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YOUTH JUSTICE AND THE AGE OF CRIMINAL RESPONSIBILITY: SOME REFLECTIONS

I Introduction

Twenty six years ago, in an article published in this journal, Christopher Darby concluded that the implementation of a 'justice' model for young offenders by enactment of the *Young Offenders Act 1993* (SA) had done little to improve protections afforded under the previous 'welfare' based regime.[1] Across Australia, at about that time, the perceived failures of the 'care' approach suggested that the justice model, ameliorated by special rules for children, would be more fit for purpose.[2] Australia had ratified the *United Nations Convention on the Rights of the Child*[3] ('*Convention*') just a few years earlier in December 1990.

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1 Christopher Darby, 'The Young Offenders Act 1993 and the Rights of the Child' (1994) 16(2) *Adelaide Law Review* 285; Cf Rebecca J Bailey, 'A Change in Ideology in the Treatment of Young Offenders in South Australia: The Children's Protection and Young Offenders Act 1979–1982 (1984) 9(3) *Adelaide Law Review* 325, 339. Bailey examines the rehabilitative objectives and relative merits of the previous 'welfare' based regime, itself an attempt to accommodate greater observation of due process in the treatment of young offenders.

2 Judy Cashmore, 'The Link Between Child Maltreatment and Adolescent Offending' [2011] (89) *Family Matters* 31, 36. See also Committee Appointed by the Secretary of State for Scotland, *Children and Young Persons Scotland* (Report, April 1964) ('*Kilbrandon Report*'), in which the Committee concluded that neither the 'crime-responsibility-punishment' nor the 'care and protection' models were able to prevent what was then described as 'juvenile delinquency' within a framework of justice.

3 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). Australia ratified the *Convention* on 17 December 1990 with one minor reservation to Article 37 — which required children to be detained separately from adult prisoners. The reservation was to the effect that if, for family reasons, the child's best interests included accommodation within an adult facility, the provision would not apply. The *Convention* has been accepted by 196 countries including all member states of the United Nations except the United States of America.

Legislation in each state and territory since ratification of the *Convention* is broadly consistent with Australia's international treaty obligations.[4] However, the United Nations Committee on the Rights of the Child observed in 2012 that '… the juvenile justice system of [Australia] still requires substantial reforms for it to conform to international standards'.[5] The principal criticism was the low age of criminal responsibility — 10 years — across all Australian jurisdictions. Although the *Convention* does not specify a minimum age for criminal responsibility, the Committee on the Rights of the Child has recommended that 12 years should be the minimum age.[6] There are many jurisdictions where the minimum age for criminal responsibility is greater than 12 years.[7]

Since 1994, policy makers appear to have had little success in understanding the underlying factors involved in bringing children into contact with the youth justice system. Consequently, progress in systematically addressing these factors — including physical and mental health needs — has been slow, limiting opportunities for meaningful and lasting rehabilitation of young offenders. There have been, and are, some positive developments, particularly more recently. But often they are driven by individual champions for change and not as a result of entrenched policy.[8]

While youth justice policymakers may act with the best intentions, they are routinely limited by difficult budgetary and social circumstances. Consequently, their work is often influenced by sensationalist headlines, inadequate and insufficient rehabilitation programs, deficiencies in the welfare system, and indifference from an unengaged community.

In this same period, there were a number of different therapeutic and rehabilitative approaches adopted in some jurisdictions outside Australia to manage children and young people demonstrating antisocial and criminal behaviour which had

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4 It has taken many years for Queensland to move to keep 17-year-olds out of adult prisons with amending legislation being passed in November 2016 and coming into force in February 2018. See *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2017* (Qld).

5 Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [82].

6 Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) [32].

7 See generally The Law Reform Commission of Hong Kong, *The Age of Criminal Responsibility in Hong Kong* (Report, May 2000). The Report compares the age of criminal responsibility in Hong Kong with that set in various other common law jurisdictions.

8 See Office of the Children's Commissioner, *'I Think I Must Have Been Born Bad': Emotional Wellbeing and Mental Health of Children and Young People in the Youth Justice System* (Report, June 2011), especially the Foreword at 5–6. The Commissioner and Deputy Commissioner for Children in England make a similar observation on the course of improvements to the youth justice system in the United Kingdom.

documented successes over many years.[9] Not only did those initiatives give the young people concerned an opportunity for better lives, they also made their communities safer.

The decision of the Council of Attorneys-General in November 2018 to establish a committee to investigate raising the age of criminal responsibility from 10 years, together with rapid developments in neuroscience and advances made in understanding and measuring the effect of exposure to trauma on children, suggest that it is timely for this journal to consider the topic of youth justice again.

II Data Snapshot of Young People in the Justice System in Australia

In 2018, the Australian Institute of Health and Welfare ('AIHW') published a report on youth justice in Australia for the period 2016–17 concerning children and young people between the ages of 10 and 17 years.[10] It analysed data provided by the states and territories on young people under youth justice supervision orders, either in the community or in detention, because of their involvement or alleged involvement in crime.[11]

On an average day in Australia, 5,359 children and young people were under supervision — that is, about 1 in 500 of the juvenile population. Most were supervised in the community while 17% were in detention. Of those, a disturbing 60% were unsentenced. The average period under all supervision was six months. The overall rates of supervision in both the community and detention dropped over the years from 2012–13 when the last survey had been undertaken, except for Aboriginal and Torres Strait Islander young people. That cohort rose from being 15 times more likely than non-indigenous young people to be under a supervision order in 2012–13 to 18 times

9 *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017) vol 2B ('*Royal Commission Report*'): see especially 358–405. A number of approaches in different jurisdictions are discussed. New Zealand Youth Aid police divert more than 80% of young people away from the justice system and 83% of those young people do not reoffend. See also: CJ Harding and AJ Beecroft, '10 Suggested Characteristics of a Good Youth Justice System' (Conference Paper, Pacific Judicial Development Programme, Family Violence and Youth Justice Workshop, 12–15 February 2013) cited in Peter Johnstone, 'Early Intervention, Diversion and Rehabilitation from the Perspective of the Children's Court of NSW' (Speech, 6th Annual Juvenile Justice Summit, 5 May 2017) [156]–[158].

10 AIHW, *Youth Justice in Australia 2016–17* (Report, 25 May 2018) ('*Youth Justice in Australia*').

11 There are some qualifications to the results published because of small sample sizes for some areas of review; the failure of one or more jurisdictions to provide certain figures; and limited inclusion/exclusion of data outside the 10–17 years range. For some topics there are significant differences between jurisdictions, but the broad undifferentiated figures are sufficient to explore the issues I wish to canvass here.

more likely. Alarmingly, Aboriginal and Torres Strait Islander young people were found to be 24 times more likely to be in detention.[12]

Although the postcode criterion used by the AIHW is a blunt measure, the alignment of material poverty and engagement with the criminal justice system for young people is demonstrated by the figure that 38 per 10,000 children and young people under supervision on an average day come from the lowest socio-economic areas compared with 5 per 10,000 from the highest. Broadly, those from the poorer areas are seven times more likely to be under a supervision order than those from the higher socio-economic group.[13]

The data from another AIHW report reveals that young people under youth justice supervision were nine times as likely as the general population of juveniles to be in the child protection system,[14] and Aboriginal and Torres Strait Islander young people were 17 times as likely as non-indigenous youth to be in both the child protection system and under youth justice supervision.[15]

Among the 980 young people in detention on an average night in Australia in the June quarter 2018, 90% were male, 60% of whom were unsentenced and 54% of whom identified as Aboriginal or Torres Strait Islander.[16] The AIHW further reports that of young people aged 10 to 17 years who were under sentenced supervision at some time from 2000–01 to 2016–17, 39% returned to a supervised sentence before turning 18. Of the young people aged 10–16 years in 2015–16 who were released from community supervision, 26% returned to sentenced supervision within six months and 50% within 12 months. Of those released from sentenced detention, 59% returned within six months and 82% within 12 months.[17]

These figures are a powerful indicator of the overall failure of the present way of managing young people who offend.

III The Characteristics of Young People in Detention

It is well accepted that the main causes of youth offending are family dysfunction, child abuse, neglect, poor attendance at school, mental health problems and neurological disabilities.[18] In June 2011 the Office of the Children's Commissioner for England published its disturbing report, *'I Think I Must Have Been Born Bad':*

12 *Youth Justice in Australia* (n 10) v.

13 Ibid 11.

14 AIHW, *Young People in Child Protection and Under Youth Justice Supervision: 1 July 2013 to 30 June 2017* (Report, 16 October 2018) 13.

15 Ibid.

16 AIHW, *Young People Returning to Sentenced Youth Justice Supervision 2016–2017* (Report, 27 August 2018) 5.

17 Ibid.

18 Cashmore (n 2) 31–41.

Emotional Wellbeing and Mental Health of Children and Young People in the Youth Justice System'.[19] In the Foreword to that report the Commissioner and Deputy Commissioner wrote that

> [c]hildren who end up in prison are some of the most troubled and disaffected in our society … [t]he majority of children who commit offences have awful histories of abuse, abandonment and bereavement often compounded by learning difficulties and disabilities which all too often have been inadequately addressed.[20]

These observations are equally true for the juvenile detention population in Australia.

The 2011 Report prompted the Office of the Children's Commissioner to conduct a literature review into the mental health of detained young people. The ensuing report showed that there were likely to be large numbers of young people in secure settings in England who had undiagnosed neurodevelopmental conditions which had directly contributed to their offending.[21]

In Australia the most comprehensive investigation into the mental and cognitive health of young people in detention was undertaken in Western Australia by the Telethon Kids Institute. It set out to investigate the prevalence of Fetal Alcohol Syndrome Disorder ('FASD')[22] in the Banksia Hill Detention Centre detainee population, releasing its findings in February 2018.[23] The results are deeply troubling.

Nine out of ten incarcerated youth at Banksia Hill, the only youth detention facility in Western Australia, had some form of serious neuro-disability. Of the 99 young people between 10 and 17 who completed a full assessment, 36 — more than one in three — had FASD. And, despite long contact with education, child protection and the justice system in Western Australia, only *two* had been previously diagnosed.

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19 Office of the Children's Commissioner (n 8).

20 Ibid 5–6.

21 Office of the Children's Commissioner, *Nobody Made the Connection: The Prevalence of Neuro-Disability in Young People Who Offend* (Report, October 2012).

22 Fetal Alcohol Syndrome Disorder is an umbrella term to describe a spectrum of conditions caused by fetal alcohol exposure during pregnancy and is recognised as one of the most common causes of intellectual disability in the Western world. See, eg, *Royal Commission Report* (n 9) vol 1, 140.

23 See generally Carol Bower et al, 'Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study Among Young People Sentenced to Detention in Western Australia' (2018) 8(2) *BMJ Open* 1. The authors of the Report published an article on their research in The Conversation: Carol Bower, Hayley M Passmore and Raewyn Mutch, 'Almost Every Young Person in WA Detention Has a Severe Brain Impairment' *The Conversation* (Web Page, 14 February 2018) <http://theconversation.com/almost-every-young-person-in-wa-detention-has-a-severe-brain-impairment-90695>. A summary of the findings can be found on the Telethon Kids Institute website: <http://www.telethonkids.org.au>.

This, the researchers concluded, was the highest known prevalence of FASD in a custodial setting *in the world.*

No less concerning, the Banksia Hill Project found that 89% of sentenced young people in their study had at least one severe neurodevelopmental impairment, whether or not they had FASD. Again, this is amongst the highest reported rate of neuro-disability for sentenced young people in the world. Two-thirds had at least three domains of severe neurodevelopmental impairment and a staggering 23% had five or more severely impaired domains. They included problems with executive function, such as not being able to relate cause and effect or to plan, and problems with memory, cognition, motor skills, attention, social skills and adaptive behaviour. Almost half had severe problems with language, as well as how to listen and understand, and how to reply and explain what they thought. About a quarter were found to have an intellectual disability with an IQ score at or below 70.

The Banksia Hill Project Report has revealed, but much more starkly, what many who work in the youth justice area suspected — while these children and young people had engaged in antisocial behaviour and criminal conduct, some very serious — they were also profoundly impaired. This is not to seek to excuse their conduct and the effect on their victims, but to make quite clear that the solution can never be found in a 'tough on crime stance'.[24]

Because the figures of young people in detention in Australia are actually quite small, it is possible to address therapeutic intervention realistically. After completing their assessments, the Banksia Hill team prepared a report for each of the 99 young people in custody which aimed to help detention centre staff — and the detainees' wider circle of care — to understand each young person's specific difficulties, allowing them to create tailored rehabilitation plans building on and complimenting their relative strengths. This kind of quality intervention requires significant investment in a highly trained and dedicated workforce, appropriate infrastructure, long-term policy commitment outside the electoral cycle, and the engagement of the whole community.[25]

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24 *Royal Commission Report* (n 9) vol 2B, 149.

25 Should this occur the likely economic benefits are compelling. The Royal Commission engaged Deloitte Access Economics to model the potential cost and benefits to the Northern Territory in adopting reforms to youth justice of the therapeutic type recommended. The analysis concluded that implementation of the reforms would produce a net benefit of $335.5 million dollars for the Northern Territory over a 10-year period. Recidivist rates would fall from an estimated 75% of youth to 46% of youth, meaning that both youth and adult crime rates would fall: see *Royal Commission Report* (n 9) vol 2B, ch 28, 466–9.

IV Childhood Abuse and its Effect

I propose to drill down a little deeper into what may lie beneath these stark figures of disability in the detention population acknowledging, however, that it is far from my area of expertise.[26]

Developments in neuroscience help us to understand what had previously been recognised in a behavioural and clinical sense. Many health researchers, clinicians and scientists have closely followed these developments, but government policy writers, police, educators, courts and practising lawyers in Australia have generally been very slow to realise the implications of these new discoveries.[27] Notwithstanding that observation, the vital importance of the first 1,000 days in the life of an infant in building healthy brain architecture is understood in a general way even if the physiological reasons are not. A child's risk of developmental delay is compounded directly by experiences of adversity in early life. If these experiences are not addressed, there is a high likelihood the child will continue to suffer from symptoms of adverse mental and physical health into adulthood, with an associated risk of passing these traits on to subsequent generations.[28]

The environment both before and after birth provides the context for organising the developing brain. That which causes sustained stress is toxic for brain development. Adverse childhood experiences include actual physical, sexual and verbal abuse; physical and emotional neglect; ethnic abuse; having a family member with diagnosed depression or other mental illness or who is addicted to alcohol or other substances; a close family member being in prison; witnessing a mother being abused; or losing a parent to separation, divorce or death.[29]

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26 I wish to acknowledge the assistance of Professor Pankaj Sah, Director of the Queensland Brain Institute at the University of Queensland, for guiding my reading and understanding of this subject for which I am most grateful.

27 Andrew Becroft, as the Principal Youth Court Judge of New Zealand (presently his Honour is the New Zealand Children's Commissioner), has been credited by Judge Peter Johnstone, President of the Children's Court of New South Wales, as being one of the first Judicial Officers to highlight the importance of understanding neuroscience, and how that understanding may assist the justice system in meeting the need to match policy and legislation to the factual realities revealed by science. See Judge Johnstone's address: Johnstone, (n 9) [60]. His Honour has been a forceful advocate for an understanding of the science behind the brain in children and adolescents in the development of policy and its application in the juvenile justice system.

28 See, eg, *Royal Commission Report* (n 9) vol 1, 134.

29 Eleanor Nelson, 'Abuse Casts a Long Shadow by Changing Children's Genes' *PBS Nova Next* (Web Page, 31 July 2014) <https://www.pbs.org/wgbh/nova/article/epigenetics-abuse/>; LI Lara, 'Your Childhood Experiences Can Permanently Change Your DNA' *Smithsonian* (Web Page, 14 September 2017) <https://www.smithsonianmag.com/science-nature/your-childhood-environment-can-permanently-change-DNA-180964869/>; N Burke Harris, *The Deepest Well: Healing the Long-Term Effects of Childhood Adversity* (Houghton Mifflin Harcourt, 2018).

When the molecular structure of DNA was discovered in 1953 it was accepted that DNA and its coded information could not be altered in any way by the environment or by how a person lived their life, although the environment could stimulate the *expression* of a gene.[30] The structure of the DNA neighbouring the gene provides a list of instructions — a gene programme, if you like — which determines under what circumstances a gene is expressed. It was thought that those instructions could not be altered by the environment. However, the developing field of epigenetics,[31] especially over the past decade, has shown not only that gene expression is influenced by environmental factors, but that it may very likely be heritable.[32] The genes themselves are not affected, but the way in which they are *read* is, by blocking access to certain genes and preventing their expression. This mechanism may be the hidden cause behind such conditions as anxiety, depression and paranoia.[33]

Many clinical studies have shown that adverse childhood experiences can give rise to health problems in adults — heart disease, cancer, mood and dietary disorders, alcohol and drug abuse, infertility, suicidal behaviour, learning deficits and sleep disorders. Research from laboratories in a number of centres around the world from about 2003 onwards was able to identify the genetic mechanisms why this is so.[34]

As an example, the body and the brain normally respond to danger and frightening experiences by releasing a hormone, a glucocorticoid, which controls stress. It prepares us for these challenges by adjusting our heart rate, energy production and brain function. It binds to a protein — the glucocorticoid receptor — in nerve cells of the brain. In a normal situation, as we all know from our own experiences of getting a fright, when the danger passes, our stress symptoms gradually ease and then cease.

In a recent paper, after analysing over a decade of findings about epigenetics, the authors noted that the gene for the receptor is inactive in people who have experienced childhood stress and, as a result, those people produce fewer receptors.[35] Without receptors to bind to, glucocorticoids cannot shut off their own production, so the hormone keeps on being released and the stress response continues, even if there is no immediate threat.

This helps to explain evidence heard in the Royal Commission of children and young people with a history of dysfunctional family life exhibiting highly anxious

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30 Israel Rosenfield and Edward Ziff, 'Epigenetics: The Evolution Revolution' (2018) 65(10) *The New York Review of Books* 36.

31 BF Vanushin and VV Ashapkin, 'History and Modern View on DNA Modifications in the Brain' in Timothy W Bredy (ed), *DNA Modifications in the Brain: Neuroepigenetic Regulation of Gene Expression* (Elsevier, 2017) 3.

32 Rosenfield and Ziff (n 30) 36.

33 Ibid.

34 Ibid; Gustav Turecki and Michael Meaney, 'Effects of the Social Environment and Stress on Glucocorticoid Receptor Gene Methylation: A Systemic Review' (2016) 79(2) *Biological Psychiatry* 87, 92.

35 Turecki and Meaney (n 34) 92.

behaviour in a detention setting and elsewhere: 'fight or flight', if you will, as a constant state.

This effect, known as methylation, is long lasting, and the consequences may be chronic inflammation, diabetes, heart disease, obesity, schizophrenia and major depressive disorder. Hearteningly, there is some evidence to suggest that it may be reversible.[36]

Many of the children and young people who come into contact with the youth justice system demonstrate or admit to a heavy use of non-therapeutic drugs of addiction such as nicotine, alcohol and unlawful drugs.[37] While it is currently accepted that 50% of the risk for addiction to any drug is genetic, the other 50% is thought to reflect a variety of environmental exposures through epigenetic mechanisms in the brain.[38]

The greater likelihood of suicide in a person who has been exposed to childhood trauma has been demonstrated in humans by comparing the genes of samples from the Canadian Brain Bank of those who have died by suicide with a history of childhood abuse and samples from those who died in a sudden non-suicide related event. The brain samples of those who died by suicide but who had not been exposed to childhood trauma did not show epigenetic marks.[39]

Perhaps even more concerning however, are the experiments that demonstrate that animals which have not been exposed *directly* to traumatic circumstances — such as those still in their mother's womb during stressful or traumatic events — have blocked receptor genes. It is postulated that this is due to the transmission of glucocorticoids from the mother to the fetus via the placenta.[40] This quite foundational research shows that stress caused by

> war, prejudice, poverty and other forms of childhood adversity may have consequences both for the person affected and for their future unborn children not only

36 Nelson (n 29).

37 AIHW, *Overlap Between Youth Justice Supervision and Alcohol and Other Drug Treatment Services: 1 July 2012 to 30 June 2016* (Report, 13 July 2018) 1–2.

38 J Feng and EJ Nestler, 'Epigenetic Modifications of DNA and Drug Addiction' in Timothy W Bredy (ed), *DNA Modifications in the Brain: Neuroepigenetic Regulation of Gene Expression* (Elsevier, 2017) 128.

39 Patrick O McGowan et al, 'Epigenetic Regulation of the Glucocorticoid Receptor in Human Brain Associates with Childhood Abuse' (2009) 12(3) *Nature Neuroscience* 342, 344.

40 JR Pfeiffer, L Mutesa and M Uddin, 'Traumatic Stress Epigenetics' (2018) 5(1) *Current Behavioral Reports* 81, 88. See also TW McDade et al, 'Do Environments in Infancy Moderate the Association Between Stress and Inflammation in Adulthood? Initial Evidence From a Birth Cohort in the Philippines' (2013) 31(7) *Brain, Behavior and Immunity* 23, 28.

> for social and economic reasons [which were well known] but also for biological ones.[41]

These findings, albeit specialised, are widely known by non-experts and ought to be at the forefront of youth justice policy design.

V Adolescent Maturity and the Brain

Even in optimal developmental circumstances, after a child leaves the highly vulnerable age of infant dependence and approaches adolescence, brain structure and processes undergo considerable change. Since its advent, magnetic imaging has shown that the adolescent brain is structurally different to that of a mature adult and, particularly in the area devoted to impulse control and decision-making, inclined to risk taking.[42]

Neural connections proliferate during childhood and adolescence, peaking at about 11 for girls and 12 for boys. Thereafter the brain embarks on a process of pruning those connections rarely used, making itself more efficient and specialised. Those neural connections that survive the pruning process become more adept at transmitting information and increase brain integration.[43]

The prefrontal cortex is the last area of the brain to show these structural changes. It is the part of the brain which coordinates higher order cognitive processes and executive functioning. It is used for goal-directed behaviour 'including planning, response inhibition, working memory and attention'. In everyday parlance, these skills 'allow an individual to pause long enough to take stock of the situation, assess his or her options, plan a course of action and execute it'.[44] Conversely, poor executive functioning leads to difficulty with planning, attention, using feedback, and mental inflexibility, all of which undermine judgment and decision making: a not atypical teenager!

With age, the necessary skills grounded in the prefrontal cortex are matured, explaining the well-known phenomenon of young people 'growing out of' unwanted behaviour. This supports a strong diversion policy to keep a young person out of the criminal justice system, for it is established that any period in juvenile detention will likely lead to time in an adult prison.[45]

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41 Rosenfield and Ziff (n 30) 36.

42 Staci A Gruber and Deborah A Yurgelun-Todd, 'Neurobiology and the Law: A Role in Juvenile Justice?' (2006) 3(2) *Ohio State Journal of Criminal Law* 321, 330; Sara B Johnson et al, 'The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy' (2009) 45(3) *Journal of Adolescent Health* 216, 218.

43 Johnson (n 42) 217.

44 Ibid.

45 See generally *Youth Justice in Australia* (n 10). See also *Royal Commission Report* (n 8) vol 2B, 283–5.

A positive aspect of this maturation process is that the very immaturity which can lead to offending behaviour makes the young person apt for change where adult offenders may be more intractable.[46] It supports a strong diversionary policy aimed at keeping a young person at the very least out of detention, but also out of the formal criminal justice system.

VI The Purpose and Continuing Role of an Age of Criminal Responsibility

With the information which is now available to inform policy makers, legislators and the courts about the make-up of the majority of young people who offend, it is timely to reconsider the age of criminal responsibility from which the irrebuttable presumption operates, as well as its associated rebuttable presumption of *doli incapax*.

The approach to criminal responsibility in young children has been to resile from attributing legal blame to them because of their moral and physical immaturity. Societal response to wrongdoing by children has been, progressively, to raise the age at which they are deemed to be criminally responsible for their acts. The *Convention* requires each signatory state to seek to promote the establishment of laws, procedures and institutions specifically applicable to children 'alleged as, accused of, or recognised as having infringed the penal law'.[47] In particular, states are required to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. As mentioned earlier, no specific age is nominated, although the United Nations Committee charged with monitoring compliance with the *Convention* has criticised those jurisdictions in which the minimum age is less than 12 years old.[48]

The *UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')* made under the *Convention* explain this further:

> The minimum age of criminal responsibility differs widely owing to history and culture. 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 antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities.[49]

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46 Gruber and Yurgulen-Todd (n 30); Johnson (n 42) 330–1.

47 *Convention* (n 3) art 40(3).

48 Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) [32].

49 *The Beijing Rules* by GA Res 40/33, 40th sess, 96th plen mtg, Agenda Item 98, UN Doc A/RES/40/30 (29 November 1985).

In Australia across all jurisdictions, the statutory minimum age below which children are deemed incapable of committing a *criminal* act is 10 years. The language used varies. The South Australian *Young Offenders Act 1993* (SA) provides succinctly in s 4 that

> [a] person under the age of 10 cannot commit an offence.

On the other hand, the New South Wales *Children (Criminal Proceedings) Act 1987* (NSW) provides rather more compendiously in s 5 that

> [i]t shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence.

The Queensland *Criminal Code Act 1899* (Qld) avoids any judgement by a simple policy statement in s 29(1):

> A person under the age of 10 years is not criminally responsible for any act or omission.

All states and territories, either by the retention of the common law presumption or by legislative enactment, have retained the legal concept of *doli incapax.* This is a rebuttable presumption that a child aged between 10 and 14 years is excused from criminal responsibility unless it is proved by the prosecution to the criminal standard that, at the time of committing the offence, the young person had the capacity to know that he or she ought not to have performed that act (or omission). In England, the presumption was removed legislatively in 1994 by s 34 of the *Crime and Disorder Act 1998* (UK).

There are many countries in which the minimum age for criminal responsibility is higher, some by a considerable margin. For example, in Belgium it is 18 years; it is 16 years in Japan, Portugal and Spain; in the United States there are various ages (18 years in some states and 16 years in others); in the Scandinavian countries and Iceland, it is 15 years; in Austria, Germany and other European countries, it is 14 years; for New Zealand it is effectively 14 years (except for murder and manslaughter which is 10); and in Canada, Ireland, Greece and the Netherlands, it is 12 years.[50]

Scotland is a rather special case. As a result of recommendations made by the Kilbrandon Committee in 1964, virtually no child under the age of 16 years who has committed an offence is prosecuted in the criminal courts. Those children are brought before welfare panels for training and rehabilitation and do not appear in any court.[51] While a discretion to prosecute a young person remains, it is used rarely and

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50 See generally *Report on the Age of Criminal Responsibility in Hong Kong* (n 7).

51 See generally *Kilbrandon Report* (n 2). See also the discussion by Gerry Maher, 'Age and Criminal Responsibility' (2005) 2(2) *Ohio State Journal of Criminal Law* 493.

in exceptional cases. In 2016 only 24 children out of a total population of 5.4 million were prosecuted.[52]

The origin of the proposition at common law that a child ought not be held criminally responsible for acts or omissions under a particular age is ancient, and predicated on the assumption that a young child does not have the 'discretion to discern between good and evil'.[53] In other words, children are not fully formed or complete persons. Nor was it acceptable that young children should be exposed to both the rigors of an adult trial and the usually severe punishment which followed. By the 1820s there were said to be some 200 offences which attracted the death penalty, although by 1841 only eight remained on the statute books.[54] As a general proposition, from the time of Sir Matthew Hale the common law accepted that children under the age of seven years were incapable of distinguishing between good and evil and thus not subject to the criminal law. Between the ages of eight and 14 years they continued to be deemed incapable, but that presumption could be rebutted by the prosecution. After the age of 14 young people were deemed capable and subjected to the ordinary criminal law.

In truth there is no scientific or, indeed, any other evidence to support these or any ages for fixing the imposition of criminal responsibility. The Kilbrandon Committee concluded that

> [t]he legal presumption by which no child under the age of [eight] [then the law in Scotland] can be subjected to criminal proceedings is not therefore a reflection of any observable fact, but simply an expression of public policy to the effect that in no circumstances should a child under the age of [eight] be made the subject of criminal proceedings and thus liable to the pains of the law. Equally, at various intermediate stages prior to adulthood, the effect of statute law is to exempt juveniles below certain ages from certain forms of judicial action … It is clear, therefore that the 'age of criminal responsibility' is a largely meaningless term, and that in so far as the law refers to the age of [eight] as being the minimum age for prosecution, this is essentially the expression of a practical working rule

52 *Royal Commission Report* (n 9) vol 2B, 364–5. Independent charitable providers are the main suppliers of grant-supported residential services, including secure accommodation. One such provider, the Kibble Education and Care Centre, is discussed at 365–9.

53 Sir Matthew Hale, *History of the Pleas of the Crown* (T Payne, 1778) vol 1, ch 3; *R v JTB* [2009] 1 AC 1310, 1329 [8] (Lord Phillips).

54 The matter is discussed in AN Wilson, *The Victorians* (Arrow Books, 2003), at 38. Enactment of the *Forgery, Abolition of Punishment of Death Act 1832*, 2 & 3 Wm 4, c 123 reduced the number of capital crimes to approximately 60, the *Offences Against the Person Act 1837*, 7 Wm 4 & 1 Vict, c 85 to approximately 16, and the *Criminal Law Consolidation Acts 1861*, 24 & 25 Vict, c 84–100 to four (murder, high treason, arson in a royal dockyard and piracy).

> determining the cases in which a procedure which may result in punishment can be applied to juveniles.[55]

This want of an evidentiary basis for conclusions about criminal responsibility is reflected in many of the decisions about *doli incapax* culminating in *R v JBT,*[56] the decision which brought to a complete end the presumption in English law, either as part of the prosecution case to be proved or as a defence. Decisions quashing convictions imposed on juveniles were described as 'inconsistent with common sense'.[57] Lord Phillips described the rebuttable presumption as 'an anachronism',[58] and quoted with approval Professor Glanville Williams:

> In this climate of opinion, the 'knowledge of wrong' test no longer makes sense … [it] stands in the way not of punishment, but of educational treatment. It saves the child not from the gallows, but from the probation officer, the foster-parent or the approved school. The paradoxical result is that, the more warped the child's standards, the safer he is from the correctional treatment of the criminal law.[59]

Threaded throughout these relatively recent decisions are generalisations that, in past times when the presumption was developed, 'children did not grow up as quickly as they do now',[60] or that universal education has inculcated in children the difference between right and wrong. Perhaps that might have been so for the shielded children of the prosperous, but for those of the poor sent to work as young as six years old, or the victims of the widespread starvation and privation which were features of both rural and city life before the welfare state, it might be supposed that they hardly experienced childhood. Observations today about 'helicopter' and 'snowplough' parents suggest that, at least their children, remain essentially immature for much longer than their more deprived ancestor counterparts. It is certainly a consideration that dedication to an artificial online world might also blunt the moral compass of the young people engaged with it.[61]

How, then, can the law accommodate natural brain immaturity in children, the impacts of adverse childhood experiences on adolescent behaviour, and the likelihood of repeat offending? It is said that raising the age of criminal responsibility will give modern day Fagins a larger pool to draw on and those children will be outside any remedial jurisdiction. In all Australian jurisdictions, 'care and protection' orders are

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55 *Kilbrandon Report* (n 2) [65].

56 [2009] 1 AC 1310.

57 Ibid 1332 [20] (Lord Phillips) quoting Bingham LJ in *A v DPP* [1992] Crim LR 34.

58 Ibid 1331–1332 [20]–[21] (Lord Phillips).

59 Glanville Williams, 'The Criminal Responsibility of Children' (1954) 1(1) *Criminal Law Review* 493, 495–6.

60 *C (A Minor) v DPP* [1996] 1 AC 1, 9 (Laws J).

61 Thomas Crofts, 'Doli Incapax: Why Children Deserve its Protection' (2003) 10(3) *Murdoch University Electronic Journal of Law* 1, 9 [41]; Will Pavia, 'Snowplough Parents Dig Deeper Hole', *The Australian* (Sydney, 26 March 2019) 10.

made to endeavour to tailor a plan for each child at risk. It is not the case that children not subject to the criminal law are or will be left to drift eventually into a life of crime.

The science in general, and the specific neurobiological profiles for the cohort of young people who are the subject of sentenced supervision orders, suggests that 12 is still too low an age. If the rebuttable presumption of incapacity were to be absorbed into the irrebuttable, the age of criminal responsibility would rise to 14 years consistently with many other countries with which Australia would see itself as culturally aligned. Any age, even into early adulthood, is arbitrary, and even then, some young adults — particularly some young males — are not fully formed.

A public health and welfare model to drive policy about children and young people who demonstrate offending conduct, rather than a justice model, presents the greatest prospect of successfully rehabilitating what is largely a damaged group. It will be quite insufficient merely to raise the age of criminal responsibility. As Scotland's much praised Kilbrandon Committee recognised well over 50 years ago, taking young people who offend out of the criminal justice system for training and education is the surest way to rehabilitation, and the evidence convincingly demonstrates that communities will be safer. So much more is now known about the fundamental damage that exposure to poverty, violence, neglect and the other calamities of life do to the structure of the brain, with consequences of mental, cognitive and physical ill health than when our legal responses to childhood delinquency were developed. It is irrational to continue to base a system on processes that do not produce beneficial outcomes when other, more successful approaches are known and not beyond reach. Accordingly, there can be no advocating for anything other than a welfare (in the best sense of that much maligned word) approach.