Lagging behind Europe: The criminalisation of children in England

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1. Introduction

England and Wales has always had one of the lowest age levels of criminal responsibility in Europe. This unenviable situation was made worse in 1998 when the rebuttable presumption of *doli incapax* (that children are incapable of guilt) applying to children between the ages of ten and fourteen was abolished by s34 of the *Crime and Disorder Act* 1998 (CDA 1998). Much concern was expressed at the time over the abolition of the presumption and more recently there have been mounting calls, especially from Europe, for an increase in the age of criminal responsibility in England. In 2007 there was hope that the English courts might find that a defence of *doli incapax* did exist for ten to fourteen year olds. In *DPP v P* [2007] EWHC 946 Smith LJ questioned, albeit obiter, whether the effect of the CDA 1998 had been to abolish only the presumption of *doli incapax* but not the underlying doctrine. Such hope was, however, short lived as the Court of Appeal held in *R v T* [2008] EWCA 815 that the CDA 1998 had abolished the whole doctrine.

This clarification from the courts emphasises just how severely England is lagging behind the rest of Europe in the age at which it allows children to be drawn into the criminal justice system. Although there is no uniform approach to the age of criminal responsibility in Europe, the age levels in the other member states are generally much higher than in England. As noted by the Council of Europe's Commissioner for Human Rights (2006) in most European states children are held criminally responsible between 12 and 15 or 16. It must also be noted that the low age level of criminal responsibility in England does not mask a welfare approach to those over the age of ten. From this age children are prosecuted and can be sentenced to the severest penalties. Indeed, concern has been expressed that since the abolition of the presumption of *doli incapax* in England younger children are being detained in custody for lesser crimes and for increasing periods (UN Committee on the Rights of the Child, 2002: [59]; Allen, 2006).

Recognition of a defence or presumption of *doli incapax* would have gone someway to protect children from criminal proceedings and bring the law in England closer into line with the approach taken in other European states; something which has been called for by the Council of Europe Commissioner for Human Rights (2005: 33; see also 2006). However, while the efforts of Smith J in *DPP v P* [2007] EWHC 946 to argue that a defence of *doli incapax* might exist were laudable they were not convincing. The decision of the Court of Appeal in *R v T* [2008] EWCA 815 was therefore unsurprising. Now that any hope of a defence of *doli incapax* being recognised by the court has been quashed this article questions whether influence from Europe may help persuade the Government to take the politically courageous step of reintroducing the doctrine of *doli incapax*, whether as a defence or a presumption, and placing it on a legislative footing. In order to discover whether such a step is likely to gain support it must first be established what led to the down fall of the presumption of *doli incapax* in 1998 and how a new defence could avoid the criticisms of the earlier presumption.

2. Background to the English position on the criminal responsibility of children

Special treatment of the young can be traced back to the Laws of King Ine from 688 AD and King Aethelstan from 925 AD (Sanders, 1970: 3). For instance, under the Laws of King Aethelstan a thief caught stealing could not be spared punishment if above the age of twelve and the value of the stolen item was over eight pence. In noting that the presumption of *doli incapax* has existed since at least the reign of King Edward III (1327–1377) Blackstone is apparently not referring to these laws but to the structure of two age levels, which existed in England until 1998 (1769: 23). There was a lower age level under which a child was absolutely presumed incapable of forming a guilty mind and an older age period where this presumption could be rebutted. This structure was clear from around the time of Kind Edward III, but the age line dividing these two groups was unclear for a long time. This is probably because, as Kean notes, fixed age levels would not have been of great use when there was no system for the registration of births (1953: 370). Once set at seven the minimum age level of criminal responsibility remained steady throughout history and was only changed in the twentieth century. It was raised to eight in 1933 (*Children and Young Persons Act* 1933, s50) and to its current level of ten in 1963 (*Children and Young Persons Act* 1963, s16(1)). Based on a recommendation made in the White Paper *Children in Trouble* in 1968 provision was made in s 4 of the *Children and Young Persons Act* 1969 for the age under which a child could be prosecuted to be raised to twelve or even fourteen (except for cases of murder).

Due to a change in government from Labour to Conservative before the Act could be implemented this section never came into force and was eventually repealed. In contrast to the lower age level, once the upper age level of conditional criminal responsibility was firmly set at fourteen, which occurred around the fifteenth century (Kean, 1937: 369) it was never changed until it was abolished in 1998.

Naturally, a rule having such a long existence is bound to be subject to a degree of criticism and as early as 1883 it was criticised by Stephen that the presumption operates seldom and capriciously (1883: 98). With the move towards the welfare model of juvenile justice following the Second World War the presumption was seen as unnecessary given that the focus had shifted from punishment and retribution to providing children with support and care (Williams 1954: 493). Thus the presumption was seen as hindering children receiving the help that they deserved. In 1960 the Ingelby Committee recommended setting aside the presumption (Home Office, 1960: [93]) alongside a number of changes designed to remove young offenders from the criminal justice system altogether, including an increase in the minimum age of criminal responsibility to at least twelve but possibly even thirteen or fourteen.

With the return of the justice model in England in the 1980s and 1990s the criticism now became that the presumption stood in the way of appropriate punishment. During this period courts also began to criticise the presumption, for instance, in *JBH and JH v O'Connell* [1981] Crim LR 632 it was felt to be 'ridiculous' that there should be a need for proof of mischievous discretion in these days of universal education from the age of five. While in *A v DPP* [1992] Crim LR 34 the presumption was thought 'to lead to results inconsistent with common sense'. Despite such criticism, and perhaps surprisingly, the Conservative Government made clear in its White Paper *Crime, Justice and Protecting the Public* that it had no plans to change the doctrine of *doli incapax*, which was said to 'make proper allowance for the fact that children's understanding, knowledge and ability to reason are still developing' (Home Office, 1990: [8.4]). However, by the mid 1990s increasing concern about youth crime fuelled particularly by the media hype surrounding the Bulger case led to more persistent criticism and calls for a tougher approach to young offenders. The response of the Divisional Court was to hold the rebuttable presumption of *doli incapax* to no longer be valid law (*C v DPP* [1995] 1 Cr App R 118). On appeal the House of Lords held that the presumption was still valid law. However, this was based less on a conviction that the doctrine still had a valid role to play than a concern that such a controversial change should not come from the courts but from Parliament. Lord Lowry opined that this was a 'classic case for parliamentary investigation, deliberation and legislation' (*C v DPP* [1996] AC 1 at 40).

Against this background and in the run up to the 1997 election there ensued a competition over which party was going to be the toughest on crime (see Piper, 1999: 400; Fionda, 1998: 86; Freeman, 1997: 115–11; Newburn, 1997: 649). Labour won both releasing a Consultation Paper shortly after coming into office in which two models were proposed to 'modernise the archaic rule of *doli incapax*': either the presumption was to be reversed or it was to be abolished (Home Office 1997: [15]). The Government made clear that it preferred the latter approach and the CDA 1998 was passed which abolished the presumption of *doli incapax* (s34). This means that from the age of ten a child in England goes from being presumed criminally incapable to being as fully criminally responsible as an adult.

3. Criticism of the approach in England

There was much objection to the abolition of the presumption at the time of enactment of the CDA 1998 and this criticism has not died down, indeed, in recent times there have been mounting calls for an increase in the age of criminal responsibility in England and Wales. For instance, as part of the review of the criminal courts a group of human rights organisations called in 2001 for a government led consultation process to review the age of criminal responsibility which was thought to be too low (Criminal Courts Review Report, 2001: [2.2]). Similarly, NACRO argued that the minimum age should be considerably raised (2002: 2). More recently a report by Allen in 2006 expresses concern that ever younger children are being detained for increasing periods since the abolition of the presumption of *doli incapax*. This report calls for a fundamental shift in the way childhood offending is tackled, including an increase in the age of criminal responsibility to fourteen with children under this age brought before the Family Court in cases of serious offending (Allen, 2006).

Such criticism has not been limited to the domestic arena; internationally there have been calls for England to increase the age of criminal responsibility. The *UN Convention on the Rights of the Child* does not specify a minimum age in calling on nations to establish a minimum age 'below which children shall be presumed not to have the capacity to infringe penal law' (article 40.3). However, the *UN Standard Minimum Rules for the Administration of Juvenile Justice* (the 'Beijing Rules') do state that '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' (Rule 4.1). In commenting on England and Wales the UN Committee expressed particular unease at the low age at which children can be brought into the criminal justice system and at the abolition of the principle of *doli incapax* (2002: [59]). Deep concern was also expressed 'at the increasing number of children who are

being detained in custody at earlier ages for lesser offences and for longer sentences' (2002: [59]). The Committee called on England and Wales to 'considerably raise the minimum age of criminal responsibility' (2002: [62(a)]).

On a European level the European Social Rights Committee (ESRC) declared that England was not in conformity with article 17 (rights of mothers and children to social and economic protection) of the *European Social Charter* because the age of criminal responsibility is 'manifestly too low' (2005: 33). This low age level means that young children can be punished and detained for their behaviour when they may not even have understood the wrongfulness of what they had done. The ESRC noted that it 'considers the number of young offenders being detained is very large' and that '[i]t seems to the committee that deprivation of liberty is not being used as a measure of last resort and for the shortest appropriate period of time' (2005: 31).

The Council of Europe's Human Rights Commissioner also expressed concern at the low age level of criminal responsibility in England, commenting that he had 'extreme difficulty in accepting that a child of 12 or 13 can be criminally culpable for his actions, in the same sense as an adult' (2005: 33). While noting that the European Convention on Human Rights does not require any age limit be set before a child can be held criminally responsible the Commissioner did suggested that the age level in England ought to be raised to bring it into line with other European countries (2005: 33–4). The following year the Commissioner argued for an increase across Europe in the age of criminal responsibility (2006). One method of bringing the law in England closer into line with the law in other European states would be to either reintroduce the rebuttable presumption of *doli incapax* or a defence of *doli incapax* for children aged between ten and fourteen. There following will examine the discussion in 2007 of whether a defence of *doli incapax* had survived the CDA 1998.

4. Did a defence of *doli incapax* survive the Crime and Disorder Act 1998?

The dissatisfaction with holding children fully criminally responsible at the age of ten seemed to eventually filter through to the courts in 2007 with *DPP v P* [2007] EWHC 946 raising the question of whether only the presumption of *doli incapax* was abolished but not the underlying defence. This case highlights the unfairness of the English approach of a child going straight from being presumed criminally incapable to fully criminally responsible at the age of ten. It concerned a boy who was diagnosed with ADHD and found to have an IQ which placed him in the lowest percentile of the population. In a report prepared by a clinical psychologist

the view was expressed that P would 'have great difficulty in understanding concepts such as right and wrong and differentiating between "seriously wrong" and merely "naughty"' (*DPP v P* [2007] EWHC 946 at [6]). Other reports agreed that the child did not have the capacity to understand and effectively participate in the proceedings. Doubt was expressed about his ability to listen to evidence and instructions, give evidence and remember events under discussion because of his lack of concentration (at [7]).

On this basis the defence proceeded with an abuse of process application in the belief that since the abolition of the rebuttable presumption of *doli incapax* in 1998 this was the only way to protect a child in P's situation from criminal proceedings. Smith LJ was concerned with the assumption that the doctrine of *doli incapax* had been completely abolished and although pointing out that it was not essential to the decision her Ladyship determined to look into this question. In researching the matter Smith LJ found that at the time of its enactment there had been some academic dispute over the effect of s34 CDA 1998, which states that: 'The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is abolished.'

Smith LJ revived the argument made by Walker in 1999, which had been largely ignored, that s34 could be understood as having merely abolished the presumption of *doli incapax* but not the defence underlying this presumption (1999: 64). In favour of this argument was the literal meaning of the words because the verb 'is abolished' clearly refers to the 'rebuttable presumption of criminal law' as the subject of the sentence (*DPP v P* [2007] EWHC 946 at [41]). Secondly, taking a purposive approach Smith LJ noted that a main impetus for s34 of the CDA 1998 was the call by their Lordships in *C v DPP* for parliament to review the operation of the presumption because the difficulties facing the prosecution were thought to be leading to inconsistent results (at [43]). Further evidence for the fact that it was only the presumption but not the underlying defence that was to be abolished was found in the comment by the Solicitor-General that:

> The possibility is not ruled out, where there is a child who has genuine learning difficulties and who is genuinely at sea on the question of right and wrong, of seeking to run that as a special defence. All that the provision does is remove the presumption that the child is incapable of wrong. (Parl. Debates (HL), 16 December 1997: 595–6)

From the fact that the clause became law without amendment Smith LJ concluded that 'it would be reasonable to rely on the government's intention as a guide to Parliament's intention in passing the clause into law' (*DPP v P* [2007] EWHC 946 at [43]).

This approach would have been unproblematic if it were clear that the Government intended to leave a defence in place. There are, however, many indications before during and after the enactment of s34 that it was the intention of the Government to abolish the whole doctrine of *doli incapax*. In the Consultation Paper *Tackling Youth Crime* which first proposed 'modernising the archaic rule of *doli incapax*' it was suggested that this could be achieved by abolishing or reversing the presumption. The Government made clear even from this early stage in the reform process that it preferred outright abolition because this was 'the simplest course and would send a clear signal that in general children of ten and over should be held accountable for their own actions' (Home Office, 1997: [15]).

The Consultation Paper did mention that after abolition a child could not be convicted without proof beyond reasonable doubt of any necessary criminal intent. Therefore it would still be 'left open to the defence to show that a child under 14 who suffered, for example, from significant mental handicap did not have the capacity to form the necessary criminal intent' (Home Office, 1997: [17]). This statement does not reassure, however, that the aim was to retain a defence of *doli incapax* and provide protection for children not able to understand the wrongfulness of their actions. Rather, it appears merely to hint at the general rule of criminal law, that unless intention can be established (where an intention is required) a person should not be convicted. The concept of *doli incapax* is, however, something quite distinct from the ability to form an intention in relation to an offence (Williams, 1961: 814). It is possible to do an act with intention without knowing it is wrong. For instance, a child may intend to take a toy from another child and keep it without understanding that it is seriously wrong as opposed to merely naughty to do so. Mentioning the example of a 'significant mental handicap' also suggests that it was not envisaged that a defence could be raised where a normally developed child might lack capacity to understand.

Furthermore, consideration was given in the Consultation Paper to leaving a defence of *doli incapax*. This approach was rejected because it was feared that this 'might simply lead to the *doli incapax* defence being employed in almost every case' which would mean that the 'practical difficulties in securing prosecutions and convictions of children under 14 might persist' (Home Office, 1997: [18]). This statement puts into perspective the mischief which s34 was introduced to solve. The Government clearly indicated in the Consultation Paper that abolition was the preferred method to combat the mischief of the difficulty facing the prosecution. This was despite the fact that there was no evidence at all that the presumption was hindering the prosecution of children. Indeed, when asked in Parliament what research supported this assertion the government admitted that there were no empirical data available on the operation of the presumption of *doli*

incapax (House of Commons 1998: [332]). If any evidence was to be found then it pointed to the fact that the presumption was treated as a formality and easily rebutted (see e.g. Lord Lowry in *C v DPP* [1995] 2 All ER 43 at 63; Bandalli, 1998: 116; Fortin, 1998: 444).

During parliamentary debates there were also indications that the aim remained abolition of the whole doctrine. An amendment was proposed in the Lords which would have introduced a defence of *doli incapax* (Amendment no. 81, Parl. Debates, (HL), 19 March 1998: 831). If it were clearly the case that the Bill was only designed to abolish the presumption one would have expected this amendment to have been adopted to add certainly to the law. Further, as noted by Smith LJ it was less clear in the House of Commons whether the intention was to abolish merely the presumption or the whole doctrine. Straw in his second reading speech commented that since the concept of *doli incapax* had developed things had changed in the sense that sanctions in criminal law were no longer so severe and children 'now understand the difference between right and wrong at an earlier age' (Parl. Debates (HC), 8 April 1998: 372). Smith LJ finds that this statement makes clear that the government's wish was to make prosecution easier, something consistent with both abolition of the presumption or the whole defence. Significantly, however, Straw did not mention retaining any defence or the possibility of a child arguing that they were *doli incapax*. This would in fact have been inconsistent with the claims made in the Consultation Paper that it flies in the face of common sense to 'presume that normal children are incapable of the most basic moral judgments' (Home Office 1997: [13]).

Once the Bill was passed there was also evidence to show that the Government thought that the Act had abolished the whole doctrine. A Home Office circular published about the Act did not mention any defence and in fact stated that children who are over the age of criminal responsibility (ten to thirteen years old) will be treated in the same way as other juveniles when deciding whether or not to prosecute. Walker expressed surprise at the time about this circular (1999: 64), given the comments by the Solicitor-General in the House of Lords. This is, however, only surprising if all the indicators suggesting that the government did not intend to retain a defence are not taken into account.

DPP v P did not set out to determine the issue of whether s 34 of the Crime and Disorder Act 1998 had abolished the whole doctrine or merely the presumption of *doli incapax*. Smith LJ was clear that the part of the judgment arguing that the defence of *doli incapax* still existed was obiter and the issue would need deciding in a case which directly raised this point. Unsurprisingly, soon after the issue was directly raised in *R v T* [2008] EWCA Crim 815. Unsurprising, considering the discussion above, the Court of Appeal came to the conclusion the effect

of s34 CDA had been to abolish the whole doctrine of *doli incapax*. The court felt that the main issue was, 'what was understood in 1998 to be the true ambit of the concept of *doli incapax*, and the extent to which it was coterminous with the presumption' ([at 5]). It was found that:

> Parliament must be taken to have intended "the presumption" to encompass the concept of *doli incapax* when it was abolished in section 34. That appears to have been the common understanding of the words at the time that the Act was passed [at 20].

This case conclusively puts an end to speculation about the effect of s34 and confirms that from the age of ten a child in England is fully criminally responsible.

5. The future

Given that there is no longer any hope of an increase in the age level of criminal responsibility coming from the courts in England the question is whether the Government will see these cases as the impetus it needs to investigate and legislate on how best to protect immature children from the criminal justice system. So far the Government has been has been remarkably resilient to domestic criticism of the low age level of criminal responsibility and appears to be committed to the deployment of criminal law as an answer to social problems. This leads to the question of whether there is any hope of change coming from Europe. The European Convention on Human Rights does not require any age limit be set before a child can be held criminally responsible and therefore there is no requirement for states to align the age at which they hold children criminally responsible. Although there is no legal obligation from Europe to increase the age at which children may be drawn into criminal proceedings, there may be political or social pressure. The European Commissioner for Human Rights has, for example, expressed surprise at the age level in England (2005: 33) and the European Social Rights Committee has found the age of criminal responsibility to be 'manifestly too low' (2005: 33). In 2006 the European Human Rights Commissioner argued for an increase in the age of criminal responsibility across Europe 'with the aim of progressively reaching 18 and that innovative systems of responding to juvenile offenders below that age should be tried with a genuine focus on their education, reintegration and rehabilitation' (2006). Currently, this age level is found only in few countries, such as France, Germany and Italy.

In France there is no lower age level of absolute criminal incapacity. This lower age level which applied to children under the age of fourteen was abolished, not uncontroversially, in 1942 (see Guest, 1948: 85). There is now only a conditional age period of criminal responsibility applying to all minors under the age of eighteen.

Thus a minor can only be held criminally responsible and convicted when there is proof that the minor acted with *discernement*, i.e., with the ability to discern the wrongfulness of the act (Art 122–8 *Code Pénal*). Although the lower age level of criminal incapacity was removed, there are fixed age levels below which punitive measures cannot be applied to a child. According to Art 122–8 *Code Pénal*:

> All Minors who have been found guilty of criminal offences are subject to protection, assistance, supervision and education according to the conditions laid down by specific legislation.
>
> This legislation shall also determine the conditions in which the sentences may be imposed upon minors over thirteen years of age.

In Germany and Italy there are two age periods, an age level of fourteen under which a child is conclusively presumed criminally incapable (§19 *Strafgesetzbuch* (Germany); Art. 97 *Codice Penale* (Italy)) and a conditional age period from the age of fourteen until the age of eighteen. During this age period the young person can only be convicted where it is found that he or she was developed enough to be criminally responsible (§3 *Jugendgerichtsgesetz* (Germany); Art. 98 *Codice Penale* (Italy)). The German test contained in §3 *Jugendgerichtsgesetz* is worth noting because it does not simply require an ability to discern the wrongfulness of the act.

> A young person is criminally responsible if at the time of the act he was mature enough, due to his moral and mental development, to understand the wrongfulness of the act and to act according to this understanding.

This test is stricter than that which applied in England in merely requiring proof that the child understood that the act was seriously wrong. In Germany, if taken seriously (there is some doubt about this, see for instance Crofts, 2002: 177–80), there must be an examination of the young person's moral and mental development. This development must be such that the young person is able to understand the wrongfulness of the act *and* that he or she is able to control his or her actions according to this understanding. While this test may seem strict it does accord with the basic principles of criminal law.

As noted by Hart the principle of criminal responsibility 'could rest on the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him' (1968: 181). A similar opinion can be found in the work of Austin who argues that:

> in order that the obligation may be effectual, or in order that the sanction may determine the party from the wrong, it is necessary, 1st, that the party should know or surmise the law which imposes the obligation, and to which the sanction is annexed; and 2ndly, that he should know, or might know by due attention or advertence, that the specific act, for-

> bearance, or omission would conflict with the ends of the law and of the duty. Unless both these conditions concur, the sanction cannot operate as a motive, and the fact, forbearance, or omission, is not imputable to unlawful intention, or to negligence, heedlessness, or rashness. (1885: 489)

Criminal responsibility should therefore be based on two elements: First, a cognitive element, the ability to orientate oneself on legal norms, to understand what the law requires one to do or not to do and the ability to understand the nature of the act committed and its consequences. Secondly, it requires a volitional element, the ability to control one's actions and thus the ability to behave according to the legal norms recognised (Hart, 1968: 218; Lacey, 2001: 353).Where a person lacks these abilities due to immaturity or mental impairment they do not have capacity or the opportunity to adjust their behaviour to the law.

In general adults are developed enough to have these abilities. Therefore it can be assumed that they are criminally responsible and can be blamed for what they do without there being a need for an individual examination of whether these abilities are given. If this is exceptionally not the case, such as where the adult has a mental impairment, the law allows a defence to be raised.

This is not the case with children, who from infancy are in the process of reaching the required stage of development. The lack understanding is not an exception to the norm, rather it is a stage 'through which we must all of us have passed before attaining adulthood and maturity' (Bridge LJ in *R v Camplin* [1978] 1 All ER 1236 at 1241). Briefly explained, children do not have the same level of life experience or intelligence as adults and have a limited ability 'both to appreciate the risks of doing certain things and to appreciate the significance of the resulting harm' (Gross, 1979: 151). The child's values are not as fixed and concrete as those of adults because the young are in the process of developing these values. Children 'lack skill at making comparative judgments, at placing a bit of behaviour on a scale relative to other deeds' (Richards, 1977: 77). It is therefore 'frequently unjustifiable to assume that a child's mind works like an adult's, and that he foresaw what an adult would have foreseen' (Williams, 1961: 815). This is recognised in civil law, for instance, Sir Thomas Bingham MR noted in *Re S* [1993] 2 FLR 437 that the law is careful to protect the rights and interests of children,

> because they are liable to be vulnerable and impressionable, lacking the maturity to weigh the longer term against the shorter, lacking insight to know how they will react and the imagination to know how others will react in certain situations, lacking the experience to weigh the probable against the possible [at 448].

As the young mature they not only become 'increasingly able to consider the long term consequences of their actions' but are more aware 'of the effects of their

actions on other people' (Justice, 1996: [3.8]). Until the child has reached this stage of development they may lack the maturity to fully evaluate their conduct and understand that it is seriously wrong rather than just naughty.

This development does not take place at a steady nor constant rate and it is difficult to make any generalisations about the abilities of the young and set fixed age limits. Thus as stated by the official commentary on the *UN Standard Minimum Rules for the Administration of Juvenile Justice* (the 'Beijing Rules') (1985):

> The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behaviour.

This is exactly what the system existing before the 1998 reforms tried to do. Under the age of ten it was thought that the ability of a child to be doli capax was 'almost an impossibility in nature' (Blackstone, 1769: 23) and therefore the presumption of incapacity was and remains absolute. From this age until the age of fourteen it was recognised that some children might have developed sufficiently to be criminally responsible while others might not. As it would still be normal for children within this age period to lack the capacity to be criminally responsible there was a presumption of incapacity which could be rebutted if there were proof of sufficient understanding. This therefore allowed children to be protected while also allowing children to be convicted if they were so developed.

6. Should the doctrine be reintroduced as a presumption or defence?

The real issue in the debate over the age of criminal responsibility and whether the doctrine of *doli incapax* should be reintroduced for those over the age of ten is whether the concern is the ability of the child to be criminal responsible or whether it is a concern to set an age at which it is thought that children must be dealt with in the criminal justice system regardless of their criminal responsibility. The system for dealing with young offenders in England is not a welfare system but a criminal justice system, with all that that entails, therefore the concern should be to set an age level which protects children from that system when they are not developed enough to be criminally responsible.

The nature of children's development means that the lack of capacity to be criminally responsible is something normal and not exceptional. It would therefore be preferable to reinstate the doctrine of *doli incapax* as a rebuttable presumption rather than as a defence. It could of course be argued that a defence should apply to those beyond the age of fourteen until the age of eighteen as it is quite pos-

sible that a normally developed young person may lack the capacity required for criminal responsibility. This would bring the law in England up to the age level of eighteen as recommended by the European Commissioner. It would, however, clearly be fanciful to expect that such a proposal would be accepted in England since even increasing protection to the age level of fourteen is politically controversial in the current law and order climate. The suggestion of reinstating the doctrine as a presumption of incapacity for ten to fourteen year olds may also cause alarm in some quarters. It is highly unlikely that the Government would take this step because of the fear of appearing to backtrack on the policy of being tough on young offenders. This is despite the fact that criticism directed at the presumption in its former life tended to circle around a misunderstanding of how the presumption operated.

Many of the arguments which led to the abolition of the presumption of *doli incapax* in 1998 did not actually address the issue of whether children are developed enough by the age of ten to be criminally responsible. Instead the focus was mainly on making children take responsibility for their actions (Tackling Youth Crime 1997: [1]). Arguments which actually related to children's capacity to be criminally responsible tended to be founded on basic appeals to common sense claiming that children develop quicker and are better able to distinguish right from wrong due to compulsory education and better access to technology. Such claims were made without a thorough examination of whether children today really are better able to discern right from wrong. More worryingly some claims equated the ability to make basic moral judgements with criminal responsibility (Tackling Youth Crime 1997: [13]). This view of when a child is criminally responsible is, however, a gross simplification of the issue.

Whether a presumption or defence of *doli incapax* were reintroduced there would need to be clarity over what needs to be proven before a child can be found criminally responsible. Since at least 1830 case law has consistently required proof that the child had guilty knowledge that what he or she was doing was wrong (*Owen* (1830) 4 Car & P 236, 172 ER 685). This was explained in the case of *Gorrie* (1919) 83 JP 136 to mean proof that the child understood that what he had done was seriously wrong. In the Divisional Court decision of *C v DPP* [1995] 1 Cr App R 118 at 126 Laws J criticised that the concept of seriously wrong was unclear. Lord Lowry agreed in the House of Lords that this concept was obscure, a view which he felt confirmed by the 'rather loose treatment accorded to the *doli incapax* doctrine by the textbooks' (*C v DPP* [1995] 2 All ER 43 at 57 (HL)). He did, however, feel that the meaning of seriously wrong became reasonably clear when contrasted against 'merely naughty or mischievous'. Although in England there was some discussion about what exactly was meant by the term 'seriously wrong' (see

Williams, 1961: 817–18; Crofts, 2002: 42–5), Australian courts have interpreted this term in line with the required understanding in the case of insanity (*Stapleton v The Queen* (1952) 86 CLR 356). It must therefore be established that the child understood that the act or omission was wrong according to the ordinary standards of reasonable people (*R v M* (1977) 16 SASR 589). Understanding that the act was disapproved of by adults would not be sufficient, because '[a]dults frequently disapprove of breaches of decorum and good manners on the part of children … without regarding the acts or omissions in question as wrong in the relevant sense' (*R v M* (1977) 16 SASR 589 at 591). Similarly, during debates on the presumption in England Lord Goodhart interpreted the requirement as an understanding of the criminality of the act, in the sense that the child knows 'the difference between doing things which are naughty and for which you will be punished (it is to be hoped) by a parent, and doing those things which are seriously wrong and liable to punishment by a court' (Parl. Debates (HC), 19 March 1998: 832).

The most sensible requirement would be for proof 'the child knew that the acts or omissions were wrong by reference to the ordinary standards of reasonable men and women in society generally going beyond mere disapproval or the imposition of merely disciplinary sanctions' (*R v JA* [2007] ACTSC 51 at [82]). This would give much clearer guidance on what sort of understanding a child should have if theya re to be found criminally responsible. The next question which arises is should the prosecution be required to bring such proof or should the burden be on the defence to raise the issue of whether a child has such an understanding. As discussed above it seems futile to hope that the Government would reintroduce the same presumption that it abolished ten years ago. A more realistic expectation is that with domestic criticism and European influence the Government may be convinced that some form of protection from conviction is needed for children aged between ten and fourteen and the least controversial way to do this would be to introduce the possibility of a defence.

The next issue to determine would be where the burden of proof should lay. Once the defence of *doli incapax* were raised should the burden of proving this remain with the defence or should it passes to the prosecution to disprove the defence? It would be in line with the defence of insanity if the defence were required to prove that the child was *doli incapax* on the balance of probabilities. However, whether this should be the case depends to an extent on whether it is thought that lack of understanding is something normal amongst ten to fourteen year olds or not. Previous courts did criticise the assumption that children of this age are not able to understand the wrongfulness of their behaviour (e.g. Laws J. in *C v DPP* [1995] 1 Cr App R 118 at 125; Forbes J in *JBH and JH v O'Connell* [1981] Crim LR 632). The Government also clearly thought that it was abnormal

for a child not to be able to understand the wrongfulness of criminal behaviour by the age of ten (Home Office, 1997: [8]). Given the previously alleged difficulties facing the prosecution in bringing proof that child was doli capax (whether this was the case or not) it is unlikely that the burden would be placed on the prosecution. The most likely step for the Government to take (not least because it is least controversial) would be to introduce a defence of *doli incapax* which must be raised and proven on the balance of probabilities by the defence. This approach might actually have the practical advantage that once raised the defence is taken seriously rather than being treated as a formality as the presumption was in its former life.

7. Conclusion

The concerns expressed both domestically and internationally over the low age of criminal responsibility in England and Wales are justified. England criminalises children at a lower rate than most countries in Europe. There are clearly cases as illustrated by *DPP v P* [2007] EWHC 946 where children may lack the capacity to be criminally responsible beyond the age of ten. In questioning whether the CDA 1998 had abolished only the presumption of *doli incapax* this case raised the hope that a future court might resurrect a defence based on the doctrine of *doli incapax*. This was, however, a faint hope given that there were many indications that the Government clearly intended to abolish the whole doctrine of *doli incapax* in line with its philosophy of making children take responsibility. It was therefore unsurprising that in *R v T* [2008] EWCA 815 the Court of Appeal found that whenever the Government spoke of the presumption of *doli incapax* this was understood as referring also to the underlying doctrine.

Now that the Court of Appeal has confirmed that a defence of *doli incapax* does not exist at common law any change will need to come from Parliament. This article expresses the hope that European influence may persuade the Government in England that it is now time to provide a form of protection for children from prosecution when they are not developed enough to be criminally responsible. Although the European Commissioner for Human Rights recommended that the age level of criminal responsibility might be raised to eighteen across Europe it would be unrealistic to expect that such a dramatic change will occur given the varied age levels in Europe and the fact that there is no legal obligation for States to raise age levels. A more practical expectation for England is that the Government may be convinced to introduce a defence of *doli incapax* which may be raised by a child aged between ten and fourteen if it can be shown that they did not understand that the act was wrong according to the ordinary standards of

reasonable men and women in society. This would be a step towards closing the gaping age difference at which a child is held fully criminally responsible without exception in Europe.

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