The age of criminal responsibility establishes protection that limits the accountability of young persons and establishes that young persons should be regarded differently in criminal proceedings from adults. Since the inception of the *Juvenile Delinquents Act* in 1908, the Canadian criminal system has identified that children of a certain age should not be held responsible for delinquent or criminal acts in the same manner or to the same extent that adults are held responsible. The age of criminal responsibility is the “age at which a person becomes subject to the full penalties provided by the criminal law” (Millet, 1995, p. 295) and is presumed to have the capacity to understand the criminal law and the consequences of violation. Thus, a child under the age of criminal responsibility cannot be accountable or criminally responsible. Currently in Canada, young persons who are over the age of twelve years are held accountable for contraventions of the criminal law. The establishment of the age of criminal responsibility recognizes the differences in maturity, growth and decision-making capabilities between children and adults. The age of criminal responsibility has fluctuated over the history of Canada’s legislation and is based on the arbitrary assumption that young persons of this designated age are capable of understanding and appreciating the consequences of committing a criminal offence.

In order for a person to commit and be charged with a crime, the Crown must be proven a person is capable of establishing the requisite components of mens rea (the guilty mind) and actus reus (the guilty act). With mens rea, the person must be able to comprehend the act they
have committed is illegal (Maher, 2004). If the person does not understand this, they might not be of sufficient mind to know they have committed a crime. Furthermore, if the person cannot understand the difference between right and wrong and cannot form mens rea, then laying a criminal charge may not be appropriate (Maher, 2004). Therefore, the minimum age of criminal responsibility is established at an age where it is believed a young person is able to fully mentally understand and ascertain the consequences of a criminal act.

The presumption in establishing the age of criminal responsibility is based on the cognitive developmental stages of adolescents and puberty. According to Judge Omer Archambault, the minimum age of twelve years “reflects the level of development and maturity which justifies holding a young person responsible for illegal behaviour” (Abramovitch, 1986, p.48). Psychologist Jean Piaget found that the development of a child’s thinking and reasoning patterns moved from concrete to more abstract thought at the approximate age of seven (Peterson, 1988). The development of abstract thought allows the child to construct principles and actions that are understandable, thoughtful and justifiable. As well, the transition from pre-conventional to conventional moral reasoning is necessary in the establishment of formal thought toward actions and consequences (Peterson, 1988). These types of thinking and reasoning are a crucial developmental stage and are necessary in order to understand consequences, acceptability and make reasoned decision with regard to behaviour. Furthermore, it is hypothesized that a child’s brain is not completely developed and thus cannot form the mens rea component of a criminal act (Maher, 2004). The frontal lobe portion of the brain that controls the ability to think matters thoroughly does not tend to develop until adolescents. Thinking and reasoning prior to this development is therefore typically of an impulsive nature (Begin, 1993). As reported by Peterson (1988), children who are between the ages of ten and eleven years had significant less
appreciation and understanding of criminal behaviour than those children who were thirteen and fourteen years old. The cognitive development and thus the ability to understand consequences is not developed sufficiently until after twelve years of age. It is necessary to respect and appreciate the significant developmental stages that occur during pre-pubescent years in establishing the minimum age of criminal responsibility.

The historical origins of establishing an age of criminal responsibility in Canada began before Confederation. The English common-law doctrine which was adopted as the law in Canada contained the doctrine of *doli incapax*. Under this principle, children under the age of seven were considered “too immature” to form the required mens rea for criminal intent and were thus “incapable of wrongdoing” (Minaker & Hogeveen, 2009). Accordingly, children under seven could not be prosecuted for committing a criminal offence. Children between the ages of seven and fourteen years were believed to have a diminished capacity to appreciate the consequences of their actions (Stevenson, K., Tufts, J., Hendrick, D., & Kowalski, M., 1998). If a child between seven and fourteen years was charged with a criminal offence, the Crown was responsible to prove the young person was capable of establishing criminal intent and consequently capable of being held accountable for their actions. Young people over the age of fourteen were believed to be mature enough to fully appreciate and understand the consequences of their actions, and were fully prosecutable in the criminal courts (Stevenson et al, 1998). The doctrine of *doli incapax* established a safeguard that protected young person’s individual developmental progress to that of full mature logically thinking adult.

In 1908, the *Juvenile Delinquents Act* was the first legislation in Canada that formally addressed young persons in conflict with the law and formally established the age of criminal responsibility. The social welfare approach of the *Juvenile Delinquents Act* addressed at section
38 that “the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable, every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child.” The government acted paternalistically to children in conflict with the criminal law and judges ensured sentences were in the child’s best interest of rehabilitation in providing direction and guidance. The Criminal Code of Canada set the absolute minimum age of criminal responsibility at seven years of age and incorporated the doctrine of doli incapax. Despite this establishment, there was significant flexibility across Canada in the minimum age of criminal responsibility which ranged from seven to fourteen years of age. By 1962, there was national consensus that the minimum age of criminal responsibility should be increased from seven years and that the age should be consistent across Canada (Lees, 2000). While theoretically under the Criminal Code of Canada a young person between the ages of seven and fourteen year of age could be criminally charged, the minimum age of criminal responsibility was nationally settled in 1977 to twelve years of age. However, until this nationally agreed minimum was formally legislated, it was still necessary in theory for the Crown to prove a child seven and fourteen years of age was “competent to know the nature and consequences of his conduct, and to appreciated that it was wrong” (Lees, 2000, p. 83).

In 1982, the Young Offenders Act was passed to supersede the Juvenile Delinquent’s Act. The new legislation shifted from its paternalistic roll over misguided children towards legislation that ensured young persons in conflict with the criminal law were held responsible for their actions. Consequently, the age of criminal responsibility was raised from seven to twelve years old and the doctrine of doli incapax was eliminated. While this legislative revision upheld the belief that children under the age of twelve did not possess the moral or mental capacity to
understand the ramifications of their criminal actions, accept responsibility or to be held accountable, it also severed any safeguards to those who do have not acquired the mentalities theorized a twelve year old should behold. The 1996 Report of the Federal-Provincial-Territorial Task Force on Youth Justice – “A Review of the Young Offenders Act and the Youth Justice System in Canada” supported the opinion that twelve years of age “roughly corresponds with the onset of adolescence, a stage of development and social maturation set between childhood and adulthood” (Lees, 2000, p. 92) and that it was sceptical children under the age of twelve have the capacity for meaningful participation in criminal justice proceedings. The child welfare system was a more appropriate institution to address the needs and circumstances of children under the age of criminal responsibility. In 2003, the Youth Criminal Justice Act was enacted to replace the Young Offender’s Act, which furthered the concept of accountability in young persons in conflict with the criminal law.

The current Criminal Code of Canada contains the Youth Criminal Justice Act and establishes the age of criminal responsibility at section 13: “[n]o person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years”. This established the age of criminal responsibility as a chronological age and not a mental age, and established the commencement of criminal responsibility and accountability to twelve years of age. Anyone who is under the age of twelve who is involved in criminal activity is governed by provincial child welfare legislation (Stevenson et al, 1998).

The establishment of a minimal age of responsibility includes an element of arbitrariness. The abolishment of doli incapax with the Young Offenders Act eliminated a time and developmental period between complete incapacity and full responsibility. Upon the twelfth birthday, a young person is deemed to have arbitrarily attained full responsibility for a criminal
act, however, “[n]o child suddenly attains the requisite emotional, mental and intellectual maturity upon his ‘coming of age’ as dictated by law” (Lees, 2000, p. 102). It is by philosophical speculation that an arbitrary age of twelve years would give rise to the relating concepts of criminal responsibility. While the exact age of twelve years was established in an arbitrary manner, it is however, necessary to establish and formally recognize the difference between incapacity and capacity to be held responsible for criminal acts. However, by restoring the idea of doli incapax and an age range of in the development of criminal responsibility rather than an absolute age, the element of arbitrariness could be eliminated. The Crown would return to the requirement to prove the child is mentally capable in appreciating the consequences and form the necessary criminal intent of mens rea. This would address the element of arbitrariness while maintaining that some children develop at different rates than others.

When a young person under the age of criminal responsibility commits an act of criminal nature, the media often distorts the disturbing case out of context. Media discourse represents these rare cases as ‘the norm’ and the resulting media panic impels the public to respond with demands to lower the age of criminal responsibility. However, these children under the age of criminal responsibility are governed by provincial and territorial child welfare and mental health legislation which are better assisted through the expansion of funding, services and power in the child welfare system. These agencies have access to a broader range of services and guidance that can adequately address the needs of the child, family and community rather than the formal criminal justice system: “[t]his is not about locking them up at that age; it’s about providing them with help” (Morris, 2009)”. Instead of lowering the age of criminal responsibility to address the infrequent and exceptional child ‘criminal’, it is necessary to work towards creating a more comprehensive and non-criminalized methods to care for these children who fall below the age
of criminal responsibility: “there must be other ways of dealing with this [issue] apart from criminal prosecution” (Morris, 2009). Statistically, there are very few children under the age of twelve who commit criminal acts (Statistics Canada, 1997). Female accused youths are more likely to be fourteen to fifteen years of age, and male accused youths are more likely to be sixteen to seventeen years of age (Statistics Canada, 1997). The establishment of accountability for criminal acts is only appropriate for those who are blameworthy, and who can take responsibility and understand the consequences for their actions. The arguments to lower the age of criminal responsibility are ill-founded based on statistics and the developmental progresses to logical and reasoned thinking. It would be more effective to increase services in the child welfare system than to amend criminal legislation and procedures for this statistically small minority.

The age of criminality is a difficult area of the criminal justice system where legislation has to determine when a person has crossed the threshold of childhood innocence and entered into that of a fully capable and responsible adult. Throughout the development of criminal law in Canada, specific legislation and rules have been developed to differentiate the position of young persons and adults in the criminal justice system. Theories behind the establishment of the age of criminal responsibility have dealt with the development and maturation processes of puberty and adolescents that are required to properly formulate mens rea. It has been established that children under the age of responsibility are mostly unable to possess the ability to form mens rea. While there are arguments to lower the age of criminal responsibility, this is mainly due to a small number of young persons who have needs that are better served through social welfare agencies and not the formal criminal justice process. A more effective intervention than lowering the criminal age of responsibility would be to reintegrate the doctrine of doli incapax and an age
range before absolute criminal responsibility and providing the benefit of the doubt for a greater number of children who may truly be *doli incapax* despite their chronological age.
Reference


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