

Childhood Policy Programme

How should children and young people accused of a crime be treated within the justice system?

January 2021

On 08 December 2020, the British Academy hosted an online panel discussion which brought together different perspectives to consider how children and young people accused of a crime should be treated within the justice system.

This online event formed part of the British Academy's Childhood Policy Programme. The programme was set up to reframe debates around childhood in both the public and policy spaces, and to break down academic, policy and professional silos in order to explore new conceptualisations of children in policymaking.

The Academy's *Reframing Childhood* series of provocation papers, written by experts from across the arts, humanities and social sciences, accompanies the programme. This event provided an opportunity to debate and discuss issues surrounding two of these provocation papers – Dr Michelle Donnelly's paper 'Scottish youth justice and the legacy of Kilbrandon' and Dr Harriet Pierpoint's paper 'Age of criminal responsibility'. The event was chaired by Dr Molly Morgan Jones, Director of Policy at the British Academy.

Speakers at the event comprised:

- Dr Michelle Donnelly, Lecturer in Law, University of Stirling
- Dr Harriet Pierpoint, Associate Professor, Centre for Criminology, University of South Wales
- Professor Claire McDiarmid, Head of the Law School, University of Strathclyde
- Dr Kathy Hampson, Lecturer in Criminology, Aberystwyth University
- Junior Smart, Business Development Manager, St Giles Trust

Provocation Speeches

Michelle Donnelly and Harriet Pierpoint opened the event by building on the arguments in their respective provocation papers, published as part of the British Academy's [Reframing Childhood Past and Present](#) series.

Michelle Donnelly discussed Scottish youth justice from a legal perspective, reflecting on the legacy of the Kilbrandon report, and highlighting inconsistencies between the Scottish approach to youth justice and the UN Convention of the Rights of the Child (UNCRC). The Kilbrandon report of 1964 continues to have a profound effect on youth justice, and led to the present Children's Hearings system. This system recognises that children who offend, and those who are maltreated, are both equally in need of protection within an integrated tribunal system of youth care and justice, in which the welfare of the child is paramount. However, the overall welfare ethos is undermined somewhat as the power to prosecute serious offences in the criminal court system remains. The blending of welfare and justice agendas results in contradictions and compromises that can undermine the rights of the child. Three inconsistencies were highlighted, as follows:

- **The age limit of the children's hearings system:** This limit is generally 16 but in some cases will be 18 years. 16/17 year olds who are already involved in the hearings system stay within it, however 16/17 year olds who are new offenders are not brought within the hearings system but are instead processed in the criminal justice system and can be prosecuted in adult courts. This leads to a stark difference in treatment between the two groups of young people, and conflicts with the UNCRC. A solution to this inequality would be to amend the definition of a 'child' and to raise the age limit to 18 years in all cases. A public consultation is currently taking place on this issue.
- **Criminal records and disclosure of childhood offending:** The fact that children within the hearing system are subject to criminal records is out of step with the welfare orientation of the hearings system. Childhood criminal records have a harmful effect and impact negatively on individuals' later life chances. Some improvements have been made, for example disclosure periods have been reduced, but the legal framework remains contradictory. A solution to this would be to exclude children's hearings proceedings from the Rehabilitation of Offenders regime.
- **Prosecution in the adult criminal courts:** Most crimes committed by children are treated within the children's hearings system, but it remains possible for serious offences to be prosecuted within the adult criminal courts. There is a presumption that children are referred to the children's hearings system unless it is in the public interest to prosecute. Nevertheless, a significant amount of children are prosecuted within adult criminal courts (nearly 4,000 children in 2016/17). This defeats the point of having a dedicated youth justice system, and a more consistent approach would be to use children's hearings to respond to all childhood offending.

The inconsistencies outlined above could be collectively resolved by raising the age of criminal responsibility (the ACR), and the upper age limit of the hearings system, to 18 years. The ACR in Scotland was recently raised from 8 to 12, but this is still very low by international standards. An ACR of 18 would effectively convert child offending from a criminal to a civil matter. Children would be seen as incapable of committing crimes but harmful behaviour could be addressed by children's hearings on a welfare basis and compliance with children's rights standards would be strengthened.

Harriet Pierpoint discussed the position in England and Wales, where the ACR is currently 10 years of age. Previously there existed the doctrine of *doli incapax* which meant there was an assumption that children aged 10-14 were incapable of committing crime unless the prosecution could rebut that presumption – so while there was a conditional ACR of 10, this existed alongside an absolute ACR of 14. The *doli incapax* doctrine was abolished in the wake of the James Bulger case in the 1990s. Harriet spoke of the tendency for children to

traditionally be viewed as angelic or innocent, however if a child then acts inappropriately they are instead seen as ‘devils’ who can be treated in ways in which society wouldn’t treat other children.

It was noted that an ACR of 10 can seem inconsistent within a wider system in which for example an individual needs to be 12 years old to watch some *Star Wars* films, or needs to be 18 years old in order to vote or sit on a jury. Additionally, it was stated that within an international context England & Wales’ ACR of 10 is extremely low.

The ACR was set at a time when there was no access to brain-scanning technology, and we did not have the knowledge we do now about the brain developments that underpin behaviour. Neuroscience has now established that during adolescence individuals are more predisposed to risky behaviours, and do not have the same ability as adults in terms of controlling impulses. Additionally, it has been widely observed that criminal behaviour peaks in later adolescence, and that many individuals ‘grow out of crime’.

There are many negative implications of having a low ACR, including:

- Having contact with the criminal justice system can extend the criminal careers of young people, rather than curtail them, and can cause difficulties when applying for jobs, education courses etc. Also, ‘labelling theory’ indicates that children who are categorised as offenders are more likely to perceive themselves as offenders and also be treated as such by others.
- A low ACR bears more acutely, and can be seen as criminalising, those young people with more complex social needs.
- Criminal proceedings are expensive, and therefore having a low ACR effectively costs a significant amount of money.

Two potential paths forward were outlined: 1) increase the ACR to 12 or 14, underpinned by appropriate resources and infrastructure, or 2) reintroduce the doctrine of *doli incapax* as either a rebuttable presumption or as a defence. Harriet stated that her preference would be for the ACR in England and Wales to be increased to 14 years of age.

Panel Responses

Claire McDiarmid, Kathy Hampson and Junior Smart then responded to the two provocation authors. Points put forward during this section included:

- How children are ‘constructed’ by the law: they can be seen as simultaneously vulnerable/in need of protection and also developing agency and autonomy. This can be difficult as the law generally finds it easier to respond to one of these characteristics at a time. Criminal law has a tendency to view a child who has committed a crime as an autonomous agent. A welfare response – in the best interests of the child-offender – can fully recognise the status of the child as a child and can also allow the taking of some responsibility at the same time.
- While an ACR can be deemed necessary, it is not sufficient in and of itself: it does not account for those individuals who have reached the ACR but whose personal development means they lack the understanding needed to be held criminally responsible. Additionally, setting an ACR is always going to be somewhat arbitrary as children develop at different rates.

- The question of what understanding is required before a child can be said to be responsible for their behaviour is complex, and there are many aspects children need to understand:
 - Legal wrongness - what is criminal and what isn't, criminal consequences
 - Moral wrongness - difference between right and wrong
 - Causation (e.g. that committing an assault could result in death)
 - Ability to control actions
 - Ability to explain actions
 - Understanding of criminal law terminology (e.g. murder v manslaughter)
- UN guidance states that 14 is the youngest age at which an ACR should be set. European countries have an average ACR of 14, while the average worldwide is 12. This puts England and Wales's ACR of 10 as significantly low within an international context. Additionally, it was noted that in England and Wales many under 18s are tried in Crown criminal courts.
- There can be an erosion of children's rights when they are accused of committing a crime, which should be guarded against. This is especially important as trauma and adversity are common factors for a lot of these children. Linked to this point, it was stated that it can be unhelpful to overly individualise why a child commits a crime, and instead it is important to keep societal factors and wider systems in mind as well.
- The question of whether a child or young person is fully capable of having a thorough understanding of a crime they have committed is always going to be complex, with many shades of grey. However, it was noted that the *doli incapax* argument can be seen as difficult to justify when applied to 16/17 year olds.
- Nearly 30 years on, the James Bulger case is still very influential, and can make policymakers wary of relaxing the treatment of young people accused of a crime in any way. The Bulger case also highlights the vulnerability of youth justice policy in relation to political pressures and populist understandings of a case.
- There is growing evidence in England and Wales that the current system is damaging children, and so there should be careful thought about pulling more and more children into it. The system tends to responsabilise children, and to treat them as adults with an adult's legal knowledge and understanding. In Wales, the Youth Justice Board is promoting 'child first' justice, but it is difficult, if not impossible, to deliver this within a system that has an ACR of 10.
- There is a strong link between child criminal exploitation in relation to county lines activity (which can groom and exploit children as young as 10), and school exclusions. Also, numeracy issues, literacy issues and mental health issues are prevalent amongst young people who come into contact with the justice system. As there are several 'red flags' there is the question of when an intervention could and should be made regarding these individuals.
- It is important to bear in mind how costly the prison system is (it costs more to put a young person in prison than it does to send them to private school). And crucially, prison often does not succeed in reforming and rehabilitating offenders, as demonstrated by the high repeat offending rate.
- The disproportionality of BAME groups in relation to the criminal justice system cannot be overlooked, and there are systemic elements that need to be reformed. However, this cannot happen on a short timescale and so it is imperative that we try to lessen the damage that those young people who are involved with the justice system experience, e.g. in terms of future employment prospects. Labelling young people as criminals is damaging and dangerous, and can lead individuals on a downward slope, and towards a 'revolving door' of repeat offending.

- Extremely high percentages of young offenders have experienced mental health issues, and/or have experienced multiple difficulties or vulnerabilities during their lives. It does these individuals a disservice to treat them ‘just like anyone else’, without considering the details of their particular situation, including any trauma they have experienced.

Policy Changes

During the final part of the event, panellists and participants discussed some of the topics raised and considered what policy changes are needed to ensure that children and young people accused of a crime are treated fairly within the justice system.

Flexible approaches to an ACR: The panel considered whether adopting a flexible approach to an ACR incorporating a case-by-case assessment would be feasible and beneficial. It was noted that the *doli incapax* doctrine was designed to take account of individual children and their specific circumstances. However, while individualised assessments do have potential one point made was that court-based structures are not always designed to achieve this. There is also a danger in adopting a case-by-case approach – without any minimum safeguards or standards in place there is a risk that when exceptional cases do take place there is a knee-jerk reaction, resulting in overly harsh judgements being made. A balance is needed between welfare and justice.

The legacy of the James Bulger case: The Bulger case has had a huge impact and is still referred to frequently when discussing public opinion and views on youth justice. The panel discussed moving the narrative towards a more welfare-based conversation, which focuses on the best interests of the child - both as perpetrator and victim. It was noted that discourse can tend to go in phases. For example in Scotland in the 1960s and 1970s a welfare discourse was dominant, following the Bulger case a more punitive discourse predominated in the 1990s and 2000s, and there is now a sense that this punitive discourse may be softening to an extent. Additionally, it was noted that policy should not be made based on one case. A related point is that only 0.4% of child offences fall under the ‘very serious’ category, therefore the vast majority of children’s crimes are not within the same level of severity as the Bulger case.

The role of community and society: Instead of focusing solely on the young person who has committed a crime, the justice system needs to take into account the context of the community and society in which the young person lives. There can be an argument made that responsibility extends beyond the young person as an individual, and that the system and society can be criminogenic in a sense. The narrow focus on the child who offends sits in contrast with responses to other aspects of children’s behaviour and welfare, where the child’s family and possibly the wider community would be brought in or considered in some way. Mechanisms are required to think this through and to work out how to bring the wider context to the fore in youth criminal justice processes.

Permanent school exclusions: Panellists considered the link between school exclusions and young people who go on to offend, and whether there are strategies that can lessen this link. One example given was a programme in Camberwell, London under which young people are excluded from the ‘main’ part of the school, but not from the school site altogether. The issue of whether exclusions are sometimes used before they absolutely need to be, rather than as a very last resort, was also raised.

United Nations Convention on the Rights of the Child: In Scotland the incorporation of the UNCRC into domestic law is underway, and panellists stated that this will help in addressing the accountability gap around children's rights violations, including in relation to youth justice. Incorporation will mean that alleged breaches of convention rights can be considered in the courts, plus importantly it will put a duty on state agencies and public authorities to act consistently within a children's rights framework. The move therefore opens up a host of opportunities to challenge the state and to hold it to account to ensure that all children are treated fairly within the justice system.