 years if the offence is one punishable by life imprisonment or at least 14 years, unless they are a repeat offender (defined in s 272(1A) and (1B)) in which case they can be prosecuted for offences with a maximum of 10 years or more, *Oranga Tamariki Act 1989, Children's and Young Person's Well-being Act 1989* (NZ) s 272(1).

[13] *Child Justice Act 75 of 2008* (South Africa) s 11(1).

[14] The MACR in Singapore is 7, Penal Code, s 82. There is currently a proposal from the Penal Code Review Committee that the MACR be raised to 10 <https://www.straitstimes.com/singapore/courts-crime/penal-code-review-committee-minimum-age-of-criminal-responsibility-may-be>. The Committee notes that a MACR of 7 is out of line with international standards. See also <https://www.straitstimes.com/singapore/experts-back-raising-minimum-age-of-criminal-responsibility>.

influence common law, and 7 was the age level at the time Australia received common law.[15] Gradually the MACR was raised throughout all Australian jurisdictions to the age of 10[16] from the late 1970s to early 1990s (Queensland in 1976,[17] New South Wales in 1987,[18] Western Australia in 1988,[19] Victoria in 1989[20] and South Australia in 1993[21]). Tasmania and the Australian Capital Territory were the last to raise the MACR to 10 years old in 2000.[22] This was in response to the recommendation in the 1997 Australian Law Reform Commission (ALRC) and the Equal Opportunity Commission (EOC) report "Seen and Heard", which called on all Australian jurisdictions to agree on a uniform age of criminal responsibility. The report found that it was wrong that a child could be liable to be charged in one State but not another for the same behaviour only because of his or her age.[23] The ALRC recommended a MACR of 10 years old because most Australian jurisdictions had already set the minimum at that level and this was consistent with the age in other common law countries.[24]

The presumption of *doli incapax* applies from where the MACR ends until the age of 14 years.[25] While the ALRC recommended in 1997 that the presumption should be retained and embedded in statute in all Australian jurisdictions[26] it remains a matter of common law in New South Wales, South Australia and Victoria.[27] In order to prosecute children in this age range the prosecution must bring "very strong and pregnant evidence … to make it appear he understood what he did".[28] This means that the presumption is not something that needs to be raised nor proven by the defence. The prosecution must bring evidence to

[15] See T Crofts, "The Common Law Influence over the Age of Criminal Responsibility – Australia" (2018) 67 *Northern Ireland Legal Quarterly* 283, 288; Nigel Walker, "Childhood and Madness: History and Theory" in A Morris and H Giller (eds), *Providing Criminal Justice for Children*, 19 - 35 (Edwards Arnold, 1983) 23.

[16] Some jurisdictions did raise the MACR from 7 to 8 in the early/mid 20th century, for instance, England and Wales in 1933 (*Children and Young Persons Act 1933* (England and Wales) s 50), New South Wales in 1939 (*Child Welfare Act 1939* (NSW) s 126), South Australia in 1941 (*Juvenile Courts Act 1941* (SA) s 23) and Victoria in 1949 (*Crimes Act 1949* (Vic) s 9).

[17] *Criminal Code Amendment Act 1976* (Qld) s 19. In England and Wales the age level was raised from 8 to 10 in 1963, see *Children and Young Persons Act 1933* (England and Wales) s 50 as amended by *Children and Young Persons Act 1963* (England and Wales) s 16(1). There was a provision in the *Children and Young Persons Act 1969* (England and Wales) s 4 which would have raised the age at which a child could be prosecuted to 14 for all offences other than homicide. However, this provision was never implemented and was later repealed.

[18] *Children (Criminal Proceedings) Act 1987* (NSW) s 5.

[19] *Criminal Code* (WA) s 29 para 1, as amended by the *Acts Amendment (Children's Court) Act 1988* (WA) s 44.

[20] *Children and Young Persons Act 1989* (Vic) s 127.

[21] *Young Offenders Act 1993* (SA) s 5.

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

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

[24] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, n 23.

[25] It was determinately fixed at this level in the 17th century, see T Crofts, *The Criminal Responsibility of Children and Young Persons* (Ashgate, 2002) 8–11. It has always applied from the MACR until the age of 14 in all Australian jurisdictions, aside from Queensland where there was an increase to 15 in 1976, *Criminal Code Amendment Act 1976* (Qld) s 19. This was reduced to 14 in 1997, *Criminal Law Amendment Act 1997* (Qld) s 12. In England and Wales the presumption was abolished through the *Crime and Disorder Act 1998* (England and Wales). This means that that in England and Wales now only has a MACR of 10. For discussion of whether the Act merely abolished the presumption of *doli incapax* but left in place a common law defence of *doli incapax*, see N Walker "The End of an Old Song" (1999) 149 *New Law Journal* 64; *Crown Prosecution Service v P* [2008] 1 WLR 1005; [2007] EWHC 946 (Admin); *R v T* [2008] 3 WLR 923; [2008] EWCA Crim 815; N Wortley, "Hello Doli… Or Is It Goodbye?" [2007] *Journal of Mental Health Law* 234; T Crofts, "Taking the Age of Criminal Responsibility Seriously in England" (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 267.

[26] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, n 23, Recommendation 195.

[27] The presumption is legislatively embedded in all the "code" criminal jurisdictions of Australia: *Criminal Code 2002* (ACT) s 26; *Criminal Code Act 1995* (Cth) s 7.2; *Criminal Code Act* (NT) s 38(2); *Criminal Code* (Qld) s 29(2); *Criminal Code* (Tas) s 18(2); *Criminal Code* (WA) s 29 para 2.

[28] M Hale, *The History of the Pleas of the Crown* (Professional Books Ltd, 1736, reprint, 1971) Vol 1, 27. See also *C (A Minor) v DPP* [1996] AC 1, 38; *RP v The Queen* (2016) 259 CLR 641, [9]; [2016] HCA 53.

rebut the presumption beyond reasonable doubt in every case.[29] Furthermore, it is clear that the required understanding "must be proved by express evidence, and cannot in any case be presumed from the mere commission of the act".[30] This approach was confirmed by the High Court in *RP v The Queen* where the plurality stated that: "No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts".[31] In *R v M*[32] Bray CJ explained that this requires proof that the child knew that the act was wrong according to the ordinary standards of reasonable people.[33] The standard formula now is to ask for proof that the child "knew it was seriously wrong, as distinct from an act of mere naughtiness or mischief".[34] Recently, the High Court reaffirmed this formulation in *RP v The Queen*,[35] noting that, aside from establishing that the child knew that the offence was seriously wrong in a moral sense, there was "the further dimension of proof of knowledge of serious wrongness as distinct from mere naughtiness".[36]

Recent Debate

There is uniformity across Australia in setting the MACR at the age of 10 years and the presumption of *doli incapax* (or legislative equivalents) applies from the age of 10 years until a child reaches their 14th birthday. While there has always been a degree of debate about whether to change the age of criminal responsibility, calls for change have intensified in recent years. Particularly within the last five years, there have been demands for the MACR to be raised to the age of 12 years or higher throughout Australia. Such calls have come from a broad range of sources, including Amnesty International,[37] Jesuit Social Services,[38] academics,[39] lawyers,[40] the National Children's Commissioner,[41] the former Attorney-General

[29] Despite this there is some evidence that this is not always the approach taken. O'Brien and Fitz-Gibbon have found that "a view among legal stakeholders that, in the state of Victoria, *doli incapax* is not engaged for all children in a manner consistent with the common law. Rather, the onus for doli incapax now falls, informally, to the defence, who must initiate (and bear the cost of) psychological assessments of a child's capacity in instances where they think this is appropriate": W O'Brien and K Fitz-Gibbon, "The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform" (2017) 17 *Youth Justice* 134, 140–143.

[30] Erle J in *Smith* (1845) 9 JP 682. In Australia a different view was expressed in some judgments: in *R v ALH* (2003) 6 VR 276; [2003] VSCA 129 Callaway JA took the view that authorities taking this approach "are wrong in principle and should not be followed". Similarly, Cummins AJA in the same case felt that, provided adult judgments are not attributed to children, "there is no reason in logic or experience why the proof of the act charged is not capable of proving requisite knowledge".

[31] *RP v The Queen* (2016) 259 CLR 641, [9], [38] (Gageler J agreeing); [2016] HCA 53.

[32] *R v M* (1977) 16 SASR 589.

[33] *Stapleton v The Queen* (1952) 86 CLR 358.

[34] *BP v The Queen* [2006] NSWCCA 172, [27]; see also *RP v The Queen* (2016) 259 CLR 641; [2016] HCA 53; *R v JA* (2007) 1 ACTLR 126, 174 A Crim R 151; [2007] ACTSC 51; *R v ALH* (2003) 6 VR 276; [2003] VSCA 129; *R v M* (1977) 16 SASR 589.

[35] *RP v The Queen* (2016) 259 CLR 641; [2016] HCA 53. For more discussion see T Crofts, "Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of 'Doli Incapax'" (2018) 40 *Sydney Law Review* 339.

[36] *RP v The Queen* (2016) 259 CLR 641, [11]; [2016] HCA 53.

[37] Amnesty International, *A Brighter Tomorrow: Keeping Indigenous Kids in the Community and Out of Detention in Australia* (2015) <https://www.amnesty.org.au/wp-content/uploads/2016/02/A_brighter_future_National_report.pdf>. See also Amnesty International, *'Heads Held High' Keeping Queensland Kids Out of Detention, Strong in Culture and Community* (2016) <https://www.amnesty.org.au/report-heads-held-high/>.

[38] Jesuit Social Services, *Too Much Too Young: Raise the Age of Criminal Responsibility to 12* (2015) <http://jss.org.au/wp-content/uploads/2016/01/Too_much_too_young_-_Raise_the_age_of_criminal_responsibility_to_12.pdf>. See also Jesuit Social Services, *Open Letter 20.11.2017* <http://jss.org.au/wp-content/uploads/2017/11/RAISE-THE-AGE-open-letter.pdf>.

[39] See, for instance, T. Crofts, "A Brighter Tomorrow: Raise the Age of Criminal Responsibility" (2015) 27 *Current Issues in Criminal Justice* 123; O'Brien and Fitz-Gibbon, n 29; C Cunneen, B Goldson and S Russell, "Juvenile Justice, Young People and Human Rights in Australia" (2016) 28 *Current Issues in Criminal Justice* 179.

[40] See, for instance, Aboriginal Legal Service ACT <https://www.canberratimes.com.au/national/act/aboriginal-legal-group-lobbies-to-raise-age-of-criminal-responsibility-20180531-p4zipv.html>. See also submissions made to the roundtables held by the National Children's Commissioner <https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2016.pdf>.

[41] National Children's Commissioner, n 40.

of the Australian Capital Territory,[42] the ACT Human Rights Commissioner,[43] the Queensland Family & Child Commission[44] and the Royal Commission.[45] Very recently, some of those who had previously campaigned for an increase in the MACR to 12 are now demanding an increase to 14[46] or even 16.[47] There have also been arguments about the need for reform to the rebuttable presumption of *doli incapax*, some claiming that it is over-protective while others claim that it is under-protective of young people.[48] Arguments for changes to the rebuttable presumption have been less frequently made because, to an extent, its fate tends to be linked to arguments about changes to the MACR. In some common law jurisdictions where the MACR has been raised the presumption of *doli incapax* has been abolished.[49]

MACR

Many of the arguments supporting an increase in the MACR were recounted in the Royal Commission Report. The following examines these arguments, including recent neuroscience research, findings about neurodevelopmental disability, concern about the harms caused by early contact with the criminal justice system, the need to combat indigenous over-representation and the desirability of complying with international obligations.

Neuroscience

The Royal Commission pointed out that: "Recent neurobiological research has prompted a reassessment of how recognition of developmental immaturity should affect the way society treats young offenders, particularly in determining the age at which criminal responsibility should be imposed".[50] It therefore finds that increasing the MACR to 12 would "reflect more recent scientific evidence about the developing brain of children and young people, their limited capacity for reflection before action, and their overall immaturity".[51] Research into neuroscience is helping to explain children's capacity to understand the wrongfulness of behaviour and to control themselves at the time and in the circumstances of the commission of an offence. It is now well established that children and young people "are less pyschosocially mature than adults in ways that affect their decision-making in antisocial situations".[52] They are in a period of neurodevelopmental immaturity where they are prone to impulsive, sensation-seeking behaviour,

[42] F O'Mallon, "Criminal Age Reform Possible within Barr's Term: Ex-AG", *The Canberra Times*, 16 June 2018 <https://www.canberratimes.com.au/politics/act/criminal-age-reform-possible-within-barrs-term-ex-ag-20180614-p4zld0.html>.

[43] F O'Mallon, "Calls for Canberra's Criminal Age of Responsibility to Lifted to 12 Years of Age", *The Canberra Times*, 9 December 2017 <https://www.canberratimes.com.au/national/act/calls-for-canberras-criminal-age-of-responsibility-to-lifted-to-12-years-of-age-20171208-h01nvb.html>.

[44] Queensland Family & Child Commission, Queensland Government, *The Age of Criminal Responsibility in Queensland* (2017) <https://www.qfcc.qld.gov.au/sites/default/files/For%20professionals/policy/minimum-age-criminal-responsibility.pdf>.

[45] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1.

[46] See Jesuit Social Services, n 38. It should be noted that this open letter was signed by a broad range of legal and social services.

[47] Today Show, "Calls to Raise Age of Criminal Responsibility to 16", *news.com.au*, 26 November 2018 <https://www.news.com.au/national/crime/calls-to-raise-age-of-criminal-responsibility-to-16/news-story/0c51219b6d0c5f57c27541dfde1dfc06>.

[48] See, for instance, Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, n 23, [18.19], more recently, see in *R v GW* (2015) 20 DCLR(NSW) 236, [41]–[46] (District Court Judge Lerve); [2015] NSWDC 52.

[49] For instance *Criminal Code of Canada*, s 13; *Criminal Justice Act 2006* (Ireland) s 52(1); *Children Act* (Uganda) s 88.

[50] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 134.

[51] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 28.

[52] E Cauffman and L Steinberg, "(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults" (2000) 18 *Behavioral Sciences & the Law* 741, 759. See also, eg, C Fried and N Reppucci, "Criminal Decision Making: The Development of Adolescent Judgment, Criminal Responsibility, and Culpability" (2001) 25 *Law and Human Behavior* 45; L Steinberg and E Scott, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty" (2003) 58 *American Psychologist* 1009; K Monahan, L Steinberg and E Cauffman, "Affiliation with Antisocial Peers, Susceptibility to Peer Influence, and Antisocial Behavior During the Transition to Adulthood" (2009) 45 *Developmental Psychology* 1520.

with an underdeveloped capacity to gauge the consequences of actions.[53] As a report by the Sentencing Advisory Council of Victoria notes:

> The frontal lobe, which governs reasoning, planning and organisation, is the last part of the brain to develop. This is likely to contribute to adolescents' lack of impulse control, although their attraction to risk and the high value they place on the immediate rewards flowing from risky behaviour, as well as their heavy "discounting" of the future costs of this behaviour, also contribute. Adolescents are very vulnerable to peer pressure (which in turn can strongly affect their risk-taking behaviour), in part due to the importance they place on peers and in part due to neurological and hormonal changes.[54]

There is some truth in claims that younger children might generally be able to make moral judgments about right and wrong in an abstract context. For instance, a study by Wagland and Bussey suggests that even from the age of 8 children may be as capable "of appreciating the wrongfulness of criminal conduct and differentially evaluating it from mischievous conduct" as older age groups, including 12 year olds, 16 year olds and adults.[55] However, other research finds that while young people may "have roughly the same ability as adults to employ logical reasoning in making decisions by early to mid adolescence, adolescents have far less experience using these skills".[56] More recent research confirms that even though children at a young age may have the capacity to make moral judgments about right and wrong in an abstract context they may lack this capacity in the concrete context of the commission of the act. Indeed, those children who were most at risk of committing offences were often found to lack the capacity to use their knowledge to regulate their behaviour.[57] This study by Newton and Bussey found that:

> [E]ven though children and adolescents may possess this knowledge [of right and wrong] at younger ages they can be hindered from making intelligent decisions through the influence of psychosocial factors involved in criminal decision making. That is, developmental differences on psychosocial factors such as self-efficacy beliefs can influence children to make poor judgments in relation to delinquent behavior and undermine their knowledge of right and wrong.[58]

Neurodevelopment Disability

Related to the above arguments are findings from recent research which shows that undiagnosed neurodevelopmental disabilities may well contribute to the very behaviours that lead young people to commit crime.[59] The Royal Commission pointed to a report by the Office of the Children's Commission for England in 2012 "which revealed considerably higher rates of neurodevelopmental disorders among young people in custody as compared to young people in the general population".[60] The report found that: "Several factors related to neurodisability are likely to increase a child or young person's risk of offending, including factors that may contribute to offending behaviour, such as impulsivity,

---

[53] The Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (2012) 201 <https://www.centreforsocialjustice.org.uk/library/rules-engagement-changing-heart-youth-justice>. Furthermore, it has been found that child abuse or neglect can "impair brain development leading to anxiety, impulsivity, poor affect regulation, hyperactivity, poorer problem-solving and impoverished capacity for empathy" at 202.

[54] Sentencing Advisory Council Victoria, *Sentencing Children and Young People in Victoria* (2012) <https://www.sentencingcouncil.vic.gov.au/publications/sentencing-children-and-young-people-victoria>.

[55] P Wagland and K Bussey, "Appreciating the Wrongfulness of Criminal Conduct: Implications for the Age of Criminal Responsibility" (2017) 22 *Legal and Criminological Psychology* 130, 143.

[56] Scott and Steinberg cited in Sentencing Advisory Council Victoria, n 54.

[57] N Newton and K Bussey, "The Age of Reason: An Examination of Psychosocial Factors Involved in Delinquent Behaviour" (2012) 17 *Legal and Criminological Psychology*, 75.

[58] Newton and Bussey, n 57, 85.

[59] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 134. For a discussion of these factors see B Midson, "Risky Business: Developmental Neuroscience and the Culpability of Young Killers" (2012) 19 *Psychiatry, Psychology and Law*, 692.

[60] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 135. Referring to Annexure 2 to Statement of Muriel Bamblett, Office of the Children's Commissioner (United Kingdom), Nobody Made the Connection: The Prevalence of Neurodisability in Young People who Offend, October 2012, tendered 12 October 2016, 12.

cognitive impairment, alienation and poor emotional regulation".[61] Other risk factors associated with neurodisability include "poor educational attainment, delinquency and illicit drug use".[62] The Royal Commission felt convinced that an investigation of children in custody in Australia would find similar results, especially, in relation to Fetal Alcohol Syndrome.[63] A particular concern noted by the Royal Commission in this context is that the rate of developmental vulnerability in Aboriginal children was twice that of non-Aboriginal children.[64] Similarly, research by Baldry et al finds that developmental and cognitive disabilities are more prevalent in the juvenile justice sector than the general population.[65] In line with other research it also finds that if these issues are not addressed at an early stage they can become exacerbated.[66]

Research by Cunneen et al argues that there is evidence to support the proposition that raising the age of criminal responsibility has the potential to "reduce the likelihood of life-course interaction with the criminal justice system".[67] The Royal Commission report similarly found that it was essential to recognise and treat neurodevelopmental disorders when children are young in order to divert them "from a potential trajectory into the youth justice system".[68] Raising the MACR to at least 12 would ensure that the youngest, most vulnerable children could not be drawn into the criminal justice system, which could exacerbate their problems. Instead, such children could be diverted to more appropriate social and welfare services. Such a change would go alongside the recommendation that the rebuttable presumption of *doli incapax* continues to apply for children age 12 to 14 and the recommendation that children under 14 should not be detained in detention or held on remand.[69] These recommendations are not based on a view that there may be no need to intervene when children get into trouble with the law but rather that any response should focus "wholly around their family life and social network in the community"[70] and should occur outside the criminal justice system.

Harms Associated with the Criminal Justice System

While the practices, procedures and measures of the juvenile justice system are designed to promote the welfare of young people, the system is still a criminal justice system with all the burdens, stigma and consequences that this entails. . It is now well documented that negative impacts flow from early contact with the criminal justice system, such as entangled within that system.[71] Research shows that children who come into contact with the criminal justice system are less likely to complete their school education, undertake further education or training, or gain employment, and they are more likely than other children to become chronic adult offenders.[72] For this reason the Royal Commission argued that: "To achieve

[61] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 135.

[62] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 135.

[63] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 135.

[64] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 135, referring to "Australian Early Development Census National Report 2015" (A snapshot of early childhood development in Australia, Department of Education and Training, Canberra, 32.

[65] E Baldry et al, "'Cruel and Unusual Punishment': An Inter-jurisdictional Study of the Criminalisation of Young People with Complex Support Needs" (2018) 21 *Journal of Youth Studies* 636, 640.

[66] Baldry et al, n 65, 640–641.

[67] Cunneen, Goldson and Russell, n 39, 177.

[68] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 134.

[69] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol IIB, 418.

[70] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol IIB, 419.

[71] See, eg, The Centre for Social Justice, n 53; L McAra and S McVie, "Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending" (2007) 4 *European Journal of Criminology* 315.

[72] J Bernberg and M Krohn, "Labeling, Life Chances and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood" (2003) 41 *Criminology* 1287; Queensland Family & Child Commission, Queensland Government, n 44, 37.

positive outcomes for these children we need to apply appropriate interventions rather than sentencing them to youth detention".[73]

The Royal Commission was particularly critical of placing children in detention, noting that: "any apparent punishment and deterrent value of detention is far outweighed by its detrimental impacts, particularly for the minority group of pre-teens and young teenagers".[74] It found that detention is counterproductive to efforts to rehabilitate children and prevent recidivism, because:

> [T]he harsh consequences of separation of younger children from parents/carers, siblings and extended family; the inevitable association with older children with more serious offending histories; that youth detention can interrupt the normal pattern of "aging out" of criminal behaviour; and the lack of evidence in support of positive outcomes as a result of time spent in detention.[75]

The discovery that the system of juvenile detention in the Northern Territory has failed on multiple levels adds further weight to this conclusion. The Royal Commission observed that: "Children and young people have been subjected to regular, repeated and distressing mistreatment" and that: "The systems have failed to address the challenges faced by children and young people in care and detention. Indeed, in some cases, they have exacerbated the problems the children and young people faced."[76] A Victorian study found that more than 50% of these children re-offend within two years of being released from youth detention.[77]

Thus, even though the numbers of young people in detention in Australia are low (on an average night in the June quarter of 2017 there were 964 young people in detention and 84% of those were aged between 10 and 17)[78] it is vital to push for a situation where no children are in detention or in the criminal justice system at all. In light of this a MACR of 14 or even 16 would be preferable to the approach recommended by the Royal Commission of raising the minimum age to 12, retaining the presumption of *doli incapax* and preventing the detention of children under 14.[79] Such an increase would remove all children from a system that has proven negative effects and little positive impact.

Indigenous Over-representation

An important argument in favour of raising the MACR is that it could go some way to addressing the crisis of over-representation of young Indigenous people in custody. While the overall number of young people in detention in Australia is relatively low, the rate of over-representation of Indigenous young people is alarmingly high. As Amnesty International comment: "[t]he rate at which Indigenous young people are detained in the Northern Territory has been higher than the national average rate between July 2013 and June 2014 (38.17 per 10,000 Indigenous young people in the Northern Territory, compared to 34.47 per 10,000 Indigenous young people nationally)".[80] Over this period "Indigenous young people made up an average of 96 per cent of all young people in detention in the Northern Territory (45 out of 47) while comprising around 44 per cent of the population aged between 10 and 17".[81] The situation is "significantly worse" in

---

[73] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1.

[74] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1 Vol IIB, 419.

[75] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol IIB, 419 (references omitted).

[76] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 9.

[77] G Barns, "Time to Rethink Juvenile Detention", *ABC News*, 28 October 2010 <http://www.abc.net.au/news/2010-10-28/barnsdetention/40542>.

[78] Australian Government, Australian Institute of Health and Welfare, "Youth Detention Population in Australia 2017", Bulletin 143, December 2017 <https://www.aihw.gov.au/getmedia/0a735742-42c0-49af-a910-4a56a8211007/aihw-aus-220.pdf.aspx?inline=true>.

[79] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol IIB, 420

[80] Amnesty International, n 37, 15, citing, Australian Government, Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Table s 2, s 8 <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2014/contents/table-of-contents>.

[81] Amnesty International, n 37, 15, citing Australian Government, Australian Institute of Health and Welfare, *Youth Detention Population Australia in Australia 2014*, Table s 31: Australian population aged 10–17 by Indigenous status, States and Territories, December 2010 to December 2014. Indigenous young people represent an estimated 14,887 out of 26,610 10 to 17 year olds in the Northern Territory <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2014/contents/table-of-contents>.

Western Australia where Indigenous young people were 53 times more likely than non-Indigenous young people to be in detention.[82] Amnesty International also note that the over-representation is particularly bleak for the youngest Indigenous children who make up "more than 60 percent of all 10-year-olds and 11-year-olds in detention in Australia in 2012–13".[83] Raising the MACR would help break the cycle of early entry into the criminal justice system and entanglement within that system. It would help Australia comply with its obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination and the Declaration on the Rights of Indigenous Peoples* as well as the *United Nations Convention on the Rights of the Child* (*UN CRC*).[84]

International Obligations

A further major argument in favour of an increase in the MACR would be to bring the law into line with Australia's international obligations and with the law in "other countries with similar systems of law and government".[85] In 2015 Amnesty International called on the Commonwealth Government to use its external affairs power in the Australian Constitution to raise the MACR to override State and Territory laws that are incompatible with its international obligations.[86] In particular Amnesty International claim that holding a child criminally responsible from the age of 10 is not compatible with Australia's obligations under the *UN CRC*. The *UN CRC* requires that States establish a minimum age "below which children shall be presumed not to have the capacity to infringe penal law".[87] The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules) explain this further: "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."[88]

Neither document specifies what the minimum age should be. Despite this, the UN Committee on the Rights of the Child (UN Committee) clearly had a view on what was an acceptable minimum age level. In 1997 in response to Australia's 1995 report on the measures that it had taken to recognise the rights enshrined in the *UN CRC*, the UN Committee noted that it had heard that Australia was "planning to harmonize the age of criminal liability and raise it in all the states to 10" but commented that it believed that this age level was still too low.[89] This is a position that the UN Committee has maintained. It has repeatedly recommended that Australia "[c]onsider raising the minimum age of criminal responsibility to

[82] Amnesty International, n 37, 15, citing Australian Government, Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014*, Calculation of average over four most recent quarters in Table s 10 (66.9 per 10,000 compared to 1.26 per 10,000 for non-Indigenous young people).

[83] Amnesty International, n 37, 15.

[84] Amnesty International, n 37, 15.

[85] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 28.

[86] Amnesty International, n 37. The High Court confirmed in *Commonwealth v Tasmania* (1983) 158 CLR 1 that the Commonwealth Government does have the power under *Australian Constitution* s 51(xxix) to amend State and Territory laws to ensure that are incompatible with Australia's international obligations. 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, following the finding of the UN Human Rights Committee in *Toonen v Australia* that these provisions breached Australia's obligations under the *International Covenant on Civil and Political Rights*. For discussion see, Crofts, n 39.

[87] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, General Assembly Resolution 44/25 (entered into force 2 September 1990) Art 40(3)(a).

[88] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR, 40th sess, 96th plen meeting, UN Doc A/RES/40/33 (29 November 1985), r 4.1 <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>.

[89] United Nations, *Committee on the Rights of the Child: Concluding Observations of the Committee on the Rights of the Child: Australia* (1997) (UN Doc CRC/C/15/Add.79) [29] <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f15%2fAdd.79&Lang=en>. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, n 23, [18.15] referring to *UN Committee on the Rights of the Child Report of the Committee on the Rights of the Child*: Sixth to Eleventh Sessions UN New York 1996, 73, 76 and Letter to the Australian Government from the Committee on the Rights of the Child 10 February 1997.

an internationally acceptable level".[90] The same concerns have been raised by the Committee about other countries which have a MACR of 10, such as England and Wales,[91] Hong Kong[92] and South Africa.[93]

Alongside urging individual States to increase their age levels in nation reports, the UN Committee felt that it needed to give "clear guidance and recommendations regarding the minimum age of criminal responsibility" because of the wide differences in age levels across State parties.[94] It concluded in a General Comment in 2007 that an age level below 12 years is not internationally acceptable,[95] but emphasised that States with higher age levels should not lower the age level to 12; rather, this should be seen as the absolute minimum and all States should work towards higher age levels. The UN Committee stated that a MACR 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".[96] This highlights the importance of raising the MACR so that only educational and welfare measures can be used to address offending, rather than applying measures of the criminal justice system. It is also in line with the idea contained in the Commentary on r 4.1 of the Beijing Rules: "[i]n general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.)."[97]

Raising the MACR to 12 would not only bring the Northern Territory into line with Australia's obligations under the *UN CRC* but also with changes made in other common law jurisdictions; for instance, Canada, Ireland and Uganda. It should also be noted that other common law countries, such as England and Wales and Scotland, are also currently considering raising the MACR to 12.[98]

Conditional Age of Criminal Responsibility and Presumption of Doli Incapax

Alongside recommending that the MACR be raised to 12 the Royal Commission recommended that the rebuttable presumption of *doli incapax* be retained for 12 to 14 year olds.[99] This recommendation immediately precedes the recommendation that no child under 14 should be sentenced to, or remanded in, detention.[100] Taken together these recommendations would ensure that criminal proceedings are used

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

[91] United Nations, *Committee on the Rights of the Child: Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland* (2016) (UN Doc CRC/C/GBR/CO/5) [78(a)] <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En>.

[92] United Nations, *Committee on the Rights of the Child: Concluding Observations on the Combined Third and Fourth Periodic Reports of China* (2013) (UN Doc CRC/C/CHN/CO/3-4) [94] <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/CHN/CO/3-4&Lang=En>.

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

[94] United Nations Committee on the Rights of the Child, *General Comment No 10 (2007): Children's Rights in Juvenile Justice*, 44th sess (UN Doc CRC/C/GC/10) (*General Comment No 10*) [30].

[95] *General Comment No 10*, n 94, [32].

[96] *General Comment No 10*, n 94, [33].

[97] *United Nations Standard Minimum Rules*.

[98] *Age of Criminal Responsibility Bill* [HL] 2017–2019; *Age of Criminal Responsibility (Scotland) Bill 2018* (Scotland). There are also calls for a higher MACR than 12 in Scotland, see Equalities and Human Rights Committee, n 9.

[99] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol IIB, 418.

[100] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol IIB, 418.

as a last resort for 12 and 13 year olds and that even if convicted, such children could not be placed in detention. There is no direct discussion of why the presumption should be retained in the Report of the Royal Commission. This section will therefore summarise arguments made elsewhere about the rebuttable presumption of *doli incapax*.

This presumption has remained stable throughout Australia (aside from the lower age level being raised to 10) despite being subject to criticism throughout history by academics, lawyers and law reform bodies primarily, but not only, in England.[101] The presumption was abolished by the English Divisional Court in *C (A Minor) v DPP*,[102] and then reinstated on appeal to the House of Lords,[103] before its final demise through the *Crime and Disorder Act 1998* (UK).[104]

A common argument is that the presumption should be abolished because it is over-protective of young people and hinders their prosecution.[105] For instance, in the lead-up to the 2007 elections in New South Wales, Peter Debnam, the then leader of the New South Wales opposition promised to reduce the age at which the presumption of *doli incapax* applies if the Liberal Party were elected. This was because, in his view, the current age of 14 is "a severe impediment to policing and responding to criminal behaviour by very young children".[106] This argument typifies the view that young children must be made responsible for criminal behaviour within the criminal justice system. It goes hand in hand with the claim that children do not need the protection that the presumption of *doli incapax* provides because the criminal justice system is no longer as punitive as in former times.[107] A further argument is that the presumption is redundant because in modern society young children have the benefit of compulsory education and are able to make moral judgments about right and wrong.[108] Aside from being an inaccurate simplification of what is required to rebut the presumption of *doli incapax*[109] much could be said about this claim.[110] Here, it is sufficient to note, as already discussed above, that recent neuroscience research is encouraging a reassessment of understanding about the ability of children to understand the wrongfulness of their behaviour, control their actions and be held criminally responsible.[111]

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

---

[101] As early as 1883 Stephens criticised that the rule was "practically inoperative, or at all events operates seldom and capriciously": J Stephens, *A History of the Criminal law of England* (Macmillan, 1883) Vol 2, 98; Williams also commented that the *doli incapax* presumption was of obsolete character considering the changes made in the way children were dealt with by the criminal system: G. Williams, "The Criminal Responsibility of Children" [1954] *Criminal Law Review* 493, 493. Similarly, the Ingelby Committee in England and Wales recommended setting aside the presumption, because of its doubtful value for any child, Home Office, *Report of the Committee on Children and Young Persons*, Cmnd 1191 (1960) [94] and the English Law Commission saw no case for retaining the presumption in the draft criminal code, *Commentary on the Draft Criminal Code*, Law Commission Number 143 (1985) [11.22].

[102] *C (A Minor) v DPP* [1994] 3 WLR 888; [1995] 1 Cr App R 118. The presumption had previously been criticized in a number of cases: *H v O'Connell* [1981] Crim LR 632; *A v DPP* [1992] Crim LR 34.

[103] *C (A Minor) v DPP* [1996] AC 1.

[104] Section 34. For a fuller discussion of the criticism of the presumption of *doli incapax* and its fate in England and Wales, see Crofts, n 25.

[105] Home Office, *Tackling Youth Crime: A Consultation Paper* (1997).

[106] See Debnam, cited by S Benson, *Daily Telegraph*, Sydney, 2 March 2007.

[107] See eg, Home Office, n 105.

[108] Home Office, n 105, [8] See also *C (A Minor) v DPP* [1994] 3 WLR 888; [1995] 1 Cr App R 118, 125 (Laws J); Queensland, *Parliamentary Debates*, Legislative Assembly, *Criminal Code Amendment Bill*, 18 August 1999, 3179 (Pfaff).

[109] As discussed above the test is not can a child distinguish right from wrong in a simple abstract moral sense – but rather whether the child knew that the offence was seriously wrong in a moral sense with "the further dimension of proof of knowledge of serious wrongness as distinct from mere naughtiness", *RP v The Queen* (2016) 259 CLR 641, [11]; [2016] HCA 53.

[110] For a discussion of such claims see, Crofts, n 25.

[111] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 134.

> [I]t 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.[112]

Despite these problems the ALRC recommended that the presumption should be retained and placed on a statutory footing in all Australian jurisdictions.[113]

The UN Committee has also been critical of flexible mechanisms such as the presumption of *doli incapax*. It considers that this is confusing and could lead to children being treated differently based on the evidence led to rebut the presumption, which might not necessarily require evidence from an expert, such as a psychologist.[114] In its view, this rule means that often in practice only the MACR is applied, particularly for serious offences. Furthermore, the UN Committee expressed concern about too much discretion being left with the court/judge which could lead to "discriminatory practices".[115] Concerns that the presumption does not provide a great deal of protection and is relatively easily rebutted are well founded.[116] Recent research with legal stakeholders confirms the view that, at least in Victoria, the presumption does not operate in a consistent manner for all children.[117] There is also evidence that it does not operate as it should with the onus on the prosecution to rebut the presumption. In practice the onus often seems to fall on the defence to establish that the child lacked capacity.[118]

Rather than retain a period where there is a rebuttable presumption the UN Committee prefers a single MACR set at 12 at least but preferably higher. It is this approach, rather than arguments that the presumption is over-protective, which represents perhaps the biggest threat to the presumption of *doli incapax* and which could lead to an overall reduction in the protection available to young people. While there are problems with the presumption of *doli incapax*, there are good reasons to retain it.

The first main argument in favour of retaining the presumption of *doli incapax* is a practical one. Although the UN Committee has emphasised that it sees 12 as the minimum acceptable age level those common law jurisdictions that have raised the MACR tended to see 12 as the appropriate age level. When they raised the MACR they have abolished the higher conditional age level where the presumption of *doli incapax* applied (eg Canada, Ireland and Uganda). While this step enhances protection for 10 and 11 year olds in making their protection absolute,[119] rather than dependent on an assessment of their individual capacities, it removes the protection for children aged 12 and 13.

This highlights a second and more fundamental justification for the presumption of *doli incapax*: It is in line with the concept of criminal responsibility and the reality of young people's development. It is "a practical way of acknowledging young people's developing capacities. It allows for a gradual transition to full criminal responsibility".[120] Thus while the system for addressing criminal behaviour by children is rooted within a criminal justice system there is a need for some mechanism to prevent young people being drawn into that system if they are not developed enough to have the capacities required to be held criminally responsible.

---

[112] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, n 23, [18.20].

[113] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, n 23, Recommendation 195.

[114] *General Comment No 10*, n 94, [30].

[115] *General Comment No 10*, n 94, [30].

[116] See, eg, A West, "Immature Age and Criminal Responsibility" (1998) 19 Qld Lawyer 56; M Groves, "Are You Old Enough?" (1996) *Law Institute of Victoria Journal* 41; Queensland, *Hansard,* Legislative Assembly, 4 October 2000, 3452 (M Foley, Attorney-General and Minister for Justice and Minister for the Arts); L Schetzer, Director and Principal Solicitor, National Children's and Youth Law Centre, Witness before the Victorian Parliament Law Reform Committee, *Inquiry into Legal Services in Rural Victoria*, Wodonga, 13 June 2000.

[117] O'Brien and Fitz-Gibbon, n 29.

[118] O'Brien and Fitz-Gibbon, n 29.

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

[120] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, n 23, [18.20].

Much of the criticism around the presumption of *doli incapax*, whether that it is over- or under-protective seems to stem from the same source – a lack of understanding about how the presumption actually operates. Greater clarity over what the presumption actually requires and what sort of evidence can and should be admitted to rebut it might go some way to allay concerns about the presumption.[121] The presumption of *doli incapax* serves an important function in ensuring that children are only prosecuted as a last resort when absolutely necessary. It should, if taken seriously, prevent the police, prosecution, and the courts simply relying on assumptions about what average children might know and understand, and ensure that there is a thorough assessment of whether prosecution really is the best way of dealing with the child. This is in line with the basic principle enshrined in the *UN CRC* that: "[w]henever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings".[122] Those who argue that the presumption should be abolished or weakened so that children can be brought within the reaches of the criminal law tend to minimise or even overlook the dangers associated with prosecuting children at a young age. In strongly arguing against Australia taking the path of England and abolishing the presumption of *doli incapax*, Cummins AJA comments that some of the criticisms of the presumption "are infected by the therapeutic theory of criminal justice whereby the coercive dealings with children as criminals is held a priori to be a benefit to them".[123]

If applied appropriately this presumption, alongside a higher-level MACR, should ensure that only children who are capable of being criminally responsible are dealt with within the criminal justice system. Unless the MACR can be raised to 14 or even 16 as recommended by the UN Committee it is preferable to retain the presumption of *doli incapax* and to raise the age at which it applies to 16.

What Led to This Call for Change in the Northern Territory?

The 'in principle' endorsement of the Government of the Northern Territory of an increase in the MACR is a response to the recommendations made by the Royal Commission. The Royal Commission was set up only days after the airing of images showing how young people were treated in detention in the Northern Territory on *ABC Four Corners* in July 2016. This included "footage of a child being thrown across a room, pinned to the ground, stripped naked, and strapped to a chair with a hood over".[124] As the Royal Commission stated these images "shook the nation" and "raised fundamental questions about why and how children could possibly be treated in this way".[125] It therefore seems fair to say that a driver for reform is the public response to the shock of seeing children subjected to such cruel treatment. It is these visual images that stuck in the mind of the public and caused such a visceral reaction. Such an insight into the treatment of young people did not allow viewers to ignore the treatment of young people who get into trouble with the law. The question is whether this outcry has been loud enough and sustained enough to lead to change.

The Royal Commission may well have been wise to focus its call for an increase in the MACR on evidence from neuroscience which shows that children lack the capacities to be held criminally responsible. This was the approach taken in the US case of *Roper v Simmons*[126] where an appeal to the Supreme Court of the United States challenged the constitutionality of imposing capital punishment on children under the age of 18. Kennedy J, in the majority, reached the decision that imposing the death penalty on offenders under the age of 18 was unconstitutional cruel and unusual punishment, in violation of the Eight Amendment. In his judgement Kennedy J referred to scientific and sociological research confirming: that children lack maturity, have an underdeveloped sense of responsibility, have

[121] For discussion of what evidence is used in cases dealing with the presumption see Crofts, n 35.

[122] *United Nations Convention on the Rights of the Child*, Art 40(3)(b).

[123] *R v ALH* (2003) 6 VR 276; [2003] VSCA 129.

[124] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 10.

[125] Royal Commission into the Protection and Detention of Children in the Northern Territory, n 1, Vol I, 10. For a discussion of the Australian media coverage of this see Fitz-Gibbon, n 4.

[126] *Roper v Simmons*, 543 US 551 (2005).

less capacity for control, have more transitory personality traits than adults and are more vulnerable to negative influence.[127]

Such scientific evidence alongside evidence of the levels of children in the criminal justice system with complex needs, including neurodevelopmental disability, and evidence of the harms associated with early contact with the criminal justice system add further weight to calls for an increase in the MACR and retention of the presumption of *doli incapax*. Such an approach places arguments in the realm of scientific, verifiable research. However, scientific research alone is unlikely to lead to a change in the MACR. The setting of the age of criminal responsibility is not merely an objective, scientific exercise. As Keating notes the exercise is:

> [N]ot purely one of determining the point at which, in developmental terms, a child can be said to be responsible for their actions - the issue is also one of policy and is shaped in part, at least, by political considerations.[128]

It is therefore likely that politics will play a large role in changing the MACR. Criminal law is replete with examples where changes have been made to criminal law based on governments feeling the need to be seen to be doing something in response to public expressions of concern about how laws are operating (or not operating). Such examples include the creation of one-punch offences in response to concerns about king-hits/coward's punches,[129] changes to sexual assault laws following outcries over Lebanese gangs[130] and even removal of the presumption of *doli incapax* in England and Wales following the public reaction to the killing of James Bulger by two 10-year-old boys.[131] While these examples show an expansion of criminal law, public outcry may also be directed at overcriminalisation. An example here is the creation of defences to child pornography laws and alternative offences with lower penalties in response to concerns about children being prosecuted under child pornography laws for engaging in "sexting".[132] When these calls for change are in line with scientific research they may become more compelling and enduring. This combination of an emotional response and a scientific, research-based call for change may be just what it takes to lead to a change in the MACR.

Conclusion

There are many compelling arguments for raising the MACR detailed particularly in the Royal Commission Report. These arguments are primarily evidence based. Increasingly research in neuroscience is revealing how brain development affects children and their capacity to be criminally responsible. It shows that children are in a process of neurodevelopment where they are prone to impulsive, sensation-seeking behaviour, with an underdeveloped capacity to gauge the consequence of actions. It has also been clearly established that neglect can adversely affect neurodevelopment and indeed, such neurodevelopmental immaturity and disability may well contribute to the very behaviours that lead young people to commit crime. Research confirms that there are high levels of children with such disability and other complex needs within the criminal justice system. The negative impacts of early engagement with the criminal justice system are also well documented. It is quite clear that treatment within the criminal justice system, particularly detention, is not conducive to moving children away from committing crime but may actually be criminogenic.[133] Compounding all of these factors is the disproportionate effect that

[127] *Roper v Simmons*, 543 US 551 (2005).

[128] H Keating, "The 'Responsibility' of Children in the Criminal Law" (2007) 19 *Child and Family Law Quarterly* 183, 191.

[129] A Flynn, M Halsey and M Lee, "Emblematic Violence and Aetiological Cul-De-Sacs: On the Discourse of 'One-Punch' (Non) Fatalities" (2016) 56 *British Journal of Criminology* 179; J Quilter, "Populism and Criminal Justice Policy: An Australian Case Study of Non-punitive Responses to Alcohol-related Violence" (2015) 48 *Australian and New Zealand Journal of Criminology* 24; R Hogg and D Brown, *Rethinking Law and Order* (Pluto Press, 1998).

[130] G Coss, "The Politics of Reaction" (2008) 32 Crim LJ 392.

[131] M Freeman, "The James Bulger Tragedy: Childish Innocence and the Construction of Guilt" in A McGillivary (ed), *Governing Childhood* (Dartmouth, 1997) 115–134.

[132] Parliament of Victoria, Law Reform Committee, *Report of the Law Reform Committee into Sexting* (2013); T Crofts et al, *Sexting and Young People* (Palgrave, 2015).

[133] McAra and McVie, n 71, 318.

the criminal justice system has on indigenous young people who are alarmingly overrepresented in the criminal justice system. A further international dimension is the fact that Australia is out of line with its international obligations under the *UN CRC*. The UN Committee has repeatedly made clear that it thinks a minimum internationally acceptable age level is at least 12 if not 14 or 16. In line with such calls several countries with similar systems of law to Australia have already raised their MACR to 12 or are currently actively considering such change.

These factors alone, backed by evidence-based research, ought to be sufficient to convince any government to increase the MACR. Calls for change to the MACR in Australia based on these factors have been made for many years to little effect. This is because setting the MACR is not a scientific question, it is not just about determining the age at which it can be shown based on research that a child has the capacity to be held criminally responsible. Setting the MACR is largely a sociopolitical issue. It is about governments being keen to show that they are responsive to youth crime and are taking it seriously rather than letting children off lightly. The airing of images on the ABC in 2016, showing how children were treated in detention in the Northern Territory, made it abundantly and viscerally clear that excuses were not being made for children and they were not getting off lightly. Rather, they were being treated cruelly by adults who were charged with looking after them. Seeing this on national television meant that the public could not turn a blind eye to how children are treated in the criminal justice system and this led to calls for change. It is this emotional response, which could potentially be short-lived, combined with enduring and ongoing objective research that is likely to lead to a change to the MACR in the Northern Territory. A change to the MACR in the Northern Territory is also likely to cause a shift across Australia, given the mounting calls in other jurisdictions for change and the desirability of harmony on this issue as noted by the ALRC and as evidenced by the Commonwealth Attorney-General establishing an inquiry into the MACR across Australia.[134] Such a step would place Australia alongside other common law countries which have increased their MACR and this may also increase pressure on other countries which follow the traditional common law approach to raise their MACR.

A MACR of 14 or 16, as called for by the UN Committee, would be preferable. However, raising the MACR to 12 years is perhaps all that can be hoped for in the present political climate.[135] In such a case it is important to retain the presumption of *doli incapax* to keep potential protection for children aged 12 and 13 years and possibly expand its application to 14 and 15 year olds. These steps should, however, be seen as the first step in an ongoing path to raising the MACR to 14 or 16 years. This would be in line with the age at which children begin to take on other social rights and responsibilities, as noted in the Beijing Rules. It would contribute to a juvenile justice system which deals with children in conflict with the law without resorting to judicial proceedings as required by the *UN CRC*. It would also go some way to harmonising how the law in different fields treats the capacity of children.

[134] "Calls to Raise Age of Criminal Responsibility to 16", *news.com.au*, 26 November 2018 <https://www.news.com.au/national/crime/calls-to-raise-age-of-criminal-responsibility-to-16/news-story/0c51219b6d0c5f57c27541dfde1dfc06>.

[135] Cunneen, Goldson and Russell, n 39, 411.