

Keeping up (tough) appearances: the age of criminal responsibility

Tim Bateman highlights the case for
and resistance against raising the age in
England and Wales

Whatever else may have changed with the election of the coalition government, the new administration shares with its Labour predecessor a resolute opposition to any suggestion that the age of criminal responsibility should be raised from its current ten years of age. Indeed, the similarity of responses, on this issue, either side of the election is striking.

The current age of criminal responsibility was established in 1963 but, until 1998, the common law principle of *doli incapax* had afforded a degree of protection to children aged 10 to 14 years, by requiring the prosecution to show not only that the child had committed the act alleged, but also that he or she knew that the behaviour in question was seriously wrong, rather than just naughty or mischievous. In defending its decision to abolish the principle, the then Labour government contended that any suggestion that ten year olds did not understand the difference 'between naughtiness and serious wrongdoing' was 'contrary to common sense' (Home Office, 1997). Some 15 years later, responding to an open letter by 55 experts calling for a review of the age of criminal responsibility, Jeremy Wright (2012), Minister with responsibility for youth justice, maintained that 'the Government is of the opinion that children do know the difference between right and wrong at age 10'. On neither occasion was any evidence provided in support of the assertions.

Unacceptably low

Yet there is a growing acknowledgment, even within political circles, that the current age of criminal responsibility is unacceptably low. In 2009, for instance, the Joint Committee on Human Rights concluded that the government's position was unconvincing. More recently, the All Party Parliamentary Group for Children and the All Parliamentary Group on Women have both recommended an increase in the age at which children become criminally liable. Significantly, Liberal Democrat policy on this point is at odds with that of their Conservative partners. On 17 January 2013, a private members Bill was introduced to Parliament, by Lord Dholakia, to increase the age of criminal responsibility to 12 years. At the time of writing, the outcome is unknown, but without the support of the two main parties, the prospects that it will become law are slim. Other jurisdictions within the UK have been less resistant to change: in Scotland, the age at which children can be prosecuted was raised from eight to 12 years in 2010; in Northern Ireland, which currently shares a minimum age of criminal responsibility with England and Wales, Justice Minister, David Ford, recently confirmed that he

is committed to pressing for an increase.

In this context the National Association of Youth Justice has explained the government's rigidity as 'an ideological commitment to appear tough on youth crime rather than a dispassionate review of the evidence' (Bateman, 2012). The grounds for reconsidering the current position are indeed compelling.

The UN Committee on the Rights of the Child has indicated that 12 years should be the 'absolute minimum' age at which children become liable to criminal proceedings. By international standards, this requirement is a relatively modest one and the Committee has, accordingly, urged states to move towards an age higher than the minimum. The jurisdictions of the UK have the lowest ages of criminal responsibility in the European Union. When countries outside of Europe are considered, England and Wales remains an outlier. In Cuba, Argentina, the Russian Federation and Hong Kong, the age of criminal responsibility is 16; in Tanzania it is 15; in Mongolia, Korea, Azerbaijan and China it is 14; and in Canada, Ecuador, Lebanon and Turkey, it stands at 12 years. A recent survey of 90 countries found

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that the most common age (adopted by around a quarter of the sample) was 14 years.

The government's obdurate refusal to countenance any change is thus at odds with

youth justice practice elsewhere. As the UN Committee on the Rights of the Child has consistently noted, it also represents a failure on the part of the UK to meet its obligations under international standards of children's human rights.

Contrary to common sense

The views of New Labour notwithstanding, it is the attribution of criminal responsibility at age ten that runs counter to common sense. Outside of the youth justice system,

the legislative framework provides for a range of safeguards predicated on rather different assumptions about the age at which children are able to make informed choices and can be considered fully responsible for their actions.

In law, young people are not, for instance, considered sufficiently mature to make decisions in relation to the purchase of alcohol and tobacco, apply for a credit card, or get married without parental permission, until eighteen years of age. Full culpability for behaviour that transgresses the criminal law is attributed eight years earlier. Children below the age of 16 years are not regarded as legally competent to consent to sex or to buy a lottery ticket. Conversely, where a child commits a 'grave crime', she/he becomes liable to the same penalties as adults, up to life imprisonment, six years before she/he can make decisions about sexual behaviour.

Whatever the legitimacy of the various age-related thresholds, there is a clear tension between how children in general, and those in trouble, are conceived. This tension is exacerbated by evidence that early induction to the youth justice system is itself *criminogenic*; it both inhibits the natural process of desistance that – for the large majority of children who commit delinquent acts – comes with experience and maturity, and impacts negatively on future prospects for social and economic advancement through legitimate means.

Knowing right from wrong

The core of the government's argument – that children aged ten know the difference between right and wrong – does have an intuitive appeal precisely because there is a sense in which it accords with experience. Indeed, many children have that knowledge much earlier. But the argument involves a categorical error. Acquiring a moral understanding is not like learning to walk, a once-and-for-all achievement. It is rather a skill that improves incrementally over an

extended period: just as we would not expect an infant who has grasped the rudiments of arithmetic to solve quadratic equations, so too a primary school child who understands that damaging property is 'wrong' is not manifesting an ethical stance that would properly qualify him or her for jury service. In important respects children's decision-making, and the cognitive functioning that underpins it, is different from that of adults.

The capacity for abstract reasoning matures throughout adolescence and is significantly underdeveloped in children aged 11–13 by comparison with 14–15 year-olds, who are, in turn, outperformed by older teenagers. Such limitations impact on the ability of those in the younger age groups to engage in the kinds of hypothetical thinking and perspective taking that are constitutive of the sort of moral contemplation implied by the attribution of criminal responsibility. Recent advances in neurological science confirm that those parts of the brain responsible for judgment, decision making, and impulse control are not fully developed until early adulthood. Younger adolescents accordingly have a greater propensity to take risks, prioritise short term over longer term consequences, and engage in the sorts of behaviour that would, from an adult perspective, be considered ill-judged (The Royal Society, 2011). They are also less equipped to understand complex processes and are more vulnerable to making 'choices that reflect a propensity to comply with authority figures, such as confessing to the police rather than remaining silent' (Grisso et al., 2003). Such considerations raise doubts as to: the appropriateness of attributing criminal intent at such an early age; the competence of those currently subject to youth justice proceedings to participate in them effectively; and the legitimacy of subjecting younger adolescents to any form of criminal sanction.

Appropriate sanctions?

The government contends that such sanctions are required if

children are to be held accountable for their wrongdoings and future offending is to be averted. But the poor performance of the youth justice system (one in three children reoffend within a year of disposal), and the fact that recidivism rises with the intensity of intervention and the number of previous sanctions, undermines such claims. In exceptional cases, children may pose a risk to others, but a reasonable concern for public protection – as opposed to a gratuitous desire for retribution – does not require criminalisation. Children can be placed in secure accommodation through welfare proceedings if necessary, an approach which has the advantage that any therapeutic input is not delayed by criminal proceedings.

Far from constituting a response that resonates with common sense a very low age of criminal responsibility is: unnecessary; illogical; potentially harmful; and, from the perspective of children's rights, illegitimate. A high price to maintain a tough appearance. ■

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