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To what extent is the age of criminal responsibility in England and Wales correct?

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Abstract

In England and Wales, the point at which a child can be held criminally responsible for their actions is 10 years of age. This is vastly out of line with ages of civic responsibilities and societal freedoms, which are most commonly set between 16 and 18 years of age. In England and Wales, a child cannot consent to sexual activity, vote, consent to healthcare, sit on a jury or marry another person until they meet the appropriate age threshold. The illogicality of this is made apparent by the notion that a child of ten years can be held to have sufficient competence to commit murder, yet they cannot get medical treatment alone. This dissertation will outline the history of minimum age of criminal responsibility, along with identifying the illogicality of the current age. Proposals for reform will also be made.

Introduction

Section 50 of the Children and Young Persons Act 1993 states that 'no child under the age of ten years can be guilty of an offence'. This is a conclusive presumption, making clear that any child who commits a crime above the age of 10, shall be responsible for themselves in law.[1] In England and Wales, every offence has two required elements: the *actus reus* and the *mens rea*. The *actus reus* refers to the guilty act of the defendant, considering their physical acts or omissions which form the offence.[2] The *mens rea* concerns the defendant's guilty mind, looking to their mental state at the time of the *actus reus*.[3] In criminal proceedings where a child is the defendant, the problematic area usually concerns their ability to have sufficient *mens rea*. This is due to scientific research which doubts the developmental maturity of children aged between 10 and 14 years of age.[4] The Government in England and Wales justifies it's approach by arguing that a child of 10 years has the ability to distinguish between right and wrong, therefore it is 'entirely appropriate' for them to be legally responsible.[5] This stance has been subject to vast amounts of criticism, with calls for reform coming from both academics and international bodies.[6] Such critique can also be found within Parliament itself, with members stating that the current age of criminal responsibility is 'absurd',[7] 'completely unacceptable',[8] and 'counterproductive'.[9] The full content of the debate on the minimum age of criminal responsibility will not be discussed further, instead a narrower focus will be placed on the illogicality of the current law due to its misalignment to ages of civic responsibilities and societal freedoms.

Age is an important factor in many areas of life. It is illegal for a child to consent to sexual activity and make independent medical decisions (unless determined to be Gillick competent) until they turn 16, with the ability to vote, sit on a jury and to marry being conferred upon turning 18. This is because children who are younger than the specified ages are regarded as not having enough competency to do such things.[10] The current threshold set by ages of civic responsibilities and societal freedoms renders

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[1] Children and Young Persons Act 1993, s 50.
[2] Paul Robinson, 'Should the Criminal Law Abandon the Actus Reus – Mens Rea Distinction?' (1993) 185 Criminal Law: Action, Value & Structure 187, 188.
[3] *ibid.*
[4] Royal College of Psychiatrists, 'Royal College of Psychiatrists Additional submission to Justice Select Committee | Inquiry into Children and Young People in Custody' (*UK Parliament*, July 2020) <https://committees.parliament.uk/publications/2010/documents/19436/default/> accessed 5 November 2021.
[5] Tim Bateman, 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' (*National Association for Youth Justice*, October 2012) <https://thenayj.org.uk/wp-content/uploads/2015/06/2012-The-Age-of-Criminal-responsibility.pdf> accessed 4 November 2021.
[6] Terry McGuinness, *The age of criminal responsibility* (House of Commons Library Briefing Paper 7687) <https://researchbriefings.files.parliament.uk/documents/CBP-7687/CBP-7687.pdf> accessed 21 November 2021.
[7] HL Deb 8 November 2013, vol 749, col 477.
[8] *ibid*, col 479.
[9] *ibid*, col 480.
[10] Tim Bateman, 'Keeping up (tough) appearances: the age of criminal responsibility' (2013) 92 c j m 28, 29.

the minimum age of criminal responsibility in England and Wales to be an 'anomalous exception'.[11] With this lack of consistency, the Government is undermining itself. It is difficult to make sense of the fact that a child of ten years can be held to have had the mental capacity to commit murder, six years before they have sufficient competences to consent to sexual activity.[12] The Government would argue that the current law offers flexibility, so that young offenders can be dealt with effectively.[13] But in reality, the Government's rigidity on the current age of criminal responsibility is just an 'ideological commitment to appear tough on youth crime'.[14] This appears to be an overbearing use of legislative powers for the purpose of political gain, which makes children even more vulnerable. Ultimately, section 50 of the Children and Young Persons Act 1993 is illogical. Logic within the law is invaluable as it facilitates clarity, consistency, and common sense.[15] The presence of logical laws allows their practical application within society. On this basis, it is problematic to understand how the minimum age of criminal responsibility in England and Wales can be successfully justified.

This dissertation will establish the extent to which the age of criminal is misaligned to civic responsibilities and societal freedoms. The first chapter will trace the history of the minimum age of criminal responsibility in England and Wales, establishing how the law has reached its current form. The second chapter will establish the disparities, identifying the illogicality of the current law within an age structured approach. The third chapter will propose potential reforms and recommendations to the age of criminal responsibility.

History of the age of criminal responsibility

In order to discuss the age of criminal responsibility within the context of other civic responsibilities and societal freedoms, it's historical development must be understood. Prior to a formal age of criminal responsibility being identified, consideration was given to morals within conscious wrongdoing.[16] The Ancient Romans applied this distinctly to children within their earliest form of written law, the Twelve Tables in 450 BC.[17] The Twelve Tables briefly identified pre-pubescent children as being able to avoid punishment depending on the voluntary nature of their crime. At its earliest stages, this was not an absolute rule, but rather one which was accepted and followed. By 81 BC, pre-pubescent children were not liable for their own criminal acts as they did not have the ability to form the intent required for

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[11] HL Deb 8 November 2013, vol 749, col 477.
[12] Tim Bateman, 'Keeping up (tough) appearances: the age of criminal responsibility' (2013) 92 c j m 28, 29.
[13] HL Deb 8 November 2013, vol 749, col 492.
[14] Bateman T, 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' (*National Association for Youth Justice*, October 2012) <https://thenayj.org.uk/wp-content/uploads/2015/06/2012-The-Age-of-Criminal-responsibility.pdf> accessed 4 November 2021.
[15] Morris Cohen, 'The Place of Logic in the Law' (1916) 29(6) Harv. L. Rev 622, 623.
[16] Don Ciprani, *Children's Rights and the Minimum Age of Criminal Responsibility* (Routledge 2016) 71.
[17] *ibid.*

'willing a harmful act',[18] as such they were 'exempt under the law'.[19] Children who had reached puberty were subject to all punishments as they were deemed to be capable of forming guilty intentions, they were *doli capax*.[20] For quite some time, the decision as to whether a child had reached puberty or not was determined by their inclusion into one of three groups: *infinita* (infancy), *infantiae proximus* (near infancy) and *pubertati proximus* (near puberty).[21] By 300 AD, children in *infinita* and *infantiae proximus* were deemed to be *doli incapax*, incapable of forming guilty intentions. Subsequently, it became generally accepted that once a child reached puberty, they became criminally responsible.[22] In 500 AD, the onset of puberty was explicitly identified as 14 years of age for boys and 12 years of age for girls.[23] By this time, children younger than 7 were *doli incapax*, with girls aged 7 to 11 and boys aged 7 to 13 presumed to be *doli incapax*.[24] This presumption could be rebutted by demonstrating evidence of the child's 'clear and certain' evil intentions.[25] This meant that if a child did wrong at the age of 8, they would be presumed to be incapable of forming sufficient intent, unless it could be proven otherwise. By using puberty as the benchmark for criminal responsibility, the Romans were identifying the subjectivity of development. Their application of the *doli incapax* presumption also supports this, as they were acknowledging the flexibility that needs to be applied. As the study of Roman Law became more common in the 1000s, their rules surrounding the age of criminal responsibility became more widespread. Roman Law was watered down over time, with ages of criminal responsibility varying across nations. Despite this, it remained a prominent legal force until the 1700s.[26]

While English and Welsh Law was heavily influenced by Ancient Roman policy, it has been identified as a 'principle exception to the European trend' due to its amalgamation of both Anglo-Saxon and Roman Law.[27] This approach resulted in a general notion of leniency being awarded to children who offended.[28] This is supported by the age of criminal responsibility between 688 AD and 900 AD, which ranged from 10 to 15 years of age.[29] The religious influence of late Anglo-Saxon England can provide some explanation for this approach. It was believed that children were 'incapable of personal sin'

[18] Anthony Platt and Bernard L. Diamond, 'The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: an Historical Survey' (1996) 54(3) C L R 1227, 1230.
[19] *ibid*.
[20] Don Ciprani, *Children's Rights and the Minimum Age of Criminal Responsibility* (Routledge 2016) 72.
[21] *ibid*.
[22] *ibid,* 73.
[23] *ibid*.
[24] *ibid*.
[25] Anthony Platt and Bernard L. Diamond, 'The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: an Historical Survey' (1996) 54(3) C L R 1227, 1230.
[26] Don Ciprani, *Children's Rights and the Minimum Age of Criminal Responsibility* (Routledge 2016) 74.
[27] *ibid*.
[28] *ibid,* 75.
[29] *ibid,* 74.

despite them being 'tainted by original sin'.[30] It was argued that children were not capable of sin because they were unable to voluntarily acknowledge and freely pursue it,[31] subsequently their ignorance protected and excused them from liability.[32] This inability to acknowledge wrongdoing and pursue it freely links to the modern day understanding of the age of criminal responsibility. The key point of contention in today's society revolves around the developmental maturity of children, essentially assessing if they have the ability to fully understand the consequences of their actions.[33] These two points are heavily linked, showing a historical understanding of the complexities which can still be seen today. By the mid 11th Century, an upper and lower limit for the age of criminal responsibility was established. The lower limit was never confirmed to be an exact age, though the age of 7 has been cited.[34] In the absence of a firmly established lower limit, judges were able to exercise a great deal of discretion in deciding if a child was to face punishment.[35] By the 1700s, the age of criminal responsibility was 7 years of age, but children between the ages of 7 and 14 were rebuttably presumed to be *doli incapax*.[36] Children aged 14 and over were criminally responsible for their actions. These rules remained until the age of criminal responsibility was placed on a legislative footing in 1933.

The Children and Young Persons Act 1933 enshrined the age of criminal responsibility into legislation in England and Wales. Section 50 changed the minimum age of criminal responsibility from 7 to 8 years of age.[37] Prior to this Act being entered into force, there was debate surrounding this provision amongst Members of Parliament. A handful of members have argued that the age should be set at 14 years rather than 8, as the age of 8 was 'tragic' and a 'disgrace in this enlightened age'.[38] It was argued that 14 years old was 'early enough' to brand a child as a criminal.[39] This was also the age at which a child of a working class family would typically leave education and lose the influence of the school.[40] It was reasoned that teachers were 'one of the most important public officials',[41] who were more capable of dealing with young offenders than the police or the courts.[42] As such, while a child is still under the supervision of the school, they should be excluded from criminal liability because teaching staff have

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[30] Anthony Platt and Bernard L. Diamond, 'The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: an Historical Survey' (1996) 54(3) C L R 1227, 1232.
[31] *ibid*.
[32] *ibid*.
[33] Royal College of Psychiatrists, 'Royal College of Psychiatrists Additional submission to Justice Select Committee | Inquiry into Children and Young People in Custody' (*UK Parliament*, July 2020) <https://committees.parliament.uk/publications/2010/documents/19436/default/> accessed 5 November 2021.
[34] Don Ciprani, *Children's Rights and the Minimum Age of Criminal Responsibility* (Routledge 2016) 75.
[35] *ibid*.
[36] Thomas Crofts, 'Catching Up with Europe: Taking the Age of Criminal Responsibility Seriously in England' (2007) 17(4) Eur J Crim L & Crim Just 267, 274.
[37] Children and Young Persons Act 1933, s 50.
[38] HC Deb 12 May 1932, vol 265, col 2234-2235.
[39] *ibid*, col 2234.
[40] *ibid*, col 2240.
[41] *ibid*, col 2239.
[42] *ibid*.

the ability to mould children so that crime will become 'unthinkable' to them.[43] This argument was furthered by stating that only a small minority of under 14s commit crimes which go beyond 'mere boyish pranks'.[44] The essence of their argument was that schools were better placed to deal with children who offended, rather than criminalising them before they had even 'had a chance in life'.[45] While this argument was strong and well evidenced, it was the minority view and the 'old diehard Tory idea' of being tough on youth crime prevailed in the House.[46] The age of criminal responsibility remained at 8 years of age, with the rebuttable presumption of *doli incapax* in place for those under 14, until 1963.

At this point, the Children and Young Persons Act 1963 reformed the age of criminal responsibility, setting it at 10 years old with *doli incapax* retained.[47] This increase in age was a response to the Ingleby report by the Ingleby Committee in 1961, which recommended raising the age from 8 to 12 in order to sufficiently protect children.[48] Setting the age of criminal responsibility at 10 years of age was a step in the right direction, but for many, this did not go far enough. These shortfalls were addressed within the drafting of the Children and Young Persons Act 1969, which included an approach which favoured the welfare of the child within the age of criminal responsibility, as previously recommended by the Ingleby Committee.[49] However, due to the constant back and forth between the Labour and Conservative party being in power between 1959 and 1997, the Act was never fully implemented and such reform never took place.[50]

The approach to youth justice was heavily impacted in 1993, when two 10 year old boys killed 2 year old James Bulger in a brutal and calculated attack in Liverpool.[51] The two boys had 'only just' reached the age of criminal responsibility when they took James Bulger on a two mile journey to a train track,[52] where they 'battered' James to death before placing his body over the railway line to be run over by a train 'in an attempt to conceal his murder'.[53] The actions of the two boys, Venables and Thompson, have been described as 'without mercy',[54] 'cunning' and 'very wicked'.[55] The presumption of *doli incapax* was rebutted in this case, leaving the boys to be found guilty of murder.[56] The specific facts of

[43] *ibid*.
[44] *ibid*, col 2240.
[45] *ibid*, col 2234.
[46] *ibid*, col 2235.
[47] Children and Young Persons Act 1963, s 50.
[48] Elizabeth Howard, 'The Ingleby Committee Report' (1961) 1(3) Brit. J. Criminol. 264, 264.
[49] Thomas Crofts, 'Catching Up with Europe: Taking the Age of Criminal Responsibility Seriously in England' (2007) 17(4) Eur J Crim L & Crim Just 267, 271.
[50] *ibid*.
[51] *R v Secretary of State for the Home Department, Ex parte Venables, Ex parte Thompson* [1998] AC 407.
[52] *R v Secretary of State for the Home Department, Ex parte V and R v Secretary of State for the Home Department, Ex parte* T (House of Lords, 12 June 1997).
[53] *ibid.*
[54] *ibid.*
[55] *ibid.*
[56] Don Ciprani, *Children's Rights and the Minimum Age of Criminal Responsibility* (Routledge 2016) 114.

this case are not to be discussed in any further detail, as it is the aftermath which is of importance here. During and after the trial an 'unprecedented' amount of 'public hysteria' arose,[57] with the media and the public demonising the defendants to an extent which levelled 'a kind of moral condemnation that is usually reserved for the enemy in times of war'.[58] This degree of public disapproval and moral disgust led to the boys being described as the 'incarnation of evil and brutal children',[59] resulting in fears for the country's public safety to grow. With this, a general disregard for the cause of crime amongst children became apparent.

With the 1997 general election looming, public opinion relating to the age of criminal responsibility began to be reflected in party manifestos. This is particularly true of the winning party, the New Labour Government, who made it's intentions clear that they were to 'insist on individual responsibility for crime'.[60] Bearing this approach in mind, it is unsurprising that in 1998 section 34 of the Crime and Disorder Act abolished the 'archaic' *doli incapax* presumption in its entirety.[61] At first glance, this was not too detrimental, as by this time, many European countries had also done away with this presumption. However, they did so in conjunction with raising their age of criminal responsibility.[62] This did not happen in England and Wales, instead the *doli incapax* presumption was abolished in isolation. It has been argued that it was appropriate for the *doli incapax* presumption to be abolished because children had a higher awareness of right and wrong than they have had historically.[63] However, this argument is flawed. Whilst a higher standard of education and an increasing access to technology allows children to have a wider breadth of knowledge about the world, this does not equate to better understanding of the morality of actions. Some argue that such exposure has been counterproductive, leading to a 'gradual disappearance of reality' instead.[64] This was further supported by Lord Lowry, who argued that better education and 'earlier sophistication' does not guarantee a child's ability to 'more readily distinguish right from wrong'.[65] Consequently, the notion that better education and increased access to technology improves a child's morality can be overlooked. The abolition of the *doli incapax* presumption left

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[57] *ibid*.
[58] Michael King, 'The James Bulger murder trial: Moral dilemmas, and social solutions' (1995) 3 Int'l J. Child. Rts 167, 172.
[59] Don Ciprani, *Children's Rights and the Minimum Age of Criminal Responsibility* (Routledge 2016) 116.
[60] Archive of Labour Party Manifestos, 'New Labour because Britain deserves better' (*Archive of Labour Party Manifestos*) <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> accessed 24 April 2022.
[61] Mary Barber, The Crime and Disorder Bill: *Youth Justice, Criminal Procedures and Sentencing* (House of Commons Research Paper 98/43, 1998) <https://researchbriefings.files.parliament.uk/documents/RP98-43/RP98-43.pdf> accessed 11 January 2022.
[62] Harriet Pierpoint, 'Age of criminal Responsibility' (*Reframing Childhood Past and Present*: 4 February 2020) <https://medium.com/reframing-childhood-past-and-present/age-of-criminal-responsibility-1e7714db9c1c> accessed 9 January 2022.
[63] Thomas Crofts, 'Doli Incapax: Why Children Deserve its Protection' (2003) 10(3) MurcochUeJL1Law <http://www5.austlii.edu.au/au/journals/MurdochUeJlLaw/2003/26.html> accessed 11 January 2022, para 23.
[64] *ibid.*
[65] *C v DPP* [1995] 2 All ER 43 [57].

English and Welsh children even more vulnerable to the criminal justice system. In essence, children aged 10 to 13 no longer had the benefit of the doubt that previously protected them from being criminalised so young. This means that England and Wales now has one of the lowest ages of criminal responsibility in the world,[66] leaving our system to be described as 'cruel'.[67]

It is important to acknowledge the role of politics in the abolition of the *doli incapax* presumption. As has been established, the aftermath of the James Bulger murder brought about public hysteria to a degree never before seen.[68] Naturally, this had an influence in the election which followed. However, it has been argued that New Labours 'tough on crime' approach was the deciding factor in the 1997 general election,[69] due to the Bulger murder providing 'fertile ground' for their justice policy.[70] This outlook highlights the way in which New Labour used the murder of James Bulger to implement their approach on youth justice, which appears to criminalise children for the purpose of political gain. This victimises children in such a senseless way, that the only logical conclusion to reach is that these reforms were a knee-jerk reaction to the murder in order to gain the majority vote. Even today, the Bulger case casts a 'long shadow' over the potential of any reform.[71] This has also been alluded to by the Law Commission, who paid acknowledgment to issues that prompt concerns remaining 'in the forefront of our minds'.[72] By hinting at the role that the Bulger murder still plays, the Law Commission is inadvertently acknowledging that the age of criminal responsibility 'is not so much a legal as a social problem, with a dash of politics thrown in'.[73] The law surrounding the age of criminal responsibility remains unchanged, with the absolute age of criminal responsibility being set at 10 years old.

International bodies have published recommendations as to what individual countries should set their age of criminal responsibility at. For example, The United Nations Committee on the Rights of the Child recommend that the absolute minimum age of criminal responsibility should be set no lower than 12 years of age.[74] Ages set below 12 are 'considered by the Committee not to be internationally acceptable'.[75] This is furthered by the Beijing Rules. Rule 4 states that an age of criminal responsibility should not be set too low, so that it fails to consider the emotional, mental and intellectual maturity of

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[66] Thomas Crofts, 'Doli Incapax: Why Children Deserve its Protection' (2003) 10(3) MurcochUeJL1Law <http://www5.austlii.edu.au/au/journals/MurdochUeJlLaw/2003/26.html> accessed 11 January 2022, para 13.
[67] Leon Radzinowicz and Roger Hood, *A History of English Criminal Law* (5th edn, Stevens & Sons Limited 1986) 133.
[68] Don Ciprani, *Children's Rights and the Minimum Age of Criminal Responsibility* (Routledge 2016) 114.
[69] Richard Sparks, Evi Girling and Marion Smith, 'Children talking about justice and punishment' 2001 8(3) Int'l J Child Rts 191, 203.
[70] *ibid*.
[71] HL Deb 8 September 2017, vol 783, col 2202.
[72] Law Commission, *Unfitness to Plead* (Law Com No 364, 2016) para 7.54.
[73] HL Deb 8 September 2017, vol 783, col 2202.
[74] United Nations Committee on the Rights of the Child 'General Comment No.10 (2007): Children's Rights in Juvenile Justice' (25 April 2007) UN Doc CRC/C/GC/10.
[75] *ibid*.

children.[76] In modern day society, children appear to be 'increasingly self-confident and in control of their lives',[77] however it has been argued that this only highlights the need for the assessment of maturity to be robust.[78] Today's children are 'more protected, less autonomous, emotionally less mature and more subordinate and susceptible to being manipulated than before'.[79] Subsequently, while children may appear to be more independent due to the freedoms and opportunities which they are given,[80] this does not equate to maturity in law. Maturity has been identified as a 'key concept' in establishing the discernment of children,[81] with factors such as education, interpersonal relationships, reasoning capacity and susceptibility contributing to making such an assertion.[82] It is very easy to identify that the age of criminal responsibility in England and Wales does not only fail to comply with international recommendations, but also does not allow children to reach such discernment. At age 10, very little educational experience and social intelligence has been acquired, subsequently such children cannot be identified as mentally mature. The Government argues that it is justified in its approach,[83] however when looking at the standards set by other countries, it is clear to see that England and Wales are falling out of line. Both Scotland and the Republic of Ireland have recently raised their ages of criminal responsibility to 12 years old,[84] moving themselves to be more in line with the rest of Europe. Despite the prospect of reforming the age of criminal responsibility being a 'surprisingly difficult endeavour' for Scotland and Ireland,[85] reform in both countries occurred due to the desire to comply with international standards set by bodies, such as the United Nations, and other European countries.[86] This highlights the value which has been given to European standards by other legal systems within the United Kingdom. As of 2018, more than 80% of member states to the European Union had an age of criminal responsibility set above 14 years old, with some states setting their age as high as 16.[87] In order

[76] United Nations 'The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")' (26 November 1985) UN Doc RES/40/33.
[77] Nuno Ferreira, 'Putting the Age of Criminal and Tort Liability into Context: A Dialogue between Law and Psychology' (2008) 16(1) Intl J. Child Rts 29, 44.
[78] *ibid*.
[79] *ibid*.
[80] *ibid*.
[81] *ibid*.
[82] *ibid*.
[83] Tim Bateman, 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' (*National Association for Youth Justice*, October 2012) <https://thenayj.org.uk/wp-content/uploads/2015/06/2012-The-Age-of-Criminal-responsibility.pdf> accessed 4 November 2021.
[84] Harriet Pierpoint, 'Age of criminal Responsibility' (*Reframing Childhood Past and Present*: 4 February 2020) <https://medium.com/reframing-childhood-past-and-present/age-of-criminal-responsibility-1e7714db9c1c> accessed 9 January 2022.
[85] Dermot Walsh, Raising the Age of Criminal Responsibility in the Republic of Ireland: A Legacy of Vested Interests and Political Expediency' (2016) 67 N Ir Legal Q 373, 373.
[86] The Scottish Parliament, 'Age of Criminal Responsibility (Scotland) Bill' (*The Scottish Parliament*) <https://www.parliament.scot/bills-and-laws/bills/age-of-criminal-responsibility-scotland-bill> accessed 4 May 2022.
[87] Aaron Brown and Anthony Charles, 'The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach' (2019) 21(2) Y. J. 153, 160.

to identify if there is any justification for the age of criminal responsibility being so low in England and Wales, age will now be discussed within the context of civic responsibilities and societal freedoms.

The age of criminal responsibility within the context of civic responsibilities and societal freedoms

In England and Wales, civic responsibilities and societal freedoms for children tend to range from 16 to 18 years of age, with the age of criminal responsibility being the exception.[88] Civic responsibilities refer to tasks conferred onto citizens in order to ensure for a functioning government, such as the right to vote and the right to sit on a jury. Societal freedoms concern rights assigned to people, upon reaching a certain age, which grant them the rights to legally make decisions or to perform acts. Examples of societal responsibilities include medical competence, the right to engage in sexual activities and the right to marry. The Beijing Rules advise that there should be a general 'close relationship between the notion of responsibility for delinquent or criminal behaviour and other societal rights and responsibilities'.[89] This chapter will explore civic responsibilities and societal freedoms within an age structured approach, in order to identify if there is a justification for such a disparity to the age of criminal responsibility.

At age 16

Once a child turns 16 years of age, the law presumes that they have sufficient competence to give medical consent.[90] Consent refers to the legal expression of autonomy,[91] which is required for surgical, medical and dental treatment.[92] Consent given by a child aged 16 and over 'shall be as effective' as if they 'were of full age'.[93] The current age of medical consent was implemented by the Family Law Reform Act 1969,[94] upon the recommendation of the Latey Committee.[95] The Latey Committee report has been regarded as providing an 'invaluable basis for major reform',[96] with their report containing both 'realistic' and 'sensible' proposals.[97] The Committee took the view that 16 year olds should be

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[88] Tim Bateman, 'Keeping up (tough) appearances: the age of criminal responsibility' (2013) 92 c j m 28, 29.
[89] United Nations 'The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")' (26 November 1985) UN Doc RES/40/33.
[90] NHS, 'Children and young people: consent to treatment' (*NHS*, 29 March 2019) <https://www.nhs.uk/conditions/consent-to-treatment/children/> accessed 2 March 2022.
[91] Richard Griffith, 'What is Gillick Competence?' (2016) 12(1) Human Vaccines & Immunotherapeutics 244, 244.
[92] Laura Abreu, *Constituency Casework: A guide to age related legislation* (House of Commons Library Briefing Paper 7032, 2015 <https://researchbriefings.files.parliament.uk/documents/SN07032/SN07032.pdf> accessed 2 March 2022.
[93] Family Law Reform Act 1969, s 8(1).
[94] *ibid*.
[95] Latey Committee, *Report of the Committee on the Age of Majority* (CM 3342, 1967).
[96] Bernard Downey, 'Report of the Committee on the Age of Majority' (1968) 31(4) M L R 429, 429.
[97] *ibid*.

empowered to authorise their own medical treatment,[98] as such their medical competence should be automatically presumed.[99] These recommendations were made partly due to the confusion surrounding medical competence at the time; it already appeared that medical consent was being presumed at the age of 16,[100] so the Committee encouraged reform to that effect on the grounds of clarity.[101] The Committee's recommendations included the establishment of medical competence in statute 'as a matter of ethics and practice',[102] to enable simplicity and functionality within the medical field.[103] The age of 16 being identified as the age for absolute medical competence was the 'express request' of all relevant professional medical bodies,[104] who 'enthusiastically supported' its implementation.[105]

While absolute medical competence is set at 16 years of age, Gillick competency provides a framework which allows children younger than 16 to seek medical aid without parental consent.[106] As established in *Gillick v West Norfolk and Wisbech Area Health Authority*,[107] a medical professional is able to assess a child's understanding in order to determine if they 'understand the nature and implications of the proposed treatment' to such an extent that they are able 'to make a responsible and reasonable decision'.[108] The case concerned whether it was lawful for a girl, under the age of 16, to seek contraception from a doctor without parental consent.[109] The case made its way up to the House of Lords, with the ultimate point of contention being the balance of parental responsibility and the child's individual wishes.[110] Regard was given to the notion of parental responsibility 'dwindling' as a child gets older due to their increasing independence.[111] This paved the way for medical professionals to have decision making capacity in relation to the assessment of the child's competence,[112] this also creates impartiality as the parent is unable to let emotional factors or knowledge of their own child become influential. There is no lower limit to Gillick competency,[113] which has caused confusion in practice relating to its application. Academic argument has determined that it would rarely be appropriate for a child under 13 years to be allowed to consent,[114] whereas judicial opinion appears to have identified a

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[98] Latey Committee, *Report of the Committee on the Age of Majority* (CM 3342, 1967).
[99] Rosy Thornton, 'Minors and Medical Treatment. Who Decides?' (1993) 52(1) C L J 34, 36.
[100] HC Deb 9 July 1969, vol 789, col 1418.
[101] *ibid*.
[102] *ibid*, col 1420.
[103] *ibid*, col 1419.
[104] *ibid*, col 1418.
[105] *ibid*.
[106] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.
[107] *ibid*.
[108] *ibid*, 113-124.
[109] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.
[110] *ibid*.
[111] *ibid*, 113.
[112] *ibid*, 112-113.
[113] NHS, 'Children and young people: consent to treatment' (*NHS*, 29 March 2019) <https://www.nhs.uk/conditions/consent-to-treatment/children/> accessed 2 March 2022.
[114] Susan Bailey and Anthony Harbour 'The Law and a Child's Consent to Treatment (England and Wales)' (1999) 4(1) J Child Psychol Psychiatry 30, 30-35.

lower limit to be one year later. The case of *R v D*,[115] for example, concerned a situation of parental kidnapping. Despite the different area of law, the same determinative factors for consent as in Gillick were applied. In this case, Lord Brandon stated that he 'should not expect a jury to find at all frequently that a child under 14 had sufficient understanding and intelligence to give consent'.[116] Both the judiciary and academics appear to be of the same opinion, that the unofficial lower limit to Gillick competence is around the ages of 13 and 14. Yet, the Government's unwillingness to accept the mental immaturity of children disrupts this harmonised approach. In the roll out of the COVID-19 vaccination programme, it was stated that Gillick competence could be applied to children aged 12 to 15 where parental consent was not present.[117] With this, it is being identified that the youngest possible age where a child can be identified as Gillick competent is 12. While this age seems to be awfully low, it highlights how inappropriate the age of criminal responsibility is. It is made clear that it would be unheard of for a child of 10 years to have sufficient capacity to consent to their own medical treatment, as they do not have the ability to 'to make a responsible and reasonable decision'.[118] It is entirely illogical for criminal law to conclusively presume that a 10 year old has such capacity, when under medical law it is an outright acceptance that they do not.

To determine if there is any justification for the differing ages relating to criminal responsibility and medical competence, the extent to which they are similar should be established. At first glance, the two competences appear to be very different; medical competence concerns the personal autonomy to make a legal choice, whereas criminal responsibility relates to the responsibility in law for an illegal act. However, taking each component with its counterpart, the supposed differences can be reduced. Looking first to the concepts of personal autonomy and legal responsibility; autonomy relates to the ability to make independent decisions, whereas responsibility requires accountability to be taken for such decisions. As can be identified from their definitions, the two concepts are entirely interlinked. Autonomy is understood in terms of responsibility due to the personal accountability which must be taken. The presence of choice opens up the notion of responsibility,[119] subsequently the conceptual gap between autonomy and responsibility can be bridged.[120] The differentiation between a choice and an act can also be overcome. Taking their most basic definitions, a choice appears to lack physicality, while an act outright requires it. However, medical competence requires a choice to be made, this requires a

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[115] *R v D* [1984] 1 AC 778
[116] *ibid*, 806.
[117] UK Health and Security Agency, 'COVID-19 vaccination programme for children and young people: guidance for schools (version 3) (*GOV.UK*, 19 January 2022) <https://www.gov.uk/government/publications/covid-19-vaccination-resources-for-schools/covid-19-vaccination-programme-for-children-and-young-people-guidance-for-schools> accessed 25 April 2022.
[118] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 124.
[119] Jos Welie and Sander Welie, 'Patient decision making competence: Outlines of a conceptual analysis' (2001) 4 Med Health Care and Philos 127, 129.
[120] Gerben Meynen, 'Exploring the similarities and differences between medical assessments of competence and criminal responsibility' (2009) 12(4) Med Health Care and Philos 443, 448.

form of expression or communication, which is a physical act.[121] The idea that vocal communication is an act is supported by the crime of perjury, where a false answer is sufficient to amount to the *actus reus*.[122] Consequently, the proposed difference between medical competence and criminal responsibility is overcome. A more glaring distinction between the two competences concerns the legality of the acts to which they relate. Criminal responsibility exists within the realm of illegal acts, while medical competence concerns legal medical treatment. However, medical competence has the ability to fall into the concern of the criminal courts, due to a doctor's potential liability where competence to consent is incorrectly established.[123] This means that actions relating to both competences can have criminal sanctions attached to them, bringing the two competences even closer together. Due to the importance of legality, this difference cannot by entirely overcome. Despite this, medical competence and criminal responsibility are exceptionally similar in practice. Consequently, it would be illogical to determine that there is justification for such a great disparity between the two ages.

Lawful sexual activities are also restricted by age in England and Wales, with the age of sexual consent being set at 16 years of age.[124] The law presumes that children under the age of 16 are incapable of consenting to sexual activities, this presumption is not rebuttable. This was first established by the Criminal Law Amendment Act 1885, which had the aim of controlling the younger population in order to meet society's expectations.[125] Today, the age of consent for sexual activities is found within the Sexual Offences Act 2003, having a more protective role with regards to preventing underage pregnancy and paedophilia.[126] Due to its relatively unchanged nature, calls for reform have urged the Government to change the age to bring it in line with modern society. This has been argued because 'society has moved on to more informed and enlightened attitudes about sex'.[127] While some may argue this to be true, the Government has refused to engage in public discussion on this topic,[128] instead it has explicitly stated that the age is 'at the right level' and there are 'no plans to lower it'.[129] Former Prime Minister, David Cameron, made the Government's position even clearer by stating that the suggestion to lower the age of sexual consent was 'repulsive',[130] identifying the protective role that it must continue to

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[121] Allen Buchanan and Dan Brock, *Deciding For others: The Ethics OF Surrogate Decision Making* (Cambridge University Press 1990) 18.
[122] Gerben Meynen, 'Exploring the similarities and differences between medical assessments of competence and criminal responsibility' (2009) 12(4) Med Health Care and Philos 443, 448.
[123] Imogen Goold and Jonathan Herring, *Great Debates in Medical Law and Ethics* (2nd edn, Macmillan 2018) 30.
[124] Sexual Offences Act 2003.
[125] Victoria Bates, 'The Legacy of 1885: girls and the age of sexual consent' (History and Policy*, 8 September 2015*) <https://www.historyandpolicy.org/policy-papers/papers/the-legacy-of-1885-girls-and-the-age-of-sexual-consent> accessed 10 March 2022.
[126] *ibid*.
[127] *ibid*.
[128] *ibid*.
[129] HL Deb 23 October 2009, vol 713.
[130] Sky News, ' Cameron Rejects Making Age of Consent 14' (*Sky News*, 11 January 2013) <https://news.sky.com/story/cameron-rejects-making-age-of-consent-14-10458229> accessed 10 March 2022.

play.[131] The Government's outright rejection of reform is particularly noteworthy when placed in relation to the age of criminal responsibility. The Government is acknowledging that children under 16 do not have the ability to make rational choices due to their emotional and cognitive deficits, [132] which have been identified as being the basis for the age of sexual consent. [133] This causes a double standard within the law relating to the treatment of children.[134] How can it be that a child only acquires the competence to consent to sexual activities at age 16, yet a child as young as 10 is mature enough to have sufficient *mens rea* to commit a crime and face a criminal court? The illogicality is blatant, causing a 'considerable disparity' which results in a glaring 'lack of uniformity'.[135] It is difficult to determine why such a protective approach is reserved for sexual consent, when children facing the criminal justice system are just as vulnerable and in need of such protections. There is no justification as to why such protective measures are not mirrored within the age of criminal responsibility.

At age 17

At age 17, very few responsibilities and freedoms are conferred. Despite this, one of particular significance in this context relates to youth cautions under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which has amended the Crime and Disorder Act 1998. Under this Act, a youth caution can only be given to a child in the absence of parent, guardian or a local authority representative once they are 17 years old.[136] With this, it is being made clear that a child is only able to understand the meaning of being cautioned if they are at least 17 years of age. The irony of this is apparent as a child is expected to understand criminal court proceedings seven years earlier. The illogicality here is obvious.

At age 18

The age at which a person can vote in England is set at 18 years of age for both Parliamentary and local elections.[137] The voting age is a devolved matter for the Welsh Parliament, who have recently reduced

[131] Victoria Bates, 'The Legacy of 1885: girls and the age of sexual consent' (History and Policy, 8 September 2015) <https://www.historyandpolicy.org/policy-papers/papers/the-legacy-of-1885-girls-and-the-age-of-sexual-consent> accessed 10 March 2022.
[132] Mercy Deche, Sarah Kinyanjui and Kiarie Mwaura, 'The Double Standards of Childhood in the Kenyan Legal Framework: The Minimum Age of Criminal Responsibility versus Age of Consent' (2019) E. Afr. L. J. 1, 1.
[133] *ibid.*
[134] *ibid*.
[135] *ibid*.
[136] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 135 (66ZA)(2).
[137] Representation of the People Act 2000, s 1(1).

their voting age for local elections to be 16 years old.[138] This civic responsibility determines the electorate, who are expected to use 'information, feelings, and instincts' to contribute to elections.[139] This was implemented by the Representation of the People Act 1969, which lowered the age from 21 to 18. Initially, there was resistance to this reform, mainly due to the long standing 'support and authority' that the traditional age had.[140] Members of Parliament urged for such reform to be taken with a great deal of consideration, in order to ensure that the electorate maintained 'practical' judgement.[141] It was acknowledged that those aged 18 'may' have such judgement,[142] but that caution must be taken and change should only occur if there is an 'overwhelming case to do so'.[143] It is understandable why Members of Parliament took such an opinion, as in reality, it is their seat in Parliament which is at risk when it comes to elections. While academic opinion on the implementation of the Representation of the People Act 1969 is sparse, the lowering of the voting age has been described as an 'inevitable and uncontroversial outcome of changing societal attitudes to young people'.[144] More recently, there have been calls for the English voting age to be reduced to 16, with it being argued that this would be 'beneficial for our democracy as a whole'.[145] Such arguments have urged politicians to defend the reasoning behind the current age, with emphasis being placed on the maturity required to be a part of the electorate.[146] It has been argued that 16 year olds are too young to democratically contribute because they are still children,[147] as such it is perceived that they would have a lack of understanding of the relevant political issues.[148] Essentially, it is argued that a 16 year old's lack of life experience is detrimental to their right to vote.[149] By maintaining a voting age of 18 years old, time is given to allow for opinions and views to be developed,[150] making for a more considerate and aware electorate.

In defending the current voting age being set at 18 years old, acknowledgment has been made to international standards, as '18 seems to be the appropriate voting age in the vast majority of places around the world'.[151] The Electoral Commission supported this determination by stating that 'the vast

[138] Neil Johnston and Elise Uberoi, *Voting Age* (House of Commons Library Briefing Paper 1741, 2020) <https://commonslibrary.parliament.uk/research-briefings/sn01747/> accessed 19 March 2022.
[139] Conor Gearty, *Civil Liberties* (Oxford University Press 2007) 61.
[140] HC Deb 26 November 1968, vol 774, col 431.
[141] *ibid*.
[142] *ibid*.
[143] *ibid*, col 432.
[144] Adrian Bingham, ''The last milestone' on the journey to full adult suffrage? 50 years of debates about the voting age' (*History and Policy*, 25 June 2019) <https://www.historyandpolicy.org/policy-papers/papers/the-last-milestone-on-the-journey-to-full-adult-suffrage> accessed 20 March 2022.
[145] HC Deb 6 June 2008, vol 476, col 1039.
[146] *ibid*, col 1040.
[147] Martin Boon, 'Age of Electoral Majority' (*Electoral Commission*, November 2013) <https://www.electoralcommission.org.uk/sites/default/files/electoral_commission_pdf_file/ICMageofelectoralmajorityreport_final_12408-9424__E__N__S__W__.pdf> accessed 18 March 2022.
[148] *ibid.*
[149] *ibid*.
[150] *ibid*.
[151] HC Deb 6 June 2008, vol 476, col 1040.

majority of countries around the world (including all EU member states, Australia, Canada and the USA) have a voting age of 18'.[152] International standards act as a 'persuasive mechanism' to individual countries by coordinating their legislative approaches.[153] Such standards are useful because they offer harmonisation,[154] which induces cooperation due to the widespread understanding and logic that is provided by different countries taking similar approaches. Having a general worldwide understanding allows for continuity within standards, subsequently this is a valid justification of our voting age continuing to be 18 years old. However, the role of international standards becomes particularly problematic when placed in relation to the age of criminal responsibility. Over three quarters of the member states to the European Union have an age of criminal responsibility of at least 14 years old.[155] Pairing this with the fact that international bodies, such as the United Nations,[156] have not been discrete in their disapproval of the age of criminal responsibility in England and Wales, a substantial juxtaposition is created. The Government has effectively ignored such criticism, maintaining that it is entirely justified to set the age of criminal responsibility outside of international standards.[157] The National Association for Youth Justice perceive the Government's protection of the status quo to be unconvincing,[158] as it continues to favour the desire to appear tough on crime rather than having consistency and logic in the law. Its motives are entirely displaced, rendering the Government to appear hypocritical. How can it be that international standards are valued to such an extent in civil matters that it is inappropriate to reduce the voting age, yet they hold no influence over the age of criminal responsibility? This contextual disregard is without proper justification, resulting in an entirely illogical approach.

Despite the 'current lively discussions', [159] the Government has made it clear that there are 'no plans' to reduce the voting age due to their 'manifesto commitment to retain the current franchise at 18'.[160] The Government was elected on this basis, as such it remains of the belief that the voting age should

[152] Neil Johnston and Elise Uberoi, *Voting Age* (House of Commons Library Briefing Paper 1741, 2020) <https://commonslibrary.parliament.uk/research-briefings/sn01747/> accessed 19 March 2022.
[152] Conor Gearty, *Civil Liberties* (Oxford University Press 2007) 61.
[153] Kenneth Abbott and Duncan Snidal, 'International 'standards' and international governance' (2001) 8(3) J. E. P. P. 345, 345.
[154] *ibid*, 356.
[155] Aaron Brown and Anthony Charles, 'The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach' (2019) 21(2) Y. J. 153, 160.
[156] United Nations Committee on the Rights of the Child 'General Comment No.10 (2007): Children's Rights in Juvenile Justice' (25 April 2007) UN Doc CRC/C/GC/10.
[157] Tim Bateman, 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' (*National Association for Youth Justice*, October 2012) <https://thenayj.org.uk/wp-content/uploads/2015/06/2012-The-Age-of-Criminal-responsibility.pdf> accessed 4 November 2021.
[158] *ibid*.
[159] Conor Gearty, *Civil Liberties* (Oxford University Press 2007) 63.
[160] Cabinet Office, 'Voting Rights: Young People – Question for Cabinet Office' (*UK Parliament*, 29 June 2020) <https://questions-statements.parliament.uk/written-questions/detail/2020-06-15/hl5711> accessed 3 May 2022.

continue to be 'aligned with the age of majority'.[161] By taking this stance, the Government is once more alienating the age of criminal responsibility from civic responsibilities. It is being accepted that children only have the requisite judgment to democratically contribute at age 18, but they have the intellectual capabilities 8 years earlier to be criminally responsible. The Electoral Commission has urged for educational provisions relating to citizenship to be implemented before reducing the voting age can be re-considered,[162] as this would aid in the development of practical judgement. Here, it is being stated that in order for democratic responsibilities to be widened, education must be implemented to teach something which is automatically presumed 8 years prior within criminal courts. This is a troublesome approach to take when compared to the age of criminal responsibly, resulting in a lack of logic and consistency.

Another civic responsibility, which is particularly relevant in this context, is the age at which a person is able to sit on a jury.[163] This responsibility is conferred at age 18,[164] unearthing a 'particularly pronounced' contrast to the age of criminal responsibility.[165] The law has created a framework in which a child is sufficiently competent to be responsible under the law at age 10, but a further eight years must pass before they have the requisite discernment to judge others to the same degree.[166] This disparity is entirely illogical, as it is being openly accepted that a child has criminal competence for their own acts, but not in assessing somebody else's. The starkness of this misalignment is made more obvious upon the consideration of a jury of 10 year olds. If such a thought is uncomfortable, then the age of criminal responsibility is clearly out of line.[167]

Another societal freedom, which is conferred at age 18, is the absolute right to marry. This was originally implemented by the now obsolete Ages of Marriage Act 1929.[168] The age of 18 was assigned due to the belief at the time that the age of maturity was much higher than it had been in the Middle Ages.[169] Through literature, such as Shakespeare's Romeo and Juliet, it is understood that children as young as 13 would marry historically.[170] Under the Ages of Marriage Act 1929, a conditional competence was also established, meaning that a marriage involving one or more parties aged 16 or 17

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[161] *ibid*.
[162] Martin Boon, 'Age of Electoral Majority' (*Electoral Commission*, November 2013) <https://www.electoralcommission.org.uk/sites/default/files/electoral_commission_pdf_file/ICMageofelectoralmajorityreport_final_12408-9424__E__N__S__W__.pdf> accessed 18 March 2022.
[163] Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2013) 13(2) Y. J. 146, 156.
[164] Juries Act 1974, s 1.
[165] Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2013) 13(2) Y. J. 146, 156.
[166] *ibid*.
[167] Blake Morrison, *As If* (Granta 1997) 100-101.
[168] Ages of Marriage Act 1929, s 1.
[169] Stephen Cretney, *Family law in the twentieth century* (Oxford University Press 2003) 59.
[170] *ibid*.

could be valid if parental consent was obtained.[171] The reasoning behind this implementation was based around the need to comply with logic.[172] Until 1991, it was legal for a husband to rape his wife.[173] Subsequently, if the conditional age for marriage was set lower than 16, lower than the age of sexual consent, then a juxtaposition would have been created where a 15 year old could not consent to one off sexual activities, yet they could consent to intercourse in perpetuity through marriage.[174] The requirement for parental consent stemmed from the notion that young children entering into marriage was not only 'bad for the participants' but also 'bad for the institution of marriage'.[175] By requiring parental consent and setting a threshold age of 16, the opportunity for harmful child marriage was reduced. While this conditional age did reduce the possibility of child marriage, it did not eradicate it, this is something which has been rectified in the modern day. As of May 2022, the age of marriage has been reformed, removing the conditional competence and confirming the age of marriage to be 18 with no exceptions.[176] The motivation behind this reform stems from the continued prevalence of coerced and forced marriages of 16 and 17 year olds.[177] The Forced Marriage Unit has identified that out of all forced marriages in the year 2020, 26% of them involved children aged 17 or younger.[178] In order to combat this in conjunction with the absolute age of marriage being an isolated provision, the new law will to make it an offence under section 121 of the Anti-social Behaviour, Crime and Policing Act 2014 to cause any person under the age of 18 to enter into a marriage.

Within the age of marriage, the protective role, which is also seen in relation to the age of sexual consent, is apparent. The implementation of a new offence highlights the degree to which the Government wants to eradicate child marriage. While this is hugely justified and an admirable stance to take, it has already been established that such an approach is not transferred to the age of criminal responsibility. Historically, it has been identified by the judiciary that it is important to identify if those legally eligible for marriage are capable of bearing the stresses, responsibilities and freedoms which come as a consequence to marriage.[179] These include matters relating to housing, finance and the change in legal status. The same implications arise when being criminally convicted. Being given the legal status of a convicted criminal greatly reduces employment opportunities and the ability to find housing,[180] having

[171] Ages of Marriage Act 1929, s 1.
[172] Stephen Cretney, *Family law in the twentieth century* (Oxford University Press 2003) 60.
[173] *R v R* [1991] UKHL 12.
[174] Stephen Cretney, *Family law in the twentieth century* (Oxford University Press 2003) 60.
[175] *Pugh v Pugh* [1952] P. 482, 492.
[176] Marriage and Civil Partnership Act 2022.
[177] Marriage and Civil Partnership (Minimum Age) HC Bill (2021-2022).
[178] Foreign, Commonwealth & Development Office and The Home Office, 'Forced Marriage Unit statistics 2020' (*GOV.UK*, 1 July 2022) <https://www.gov.uk/government/statistics/forced-marriage-unit-statistics-2020/forced-marriage-unit-statistics-2020> accessed 27 April 2022.
[179] *Pugh v Pugh* [1952] P. 482, 492.
[180] Ministry of Justice, 'Analysis of the impact of employment on re-offending following release from custody, using Propensity Score Matching' (*Ministry of Justice*, March 2013)

the same implications as marriage just on the opposite end of the spectrum. Therefore, how can it be plausible for a 10 year old to understand such implications within a criminal context, yet within marriage they can only be understood upon turning 18?

Some academics have argued that it is appropriate for the age of criminal responsibility to be an outlier in relation to other civic responsibilities and societal freedoms, as it is a 'necessary step' which assists in 'developing competency'.[181] It has been described as an appropriate 'progression from lesser to greater competence, which gradually prepares them for adult rights and responsibilities in society'.[182] Essentially, it is argued that by subjecting children to criminal responsibility so young, they are forced to develop autonomy and independence at a quicker rate.[183] With this approach, criminal responsibility is being used as a tool for childhood development.[184] However, this is simply unfair to children. It cannot be just for a child to learn about autonomy when their own criminality is at stake, especially when a 10 year old child is unlikely to understand what that means. It has been noted by the Law Commission that developmental immaturity has an undeniably 'substantial bearing' on the effective understanding and participation of a child of 10 years.[185] Subsequently, criminal responsibility should not be used as a mechanism to encourage the development of autonomy.

Having established the illogical misalignment of civic responsibilities and societal freedoms in relation to the age of criminal responsibility, a potential approach to reform will be explored.

Reforms and recommendations

It is clear that the age of criminal responsibility in England and Wales needs to be reformed to become aligned with other ages of civic responsibilities and societal freedoms. Therefore, a new age must be established. This dissertation proposes the age of 14 be assigned. Not only does this age lessen the misalignment to other ages of responsibilities and freedoms, but it also aids in reducing debate relating to the correlation between the age of criminal responsibility and mental maturity.[186] Scientific research suggests that the greatest doubt surrounding a child's mental maturity applies to children aged under

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217412/impact-employment-reoffending.pdf> accessed 3 May 2022.

[181] Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2013) 13(2) Y. J. 146, 157.

[182] Don Ciprani, *Children's Rights and the Minimum Age of Criminal Responsibility* (Routledge 2016) 34.

[183] Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2013) 13(2) Y. J. 146, 157.

[184] Kathryn Hollingsworth, 'Responsibility and rights: Children and their parents in the youth justice system' (2007) 21(2) Int'l J. L. Pol'y & Fam 190, 196.

[185] Law Commission, *Unfitness to Plead* (Law Com No 364, 2016) para 7.54.

[186] Royal College of Psychiatrists, 'Royal College of Psychiatrists Additional submission to Justice Select Committee | Inquiry into Children and Young People in Custody' (*UK Parliament*, July 2020) <https://committees.parliament.uk/publications/2010/documents/19436/default/> accessed 5 November 2021.

14.[187] Subsequently by setting the age of criminal responsibility at 14 years old, concerns regarding maturity can be greatly reduced. Since most civic responsibilities and societal freedoms are set at age 16 or above, it can be argued that by assigning the age of criminal responsibility at 14, it still continues to be misaligned. At first glance, this may be correct, however this implementation is not proposed to be done in isolation. An absolute age is too restrictive; therefore it is proposed that the *doli incapax* presumption be reinstated to protect children aged 14 and 15 years old. As has been noted, the political atmosphere that surrounded the abolition of the *doli incapx* presumption was inappropriate, subsequently the proposal to reinstate it is expected to be successful due to its historic functional application. Much like the old *doli incapax* presumption, children aged between 14 and 15 will be presumed to be incapable of forming guilty intent, unless it can be proven otherwise. Subsequently, while the age of criminal responsibility would be set at 14 years old, the *doli incapax* presumption provides protection resulting in a situation where a child is only absolutely criminally responsible at age 16.

By reinstating the *doli incapax* presumption for children aged 14 and 15, a functional approach would be established,[188] avoiding the overbearing reliance on age related status.[189] This would offer the flexibility that the assessment of individual mental maturity requires, allowing for the assertation of discernment to be properly established instead of creating a blanket criminalisation of children. In order for this presumption to be effectively implemented, its method of assessment must be established. Within the application of the old *doli incapax* presumption, there was an acceptance that any kind of standard of normality for a child's maturity could not be assumed.[190] This meant that it was inappropriate for a judge to consider if another child of the defendants age would know 'perfectly well' that to behave in such a way was 'seriously wrong'.[191] The reasoning behind the avoidance of such an assumption was to ensure that the relevant child's maturity was being assessed, rather than assessing all children of the defendants age. However, in practice it has been established that judges were too eager to 'take legal ages of liability as the definitive element in the determination of the discernment of the child'.[192] Subsequently, it would not be appropriate to leave the assessment of 14 and 15 year olds to the judiciary, due to their historic over reliance on calendar age and lack of consideration to individual maturity. Therefore, it is proposed that wider factors be considered within a psychiatric approach to determining a child's mental maturity. Evidence of knowledge can be identified through understanding

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[187] *ibid*.
[188] Mark Taylor, Edward Dove, Greame Laurie and David Townend, 'When can the child speak for herself? The limits of parental consent in data protection law for health research' (2017) 26(3) Med L Rev 369, 372.
[189] *ibid*.
[190] Sue Bandalli, 'Abolition of the Presumption of *Doli Incapax* and the Criminalisation of Children' (1998) 37(2) Howard J. Crim. Just. 114, 115.
[191] *W (A Minor) v DPP* [1996] Crim LR 320, 321.
[192] Nuno Ferreira, 'Putting the Age of Criminal and Tort Liability into Context: A Dialogue between Law and Psychology'(2008) 16(1) Intl J. Child Rts 29, 45.

the child's level of education, home background and life circumstances.[193] Such factors can be used to determine how the child responded to the circumstances surrounding their alleged crime, thus allowing for a degree of discernment to be indicated. It is recommended that child psychiatrists be utilised, using interviews with the child to determine mental maturity, along with their parents' attitude towards parenting.[194] By ascertaining the approaches of the parents, in conjunction with making an assessment of the child's home life and education, a great deal of information can be gained relating to the child's maturity, including an indication of independence by determining the degree to which they are reliant on others. Child physiatrists are best placed to assess a child's maturity within the *doli incapax* presumption due to their ability to understand the child's body language, behaviour and use of language, allowing them to infer what has perhaps not been explicitly said. Therefore, while the burden of proof relating to the *doli incapax* presumption would be placed in the hands of the prosecution, it is proposed that any assessment of the child's mental maturity be completed by child psychiatrists rather than by the judiciary.

In actioning the proposed reforms, provisions also need to be put in place for children aged under 14 and those under 16 who are determined to be *doli incapax*. It is important that children who fall outside of the proposed age of criminal responsibility are still held accountable for their actions,[195] however this should be done outside of the 'highly charged criminal justice arena'.[196] Therefore, a civil welfare approach is suggested for these children, tackling the causes of criminal behaviours, with reform being the aim. It is important that such an approach is implemented, due to the inappropriate environment that under 14s are currently subjected to within the youth justice estate. In its publication of the most recent youth justice statistics, the Ministry of Justice provided figures which highlight the need for an alternative approach for children aged 10 to 14. These children account for less than a quarter of first-time entrants into the youth justice system,[197] yet they are responsible for over half of the violence once within the estate.[198] Their crimes are acknowledged as being of a lesser severity,[199] so it is clear that the environment within the youth justice estate is inappropriate for this age group. The current approach does not reform the behaviour of younger children, instead they are subjected to a stigma which only encourages them to act 'in increasingly delinquent ways'.[200] Therefore, an approach which utilises the

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[193] Sue Bandalli, 'Abolition of the Presumption of *Doli Incapax* and the Criminalisation of Children' (1998) 37(2) Howard J. Crim. Just. 114, 114.
[194] Y Havenga and M Temane, 'Consent by children: consideration when assessing maturity and mental capacity' (2016) 58(1) South African Family Practice 43, 44.
[195] Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2013) 13(2) Y. J. 146, 158.
[196] *ibid*.
[197] Youth Justice Board, 'Youth Justice Statistics 2021/21' (*Ministry of Justice*, 27 January 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf> accessed 19 April 2022.
[198] *ibid.*
[199] *ibid*.
[200] HL Deb 8 September 2017, vol 783, col 2189.

family court system, dispute management and social services should be implemented. This approach allows for social inclusion to be supported in a way which promotes 'personal well-being and fulfilment',[201] along with adopting a positive take on responsibility.[202] The focus on blame is removed,[203] replacing it with the acknowledgement that young offenders are often heavily influenced by their social circumstances.[204] By adopting an approach which values the welfare of the child, opportunities are created as they are diverted away from the criminal justice system,[205] resulting in brighter prospects for their future.[206] Furthermore, by not establishing a lower limit to these provisions, accessibility is created. Any child who offends, no matter their age, will have the ability to be supported and educated in the necessary ways. This approach allows for a personalised and effective approach, which can be moulded to the circumstances and needs of each child (and their families). Due to the low numbers of children under 14 who offend,[207] this approach 'will not be a huge burden' in terms of the resources required.[208] This makes the implementation of a civil welfare approach for under 14s (and those aged under 16 who are identified as *doli incapax*) ever more practical.

To some extent, England and Wales already has a criminal welfare approach, evidenced through the separation of young offenders and adults within the justice system.[209] While attention is given to the welfare of the relevant child within this approach, it is not the most important consideration.[210] This is why a welfare approach within the context of the civil law is proposed for children under 14 and children under 16 who are identified as being *doli incapax*. Such an approach would utilise already existing civil law provisions, such as those found within family law. Where a child's substandard family circumstances are a contributing factor to their criminal behaviours, care proceedings are likely to commence in any case, in order to uphold the welfare principle as in section 1 of the Children Act 1989. Further to, or as a part of any potential care proceedings, the court could invoke a secure accommodation order for the child.[211] This would involve the child being placed within a secure children's home for the purpose of protection. The current law requires that a child must be considered to be at risk of absconding or pose a physical risk to themselves or others in order for a secure accommodation order

[201] Roger Smith, 'Childhood, Agency and Youth Justice' (2009) 23(4) Children & Society 252, 257.
[202] Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2013) 13(2) Y. J. 146, 158.
[203] Roger Smith, 'Childhood, Agency and Youth Justice' (2009) 23(4) Children & Society 252, 257.
[204] *ibid*.
[205] Malcom Davies, *Davies, Croall and Tyrer's Criminal Justice* (5th edn, Pearson Education Limited 2015), 289.
[206] HL Deb 8 September 2017, vol 783, col 2187.
[207] Youth Justice Board, 'Youth Justice Statistics 2021/21' (*Ministry of Justice*, 27 January 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf> accessed 19 April 2022.
[207] HL Deb 8 September 2017, vol 783, col 2189.
[208] *ibid*.
[209] Karen Harrison, *Penology* (Red Globe Press 2020) 160.
[210] *ibid*.
[211] Children Act 1989, s 25.

to be put into place.[212] It is important to identify that a child can still be removed from the custody of their parents or care givers and placed in a secure home, without criminalising them. A civil welfare approach can be moulded to the needs of each child; where educational and emotional intervention may be sufficient for one child, another may need some time in a residential facility in conjunction with other measures. The utilisation of civil law provisions to deal with children who offend outside of the criminal justice system is used internationally by countries such as Croatia, Greece and Spain.[213] These countries have each implemented a framework which redirects children below the age of criminal responsibility for the purposes of social welfare, education, protection and therapeutic measures.[214] Scotland has also implemented such an approach, advocating for 'early and minimal' intervention which protects the child.[215] After its devolution from the UK Parliament in 1999, Scotland's youth justice policy moved away from previous penal aims of punishment, turning instead to an approach which worked within local communities to promote social welfare.[216] This was done to such a degree, that it has been described as being in 'direct contrast to many other Western jurisdictions',[217] including England and Wales.[218] In practice, the approach in Scotland is centred around the system for children's hearings.[219] These hearings involve the child, and their parents, accepting the grounds for which they have been referred in order to work with social workers, teachers, psychologists and psychiatrists to reach a suitable outcome.[220] The main focus of such hearings relates to identifying if there is a need for any residential supervision requirements, establishing if the statutory social work provisions as in the Social Work (Scotland) Act 1968 is enough in isolation.[221] This approach is very similar to the one which is proposed. Due to the similarities that England and Wales have to Scotland, it would be difficult to conclude that such an approach cannot be transferred. Scotland has a population of almost 5,500,000 people,[222] with a total number of 246,511 crimes being reported in 2020 to 2021.[223] Whereas, England and Wales have a joint population of almost 60 million[224], and just over 5 million reported crimes for

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[212] *ibid*, s 25(1).
[213] Child Rights International Network, 'Minimum ages of criminal responsibility in Europe' (*Child Rights International Network*) <https://archive.crin.org/en/home/ages/europe.html> accessed 30 April 2022.
[214] *ibid*.
[215] John Munice and Barry Goldson (eds), *Comparative youth justice* (SAGE Publications Ltd, 2006) 128.
[216] *ibid,* 127.
[217] *ibid*.
[218] *ibid*.
[219] *ibid,* 128.
[220] *ibid*, 129.
[221] Social Work (Scotland) Act 1968, s 44.
[222] Office for National Statistics, 'Population estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2020' (*Office for National Statistics*, 25 June 2021) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2020> accessed 3 May 2022.
[223] Scottish Government, 'Recorded Crime in Scotland, 2020-2021' (*Scottish Parliament*, 28 September 2021) <https://www.gov.scot/publications/recorded-crime-scotland-2020-2021/pages/3/> accessed 3 May 2022.
[224] Office for National Statistics, 'Population estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2020' (*Office for National Statistics*, 25 June 2021) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2020> accessed 3 May 2022.

the same year.[225] These crime rates are reflective of the size of the populations to which they relate to, therefore it cannot be argued that Scotland has a vastly lower crime rate, thus offering an explanation as to why it can implement a civil welfare approach. Therefore, there really is no barrier to such an implementation for under 14s and those deemed to be *doli incapax* in England and Wales.

To summarise, an age of criminal responsibility set at 14 has been proposed. The reimplementation of the *doli incapax* presumption would rebuttably protect 14 and 15 year olds, with a civil welfare approach put into place to de-stigmatise and safeguard children aged under 14 and children under 16 who are determined to be *doli incapax*.

Concluding remarks

As has been noted, reluctance for reform still lingers as a consequence to the 'horrific' murder of James Bulger in 1993.[226] While this case was particularly brutal, it is important to identify that it was 'exceptional'.[227] Children of such a young age committing serious crimes is extremely rare, evidenced by the Ministry of Justice's most recent youth justice statistic publication, which identified that only 12% of crimes committed by children aged 10 to 14 are determined to be serious offences.[228] Subsequently, while the public may still be attached to the Bulger murder, it is unreasonable to use it as a justification for today's youth justice policy.

It has been made apparent that ages of civic responsibilities and societal freedoms do not marry up with the age of criminal responsibility in England and Wales. This has been evidenced through an age structured approach. The inconsistent regard which is given to international standards has been established within the voting age,[229] highlighting the way in which the Government picks and chooses their relevance. The law surrounding the age of sexual consent has brought the selective nature of the protective approach to light, raising the question of why children are shielded so much at age 16 in relation to sexual activities, but not in relation to the criminal justice system six years earlier. Perhaps the most insensitive finding of them all relates to the commitment to maintaining the electorate and the

[225] Home Office, 'Crime outcomes in England and Wales 2020 to 2021' (*GOV.UK*, 22 July 2021) <https://www.gov.uk/government/statistics/crime-outcomes-in-england-and-wales-2020-to-2021/crime-outcomes-in-england-and-wales-2020-to-2021> accessed 3 May 2022.
[226] *Venables v News Group Papers Ltd* [2019] EWHC 494 (Fam) [1].
[227] *Venables v News Group Newspapers Ltd* [2001] Fam 430 [76].
[228] Youth Justice Board, 'Youth Justice Statistics 2021/21' (*Ministry of Justice*, 27 January 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf> accessed 19 April 2022.
[229] HC Deb 6 June 2008, vol 476, col 1040.

historic political manipulation of the youth justice policy.[230] It is, of course, natural for political parties to strive to retain voters, however this should not come to the detriment of children. Such an approach only makes children more vulnerable by criminalising them in such a way that their prospects are stinted for no good reason. Each of these factors identify the misalignment, which renders the age of criminal responsibility to be 'hypocritical, discriminatory and against children's best interests'.[231] There are 'obvious benefits to be derived from greater uniformity in laws based on age distinctions',[232] with logic and consistency being key examples. As has been established, there is no justification for the current disparity between the age of criminal responsibility and other civic responsibilities and societal freedoms. As such, there are 'sound' reasons to look afresh at the law surrounding the age of criminal responsibility in England and Wales.[233]

This dissertation has proposed that the age of criminal responsibility be set at 14 years of age, with the *doli incapax* presumption reinstated to offer wider protections to children aged 14 and 15. Due to the presence of this presumption, children would only be absolutely criminally responsible upon turning 16, thus aligning the age of criminal responsibility with other ages of civic responsibilities and societal freedoms. Provisions have also been proposed for children aged under 14 through a civil welfare approach. Such an approach would value education and protection,[234] with a focus on dealing with the cause of criminal behaviour rather than criminalising children for it.[235] This would promote social inclusion and reduce the number of children being subjected to the stigma of being criminalised so young. International examples of a civil welfare approach have been provided, with a particular focus being given to the approach in Scotland. Due to the similarities that England and Wales have to Scotland, it is clear that such an approach could be functional if the Government were to implement it.

In essence, the Government is picking and choosing when a child is competent, with no consideration being given to the need for consistency or logic. The only reasonable way to conclude is by stating that the age of criminal responsibility is out of kilter with other ages of civic responsibilities and societal freedoms. The stubbornness of the Government makes it highly unlikely that any reform to the age of criminal responsibility will occur in the near future. In spite of this, it is undeniable that the age of

[230] Bateman T, 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' (*National Association for Youth Justice*, October 2012) <https://thenayj.org.uk/wp-content/uploads/2015/06/2012-The-Age-of-Criminal-responsibility.pdf> accessed 4 November 2021.
[231] Mercy Deche, Sarah Kinyanjui and Kiarie Mwaura, 'The Double Standards of Childhood in the Kenyan Legal Framework: The Minimum Age of Criminal Responsibility versus Age of Consent' (2019) E. Afr. L. J. 1, 1.
[232] Bernard Downey, 'Report of the Committee on the Age of Majority' (1968) M L R 31(4) 429, 433.
[233] Law Commission, *Unfitness to Plead* (Law Com No 364, 2016) para 7.54.
[234] Child Rights International Network, 'Minimum ages of criminal responsibility in Europe' (*Child Rights International Network*) <https://archive.crin.org/en/home/ages/europe.html> accessed 30 April 2022.
[235] John Munice and Barry Goldson (eds), *Comparative youth justice* (SAGE Publications Ltd, 2006) 128.

criminal responsibility is illogical. While the prospect of reform is dire, this identification is nonetheless worthwhile.

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