

# **Children's Criminal Responsibility In Australia: Some Legal, Psychological And Human Rights Issues**

*Ben Mathews, Faculty of Law, Queensland University of Technology,  
Brisbane, Australia*

## **Introduction: Legal Transitions From Childhood to Adulthood**

Australian law marks the transition from a protected state of childhood and legal incapacity to a state of liberated adulthood and legal responsibility in many facets of life. The law says at what age an individual acquires legal capacity to make contracts, have sexual intercourse, consent to medical procedures, marry, consume legal drugs, drive a motor vehicle, and participate in elections. These changes in legal personality are not catalysed by merit or personal characteristics, but by the expiry of a span of time from each individual's date of birth. The ages at which law sets these capacities is informed by historical habits, changing perceptions of children, and by other factors such as social climate, realpolitik and economics. Yet, since individual human beings develop at different rates – physically, intellectually, psychologically and emotionally – it is clear that the law's conferral of rights and imposition of responsibilities occurs at inappropriate times for many individuals.

This discussion sets out the Australian law ascribing criminal responsibility to children. It recognises the problems inherent in the Australian laws, and then outlines some of their legal consequences. These consequences include the low age of criminal responsibility in Australia compared with other nations, and the bareness of the law's inquiry into when a child is criminally responsible, in many cases deciding the issue simply by age, and at most only seeking to assess the offender's cognitive state. These legal positions then demand an examination of ensuing psychological and human rights issues. I refer to developmental psychological evidence to demonstrate that it is theoretically impossible and morally unjustifiable to measure criminal responsibility only by age. Finally, I contrast the Australian legal position with international law's promotion of children's rights.

## **Children, Criminal Responsibility and Australian Law**

This part first states the current Australian legal positions, and then identifies some of the most glaring problems produced by them. It will be shown that empirical legal inconsistencies between Australian jurisdictions result from some having legislative provisions (Queensland, Tasmania, Western Australia, the Northern Territory and the Australian Capital Territory), and the others remaining dependent on English common law: New South Wales, South Australia, and Victoria. The legislative provisions differ from the common law tests. As well, even those jurisdictions

having legislative provisions display differences, as there is not a common minimum age of criminal responsibility.

Despite these differences, four broad principles govern Australian laws ascribing criminal responsibility to children.<sup>1</sup> The first principle is that a child cannot be found criminally responsible for any act if they are younger than a set age. In Tasmania this age is seven,<sup>2</sup> and in the Australian Capital Territory it is eight, but in all other jurisdictions this age is 10.<sup>3</sup> These children are irrebuttably presumed incapable of possessing criminal intention - that is, they are deemed *doli incapax* - and so are excused from all criminal responsibility.

The effect of the second principle is that children aged between the minimum age and 14 are also deemed *doli incapax*, but here the presumption is rebuttable.<sup>4</sup> In common law jurisdictions, if the Crown proves beyond reasonable doubt that the child knew at the time of committing the act that it was seriously wrong as opposed to simply naughty or mischievous, then the child is deemed to possess criminal intention; the child is *doli capax*.<sup>5</sup> This conclusion is claimed to justify the child's culpability pursuant to the maxim *malitia supplet aetatem*: malicious intention overrides the innocence of non-age. This conclusion of culpability – blameworthiness – then is used to justify the State's imposition of legal sanctions.

Like the second principle, the third makes children between the minimum age and 14 in jurisdictions having statutory tests for criminal responsibility also rebuttably deemed not to possess criminal capacity. However, the test in these jurisdictions is different and arguably easier to satisfy than the common law test. If the Crown proves beyond reasonable doubt that the child had the capacity to know that they ought not to have done the act at the time they committed it, then the child is proved to possess criminal capacity and is responsible for their act.<sup>6</sup>

The fourth principle automatically deems children aged 14 and over *doli capax* and thus for the purpose of establishing criminal intention they are treated as adults. This position, like the first three, will be challenged later in this paper in the context of psychological knowledge.

### **Problems produced by these four positions**

From the first principle comes the first obvious empirical inadequacy in the Australian laws. Having different minimum ages of criminal responsibility in different jurisdictions means that a seven, eight or nine year old offender can be found either criminally responsible or lacking responsibility depending on which jurisdiction in which he or she lives. This seems clearly unfair, at least because there is no theoretical justification for imposing different minimum chronological markers of legal capacity across jurisdictional boundaries. The different minimum ages of criminal irresponsibility operating in Australian jurisdictions are nowhere explicitly justified, but rather remain a feature of an area of law characterised by constant criticism and debate and occasional change.<sup>7</sup> Indeed, this inconsistency in the lower statutory age level, and the recurrent debate about and changes to the minimum and maximum ages of criminal responsibility indicate a systemic flaw that will be discussed later. The most recent example of this ongoing tinkering with the law is the New South Wales Discussion Paper released in January 2000. This proposal suggests decreasing the maximum age to which the presumption applies from 14 to 12.<sup>8</sup> If this proposal

becomes accepted, it would produce further inconsistency, and could prompt similar legislative change in some other Australian jurisdictions, if for no other reason than electoral popularity.

The second and third principles, which detail the tests claiming to measure individual children's criminal capacity, are also different. The common law test of knowledge of the act's serious wrongness seems much more rigorous than the statutory test operating in other jurisdictions. There is no existing reasoned justification for having a test in some Australian jurisdictions which is easier to satisfy than that used in the others. The effect of this is that children in some Australian jurisdictions are more easily imputed with criminal responsibility.

Apart from these obvious inadequacies, there are a number of problems with Australian laws because of the problematic English common law principles they incorporate. Apart from operating exclusively in Australian jurisdictions that have not legislated on these issues, the common law also supplements the statutory provisions of those jurisdictions that have enacted statutes, producing problems in all Australian jurisdictions.

An example of these problems is the question of what evidence is admissible to rebut the presumption of irresponsibility for children aged between the minimum age and 14. It is generally accepted that a child's schooling, intelligence and family background can be admitted as evidence of capacity, but these may not be sufficient to discharge the presumption.<sup>9</sup> Evidence of the commission of the act itself is insufficient to prove capacity<sup>10</sup> but evidence of acts surrounding the commission of the offence can demonstrate the offender's capacity if for example, the offender disables a victim from summoning police assistance, or gives a false alibi.<sup>11</sup> A child retains the right to silence, and thus does not have to make any statement to police or give testimony at trial. In these circumstances it can be difficult for the prosecution to obtain sufficient evidence to discharge the presumption. Moreover, even with evidence, it is a difficult task to prove an individual's state of mind, especially with such a fine distinction being made in common law jurisdictions between knowledge of an act's serious wrongness and naughtiness. In a New South Wales case, the accused had allegedly forced the complainant to perform oral sex on him and had covered the complainant in a blanket when a third party had come looking for her. The court was unable to isolate the accused's conduct as evidence of knowledge of the act's serious wrongness because the concealment was thought consistent with an act only of naughtiness.<sup>12</sup>

A related problem is of the common law principle that admits evidence of the child's criminal history.<sup>13</sup> This exception to the general law was created because of the prosecution's difficulty in proving something as nebulous as an individual's mental state, particularly where it was often impossible to obtain evidence of the child's intellect and mental condition at the time of committing the act. Yet it is discriminatory to children to allow this evidence's admission before sentencing stages of a trial when in an adult trial it would be ruled inadmissible. Judicial discomfort with this rule is abundant.<sup>14</sup> This is one of several problems and inconsistencies produced by technical difficulties in rebutting the presumption.

Another legal inconsistency comes from the tendency of courts to accept evidence of the child defendant's mental normality for their age as proof of criminal capacity. By normalising the defendant as a child possessing normal mental abilities for children of that age, and by claiming that all children of that age would know of the wrongness of the defendant's act so the conclusion

is that the defendant knew of its wrongness, the presumption is criticised as illogical.<sup>15</sup> This illogicality is produced because the purpose of the rule has always been to protect children in the middle age bracket, not to convict them automatically. Judges have since consistently insisted that this practice is unacceptable and contrary to the purpose and spirit of the doctrine, yet it seems that in practice it continues.<sup>16</sup>

A final example of the problems plaguing the Australian law ascribing criminal responsibility to children is the ongoing uncertainty about what type of 'wrong' is envisaged by the legal tests. Is it knowledge of the act's legal wrongness, moral wrongness, both, or of some other type of wrongness, or of some combination of these senses of 'wrong'? Judicial statements have favoured different understandings of the term.<sup>17</sup>

Even more disturbing than these inconsistencies and criticisms is the strong empirical evidence proving that in many cases involving child defendants, the presumption of incapacity is ignored, not known of by counsel or the tribunal, or grossly manipulated by the tribunal.<sup>18</sup> With evidence of the presumption being incompletely and incorrectly observed, the criminal law's protective doctrine for children is clearly failing to achieve its object. This evidence of the doctrine's irregular use is linked to the regular censure of the presumption as a whole as being unsuitable for contemporary social conditions. It is argued that children in contemporary society are far more sophisticated and knowledgeable than their counterparts of the 1700s and 1800s.<sup>19</sup> These critics argue that because of the influence of television, multimedia and compulsory education, nearly all children aged 10 or over know which acts are wrong and which are not. Like the use of the normalcy of the offender to displace the presumption of incapacity, and the admissibility of the offender's criminal history, these manipulations have developed because of the deficiencies inherent in the legal tests.

I maintain that by themselves, the inexhaustive problems referred to above would be sufficient to mount a persuasive argument for reform. However, in the next section of this paper, I will concentrate on only some of the legal implications of Australian legal positions, which then demand a consideration of psychological evidence and human rights principles. It will be seen that apart from the already alarming superficial problems produced by Australian legal positions, there are even more serious fundamental flaws.

### **Legal Consequences**

For the purposes of this paper, I will discuss three legal consequences from Australia's legal positions. First, the law has a two-limbed inquiry into whether a child is criminally responsible or not. The first limb asks only what the child's age is, and the second engages in a bare inquiry as to whether a child between certain ages either has certain cognitive knowledge, or has the capacity to have certain cognitive knowledge, always neglecting other personal characteristics such as emotional skills. This consequence is significant because it ignores compelling psychological evidence that it is theoretically impossible either to define children's criminal responsibility by age alone, or to assess only a child offender's cognition. Second, the effect of the laws is to embroil many young offenders in the criminal justice system. Third, Australia sets a low age of criminal responsibility compared to the international community. These two consequences are significant

because they defy principles enshrined in international legal instruments, ratified by Australia, which promote children's rights. All three legal consequences will be illustrated in this section before placing the legal positions in the context of psychological and human rights discourses.

### **Imputation of criminal responsibility by age, and inquiry only into cognitive knowledge or capacity**

Fundamental theoretical problems result from Australian law's assessment of a child's criminal responsibility. The first problem is that because of the statutory establishment of lower and upper age limits of automatic responsibility and lack of responsibility, an enormous number of children are imputed with a legal state regardless of their individual characteristics. Empirical inconsistencies in Australian statutory ages of criminal responsibility, and the ongoing changes to the lower and upper ages, indicate a systemic flaw. A fundamental difficulty in formulating laws seeking to demarcate rigid areas of criminal responsibility and lack of responsibility is that the imputation of legal capacity cannot be accurately achieved by setting only a temporal qualification. It is clear that the underlying reason for imputing legal capacity is an attempt to define when an individual should become an agent possessing legal rights and bearing legal responsibilities. This issue involves theoretical and philosophical concerns that are unable to be resolved simply by setting chronological markers of legal agency.

The second consequence of the Australian positions is that for children between the lower and upper ages, the law tests only children's actual or potential cognition, and not other personal skills such as the ability to behave pursuant to their cognition. The law's failure to recognise the importance of individual skills other than cognition is a basic omission in light of psychological evidence of children's development.

### **Involvement in the criminal justice system and incidence of custodial detention**

The second consequence is that a large number of children are becoming involved in the criminal justice system and are being sentenced to detention in spite of the supposedly protective presumption of *doli incapax* and other juvenile justice principles such as custodial detention being a last resort in sentencing. Some available statistics give an impression of the extent of children's involvement in the criminal justice system. The purpose of these statistics is not to give a complete picture of all Australian jurisdictions, but simply to demonstrate that the Australian legal positions are not preventing a considerable involvement of children in the criminal justice system, or a significant incidence of custodial detention. The incidence of detention is particularly relevant, and will be explained with reference to international law. I am taking the position that it is generally undesirable to involve children in the criminal justice system and to sentence them to custodial detention.

In Australia in August 1995 there were 1753 children aged between 10 and 17 held in police custody in juvenile detention centres, remanded in custody in adult centres and prisons, and in other centres not defined as detention centres.<sup>20</sup> At 30 June 1996, 782 children aged between 10 and 17 were held in juvenile detention centres throughout Australia; this figure does not include the above other forms of police custody.<sup>21</sup> Of these, 36 were under 14.

In Queensland in 1995-96, 6694 juvenile defendants were charged with 16 413 criminal offences in Queensland courts.<sup>22</sup> Of these children, 84% were male, and about 22% were under 15. 707 defendants were convicted of at least one offence in the District and Supreme Courts; 288 in the Children's Court, and 4430 in the Magistrate's Court. In New South Wales in 1995-96, of 14 759 cases before the courts, 9 662 were dealt with by sentencing and committals to higher courts.

I acknowledge two glaring concerns within these statistics; first, the disproportionate representation of males (80-90%), and second, the alarming overrepresentation of indigenous children (26 times more likely to be involved in the criminal justice system than children from other ethnic groups namely Anglo-Saxon).<sup>23</sup> Both issues demand urgent attention but lie beyond the scope of this paper.

### **Comparative law: the age of criminal responsibility**

The third consequence is that Australian jurisdictions have a low age of criminal responsibility when compared with other nations. This factor becomes relevant when investigating whether there is a theoretical justification for having such a low age or not. It is also relevant when considering the human rights context of the law ascribing criminal responsibility to children.

In Ireland the minimum age of criminal responsibility is seven,<sup>24</sup> as it is in Cyprus, Liechtenstein and Switzerland.<sup>25</sup> In Scotland and Northern Ireland it is eight,<sup>26</sup> and in Malta it is 9. In England the minimum age is 10.<sup>27</sup> New Zealand's minimum age is also 10; there a child is criminally responsible if he or she knew his or her actions were contrary to law.<sup>28</sup> In Canada the minimum age is 12 and no presumption operates for children over that age.<sup>29</sup> In Greece, Israel, the Netherlands, San Marino and Turkey it is 12. In civil law countries, which do not recognise the *doli incapax* principle, the minimum age of criminal responsibility is generally higher. In France it is 13, and it is 14 in Japan, Austria, Bulgaria, Germany, Hungary, Italy, Latvia, Lithuania, Romania and Slovenia. The minimum age is 15 in Sweden, Norway, the Czech Republic, Estonia, Finland, Iceland, Slovakia and Denmark, and it is 16 in Andorra, Poland, Portugal and Spain. In Belgium and Luxembourg it is 18.

On several occasions the United Nations Committee on the Rights of the Child has expressed its concern to Australia and the United Kingdom about their jurisdictions' relatively low age thresholds of criminal responsibility. In 1997 the Committee urged Australia to raise the threshold from the current age of 10.<sup>30</sup> In 1995 the Committee said it was 'deeply concerned that the minimum age of criminal responsibility is generally set at the very low level of 7 to 10 years', particularly in light of the United Nations Convention on the Rights of the Child and other international legal instruments. While recognising that the Commonwealth Government envisaged a standard age limit of 10, the Committee said this limit was still too low.<sup>31</sup> These concerns will be returned to when discussing the human rights issues raised by Australian law.

### **Psychological Implications**

Informed by developmental psychological evidence, I criticise the statutory positions and statutory and common law tests for two reasons. First, I argue that it is theoretically and morally unjustifiable to assess criminal responsibility simply by age. This criticism is directed at the

statutory establishment of lower and upper age levels of criminal irresponsibility and responsibility. Second, I argue that it is just as theoretically and morally unjustifiable to assess only cognitive knowledge or capacity and to ignore other emotional skills, particularly those of behaviour control. This criticism attacks the intermediate zone, usually between 10 and 14, in Australian jurisdictions, in which a child offender may be found either criminally responsible or irresponsible, depending on the availability of evidence, the competence of counsel, and luck.

### **Assessing children's criminal responsibility only by age**

In 1984 the Australian symposium *Age And Criminal Responsibility In Children* concluded that using any single age as an element in finding whether a child is criminally responsible is unjustifiable in light of psychological knowledge.<sup>32</sup> Writers such as Thompson and Watson accepted that there is a wide chronological range for individuals' development, and that this precludes the accurate establishment of upper and lower age limits of criminal responsibility. For Thompson and Watson, there will be individuals over 15 who lack the correlates of criminal responsibility, and there will be individuals below the minimum age of criminal responsibility who possess all the attributes required of a legally responsible actor.<sup>33</sup> Such striking statements, which if correct are theoretically and morally fatal to any legal mechanism of imputing criminal responsibility by age, need to be placed in context.

The starting point is to recognise that young individuals have rudimentary skills of factual cognition (mental processes such as learning, using and understanding language, memory, thinking and perception), moral cognition and conative ability (impulse control). It is now generally accepted that 'young children think about moral and social issues and relations in ways that differ qualitatively from the ways in which older children and adults think.'<sup>34</sup> In general, the younger the child, the more barely developed will be their cognitive, moral and conative skills. If children as a group are different from older individuals in ways relevant to findings of criminal responsibility and to the justified imposition of legal penalties, then it would be unjust to ignore these differences. An investigation of the theoretical foundations of children's cognitive and moral thinking substantiates this starting point.

Using the model of children's appreciation of game rules, the seminal Swiss psychologist Jean Piaget identified three developmental stages in children's cognitive understanding of rules and of their moral foundations.<sup>35</sup> Children aged up to 4 to 5 years did not understand rules. From this age to about 9 or 10, they treated rules as unchangeable and derived from an authority like a parent; Piaget named this 'the heteronomous morality of coercion'. Children from 9 to 10 onwards interpreted rules as made by agreement with the game's players, amendable by unanimous agreement; Piaget named this stage 'the autonomous morality of cooperation'. Progression from the morality of coercion to that of cooperation is motivated by change in cognition regarding the authority/influence of peers as opposed to authority figures, and by exposure to diverse methods of 'playing the game'. Although the rough age brackets shown here have since been disputed, the structure of the scheme remains largely accepted.

Similarly, Piaget identified three stages of moral judgment of behaviour for the same age groups. Premoral judgment was the state at which rules were not understood. The second stage,

moral realism or the heteronomous morality of constraint, saw rules as coming from an external authority, and being unchangeable. Actions were evaluated by pure outcome regardless of the actor's intention, and punishment for an immoral act was inevitable. The third stage, moral subjectivism or the autonomous morality of cooperation, viewed rules as being made by people and changeable by mutual consent. Acts were evaluated by intention, not simply by their outcome, and justly imposed punishment was therefore to correspond with the act and the intention behind it.<sup>36</sup>

The critical point to be derived from these investigations into both children's cognition of rules and their understanding of the moral force of them, is that individuals progress through the stages incrementally, and roughly at around the same age, but not identically by age. This feature is confirmed by Lawrence Kohlberg's research. Kohlberg, a Harvard psychologist, developed a 'cognitive-developmental' approach to child psychological development, using subjects' responses to moral dilemmas to inform a model of moral reasoning. This isolation of the individual's psychological development by stage, and not purely by age, is significant when assessing the theoretical and moral justifiability of laws imposing criminal responsibility on children.

Kohlberg identified three levels of development, which each contained two stages.<sup>37</sup> Level 1 is Preconventional Morality, stage 1 of which is characterised by the individual acting in accordance with commands and by the fear of punishment; the actual consequences – punishment or nonpunishment - of an act determine if it is moral (right or wrong). Stage 2 sees the individual follow a rule when it is in his or her immediate interest, or if a personal benefit will result. Acclaimed research indicates that Stage 2 reasoning is prevalent at around age 10.<sup>38</sup> Both stage 1 and 2 methods of judgment depend on external consequences and images of personal gain.

This research also shows that stage 3 reasoning becomes dominant at around age 16. Level 2 reasoning, Conventional Morality, encompasses stage 3 and stage 4. Stage 3 sees individuals consider moral behaviour through the perception of a significant group of people; family, peer group, church, culture. Stage 3 hence involves perceptions of good behaviour as what significant others see it to be. Stage 4 advances to see the individual consider larger social groups or the society as a whole. Stage 3 and 4 reasoning are most common in adults.

Stages 5 and 6 comprise Principled or Postconventional Morality, where the individual consults a different source of guidance for their moral conclusions. Stage 5 elevates social utility and individual rights; the principles that guide the individual's moral decisions are self-selected. Laws are respected but are not omniscient. Stage 6 extends this even further, with the individual seeking and consistently honouring universal ethical principles of their choice. Fewer and fewer individuals reach stages 5 and 6.

The vital point from this psychological evidence is that it is impossible to conclude that any individual of a certain age, whether they are a child or an adult, will have attained a certain degree of cognitive skill. This applies particularly to children who are generally in a more volatile state of development than adults. Children between 5 and 15 might well span five of Kohlberg's six stages. Of even more significance is that children of the same age may be far more advanced than others of the same age. A child of 13, for example, might have the characteristics of Kohlberg's fourth or fifth stage, and another child of the same age may only exhibit stage 2

cognition. Legal conclusions that typify children of a similar and the same age as having the same cognitive state are theoretically unjustifiable in light of these positions.

I further argue that because of this psychological evidence, the legal positions are morally unjustifiable. There will be child offenders under 10 who have advanced cognitive skill, and who have other advanced skills relevant to the justified imputation of criminal responsibility, who escape legal consequences. Similarly, there will be child offenders over 14 who do not possess sufficient cognitive skill to justify the attribution of criminal responsibility, who nevertheless are liable to legal consequences. These results are morally unsound.

### **Inquiring only into cognition and neglecting other skills such as behaviour control**

My second criticism is that the law ignores the young offender's ability to be able to control their behaviour pursuant to that cognition. In Australia, statutory tests for child offenders aged between the lower and upper age limits at most assess the offender's actual cognitive knowledge of the act's 'wrongness' or that they 'ought not to do the act', and otherwise assess the offender's mere capacity to know of these things. The common law assesses whether the child had the actual cognitive knowledge of the act's 'serious wrongness', rather than the mere capacity to know of this. In all these tests, only cognitive states are investigated. I argue that this is theoretically and morally insufficient.

Rather than relying only on cognition, psychologists identify two qualities relevant to age and criminal responsibility: the ability to understand consequences, and the ability to regulate behaviour in accordance with that understanding.<sup>39</sup> The ability to understand consequences equates with factual and moral cognitive knowledge, but the ability to control behaviour pursuant to that knowledge (conative ability) is a different skill. This skill is vital in the context of the acts committed by young children that embroil them in the criminal justice system.

I argue that because nearly all children of low age are different<sup>40</sup> *purely because of their age* from the overwhelming majority of adults, they deserve consideration of the development of their personal skills beyond pure cognition when assessing whether they should be held criminally responsible for their acts or not.<sup>41</sup> This argument is informed by the relatively small amount of time that a child or young offender will have had to develop these crucial skills. The argument is that in cases where a child or young offender does not have reasonably well-developed conative skills as well as cognitive skills, they should not be held completely criminally responsible, at least for the majority of acts.

There are two points that are supported by psychological evidence. Evidence from Australian psychologists supports my argument that children's conative skill is integral to criminal offending and should be assessed to determine the moral question of whether a young offender should be held criminally responsible. The evidence also supports my argument that it is impossible to presume that all children under or over a certain age will possess both the cognitive ability and the behaviour-control capacity required to justify finding that an individual possesses criminal responsibility.

Bussey and Steward urge a dual assessment of intentionality and ability to control action.<sup>42</sup> They claim that about half of children by 5 possess some knowledge of intention. For children

between 5 and 14 who have committed criminal acts, they promote assessment and retraining of action control ability instead of retribution. Assessment should consider the child's knowledge of rules for themselves and for others, and their capacity to control their behaviour according to the rules, especially under emotive as opposed to optimal conditions. They accept that children over 14 usually have a stronger link between thought and action control. They think that for children between 5 and 14, intention should first be proved: 'Since some of these children understand intentionality, it is important to know if the specific child in question has that knowledge, under what conditions, and whether they can use that knowledge. A presumptive right of rebuttal for children in this age group is important for two reasons...justice to the child and...later justice to society.'<sup>43</sup>

With other authorities, Cummins accepts findings that even very young children may have sufficient cognitive skill to justify a finding of criminal responsibility, but maintains that other children of the same age may have far less developed cognitive skill.<sup>44</sup> However, he too demands a two-limbed test for responsibility; first, 'sufficient maturity of thought to understand the consequences of behaviour' and second, 'the ability to use that thought to control the behaviour.'<sup>45</sup>

Siegal believes that children possess the cognitive capacity to understand the consequences of their acts, entitling them to adult rights and responsibilities. Accordingly, Siegal endorses the lowest socially and ethically acceptable age of criminal responsibility. However, Siegal insists that 'children may be regarded as not having yet achieved the same degree of control over their behaviour as have adults.' Because of this, Siegal would find that a young offender had broken the law, but would be held only partially responsible.<sup>46</sup>

On contemporary psychological evidence, the law's failure to address the issue of behaviour control when ascribing criminal responsibility to children is fatal. Cummins concludes that the individual's ability to control their overt behaviour is the most important consideration in defining 'responsibility'. This ability 'is not simply related to cognitive competence. Affective and motivational immaturity may also create a barrier to effective behaviour control such that children cannot use the required knowledge and understanding to control their behaviour. The development of understanding of thought and the ability to control behaviour develop separately. They mature at different rates and involve different neurological mechanisms.'<sup>47</sup>

Cummins maintains that individuals may possess 'a quite sophisticated concept of consequences, but [they] cannot use that knowledge to produce normal behaviour for the child's age.'<sup>48</sup> His conclusion for the law's treatment of child offenders is that 'children must be treated as individuals. Their thought processes mature at different rates and their ability to use their developing understanding of the world to control their own behaviour shows an extremely high variability, even in so called normal children.'<sup>49</sup> Added to this variability in cognitive development and impulse control, Cummins draws attention to other factors not adequately addressed by law or adjudication: 'a multiplicity of external factors such as family environment and the immediate physical and social context have a continuing interactive effect on the production of overt behaviour'.<sup>50</sup>

Recent recognition of these psychological positions confirms their authority and relevance. The 1999 National Crime Prevention Report *Pathways to prevention - Developmental and early*

*intervention approaches to crime in Australia* (1999) accepted that ‘Only in very recent years has much of the scientifically persuasive evidence emerged that interventions early in life can have long term impacts on crime and other social problems such as substance abuse.’<sup>51</sup> The Report emphasised that there were common high risk factors in children who were criminal offenders, but stressed that these risk factors could be offset by successful intervention strategies at vital times in children’s development.<sup>52</sup>

Perhaps this psychological evidence can provide us with clues as to more effective ways to treat and prevent child criminality. It seems clear that there are certain cognitive and conative skills and personal characteristics that diminish the likelihood of criminal offending, as well as the incidence of other undesirable behaviour. If these skills can be developed in an educational context, as Kohlberg’s studies, Goleman’s research<sup>53</sup> and this more recent evidence indicates, then this strategy may offer one better option for both preventing child offending and dealing with those who do. Such possibilities are even more realistic considering the types of aspirations for children embodied in international human rights instruments.

### **Human Rights Implications**

The emerging international trend promoting children’s rights shapes another context in which the justifiability of Australian ascription of children’s criminal responsibility can be assessed. After first situating the movement promoting children’s rights, this section highlights the rights advanced for children by international law in the areas of juvenile justice and education. The recognition of children’s rights forms another dimension to the moral justifiability of laws ascribing criminal responsibility to children. If a nation has ratified international instruments that claim to protect children’s rights, but does not embody such aspirations in its domestic legislation, then can it claim its laws are morally justified in this sense? My purpose here is simply to demonstrate that Australia could do much more to translate its ratification of international instruments into practical effect.

In 1924 the League of Nations’ *Declaration of the Rights of the Child* first formally endowed children with rights in an instrument devoted specifically to them,<sup>54</sup> and ensuing international legal instruments recognised children’s needs in a piecemeal way.<sup>55</sup> But since 1979 a distinct movement to recognise and promote children’s rights has gathered momentum. Conceived in 1979 and pronounced and adopted in 1989, the *United Nations Convention on the Rights of the Child* (UNCRC) is the most widely ratified human rights instrument, ratified by 191 countries. The UNCRC purports to protect and promote children’s rights across a range of concerns.<sup>56</sup> Within a broad range of rights,<sup>57</sup> the UNCRC Article 40 gives children involved in criminal proceedings certain rights and protective measures, and promotes detention as a last resort.<sup>58</sup>

Other international instruments also promote and protect children’s rights in relation to criminal justice. Of particular relevance here are the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (‘The Beijing Rules’), which promote uniformity and generosity when fixing the minimum age of criminal responsibility.<sup>59</sup> The Beijing Rules urge that ‘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'. An international standard for the lower age limit of criminal responsibility is urged, while accepting that minimum ages of responsibility will differ between societies according to history and culture. The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* has as a fundamental perspective the principle that 'The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.'<sup>60</sup>

The *United Nations Guidelines for the Prevention of Juvenile Delinquency* (The Riyadh Guidelines) urge governments to enact and enforce laws and procedures promoting and protecting the rights and well-being of the young.<sup>61</sup> The Riyadh Guidelines aim to protect children by, among other things, 'counteracting the detrimental effects of all types of detention and to fostering integration in society'.<sup>62</sup>

Especially pertinent regarding the child's right to education, affirming earlier international instruments, is UNCRC Article 29. Among other provisions, it urges that children's education be aimed at developing their 'personality, talents and mental and physical abilities to their fullest potential.' Other treaties incorporate provisions concerning children's education.<sup>63</sup>

When placed in the context of such aspirations, Australia's legal positions and outcomes do not seem so distinguished. Many instruments stress the undesirability of detention, and others promote rehabilitation and holistic education. Such educational aspirations seem to coalesce with psychological evidence that children exhibiting certain risk factors are more susceptible to criminal offending and other antisocial and self-destructive behaviour, and that the critical emotional and personal skills to harmonious social functioning can be learnt.<sup>64</sup> It is obvious that if the goals of these international instruments were attained in Australian jurisdictions, children would not only avoid detention in all but the most serious cases, but that rehabilitation of offenders would be emphasised, and that education in diverse skills would play a vital part in this rehabilitation. As well, more emphasis would be placed on prevention of criminal offending by the attention given in education systems to developing the personal skills that psychological evidence has identified as contributing to children who are not susceptible to criminal offending and other undesirable behaviour.

However, despite the formal act of ratifying these instruments, the Australian government is not legally obliged to pursue their goals. The general principle in Australia regarding the domestic impact of international legal instruments is that, even if ratified, they have no effect unless incorporated by legislation.<sup>65</sup> However, authoritative statements from Australian courts suggest that the influence of international human rights law, even when not directly incorporated into domestic statutes, can resolve ambiguities in the common law. This was first seen in the High Court of Australia in *Mabo v Queensland (No 2)*.<sup>66</sup> One issue was the effect of Australia's 1991 adherence to the First Optional Protocol to the ICCPR. Brennan J stated that although the common law did not necessarily duplicate international law, 'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.'<sup>67</sup>

The High Court of Australia considered the domestic impact of international law regarding children's rights in *Minister for Immigration and Ethnic Affairs v Teoh*.<sup>68</sup> Mason CJ and Deane,

Toohy and Gaudron JJ held that Australia's ratification of the Convention created a legitimate expectation that an executive decision would be made in conformity with its principles and thus treat the best interests of the child as a primary consideration when making the decision. Ratification of international laws was not to be treated as a platitudinous act, particularly where the international instrument recognised global standards to be adopted by courts and administrative bodies when dealing with human rights concerning families and children.

However, the Australian Government has consistently indicated its reluctance to endorse these statements.<sup>69</sup> The position stands that, despite the gestures made by the High Court, ratification of international legal instruments, no matter how important the rights they promote, has no direct legal impact in Australian society.

### **Conclusion**

Children generally do have less life experience, intellectual ability, emotional control and personal maturity than adults to warrant possession of legal rights and responsibilities. Yet it is unarguable that there are children in all jurisdictions who have adequate mental abilities and character to deserve these rights and responsibilities, but who do not possess them because they have not attained the age set by that society's law which deems them capable of holding 'adult' rights. Until law designs more flexible and inclusive methods of conferring legal rights and responsibilities, including criminal responsibility, the inaccurate conferral and withholding of rights and responsibilities will continue. It can only be hoped that the inevitable injustices will not be too great.

### **Keywords**

Children; Criminal Responsibility; Law; Australia; Psychology; Human Rights.

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## Endnotes

- 1 'Children' and 'child' are not concepts susceptible to determinate definition. However, for the purposes of this paper, the term 'children' is used to denote those under 18, since these individuals are the subject group of the statutory and common law provisions.
- 2 Tasmania has not fulfilled its intention to raise this minimum age to 10, indicated in the *Youth Justice Bill 1997* (Tas) Cl 13.
- 3 *Criminal Code 1899* (Qld) s29(1); *Children (Criminal Proceedings) Act 1987* (NSW) s5; *Young Offenders Act 1993* (SA) s5; *Children and Young Persons Act 1989* (Vic) s127; *Criminal Code 1913* (WA) s29; *Criminal Code 1983* (NT) s38(1); *Children's Services Act 1986* (ACT) s27(1);

- Criminal Code* 1924 (Tas) s18(1). Federal legislation is similar, excusing children under 10 (*Criminal Code Act* 1995 (Cth) s7(1); *Crimes Act* 1914 (Cth) s 4M).
- 4 Note the New South Wales proposal in 2000 to reduce the upper age from 14 to 12: Discussion Paper released 10 January 2000 by Jeff Shaw, NSW Attorney-General.
- 5 This English common law principle was established in *R v Gorrie* (1918) 83 JP 136, and was confirmed by the House of Lords in *C v DPP* [1995] 2 WLR 383. However, in England the rebuttable presumption of *doli incapax* for children between 10 and 14 has now been abolished: *Crime and Disorder Act* 1998 (UK) s34. The former English common law position has been adopted and remains authoritative in Australian common law jurisdictions: New South Wales (*Ivers v Griffiths* (unreported) Supreme Court of New South Wales Common Law Division, 10255/98 22 May 1998, Newman J), South Australia (*R v M* [1977] 16 SASR 589) and Victoria (*R v Whitty* (1993) 66 A Crim R 462)
- 6 *Criminal Code* 1899 (Qld) s29(2); *Criminal Code* 1924 (Tas) s18; *Criminal Code* 1983 (NT) s38(1); *Criminal Code* 1913 (WA) s29; *Children's Services Act* 1986 (ACT) s27(1). Federal legislation makes children aged between 10 and 14 criminally responsible only if the child 'knows that his or her conduct is wrong': *Criminal Code Act* 1995 (Cth) s7(2); *Crimes Act* 1914 (Cth) s4N(1).
- 7 For example, Queensland has altered the minimum and maximum ages of criminal responsibility. The *Criminal Code Amendment Act* 1976 (Qld) s19 increased the minimum age of criminal responsibility from 7 to 10, and increased the maximum age from 14 to 15. The *Criminal Law Amendment Act* 1997 (Qld) s12 then reduced the maximum age from 15 to 14. English statutory and common law tests have also been the subject of recurrent investigation, manipulation and change.
- 8 Discussion Paper released 10 January 2000, above n 3.
- 9 *B v R* (1958) 44 Crim App R 1; *C v DPP*, above n 4.
- 10 *R v Smith* (1845) 1 Cox CC 260; *A v DPP* [1997] Crim LR 127.
- 11 *R v Folling* (unreported, Supreme Court of Queensland, Court of Appeal 20/98, 19 May 1998); *C v DPP*, above n 4.
- 12 *R v CRH* (unreported, New South Wales Court of Criminal Appeal, 18 December 1996).
- 13 *F v Padwick* [1959] Crim LR 439; *R v M* above n 4.
- 14 For example, Bray CJ in *R v M*, above n 4 at 594, Lord Lowry in *C v DPP*, above n 4 at 398-399. Connected with this difficulty is the suggestion that the defendant should bear the onus of proving that they lack criminal capacity, rather than imposing this duty on the prosecution. This suggestion has been made by those who think that the rules regarding admissibility of criminal history and proof of a state of mind are inappropriate, and that the presumption is not needed in contemporary society because children now by the age of 10 are sophisticated enough to know the difference between acts that are right and acts that are wrong. See for example the Review of Commonwealth Criminal Law, *Interim Report: Principles of Criminal Responsibility and other matters*, 1990, Australian Government Publishing Service, Canberra, which recommended fixing the age of 10 as the minimum age of criminal responsibility in all Australian jurisdictions, and recommended the reversal of the onus of proof of the mental state of defendants aged between 10 and 14; and the *Criminal Code Amendment Bill* 1999 (Qld) Cl 3, which seeks to overturn the presumption of *doli incapax* for children aged between 10 and 14, and to reverse the onus of proof.

- 15 Forbes J in *JBH and JH v O'Connell* [1981] Crim LR 632, and Lord Lowry in *C v DPP*, above n 4 at 396-399.
- 16 See Stephen Scarlett (1997) 'Doli incapax And The Age Of Criminal Responsibility', Paper presented at the *Children And The Law* conference, Continuing Legal Education Department, St Leonards New South Wales, 97/19, 63-67.
- 17 *JBH and JH v O'Connell*, above n 11; *JM v Runeckles* (1984) 79 Cr App R 255; *M v AJ* (1989) 44 A Crim R 373. There are obvious theoretical challenges to be made about such tests, which rely on stable linguistic meanings. I pursue these challenges in a forthcoming doctoral thesis.
- 18 For examples see *R v Coulburn* (1988) 87 Crim App R 309; Lord Lowry in *C v DPP*, above n 4 at 402; Scarlett, above n 12; *M v AJ*, above n 13.
- 19 See for example Laws J in *C v DPP* [1994] 3 WLR 888 at 894 and Forbes J in *JBH and JH v O'Connell*, above n 11.
- 20 Australian Law Reform Commission (1997) *Report 84: Seen and heard: priority for children in the legal process*, AGPS, Canberra, 49. Queensland had the highest number: 421. NSW : 300; Vic: 225; WA: 374; SA: 319; Tas: 34; NT: 65; ACT: 15. I recognise that the disproportionate rate of indigenous children in custody is an urgent concern, but this lies beyond the scope of this paper. As well, about 84% of the children involved in the court system in Queensland were male, and 94% of detention centre detainees are male, another fact that demands attention.
- 21 *Ibid* 57-58.
- 22 Children's Court of Queensland, *Third Annual Report 1995-96*, Children's Court of Qld, Brisbane 1996, 61.
- 23 'Indigenous youth are over-represented in detention statistics and this increases with the move away from urban to rural to remote centres (*Royal Commission into Aboriginal Deaths in Custody, National Report: Vol. 2*, Commissioner Elliott Johnstone QC, AGPS, Canberra 1991 265.) They are more likely to be repeat offenders (264). Decisions regarding sentencing options are exercised more frequently to their disadvantage (Vol 3, 61). Indigenous youths receive harsher penalties, particularly when sentenced to detention: Human Rights and Equal Opportunity Commission (1997) *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Sterling Press, 527.
- 24 *Monagle v Donegal County Council* [1961] Ir Jur Rep 47.
- 25 All sources not individually referenced I take from Gillian Douglas (1998) 'The Child's Right to Make Mistakes: Criminal Responsibility and the Immature Minor', in Douglas, G and L Sebba (1998) (eds) *Children's Rights and Traditional Values*, Ashgate, Dartmouth, 264-287, 265.
- 26 *Criminal Procedure (Scotland) Act 1975* (UK) s170.
- 27 *Children and Young Persons Act 1933* (UK) s 50 raised the age from 7 to 8, and was amended by the *Children and Young Persons Act 1963* s16(1). Ensuing legislative proposals increasing the minimum age to 12, 14 and 16 failed to be enacted.
- 28 *Crimes Act 1961* (NZ) ss21-22.
- 29 *Criminal Code* (Can) s13.
- 30 *Concluding Observations of the United Nations Committee on the Rights of the Child: Australia* (CRC/C/15/Add.79-21 October 1997) paragraphs 11, 21, 22 and 29.

- 31 *Concluding Observations of the United Nations Committee on the Rights of the Child: Australia* (CRC/C/15/Add.34-15 February 1995, paragraphs 15, 17, 35 and 36.
- 32 Cummins R and Z Burgess (eds) (1985) *Age and criminal responsibility in children*, Parkville, Australian Psychological Society, 4-5. The second conclusion was that 'If the Law requires the specification of chronological age in relation to criminal responsibility, then...It should be clearly stated that the age is for administration or other functional convenience only; It should be seen as a temporary measure until a better method of solving the administrative problem is found; It should not be called an age of "Criminal Responsibility or Capacity" '.
- 33 D Thompson and W Watson, 'In search of the psychological correlates of criminal responsibility: fool's errand or enlightened approach?' in Cummins and Burgess, above n 32, 115-128 at 125.
- 34 Rheta DeVries and Betty Zan (1994) *Moral Classrooms, Moral Children*, Teachers College Press, New York, 31.
- 35 Jean Piaget (1977) [originally 1932] *The Moral Judgement of the Child* (trans) M Gabain, Harmondsworth, Penguin, 58, 63. Piaget's small semi-naturalistic study (watching children playing marbles in Geneva) has been confirmed by Spanish psychologist Jose Linaza's larger 1984 study of English and Spanish children: Smith P, H Cowie and M Blades (eds) (1998) *Understanding children's development*, Oxford, UK ; Malden, Mass, Blackwell, 216.
- 36 Piaget, above n 35, 120, 123-4.
- 37 Kohlberg, L, C Levine and A Hewer (1983) *Moral Stages: A Current Formulation and a Response to Critics*, New York, Karger; Kohlberg, L (1981) *Essays on moral development: Vol 1 The philosophy of moral development*, San Francisco, Harper & Row. Kohlberg's findings have withstood frequent reassessments and have been affirmed: see for example J Snarey (1985) 'Cross-cultural universality of social-moral development: A critical review of Kohlbergian research', *Psychological Bulletin* 97, 202-232; H Bee (2000) *The Developing Child*, 9th ed, Allyn & Bacon, Needham Heights MA 361-366.
- 38 L Walker (1987) 'Moral stages and moral orientations in real-life and hypothetical dilemmas', *Child Development* 60, 157-160; A Colby and L Kohlberg (1983) 'Longitudinal study of moral judgment', *Monographs of the Society for Research in Child Development* 48, 1-2, Serial No 200.
- 39 J Goodnow, 'Law and developmental psychology' in Cummins and Burgess, above n 32, 8-16 at 11; K Bussey and M Steward, 'Children's preparation for and participation in the legal system: Considerations from a Social cognitive developmental perspective' in Cummins and Burgess, above n 32, 17-44 at 18ff, 25ff; M Siegal, 'Children's rights and responsibilities from the perspective of developmental psychology and the law' in Cummins and Burgess, above n 32, 45-50 at 46.
- 40 De Vries, above n 34.
- 41 There is obviously an argument that if children and young offenders deserve to have these skills assessed when debating their criminal responsibility then adult offenders should have the degree of their conative skills considered too. This problem lies beyond the scope of this paper, but I address it in a forthcoming doctoral thesis.
- 42 Bussey and Steward 27-28, above n 39.
- 43 Ibid 28.
- 44 R Cummins, 'The psychological implications of linking age with criminal capacity in children: A speculative synthesis' in Cummins and Burgess, above n 32, 133-137 at 134.
- 45 Id.

- 46 Siegal , above n 39, 46.
- 47 Cummins, above n 44.
- 48 Id.
- 49 Id.
- 50 Ibid 134-135.
- 51 National Crime Prevention (1999) *Pathways to prevention - Developmental and early intervention approaches to crime in Australia* Attorney-General's Department, Canberra, 4.
- 52 Ibid 11. The risk factors and protective factors identified by the Report in Table 1 correlate with American evidence: see for example James C Howell (1997) *Juvenile Justice & Youth Violence*, Sage Publications, Thousand Oaks 162-165.
- 53 The argument that these crucial emotional skills can be learned is confirmed by the most recent findings in emotional intelligence by theorists such as Daniel Goleman. Daniel Goleman's 1995 work, *Emotional Intelligence* (London, Bloomsbury) investigates recent scientific findings about the brain's emotional structure and capabilities. It also develops a model of human emotional intelligence, and it supplies evidence which suggests that children and adults possessing the attributes of Goleman's model are better equipped to deal with life's situations - personal, interpersonal and career - than are those who are simply academically proficient. Goleman's model of intelligence involves emotional abilities that can be taught as skills. Goleman argues that his model is a vision of how education could improve children's emotional intelligence by teaching skills such as empathy, self-awareness, impulse-control, communication skills and self-esteem. Goleman relates the success of school programs that have incorporated his theories.
- 54 Article I states: 'The child must be given the means requisite for its normal development, both materially and spiritually.' The guiding principle of the DRC is the recognition that mankind owes children the best it has to give.
- 55 The *Universal Declaration of Human Rights 1948* recognised that 'Motherhood and childhood are entitled to special care and assistance': Article 25; The *Declaration of the Rights of the Child 1959* also justified the recognition of children's rights: 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection': Principle 2; and Other humanitarian law treaties incorporated provisions specifically related to children and or education include the *International Covenant on Economic, Social and Cultural Rights 1966* Article 13; the *International Covenant on Civil and Political Rights 1966* Articles 14(4) and 18(4); and the *Declaration on Social Progress and Development 1969* Articles 10-13.
- 56 Fundamental rights' protection includes those of life (Article 6), identity (7-8), expression (12-13), freedom of thought (14), protection from abuse (19), promotion of the best interests of the child in actions affecting them (3) and in adoption situations (21), to health (24), to a standard of living adequate for development (27), to protection from economic exploitation (32) and sexual exploitation (34).
- 57 They include the rights to education (art 28, 29), to due process (art 37, 40), and to protection from criminal procedure when young art 40(3)(a). Article 40 expressly promotes protection to children involved in criminal proceedings. As well, several other recent international legal instruments promote the protection of children generally, and especially when involved in criminal proceedings.
- 58 Article 40(3)(b).
- 59 General Assembly Resolution 40/33 of 29 November 1985.

- 60 GA Res 45/113 of 14 December 1990, paragraph 1.
- 61 GA Res 45/112 of 14 December 1990, para 52.
- 62 Riyadh Guidelines paragraphs 2 and 3.
- 63 The *International Covenant on Economic, Social and Cultural Rights 1966* Article 13 reiterates that a major object of education is the full development of the human personality.
- 64 See National Crime Prevention, above n 51, 52; Goleman, above n 53.
- 65 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
- 66 (1992) 175 CLR 1.
- 67 *ibid* 42.
- 68 *Teoh*, above n 63. The case concerned the relevance of Article 3(1) of the UNCRC, which had been ratified by Australia in 1990 and entered into force on 16 January 1991, to a foreign national's application for a permanent entry permit into Australia.
- 69 The *Administrative Decisions (Effect of International Instruments) Bill 1995* (Cth), duplicated by a similar bill in 1997 indicated that international agreements ratified by the Executive did not create a legitimate expectation that decisions made by administrative bodies would comply with international instruments or give notice of their non-compliance. Neither bill has been passed, although a South Australian statute has been, which has similar effect: *Administrative Decisions (Effect of International Instruments) Act 1995* (SA).