

# Age of Criminal Responsibility



The age of criminal responsibility (ACR) refers to the minimum age that a child can be prosecuted and punished by law for an offence. In the UK the ACR falls below the internationally recommended absolute minimum of 12 years. This POSTnote considers whether the current ACR is appropriate by exploring international legal standards, the scientific research on mental and moral development and alternative approaches to dealing with children in conflict with the law.

## Background

The age of criminal responsibility (ACR) in the UK is a devolved matter. In England, Wales and Northern Ireland it is 10 years. In Scotland it is 8 years but a Bill to raise it to 12 years is in progress.<sup>1</sup> Children below the ACR cannot be arrested or charged, but those above are presumed to be sufficiently mature to stand trial, and in the eyes of the law, as accountable as adults. These assumptions have been questioned in light of recent understanding of brain and behavioural development in childhood. An ACR of 10 years conflicts with international treaties on children's rights as well as children's civil rights in the UK.<sup>2-6</sup> Below the age of 18 children cannot vote; sit on a jury; buy alcohol, tobacco or fireworks; get a tattoo, or open their own bank account. Below the age of 16 children cannot consent to sex, leave school, play the lottery or buy a pet.

## Trends in Offending by Children

The number of children arrested, charged and convicted has reduced significantly in the past decade. In 2011 over 200,000 children (under 18 years) were arrested in England and Wales; 2,000 were aged 10–11 years.<sup>7</sup> In 2016 the respective figures decreased to 87,525 and 703.<sup>8</sup> Many of the proven offences in children in 2016–17 were non-violent (such as theft, criminal damage, driving and drug-related offences). 28% of convictions were for violence against

## Overview

- The age of criminal responsibility in the UK is the lowest in Europe.
- In England, Wales and Northern Ireland it is 10 years old, which contravenes international juvenile justice standards.
- In Scotland a Bill has been raised to increase the age from 8 to 12, but there is resistance to change elsewhere in the UK.
- An age of criminal responsibility of 10 years is seen as arbitrary and not evidence-based. It is also out of step with other legal age limits for children.
- Research shows that 10-year-old children are immature in terms of moral and brain development.
- Criminalising children adversely affects their future prospects and makes them more likely to reoffend as adults.

others and 3% were sexual offences.<sup>9</sup> The recent decrease is attributed to changes in police practices and targets to reduce first time entrants into the Criminal Justice System (CJS) rather than changes in children's behaviour. The police are increasingly using discretion as to whether a child goes into the CJS or whether other agencies are more suitable.<sup>10</sup>

Many children who come into contact with the CJS come from ethnic minority backgrounds, have grown up in care or disadvantaged families, and are often the victims of crime themselves.<sup>10-13</sup> There are high rates of mental illness and substance misuse amongst children who offend.<sup>14</sup> Many have learning disabilities (23–32%), communication difficulties (60–90%), and neuro-developmental disorders such as autism spectrum disorders and attention deficit hyperactivity disorder (ADHD) (15% and 11–18% respectively).<sup>15,16</sup> This raises additional concerns about their ability to participate in criminal proceedings.<sup>17</sup>

## Policy Context

The UN Convention on the Rights of the Child highlights the need for special safeguards and appropriate legal protection for children. It promotes non-judicial measures for managing children in conflict with the law, and requires states to establish a minimum ACR that reflects children's emotional

**Box 1. Development of the ACR in the UK**

The law has long recognised that young children should not be held responsible for criminal acts.<sup>43</sup> The age at which the line is drawn has varied over time and between jurisdictions.<sup>44</sup> In the UK:

- Pre-20<sup>th</sup> century: children under 7 were deemed incapable of crime. Children aged 7 to 14 years were presumed to be *doli incapax* - incapable of appreciating the criminal wrongfulness of their actions unless proven otherwise by the prosecution.
- 1930s: ACR raised to 8 years.<sup>45</sup>
- 1960s: A Juvenile Justice review<sup>46</sup> led to an increase in the ACR to 10 in England, Wales and Northern Ireland.<sup>47</sup> In Scotland, ACR remained at 8 but the Children's Hearings System was introduced.
- 1990s: Children under 12 in Scotland cannot be prosecuted.<sup>48</sup>
- 1998: Abolition of defence of *doli incapax*.<sup>49,50</sup> Now all children above the ACR are assumed accountable for offending behaviour.
- 2018: Scotland introduces a Bill to raise the ACR to 12 years.

and intellectual immaturity.<sup>18,19</sup> In 2007 the UN Committee on the Rights of the Child (UN CRC) declared an ACR of less than 12 years "*not to be internationally acceptable*".<sup>20-22</sup> Many countries have introduced or raised their ACRs accordingly, resulting in the UK now having the lowest ACR in Europe and one of the lowest worldwide.<sup>23</sup> The UN CRC has repeatedly criticised this and called on the UK to raise the age to at least 12.<sup>20,21,24</sup> This call is supported by stakeholders including the Children's Commissioners,<sup>25</sup> the Law Societies,<sup>26,27</sup> the Royal Society,<sup>28</sup> the Royal College of Psychiatrists,<sup>29</sup> the All Party Parliamentary Groups for Children<sup>30</sup> and for Women in the Penal System,<sup>31</sup> amongst many other organisations.<sup>4,32-37</sup>

Public opinion surrounding the ACR is mixed. A 2008 YouGov poll suggested that just under half of those polled believed children are an increasing danger and that "something has to be done".<sup>38</sup> In 2010, two out of five of British adults surveyed were in favour of raising the ACR.<sup>33</sup> A more recent 2016 public consultation in Scotland showed that 95% of respondents favoured raising the ACR to 12.<sup>39</sup> One argument for maintaining the ACR at 10 years is that children should be held accountable, especially when public protection is at stake.<sup>40,41</sup> This view is shared by many who support raising the ACR, but alternative, age-appropriate responses are advocated.<sup>42</sup> The case of James Bulger, a toddler who was murdered by two 10-year-old boys in 1993, is cited as a reason for maintaining an ACR of 10.<sup>32,33</sup>

**Policy Developments in the UK****Scotland**

The ACR is 8 years, although children under 12 years cannot be prosecuted in a criminal court. From 8 years, children can be referred to the Children's Hearings System and are liable to get a criminal record.<sup>48</sup> In 2016 the Scottish Law Commission recommended that the age should be increased to 12.<sup>51</sup> In March 2018 the Age of Criminal Responsibility (Scotland) Bill<sup>1</sup> was introduced to raise it accordingly.

**Northern Ireland**

A 2011 Department of Justice review of the Youth Justice System<sup>52</sup> recommended increasing the ACR from 10 to 12 years. While this recommendation was widely supported,<sup>53</sup> a

failure to implement it has been attributed to a lack of political consensus.<sup>54</sup>

**England and Wales**

Consecutive governments have reiterated that there is no intention to review the ACR.<sup>55</sup> A 2011 statement on Youth Justice<sup>41</sup> declared "*It is entirely appropriate to hold (children over the age of 10) to account for their actions if they commit an offence*". In 2012, the government position was that "*young people aged 10 and over are able to differentiate bad behaviour and serious wrongdoing*".<sup>56</sup> A Private Members' Bill proposing to increase the ACR to 12 years is being debated in the House of Lords. At the second reading the Government responded that the current ACR "*is appropriate and accurately reflects what is required of our justice system*".<sup>57</sup>

**Research and Child Development**

Advances in our understanding of the neurobiological processes underpinning adolescent behaviour have raised questions regarding the extent to which children should be held culpable for their actions. The ACR was set at a time when we knew little about brain development (Box 1), and there was no obvious reason for it to be 10 years.<sup>66</sup> A Royal Society report contended that the current ACR is unreasonably low given what we now know about children's developing brains and decision-making abilities.<sup>28</sup> The period of adolescence (from age 10–19 years) represents significant neurodevelopmental and behavioural changes (Box 2).<sup>67</sup> An increase in impulsive, risk-taking and sensation-seeking behaviour, peaking in late adolescence before decreasing, has been observed across all cultures studied.<sup>68</sup> This mirrors a universally recognised pattern of offending, the age-crime curve, where there is an increase in criminal behaviour in children that also peaks in late adolescence and then declines throughout adult life.<sup>69</sup>

**Box 2. Understanding Brain Development**

Brain imaging has shown that brain development, especially in the regions involved in decision-making, does not stop in childhood but continues into adulthood.<sup>58,59</sup>

- The prefrontal cortex (PFC) controls high-level cognitive and executive functions such as decision-making, planning, social interaction and inhibiting risk behaviours. It undergoes significant change during adolescence and is one of the last areas of the brain to reach full maturation.<sup>60</sup>
- The amygdala and the ventral striatum are associated with risk and reward. They undergo rapid development, thought to be triggered by puberty, and become hyper-responsive in adolescence.<sup>61</sup>
- The "dual systems" model proposes that the later development of the "control system" (PFC) compared to the "reward system" leads to a window of vulnerability to risk behaviours over which adolescents have less control than adults.<sup>62</sup>
- The white matter (connections between the different parts of the brain) also increase throughout adolescence and into the third of fourth decade of life.<sup>63,64</sup> This is thought to represent a "speeding up" in the transmission of information throughout the brain.
- The grey matter (synapses) increases in childhood before decreasing during adolescence (synaptic pruning), especially in the PFC.<sup>65</sup> This is thought to represent "fine-tuning" of the brain according to the environment.

## Adolescent Behaviour

The relative neurodevelopmental immaturity of adolescents contributes to their increased propensity for risky and potentially criminal behaviour. Adolescents are less able to consider the perspective of others when making decisions, or to inhibit inappropriate actions.<sup>70,71</sup> The way their brains develop leads them to prioritise immediate rewards over long-term consequences.<sup>72</sup> Furthermore, adolescents who suffer adversity in early life show particularly high activity in the reward areas of the brain and are more prone to risk-taking behaviours.<sup>73</sup>

Research has shown that adolescents can make decisions in a similar way to adults in controlled laboratory settings, but their decision-making and behaviour in real life is highly influenced by external factors such as peers and social cues.<sup>74</sup> Between the ages of 10–14 years there is a shift from behaving in such a way to elicit approval from parents to behaviours that elicit approval from peers.<sup>75</sup> Teenagers are much poorer at planning and make riskier decisions when in the company of friends than when alone.<sup>76,77</sup> Adolescents place high value on peer relationships and are hypersensitive to social exclusion.<sup>78</sup> They are more likely to commit crimes in groups, with solo-offending becoming more common when individuals are in their 20s.<sup>79,80</sup> While many adolescents grow out of delinquent behaviour there is a small subset of children with a history of antisocial behaviour very early in life who are at greater risk for criminal behaviour persisting into adulthood.<sup>73,81–83</sup>

## Moral Development and Criminal Responsibility

Some argue that policy on the ACR should also be informed by an understanding of psychological and moral development.<sup>84</sup> In this context criminal responsibility is often conceptualised in two ways:<sup>51</sup>

- the capacity to engage in criminal behaviour, as considered in the doctrine of *doli incapax*<sup>85</sup> (Box 1)
- the capacity to be held legally accountable at court and to participate in a trial.<sup>86</sup>

### Evolving Criminal Capacities

Criminal responsibility is postulated to be more than simply understanding the difference between right and wrong. It encompasses a set of interconnected mental capacities in relation to the law and morality that develop with time and experience.<sup>85</sup> Children's capacities and autonomy grow as they are given increasing rights and responsibilities.<sup>42,87</sup> Children are given little legal responsibility until their late teens.<sup>85</sup> Individual differences, environmental factors and developmental and mental disorders add to the complexity. The difficulty in identifying an age at which children achieve these capacities is well recognised but 10 years has been considered too low.<sup>19,29,86</sup> In general research indicates that:

- conventional morality, including "law and order" morality is generally not achieved until mid-teens.<sup>88</sup>
- logical thinking and problem solving abilities develop considerably between 11–15 years.<sup>89</sup>
- adolescent intellectual abilities are thought to reach adult levels only by the age of 17 years.<sup>84</sup>
- children who are abused or neglected are particularly poorly developed in the required capacities for criminal

responsibility and are much more likely to come into conflict with the law.<sup>90</sup>

### Capacities at Court

Children are used to being accountable to parents and teachers, but a court is an unfamiliar environment with complex procedures and language. Criminal responsibility implies having the capacities to participate in a criminal trial. Although such capacities are laid out in case law relating to effective participation and fitness to plead (Box 3), there is no statutory requirement to assess them in children. Young adolescents often lack these capacities and are prone to suggestibility and making false confessions.<sup>91,92</sup> There are concerns that many children over the ACR are unable to participate effectively in their criminal trials.<sup>33</sup>

## Children in Conflict with the Law

### Criminal Justice Pathway

When a child over the ACR but under 18 years comes into contact with the police they can be arrested and detained in custody, although this should be the last resort. Attempts are made to divert children from the CJS at this stage, with liaison and diversion services in many custody suites to identify children with mental health, substance misuse and learning difficulties. Around half of children arrested go to court.<sup>96</sup>

### Children at Court

Youth courts are similar to adult courts but with adaptations to make them less formal. For example parents or carers can sit with the child; all parties should sit at the same level; magistrates should receive training in dealing with children and automatic reporting restrictions apply. Children are tried in adult courts if they are charged with an adult. When charged with offences such as murder, manslaughter, and certain serious sexual or firearms offences they are sent to the Crown Court.<sup>97</sup> A 2016 youth justice review highlighted the need for children to be treated differently to adults in court and outlines several safeguards to protect them.<sup>10</sup>

### Box 3. Effective Participation and Fitness to Plead

The European Convention on Human Rights stipulates a right to a fair trial (Article 6).<sup>93</sup> For a trial to be fair the defendant must be able to participate effectively. This takes into account:

- an understanding of the trial process and what is said in court.
- an understanding of what is at stake (including the significance of any penalty imposed).
- an ability to explain one's own version of events.
- an ability to follow what is said by prosecution witnesses and point out statements with which one disagrees.<sup>94</sup>

Modifications to the court process can be made to ensure effective participation. These include frequent breaks, setting ground rules for the conduct of questioning, and using intermediaries to assist defendants. In some cases the defendant may not be fit to plead, even after special measures are introduced.<sup>95</sup> Fitness to plead is tested using the Pritchard Criteria which address whether a defendant can plead with understanding, follow proceedings, challenge a juror, question the evidence and instruct counsel. Defendants found unfit to plead cannot be subjected to criminal trials. Statutory unfitness to plead provisions do not apply at youth court and are seen to inadequately protect children. Reform has been proposed by the Law Commission of England and Wales.<sup>17</sup>



- When cases are heard in adult courts, children are entitled to modifications to enable effective participation.
- Where there are concerns about a child's ability to participate effectively, the court can consider whether the child is fit to plead, and their case can be stopped.

While these safeguards exist in theory, there are significant limitations at every level.<sup>33</sup> In particular there is limited training for professionals including police, lawyers and judges in dealing with children and identifying participation issues.<sup>98</sup> Some argue that an alternative process, akin to the Scottish system, is required (Box 4).

#### **Box 4. Children's Hearings System (Scotland)**

In Scotland all children under 12 and most under 16 are dealt with by the Children's Hearings System. This also manages children who need care and protection, and comprises both justice and welfare elements. A panel of three lay members conduct a special hearing in which the child can participate. If the child does not require compulsory supervision, the case is discharged otherwise various forms of supervision can be recommended (such as a compulsory supervision order). If a child over the ACR is referred to the children's hearing on offence grounds, they are liable to get a criminal record.

#### **Sentencing**

Sentencing guidelines stress the importance of not criminalising children and include consideration of factors such as age, vulnerabilities and welfare issues.<sup>99</sup> A number of offences carry mandatory custodial sentences, regardless of age, but most children receive community-based sentences. In 2016–17, 1,600 children were sentenced to custody.<sup>9</sup> Children can be detained in secure children's homes (SCH), secure training centres (STC) or young offender institutions (YOI). They all have a focus on education and health services with an individual plan to meet each child's specific needs.<sup>100</sup> SCHs are run by local authorities and take children from age 10. They also house children under welfare laws. STCs and YOIs only take offenders aged 12–18 and 15–21 respectively;<sup>101</sup> the Howard League for Penal Reform have criticised these for being more punitive.<sup>102</sup> If a custodial sentence extends beyond a child's 18<sup>th</sup> birthday they are moved to a YOI or adult prison. Concerns have been raised about the treatment of children in custody and violations of their human rights. Children are subjected to physical restraint, solitary confinement and forcible stripping.<sup>24,103</sup> Staff are often poorly trained in dealing with children and there are limited educational and occupational opportunities.<sup>104</sup>

#### **Outcomes for Children**

Evidence shows that criminalising children does not reduce reoffending and can be harmful.<sup>2,3</sup> For example:

- children who are dealt with most severely by the CJS are less likely to desist from offending.<sup>105</sup>
- contact with the CJS is not associated with reduction in re-offending and can lead to increased levels of criminality in children.<sup>106,107</sup>
- reoffending rates for children who have been in custody are high.<sup>108</sup> Countries with a low ACR, including England and Wales, have the highest rates of child detention in penal institutions and the poorest outcomes with regards to rehabilitation and reoffending.

- a low ACR does not deter children from offending.<sup>109</sup>
- contact with the CJS reduces the likelihood of children completing education, obtaining qualifications and gaining meaningful employment.<sup>110,111</sup>
- children subjected to criminal proceedings experience delays in receiving therapy compared to those placed in SCHs via welfare laws.<sup>112</sup>

All children cautioned or convicted acquire a criminal record, with long-term implications. Some convictions or cautions must be disclosed when seeking employment or education courses which require criminal record disclosure. This is seen as a major factor contributing to the negative impact of contact with the CJS. It is proposed that children who perceive themselves as criminals are more likely to engage in deviant behaviours and align themselves with criminal peers.<sup>113</sup> Children who attend court are also at risk of being identified in the media, with significant short- and long-term implications for their wellbeing. Even when reporting restrictions are in place, these are often lifted when the child reaches 18 years of age. In comparison, children in care proceedings cannot be identified at all.<sup>4</sup>

#### **Alternatives to Criminalisation**

Reviewing the ACR requires consideration of how best to deal with young children effectively and safely.<sup>39</sup> An increase to 12 years (rather than older ages) has been advocated to bring the UK in line with international standards and remove the youngest children from the CJS without considerable impact on resources.<sup>33</sup> The welfare system would then manage the relatively small number of 10–11 year olds currently managed by the CJS while the CJS would remain an option for those over the age of 12.

Jurisdictions with higher ACRs tend to use welfare and restorative models for managing younger children who offend, which can include detention. These are available in the UK for those both under and over the ACR.

- Early intervention is seen as key to reducing child crime. Examples include Parenting, Youth Inclusion and Safer Schools Programmes.<sup>114</sup>
- Minimal intervention models advocate taking criminal action only if it is advantageous for the child.<sup>115,116</sup>
- In Scotland, the Children's Hearings System focuses on welfare interventions, although for serious crimes any child over the ACR is liable to criminal sanctions.
- Welfare laws can deprive children of their liberty when there is a risk of harm to themselves or others. Half of children detained in SCHs are there on welfare grounds under s25 of the Children Act 1989.<sup>117</sup>
- Children with mental disorders and those found unfit to plead can be diverted from the CJS into mental health services, although there is regional variation in the availability of diversion teams.<sup>10</sup>

The victim perspective needs particular attention if any change to the ACR is considered.<sup>51</sup> There has been little analysis of this to date although proposals to increase the ACR in Scotland were broadly welcomed by victim groups due to the close link between childhood victimisation and offending.<sup>118</sup>

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