

The Age Of Criminal Responsibility

*“My five year old daughter, Silje, was killed by two boys near our home in Trondheim, Norway. It was a year after the killing of James **Bulger**, and the two incidents were compared in the press.*

In Norway, where the age of criminality is 15, the boys were treated differently. Silje was stripped, stoned and beaten, and left for dead. I do not understand why and I will never recover, but I don't hate the boys. I think they understood what they had done, but not the consequences.

*The boys went back to school, were helped by psychologists and have had to learn how to treat others to **fit** back into society. ”*

Beate Raedergard.

Introduction

Include Youth welcomes the opportunity to respond to the Human Rights Commission's advice to Government in its Draft Bill of Rights.

Include youth promotes best practice with young people at risk of social exclusion. We achieve this through the development and promotion of resources, the provision of training, information and support of practitioners and organisations. We also undertake activities which attempt to influence public policy and public awareness locally and nationally.

Include Youth promotes the development of positive choices and opportunities for vulnerable and challenging young people whether in the community, residential care or custody. Include Youth promotes the use of community alternatives to care and custody for children and young people.

International Human Rights Standards

The clearest advice given by international human rights standards regarding the age of criminal responsibility is in the “Beijing Rules” (United Nations Standard Minimum Rules for the Administration of Juvenile Justice). Rule 4.1 states that:

*“In those legal systems **recognizing** the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. ”*

The Commentary to the Rule explains that the age of criminal responsibility differs widely according to history and culture and can range from 7 to 18 according to the political, social and economic arrangements of the particular state. The Commentary states that the modern approach

is 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. ”* The Rules advise that in general there should be a close relationship between the notion of criminal responsibility and other social rights and responsibilities (such as marital status, civil majority, etc). ”

The Commentary to the Rules states that efforts should be made to agree a reasonable lowest age limit that would be internationally applicable. However, this has not yet been achieved.

While the Beijing Rules give the most specific advice on the age of criminal responsibility, other human rights instruments have a direct influence on how the issue should be approached.

Of special significance here is the United Nations Convention on the Rights of the Child.

- Article 1 of the Convention defines all under 18 year olds as children.
- Article 2 is the non-discrimination principle which demands that all rights apply to all children without exception.
- Article 3 of the Convention enshrines the ‘paramountcy principle’ ie that the best interests of the child must be a paramount consideration in any decisions or actions affecting the child.

All of these articles must be taken into consideration when determining the age of criminal responsibility. The UN Committee on the Rights of the Child has recommended that the age be guided in particular by the best interests principle.

The Convention calls for states to establish a minimum age *“below which children shall be presumed not to have the capacity to infringe the penal law. ”* (Article 40,3(a)) While not recommending a specific age, the Committee has tended to criticise jurisdictions in which the minimum age is 12 or less (Justice 1996, p7). Specifically it has urged the UK government to give serious consideration to raising the age of criminal responsibility.’

In Northern Ireland the (now defunct) Standing Advisory Committee on Human Rights suggested that there should be a far reaching inquiry into the age of criminal responsibility which would consider questions such as the age at which children develop the moral awareness needed to distinguish right from wrong and when they develop an appreciation of the consequences of their actions.

In the cases of *T v UK* and *V v UK* (2000), involving the boys convicted of murdering, toddler James Bulger, the European Court held that the minimum age of criminal responsibility did not in itself deviate so far from European practices as to violate human rights standards. However, the Court found that the boys’ right to fair trial had been compromised in various ways because of their inability to adequately understand and participate in legal proceedings. It is questionable the extent to which very young children can meaningfully participate in their own defence in legal proceedings.

¹Consideration of reports submitted by states parties under article 44 of the Convention: United Kingdom of Great Britain and Northern Ireland. 15/02/95 CRC/C/15/Add.34 (Concluding Observations)

Domestic Social and Political Context

At 10 years, the age of criminal responsibility is seriously out of line with the other responsibilities and rights in society.

Age of marriage – 16 (with parental consent), 18 (without parental consent)

Age of sexual consent – 16 (boys) 17 (girls)

Age of majority (voting rights) – 18

Age for driving licence- 17

Leaving school – 16

Living unsupported - 16

Buying cigarettes – 16

Jury service - 18

The age of criminal responsibility sits very incongruously alongside these other developmental milestones. Such milestones which in essence bestow varying degrees of responsibility onto a young person are targeted at ages 16 to 18.

While children are held to be capable of criminal responsibility they are excluded from participation in most other areas of decision-making. As an inquiry into effective government structures for children by the Gulbenkian Foundation stated, “*Children lack the vote, or any direct political power, and play no significant part in the political process . . . children’s views barely permeate central government..*”²

Ann Hagell of the Policy Research Bureau commented, “*There is no other legal or social arena where we give children complete responsibility at 10, mostly for good reason.*” (Guardian, 1/17/02)

Goldson and Peters note that in England the Pet Animals Act (1951) provides that it is not until a child has reached the age of 12 that they are legally entitled to buy a pet. As Goldson and Peters comment “This seems perfectly sensible. It is curiously anomalous and legally inconsistent therefore, to regard the same child, albeit two years younger, to be sufficiently responsible to face the full rigour of criminal law.”³

Furthermore, even the very limited legal safeguards, which existed, have been removed. Article 3 of the Criminal Justice (NI) Order 1998 removed the safeguard of ‘doli incapax’ from children aged 10-13. This was the presumption that children are incapable of criminal intent. Before its removal, there was a duty on the prosecution to rebut this presumption by proving beyond reasonable doubt that a child understood that what they had done was seriously wrong rather than merely naughty.

As Goldson and Peters comment, a 10 year old child in primary school is now presumed to be as criminally responsible as a fully mature adult. “This cannot be right.”⁴ Sue Bandalli notes, “the

² Report of a Gulbenkian Foundation Inquiry, 1996, Effective Government Structures for Children, London.

³ Barry Goldson and Eleanor Peters, 2000, Tough Justice, Responding to Children in Trouble”, Children’s Society, p4.

⁴ Goldson and Peters p5.

‘responsibilised child’ is someone who can be tried in adult Crown Court, but not by a jury of his peers since jury members have to be 18.”⁵

The right to silence was also removed by the Criminal Justice (NI) Order 1998. Children as young as 10 now risk adverse inferences being drawn if they do not give evidence in court or answer questions during cross-examination.

It is clear that not only is the treatment of children in the justice system seriously out of line with other rights and responsibilities, but they are also offered little protection. To meet the requirements of the Beijing Rules there is a clear need to bring the age of criminal responsibility into line with the above rights and responsibilities and to ensure that children receive the protection their vulnerability requires.

Contradictions in the legal process

The current operation of the juvenile justice process creates difficulties regarding the treatment of very young children.

The UN Committee on the Rights of the Child has criticised the use of emergency legislation for children as young as 10.

There are also difficulties in relation to young children being held in custody. The Criminal Justice Review recommended that 10-13 year olds found guilty of offences should not be held in juvenile justice centre custody. The Government proposes dealing with this through the introduction of Custody Care Orders for 10-13 year olds. This has several problems, including the shortage of care provision for challenging and vulnerable children; the potential to have two different regimes in a single care institution; the prospect of children being held in virtually solitary confinement in care; and the potential for the stigmatisation of children in care for reasons other than criminal justice.

Furthermore children as young as 15 can end up in prison custody in YOC custody including in Maghabery prison. This is a clear breach of human rights.

All of the above difficulties could best be dealt with through substantially raising the age of criminal responsibility.

Comparison with other jurisdictions

The United Kingdom has among the lowest ages of criminal responsibility of any of the European Union States.⁶

⁵ Bandalli in Goldson, 2000, p89.

⁶ Scotland has an even lower age of criminal responsibility, at 8 years of age, than the rest of the UK

In all Scandinavian countries, the age of criminal responsibility is 15, and adolescents under 18 go through a system of justice geared mostly towards social services, with incarceration as the last resort.

Other European examples are Greece and Netherlands (12), France (13), Austria, Germany, Italy (14), Portugal, Spain (16), Belgium and Luxembourg (18).

The worldwide trend is to raise the age, generally to at least 14. Those countries that have an age of less than 14 tend to be Commonwealth countries or those that have an early association with the British legal system. Reasons for retaining such a low age are thus, more connected with historical tradition than with consideration of children's best interests.

Children's understanding

The concept of the age of criminal responsibility has been described as having two aspects (Scottish Legal Centre, consultation on age of criminal responsibility). These are

- (a) the age below which a child is deemed to lack capacity to commit a crime and
- (b) the age below which a child is not subject to the adult system of prosecution and punishment.

In relation to the first aspect, psychological theories suggest that no lower than 14 can be considered a reasonable age to assume a child can have criminal responsibility. This indeed was the premise upon which the *doli incapax* principle was based.

However, during the debate on the Scottish age of criminal responsibility it has been argued that the aspect of children's presumed incapacity to commit crimes should be removed from consideration altogether. Both the SLC and Children in Scotland argue that "a rule on the criminal capacity of children per se was not necessary." (Children in Scotland, Age of Criminal Responsibility, Discussion Paper July 2001.) SLC contends that the dual aspect philosophy of the age of criminal responsibility creates ambiguity and confusion.

The authors of this paper agree that basing the age of criminal responsibility on the concept of children's understanding creates difficulties. Although psychological and social theories can offer some understanding of the child development process they also recognise that children develop at different rates and in different ways. Thus, the setting of a firm age of criminal responsibility may not suit all children of that age.

The Commission's proposal that the age of criminal responsibility be fixed at 12 does not take sufficient account of children's different levels of understanding at that age.

It is the view of the authors of this paper that setting a fixed age below the age of 18 (the age of adulthood) will result in disadvantage to children with a lower developmental level than others.

If the age of criminal responsibility is to be set at any lower than 18 it is proposed that account needs to be taken of the developmental level of each individual child, and a professional assessment of their level of understanding before any prosecution could commence.

A better starting point, however, supported by international standards is the creation of a system which offers support to children based on the principle of the child's best interests. A system which does not criminalise children but rather focuses on their needs.

The Best Interests Principle

In asking whether a low age of criminal responsibility is in the child's best interests it is necessary to look at the impact of criminalisation on the child's future development. Research demonstrates that criminalisation of children tends to lead towards a criminal career. It also stigmatises the child and alienates them from society, creates problems of self-esteem, encourages the child to mix with other young people who have offended and creates barriers in the way of return to education or future employment.

While it is argued here that a low age of criminal responsibility is not in the child's best interests, it is also important to bear in mind that criminal responsibility is only one aspect of the juvenile justice process.

In applying the best interests principle to the treatment of young people at risk of offending, it is important to take a holistic approach. Thus, the age of criminal responsibility cannot be viewed in isolation from the rest of the justice process. Other aspects include whether there is a separate juvenile justice system based on children's rights and what type of measures young people are subject to (punitive, restorative or welfare).

Scotland, for example, has a low age of criminal responsibility (8) and yet deals with children accused of offending through the welfare based model of the Children's Panels.

It is argued here that in children's best interests it is important both to raise the age of criminal responsibility and in parallel to introduce and sustain a welfare-based system with the aim of supporting children at risk of offending.

Non-discrimination Principle

The justice system does not impact on all children equally. Children in areas of high deprivation are more likely to be at risk of offending and prosecution. In Northern Ireland this is particularly true of communities affected by the conflict. There is an over representation of young people from the Catholic community in juvenile justice statistics. In 1999 62% of known young offenders were from Catholic backgrounds, and in 2000 the figure was 54%.

Children in trouble are also children in need. This is clearly recognised in the Children (NI) Order, 1995. There is no shortage of research linking criminal behaviour of young people with poverty, fractured families, problems in schooling, and learning and behavioural difficulties. Children in care are also over-represented in figures of children in custody in Northern Ireland. A low age of criminal responsibility therefore further disadvantages these children by taking them on the path of criminality rather than addressing their needs.

Children in Northern Ireland have faced the additional trauma caused by the existence of an 'alternative' justice system which in the past has included punishment attacks and threats.

The starting point in addressing the problematic behaviour of some young people must be the treatment of these children as children in need rather than as young offenders. Raising the age of criminal responsibility to 18 would mean that no child was criminalized before reaching adulthood, thus giving them an increased opportunity of making a fresh start in education, training, work and family life.

The Way Forward: Criminalisation Vs Care?

The citation from Beate Raedergard (above), mother of a child killed by other young children, demonstrates the impact of raising the age of criminal responsibility and treating young people in trouble through a welfare rather than a criminal justice approach.

The boys responsible for 5 year old Silje's terrible death were not criminalized as James Bulger's killers were. Nor were they removed from their families, schools or communities. They are not being forced to live anonymous lives under fear of threat as Thompson and Veneables are. Rather they received support in dealing with the problems which contributed to them killing Silje. None of this will bring Beate Raedergard's daughter back, nor extinguish her grief but as a victim she views it as a more positive approach than criminalizing the children responsible.

We should resist any notion that the rights of children must be posited against the rights of victims. Rather both have an interest in reducing offending by young people and criminalisation is not the best way of achieving this aim.

Research indicates that "there are no negative consequences to be seen in terms of crime rates" from raising the age of criminal responsibility.⁷

A key issue in deciding on the age of criminal responsibility is what do we want the aim of the process to be. If the aim is to prevent offending, to encourage rehabilitation and the reintegration of the child into playing a constructive role in society then dealing with the child through the criminal justice system does not offer the best chance of success. Rather the focus should be on assessing the child's problems and needs and attempting to meet those needs.

At present the fragmentation in the system mitigates against meeting the needs of children in trouble. There is no overarching system which brings together the issues of dealing with the education, training family life, work, health care of children in trouble. The establishment of a Children's Commissioner will aid this process. The establishment of a Department for Children would offer the potential to draw together services for children in conflict with the law.

It is important overall to view children as children and to focus on how best to meet their needs. Treating children as junior criminals – whatever their actions – will not aid their reintegration.

⁷ Dunkel, 1996, cited in Goldson and Peters, p4.

Conclusion

The conclusion of this paper is that the age of criminal responsibility must be significantly raised. The Commission's proposal of 12 years is too low as it takes insufficient account of children's different rates of development and of the difficult circumstances which many of these children have had to deal with. Criminalisation will not assist them on the road to being integrated as responsible citizens playing a full role in society.

Neither is the age of 12 in line with other rights and responsibilities in society. Having an age of responsibility set at adulthood would be more in keeping with the requirements of the Beijing Rules. A system which clearly identifies children as being of a particular age (as ours does and the UNCRC suggests) must treat children as such until they are adults.

In the best interests of children it is proposed that the age be raised to between 16 years. This would need to be accompanied by enhanced services for children, and the development of a system based on children's rights and a child-centred approach whilst at the same time not ignoring the needs of victims.

Therefore in answer to the two questions set by the Commission:

Question 27: Should the age of criminal responsibility be raised from 10 to 12 years?

- ✓ **This paper argues that the current age of criminal responsibility years is too low as is the age proposed by the Human Rights Commission. The key recommendation is that it should be raised to 16 years and that this aspiration should be reflected in the Human Rights Commission's advice to Government in its draft Bill of Rights.**

Question 28: Should the Bill of Rights include an obligation on the state to keep the age of criminal responsibility under review?

- ✓ **Yes. There must be an obligation on the state to keep the situation regarding the age of criminal responsibility under review.**

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