Legal Incapacity, Autonomy, and Children's Rights

Lauren Eade*

Over the centuries, the child has presented the law with a number of crises of categorisation. The law's protective function has been attracted by the perceived "innocence" and immaturity of the child. At the same time, the *actual* conduct of children, from criminal acts through to sexual experimentation, has led to legal intervention arguably motivated by a desire to control rather than to protect. The tension between the law's perception of the child and the individual child's actions, and between the law's protection and control motives, may particularly be seen in the legal incapacities the law has placed upon the child. [1]

Legal incapacities, with the exception of the incapacity to consent to medical treatment,[2] are solely based upon biological age. These operate to restrict a child's agency across a wide variety of matters.[3] Additionally, they are fundamental indicators of the ways in which the law conceptualises the child. As will be seen, the law's representation of children as a series of incapacities may have serious consequences for children's autonomy

* BA (Hons) LLB

1 This tension may also be seen in the other approaches the law has taken towards children: child protection laws such as the Children and Young Persons (Care and Protection) Act 1998 (NSW) and child control laws such as the Children (Protection and Parental Responsibility) Act 1997 (NSW). There has been a great deal of legislative activity in both of these areas in recent years. However, child protection and control laws are beyond the scope of this essay.

2 A sliding scale of incapacity to consent to medical treatment has been proposed in Gillick v West Norfolk Area Health Authority [1985] All ER. This incapacity nominally expires at age sixteen in England but under the Gillick test a child may acquire the capacity to consent earlier, depending on his or her level of maturity. See, for example, Alderson, P and Goodwin, M. "Contradictions within concepts of children's competence." (1993) 1 The International Journal of Children's Rights 303.

and, as a result, for children's rights.

This essay will consider the law's conceptualisation of the child as incompetent by reference to the *doli incapax* presumption and the laws relating to age of consent for sexual intercourse. It will go on to analyse the motives behind this. It will then examine the consequences that follow for the autonomy of the child, and will discuss how this affects the issue of children's rights. It will conclude with an analysis of ways in which incapacities might be adjusted to be more responsive to the actual capabilities of individual children and their rights as human beings.

Doli Incapax

The case of the child who is alleged to have committed a crime presents an extreme point of tension for the law between its conception of the child as innocent and vulnerable, and the "fact" of the child's destructive and dangerous actions. The presumption that a child is *doli incapax*, or incapable of evil, has been the law's chief way of resolving the dilemma since the reign of Edward III.[4]

The presumption in effect sets the age at which a child can be convicted of a criminal offence: it is a "bar to conviction" rather than a defence properly so called.[5] In the past, the common law has set the expiry of the presumption, and accordingly the commencement of criminal responsibility, as early as the age of seven.[6] In New South Wales, the *Children (Criminal Proceedings) Act 1987* (NSW) provides in s 5 that the presumption is irrebuttable up to age ten. Between the ages of ten and fourteen, s 5 provides that the presumption is rebuttable by proof that the child knew that what he or she was doing was "wrong."[7]

Even from this cursory analysis it is apparent that the presumption has thrown up a number of age classifications in the New South Wales legal system alone: seven years, ten years, fourteen years. In the Australian Capital Territory, *doli incapax* is irrebuttable only up to the age of eight; in Tasmania, seven. Such differences are mirrored further afield. In Ireland,

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3 Incapacity to: be guilty of a crime, consent to sexual intercourse or medical treatment, drive a car, drink alcohol, smoke cigarettes, purchase certain prohibited items (including knives), contract for non-necessaries (outside NSW), marry and vote.

4 C (a minor) v DPP [1995] 2 WLR 383 at 387 per Lord Lowry, quoting the judgement of Laws J from the Divisional Court, which in turn quoted from Blackstone's Commentaries on the Law of England.

5 See, for example, Brown, Farrier, Neal, and Weisbrot, Criminal Laws, 1st Ed, Sydney: Federation Press, 1990 at 669.

6 Freeman, M, The Moral Status of Children: Essays on the Rights of the Child, Dordrecht: Martinus Nijhoff, 1997 at 251.

7 Although there is some controversy over what the evidence must show. Must it prove that the child knew he or she was committing "a wrong act as distinct from an act of mere naughtiness or childish mischief," or that the child knew his or her act attracted criminal sanctions? The former position is espoused by Lord Lowry in C v DPP above, n 4 at 401, the latter in R v CRH Court of Criminal Appeal NSW 18 December 1996.

the presumption expires at seven; in Scotland, at eight.[8] In the United Kingdom, it expires at ten.[9] This divergence within the common law world is puzzling, to say the least, and is no less puzzling when viewed in light of the dearth of scientific evidence to justify the ages selected as indicative of a child's competence or otherwise.[10] Indeed, what research has been done tends to suggest quite strongly that biological age is not an accurate determinant of a child's *actual*, as opposed to *presumed*, "moral" capacity.[11] It is quite difficult to conceive of these numbers as anything other than arbitrary.[12] What is the basis for this unscientific, and arguably irrational, approach to children?

The motivation for *Doli Incapax*

Viewed in its "best light," *doli incapax* is the benevolent State's means of protecting the child from the consequences of his or her innocent acts. The law views the child as inherently innocent; as by nature incapable of forming the *mens rea*[13] to be guilty of a crime,[14] although physically capable of performing the *actus reus*.[15] It acts to spare the child under ten (or seven, or eight) from the trauma associated with the criminal justice system. For the child under ten, the law's protection motive is clear.

The law is, however, unwilling to extend quite the same degree of benevolence to the child aged between ten and fourteen. The presumption of the child's innocent mind still exists, but is rebuttable. And its rebuttal may pose a unique danger to children that is not faced by adults. In seeking to rebut the presumption, the prosecution may attempt to adduce evidence of past convictions and conduct that would be inadmissible

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8 A comprehensive review of ages of criminal responsibility is at 18.12-18.15 of ALRC 84 Seen and Heard: Priority for Children in the Legal Process, 1987 at 18.12 - 18.14. See also C v DPP above, n 4 at 385 per Lord Jauncey of Tullichettle.

9 The position in the United Kingdom prior to 1998 was similar to that in New South Wales, with the doli incapax presumption irrebuttable up to age ten and rebuttable between the ages of ten and fourteen. The Crime and Disorder Act 1998 (UK) abolished the rebuttable phase of the presumption.

10 Houlgate, L, The Child and the State: a Normative Theory of Juvenile Rights, London: Johns Hopkins, 1980 at 72-3.

11 Freeman, The Moral Status of Children, supra n 6 at 7, 245.

12 This was specifically acknowledged by the Australian Law Reform Commission in supra n 8 at 18.16: "The Inquiry recognises that there is an element of arbitrariness when setting age thresholds, especially given the great variations in capacity between individual children."

13 Latin, "criminal mind."

14 Logic dictates that doli incapax is directed to mens rea, and authority supports this conclusion: C v DPP above, n 4 at 388 per Lord Lowry, quoting Archbold Criminal Proceedings and Evidence. However, since the prosecution must adduce evidence not only of the requisite mens rea for the offence but also to rebut the presumption, doli incapax and mens rea are often treated as quite separate. See, for example, the quote in Lord Lowry's judgement at 395 from Justice Donaldson's judgement in JBH and JH (minors) v O'Connell [1981] Crim. LR 632.

15 Latin, "criminal act."

against an adult.[16] Caselaw tends to suggest that such evidence is likely to be admitted,[17] although Lord Lowry in *C v DPP* made a principled stand against this, stating that "a child defendant ought not to be put in a worse position than an adult."[18] It may be said that child defendants under the presumption are at least subject to a threat not faced by adults. Viewed in its worse light, then, *doli incapax* may prejudice the child over ten.

Even so, *doli incapax* is one of the few types of incapacity that cannot be regarded as having *in itself* a child control, rather than protection, motivation. Unlike other incapacities, *doli incapax* is not an excuse for intervention in the child's life. Rather, the law creates a zone of State non-interference around the child that can only be removed between ten and fourteen with significant evidence, proved beyond a reasonable doubt. The tension between the law's perception of the child's inherent innocence and the criminal act is seemingly resolved in favour of the child's innocence.

However, this resolution is largely achieved by assumption. And therein lies a significant problem. Doli incapax presumes something fundamental about the way children think and act. The actus reus being present, doli incapax denies the existence of mens rea, and as such creates a schism between the child's will and its actions. Similar criminal defences exist in relation to insanity[19] and automatism.[20] To assume that a child – a thinking, functioning human being – falls into the same category as the seriously mentally ill or those not capable of controlling their bodies, and to make this assumption without proof presents a horribly distorted image of childhood.

Other incapacities the law places on the child may restrict the child's agency within society[21] or, more intrusively, the child's capacity to control the external treatment of his or her own body.[22] *Doli incapax* is arguably more far-reaching in operation, affecting not merely the legal validity of the child's will, but its very existence. It denies the child's ability to control his or her own body. It denies the child's autonomy generally. And in so doing, the presumption may demonstrate in its *consequences*, not of itself, that it has a very real control motive. Denying a child's autonomy

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16 Louis Schetzer, The Law Report, ABC Radio, 7/3/2000.

17 For practical examples, see M [1977] 16 SASR 589, R v B [1979] 1 WLR 1185

18 C v DPP above, n 4 at 395-6 per Lord Lowry.

19 Under the M'Naghten's rules, set down by the English House of Lords in (1843) 10 C. & F. 200, following the acquittal of Daniel M'Naghten (or Macnaughton) for murder, the defence of insanity will be available where "at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong" (italics added).

20 The defence of automatism is available where, although the requisite actus reus is present, the defendant was not in control of his or her body at the time of the offence. Typical examples include "sleepwalking in some circumstances, some cases of epilepsy, concussion, hypoglycaemia and dissociative states": R v Falconer (1990) 171 CLR 30 at 61 per Deane and Dawson JJ.

21 For example, the incapacity to contract for non-necessaries (outside NSW) or to vote.

22 For example, incapacity to consent to sexual intercourse or medical treatment.

may mean denying it something much greater, and without which it is the object of the authority of its parents or the State: its rights as a human being.

Age of consent

The sexually active child represents another point of tension between the perception of the child as innocent and the social perception of sexual activity as an adult domain at best and corrupting at worst.[23] The law has resolved this tension through a separation of childhood and sexuality.[24]

The *Crimes Act 1900* (NSW) prescribes the offence of "sexual intercourse – child" in sections 66A and 66C. The former allows for a sentence of imprisonment for up to twenty years where the child victim is under the age of ten; the latter for eight years where the child is aged between ten and sixteen.[25] The act provides higher penalties for homosexual intercourse. Section 78H allows a sentence up to twenty-five years where the child victim is aged under ten and s 78K allows for a sentence of ten years where the child is aged between ten and eighteen. In all cases the penalties are roughly comparable with those for sexual assault,[26] or aggravated sexual assault.[27] The difference is that sexual assault is defined in the Act by reference to the *absence of consent*.[28] Conversely, the issue of consent is completely irrelevant to the offences detailed above. Section 77(1) expressly states that the child's consent is no defence.

The child's incapacity to consent to sexual intercourse is thus negatively prescribed. Regardless of the child's wishes, the other party participates in a criminal act. The crime is the failure to respect the compulsory zone of non-interference that the law has drawn around the child, and it is defined unilaterally by the child's biological age.[29] Herein lies the problem. A child's sexual development is as specific to the individual child as any other kind of development; possibly more so, because it involves a composite of physical, emotional and intellectual development.[30] This development does not switch on at sixteen, or eighteen. As the very term "development" implies, it occurs along "an unbroken continuum into

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[23] See, for example, footnote 48 of Houlgate, supra n 10.

[24] Evans, D. "Falling Angels? – the material construction of children as sexual citizens" (1994) 2 International Journal of Children's Rights 1 at 3.

[25] Section 66(2)(c) provides for a higher sentence of up to 10 years where the offender was in a position of authority with the child.

[26] Section 61I allows for a sentence of up to 14 years for sexual assault.

[27] Section 61J allows for a sentence of up to twenty years for aggravated sexual assault.

[28] Section 61I

[29] Note that the focus on the child's age in the definition of the offence brings about the absurd consequence that a sexually active couple both aged under sixteen (or eighteen, as the case may be) could both be found guilty of the criminal offence of "sexual intercourse – child." The ambiguity of this situation in Britain is discussed in Evans, supra n 24 at 7.

[30] Evans, supra n 24 at 7 defines this as "notional composite sexual maturity."

adulthood."[31] It cannot be arbitrarily fixed, or once so fixed still more illogically set two years higher for a "different type" of sexual experience.

The motivation for age of consent laws

Viewed in their best light, age of consent laws have a child protection motive. Children's inexperience and lack of development makes them both physically and emotionally vulnerable to exploitation and abuse. The law seeks to protect the child in this vulnerable state by criminalising the conduct of the other party. In many cases, this is eminently desirable. Sexual experience may subject the immature child to a range of dangers, and protection until sufficient maturity has been reached may be sound policy.

However, once again it comes at a great cost. The law's protection policy presumes irrebuttably that for children, all sexual contact is necessarily damaging and abusive. And it does so by reference to scientifically-debunked criteria,[32] in a way that distorts perceptions of child development and may in a very real sense disrupt the normal sequence of that development.

Viewed in its worst light, then, the law may have a rather less admirable purpose than protection. Adult sexuality has throughout history been regarded as something of a radical force, with social structures such as marriage constructed for its control. Child sexuality, on the other hand, is constructed not as a force susceptible to control, but a taboo to be destroyed. To be regarded as "innocent" children must be constructed as "sexless."[33] Western society does *not* regard individuals as "sexual beings from before birth, negotiating their way through a sexual learning process."[34] Rather, it regards sexual activity as an adult domain. The criminal provisions relating to age of consent may be nothing more than a way of stamping out socially-unacceptable behaviour in both the young and their partners: a device for control, not protection.

Whether it is a device for control or protection, it operates in such a way as to invalidate the child's consent, regardless of *actual* capacity. Oddly enough, the conceptualisation of the child in age of consent laws may be viewed as an "improvement" in terms of autonomy and rights over *doli incapax*. *Doli incapax* denies intention at its source; the child is presumed to be incapable of *forming* the intent. Age of consent laws, however, appear to acknowledge that consent may actually occur. What is denied is the legal

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[31] Faust, B, "Child sexuality and age of consent laws: the Netherlands model" (1995) 5 Australasian Gay and Lesbian Law Journal 78 at 79.

[32] See, for example, Houlgate, supra n 10 at 72-73

[33] Faust, supra n 31 at 79.

[34] Winder, R. "The values underlying FPA sex education," quoted in Faust, supra n 31 at 78-9.

validity of that consent.[35] But ultimately, this will make little difference. Age of consent laws deny every child the right to choose for himself or herself what happens to his or her own body. They may not deny general autonomy, but they certainly negate the child's autonomy in the specific case of sexual experience. Accordingly, the denial of autonomy by age of consent laws is potentially as threatening to children's rights as *doli incapax*.

Autonomy and Rights

Does the law's presumptive denial of the capacity and thus autonomy of the child affect the ability of the child to be a rights-holder? Simplistically, it can be argued that autonomy is a precondition of the possession of rights. Emmanuel Kant regarded only the "moral agent" possessing an "autonomous will" as the proper subject of rights.[36] John Stuart Mill decreed that rights of liberty applied:

> ...only to human beings in the maturity of their faculties. We are not speaking of children...[37]

The argument is twofold. Firstly, the possession of autonomy means an individual is a "person," and "deserves" rights to continue as such. Secondly, it means that the individual has the power to exercise and enforce those rights – in other words, that those rights have meaning to that individual.[38] For obvious reasons, this is particularly true in the case of human rights relating to the control of the human body, such as those at issue here.

But the matter is not so simple, particularly in the case of children. The relationship between autonomy and rights may very well suggest a "chicken and the egg" scenario. Which comes first? Kant, Mill and others have taken autonomy as the factor attracting rights, but as Freeman has noted, the equation may well work the other way: The deep structure of the rights thesis is equality and autonomy.[39]

Rights operate to recognise and preserve autonomy. The most basic human rights, such as Mill's "liberty" right, preserve the individual from treatment that would restrict or destroy his or her autonomy. Recognition

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[35] Section 77(1). See also the text at n 47 regarding alternative charges in the Crimes Act that would be laid in the event that consent was absent.

[36] Houlgate, supra n 10 at 50.

[37] John Stuart Mill, On Liberty, quoted in Hafen, B and Hafen, J, "Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child." (1996) 37 Harvard International Law Journal 449 at 452.

[38] Houlgate, supra n 10 at 60.

[39] Freeman, "Taking Children's Rights More Seriously," (1992) 6 International Journal of Law and The Family 52 at 64.

of the autonomy of the *actually* competent child would thus be "to treat that child as a person and as a rights-holder."[40] Autonomy confers rights and rights preserve autonomy.

But "autonomy" as it is generally understood (or specifically understood, in the case of Mill) refers to adult autonomy, a presumptive total capacity across all fields of human life. Adult autonomy is indicated by complete independence. The problem for children is that they face both presumptive legal incapacity and, frequently, emotional and physical dependence as a result of their immaturity. Children, especially young children, may very well not be capable of totally autonomous action across all fields of life. Given the interrelationship of rights and autonomy, does this mean that children can never possess rights?

There is a tendency among some commentators to treat dependence and protection, on the one hand, and autonomy and "liberty" rights[41] on the other, as mutually exclusive propositions for exactly this reason.[42] Similar considerations were probably largely responsible for the predominance in the United Nations' 1959 *Declaration on the Rights of the Child* of protection and resource allocation rights – "claim" rights[43] – over choice rights for children.[44] Claim rights tend to operate as burdens on those in authority, whether parents or the State, to care for the child; they are exercised *for*, not *by*, the child.[45] The child is thus the object rather than the subject of these rights. His or her autonomy is irrelevant to their existence.

"Liberty" rights on the other hand, quite clearly do require a degree of autonomy, as discussed above. Autonomy is both the activating principle of, and the quality protected by, such rights. Need the child's dependence and resulting lack of "complete" autonomy deny him or her such rights in favour of claim rights only?[46] It is submitted that this is an unnecessarily extremist position. Feminist thinking has already debunked the myth of total human (or masculine) independence as the

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[40] Freeman, "Taking Children's Rights More Seriously," supra n 39 at 65.

[41] The distinction between "liberty" and "claim" rights is discussed at length in Houlgate, supra n 10, for example at 6-8. Houlgate gives the following example of a liberty right:

> If A is at liberty to walk the streets at night, then this implies not that others have certain duties with respect to A, but that A has no duty to refrain from being on the street and others have no right to claim that A refrain from this activity (at 7).

[42] See, for example, Hafen and Hafen, supra n 37.

[43] Discussed in Houlgate, supra n 10 at 6.

[44] Freeman, Moral Status of Children, supra n 6 at 50. The 1989 Convention on the Rights of the Child, on the other hand, does allow for some autonomy based on the actual capacity of the child, particularly in Article 12. See, for example, Freeman, "Taking Children's Rights More Seriously," supra n 39 at 69.

[45] See, for example, the submission of the French delegate to the Commission on Human Rights in 1959, quoted in Freeman, Moral Status of Children, supra n 6 at 49:

> ...the child was not in a position to exercise his own rights. Adults exercised them for the child...A child has a special legal status resulting from his inability to exercise his own rights.

[46] As the Hafens suggest in supra n 37.

sole basis of rights.[47] As Freeman points out, "Dependence is a basic human condition,"[48] not one confined only to children, and not of itself an appropriate basis for the denial of liberty rights.

Dependence may, of course, preclude the child from *actually* possessing competence and autonomy. Most infants, for example, will fall into this category.[49] But as has been argued throughout this essay, this ought only to be tested by reference to each particular child. Children's development may mean that they acquire different capacities at different times – indeed, as *doli incapax* and age of consent laws demonstrate, the law already recognises this to some degree.[50] Given the general acceptance of this proposition of specific capacity, there is no reason why children cannot also be granted specific autonomy. More moderate commentators have argued that a type of specific autonomy of children should be respected in the case of "appropriate projects,"[51] even for very young children. Dependence in one area of human life need not preclude autonomy, and thus rights, in another.

The argument that a choice must be made between granting liberty rights to the child and protecting the child is also misleading. Autonomy and protection are only exclusive propositions where the law "abandons children to their autonomy."[52] This need not be the case. The law can adapt its current presumptions of incapacity to a model more consistent with the child as rights-holder without exposing the child to predation and self-destruction.

Doli incapax protection and children's rights

How might *doli incapax* be adjusted to allow for a legal conceptualisation of children consistent with children's rights? It has been argued[53] that in the extreme case where a deliberate act is coupled with the requisite criminal intent, there is no reason why even a young child should be granted the presumption that he or she is "incapable of evil." The argument is all the more persuasive in New South Wales, where reforms such as juvenile justice conferences under the *Young Offenders Act 1997* (NSW) deal with admitted criminal activity non-punitively. Importantly, such reforms also acknowledge the child's autonomy, allowing the child

47 See, for example, Freeman, M, "The Sociology of Childhood and Children's Rights" (1998) 6 International Journal Of Children's Rights 433 at 440-1.

48 Freeman, "The Sociology of Childhood and Children's Rights," supra n 47 at 441.

49 Freeman would still ascribe a form of rights in potentiality to such children. He regards "capacity for autonomy" as sufficient basis for rights: "Taking Children's Rights More Seriously," supra n 39 at 66. But cf Lowy, C, "Autonomy and the Appropriate Projects of Children," (1992) 6 International Journal of Law and the Family 72.

50 ALRC, supra n 8 at 18.20.

51 Lowy, supra n 49 at 74.

52 The thesis of the Hafens: supra n 37.

53 The argument is dealt with by Lord Lowry in C v DPP above, n 4 at 396-397

an active role, particularly in repairing the consequences of his or her crime.[54] They are keyed towards social participation in terms of rights and responsibilities rather than exclusion in terms of privileged and separate status. The juvenile justice system is moving towards compatibility with concepts of children's rights. *Doli incapax* is not.

A number of amendments to the presumption have been suggested.[55] The most minor involve alteration of the age limits to which the presumption attaches. The Senior Children's Magistrate has suggested that the rebuttable phase of *doli incapax* should expire at the age of twelve rather than fourteen.[56] The adjustment is based upon the average age of children entering secondary school. It would arguably reduce the arbitrary nature of the age classifications involved to some degree, as the age limit proposed has some basis in the real life experience of children. It would also dramatically reduce the applicability of the presumption, as the majority of children charged with criminal offences fall into the twelve to fourteen age group.[57] However, this amendment would ultimately do nothing more than substitute one set of numbers for another. It would not alter the fundamental fact that children develop at different rates[58] and that some children will mature very much faster than the legal norm *doli incapax* attempts to impose, and some very much slower, regardless of where that norm is set.

On a more radical level, the outright abolition of the presumption has been suggested.[59] However, this would pose its own difficulties. Firstly, without *doli incapax*, the law's only ability to classify a child's failure to recognise the moral reprehensibility of his or her act due to immaturity would be as a form of insanity. While there are obvious parallels between *doli incapax* and the defence of insanity, they have very different consequences for an accused. The former results in the dismissal of proceedings, which is of obvious benefit to the actually incompetent child. The latter results in acquittal and psychiatric treatment, which is unlikely to "cure" incompetence caused by immaturity rather than mental illness. Secondly, any abolition of the presumption would arguably be in breach

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[54] In so doing, the conferences are a part of the restorative model of juvenile justice: ALRC supra n 8 at 18.45. It is worth noting that both the restorative model and the less moderate but increasingly popular "justice" model (which focuses on "due process and accountability," demonstrated by such approaches as mandatory sentencing in the Northern Territory: ALRC at 18.33) presume that children have some level of responsibility for their actions, whether punitive consequences are attached to this or not.

[55] These are outlined in Criminal Law Review Division of New South Wales, A Review of the Law on the Age of Criminal Responsibility of Children, 5/5/2000 www.lawlink.nsw.gov.au/clrd1.nsf/pages/clrd_child (visited 7/8/2001), and in Urbas, Gregor, "The Age of Criminal Responsibility" (2000) 10 Trends and Issues in Crime and Criminal Justice 1 at 4-5.

[56] Urbas, supra n 55 at 4-5; CLRD, supra n 55.

[57] Urbas, supra n 55 at 5.

[58] See the discussion at page 111, above.

[59] See, for example, Freeman, Moral Status of Children, supra n 6 at 245, C v DPP above, n 4. The rebuttable phase of the presumption was abolished in England by the Crime and Disorder Act 1998 in the wake of the killing of James Bulger.

of Australian's obligations under Article 40 of the *International Convention on the Rights of the Child*, which requires States Parties to implement a minimum age of criminal responsibility.

Finally, changes in the nature of *doli incapax* have been proposed. As noted above, *doli incapax* is a bar to prosecution rather than a defence. The most prejudicial aspects of the presumption to children's rights – most importantly, the universality of its application, but also the evidentiary difficulties noted above – arise from this. Accordingly, *doli incapax* could be made more sympathetic to children's autonomy and rights by reformulation as a standard defence as recommended by the Review of Commonwealth Criminal Law *Interim Report: Principles of Criminal Responsibility and Other Matters* in 1990. This would subject the child to a burden of proof that he or she was *doli incapax* on the balance of probabilities. Once the issue was raised, it would be for the prosecution to rebut the presumption. Reformulation along these lines would ensure that only the actually incompetent child would be labelled incompetent by the law. It would enable the law to engage with each individual child. And it would remove the present danger of prejudicial evidence being adduced against all children under the age of fourteen accused of criminal offences.

Conceptually, it would also be perfectly consistent with a child's autonomy and rights. If the defence was pleaded and was successful, the child would be proven too immature to possess the right of agency and responsibility of accountability, and would be appropriately granted the "privilege" of *doli incapax*. Otherwise, the child would be "presumed" to be an agent as autonomous as any other, with full mental competence and control of his or her own body – at least for the purposes of the criminal law.

Age of consent protection and children's rights

Likewise, protection of the immature child from sexual experience could be accomplished in ways less intrusive to the mature child. Studies have suggested that sexual contact most damaging to children is that involving violence, or incest, or a person in authority over the child,[60] or exploitation.[61] Separate offences for all of these exist in the *Crimes Act*,[62] along with separate provisions relating to other sexual exploitation of children, such as child prostitution.[63] It is pertinent to note that "sexual intercourse – child" is *additional* in the Act to sexual assault, and to these separate offences. Section 61J(2)(d) includes within the definition of "aggravated sexual intercourse" the fact that the victim was under sixteen years of age. "Sexual intercourse

[60] Faust, supra n 25 at 81.
[61] Freeman, "Taking Children's Rights More Seriously," supra n 39 at 68.
[62] Non-consensual sexual contact would be sexual assault proper, or aggravated sexual assault: ss 61I, 61J(1). Incest is prohibited under s 78A. Sexual contact by figures in authority (teachers, fathers and step-fathers) with girls is prohibited in s 73 and with boys in s 78N.
[63] Sections 91C-91G

– child" would then appear to be specifically confined to those incidents where it appears that the child *did* "consent" and where violence, incest, exploitation and abuse of authority were not involved.

However, as noted above,[64] age of consent laws are not entirely without value. A complete repeal of such laws would not be prudent. An alternative approach has been implemented in the Netherlands which allows the law to protect vulnerable children while at the same time permitting more mature children to make their own decisions. There, age of consent laws still exist, and in a similar form to those in the *Crimes Act*. However, if no issues of violence, incest or abuse of authority are present, and the child is over the age of twelve, the offence of sexual intercourse with an underage child will generally only be prosecuted on complaint of the child.[65] As a result, there is some conception of "consent" allowed for children, and a corresponding degree of autonomy. The nature of the consent may still be qualified – it is not consent proper but "absence of complaint" – and biological age may still be a factor, but the Dutch model is still a quantum leap ahead of the Australian approach in terms of children's rights.

Conclusion

Doli incapax and age of consent laws are representative of the two ways in which the law's presumption of children's incapacity denies autonomy even to the actually competent child. One denies autonomy and the fundamental stage of formation of intent; the other refuses to acknowledge the validity of a child's intent in particular areas. Both are devoid of scientific basis. Both are motivated by questionable control motives as well as a desire to protect. And both conceptualise the child in a manner inherently incompatible with the child as rights-holder.

But incapacity does not have to be an "all or nothing" issue. There is no reason why incapacity in some areas should deny capacity and autonomy in others, or why a child cannot be protected as well as allowed rights appropriate to his or her level of development. These are only irreconcilable propositions in the current model that presumptively ascribes incapacity to *all* children. If the law were to abandon its over-protective prejudices and engage with each child individually, judging his or her actual competence, these unjust consequences would be avoided. Immature children could retain the protection of incapacity. Specifically or generally autonomous children could gain recognition of their rights. And the law could at last acknowledge the fundamental fact that each and every child is a distinctly different human being.

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[64] See above "Motivation for age of consent laws."

[65] Faust, supra n 31 at 84-5. "Complaint" may pose some dilemmas for the powerless child, but in this case parents or the Child Protection Authority may complain on the child's behalf.