

# [Can article 40(3)(a) to promote the establishment of](https://assignbuster.com/can-article-403a-to-promote-the-establishment-of/)

can be heldliable for breaching a country or state’s penal laws and so is the lowest agethat a person may be held ‘ innocent until proven guilty’ once accused ofcommitting a crime.

A crime or criminal act is legally defined as a violationof the law of the state with a penalty as a consequence and thus in order forsomeone to have been considered to have committed a crime, they must have mens rea (capacity to know the wrongnessof an act) and must have carried out the actusreus (physicality of the crime) (1). A child under theMACR of their country or state is immune from criminal prosecution and as aresult cannot be formally charged by authorities nor subjected to criminal lawmeasures. England and Wales as parties to the United Nations Convention on theRights of the Child, are advised under Article 40(3)(a) to promote theestablishment of a minimum age below which the child shall be presumed to nothave the capacity to violate the penal law of the state and thus above whichthe child must understand the magnitude of their actions if they do break thelaw (2). Under the Children and Young Persons Act 1933, Section 50 states that the MACRin England and Wales is 10 years of age however there is much controversy anddebate surrounding this as the Office of the High Commissioner for Human Rights, 1989, for the United Nations Convention on the Rights of the Child defines achild as ‘ every human being below the age of eighteen years unless under thelaw applicable to the child, majority is attained earlier’ (2). Therefore, there ismuch dispute surrounding the exact age of criminal responsibility, as 10 isoften considered by professionals to be too young for a child to be held solelyresponsible and accountable for their actions, particularly considering the ageat which a child is considered by the United Nations Convention to have maturedto adulthood. The United Nations Standard Minimum Rules for the Administrationof Juvenile Justice under Rule 4. 1, council that the minimum age of criminalresponsibility should not be fixed at too low a level and should take intoconsideration the intellectual, emotional and mental maturity of children (3).

However, this broadnotion of ‘ too low a level’ remains undefined and is the most contended area ofjuvenile justice law as the debate raises crucial issues such as whetherchildren are protected fully in England and Wales through the law and if thecurrent MACR correctly measures the age at which children can sufficientlyjudge their actions. Currently, there is no exact universal criteria with whichto judge a global MACR, reflected in the differing ages worldwide. For example, in the UK alone there are three different MACRs, with England, Wales andNorthern Ireland set at 10, Scotland set at 8 and the Republic of Ireland setat 12 (4). This essay will attempt to assess whether the current MACR of 10 in England andWales should be increased or whether it is more accurate to judge that itshould stay the same through analysis and evaluation of several factorsincluding the scientific, legal and global debate.      How does the global comparison of theminimum age of criminal responsibility affect the debate? The minimum ageof criminal responsibility varies considerably across the globe, with Englandand Wales notably having one of the lowest recorded MACRS internationally. Therefore, in order to assess whether the MACR correctly stands in England andWales at the age of 10, juvenile delinquency statistics in England and Walesshould be analysed and compared with juvenile delinquency statistics worldwide. According to the Ministry of Justice and Youth Justice Board’s Youth JusticeStatistics for England and Wales 2015/2016, at the end of March 2016, therewere a total of 896, 200 arrests in England and Wales with approximately 88, 600 (10%)being that of children of legal offending age (10-17) (5). This same percentage of 10% is equivalent to the number of children within theentire population in England and Wales that are of legal offending age (5) (age 10 or overaccording to the MACR).

This illustrates that as a result of the MACR inEngland and Wales being so low, there is a considerable number of child arrestsand official juvenile delinquents with criminal records, highlighting that ahigh proportion of England and Wales’ youth are incarcerated per annum. Incontrast to England and Wales, in Brazil where the MACR is set 8 years older at18 years of age, they operate an interventionist Criminal Justice System, focusing on welfare based rather than punitive measures to educate juveniledelinquents rather than punish. In Brazil in 2015, there were only 22, 000 arrestsand confinement of juvenile delinquents (6)which is the “ most severe socio-educational measure (6)” as a means of educating delinquent youth according to the IPEA (Instituto dePesquisa Econômica Aplicada) as opposed to England and Wales’ staggering 88, 600arrests, indicating that a lower age of criminal responsibility does not deteryouth from committing crimes and thus a higher age of criminal responsibilityseems to be more successful in deterring criminal action from children. Therefore, the high proportion of imprisoned juvenile delinquents in England and Walescould be drastically reduced by increasing the MACR to an age higher than 10, encouraging rehabilitation of delinquent as opposed to subsequent enrolmentinto the Criminal Justice System. Thereby, through analysis of juvenile delinquencystatistics in Brazil, it can be inferred that raising the MACR in England andWales should be considered a viable resolution to the current punitive YouthCriminal Justice System which focuses on retribution and not education of criminalacts, resulting in more arrests of young children than necessary due to a lowMACR.  However, althoughBrazil has a lower proportion of juvenile delinquents in contrast to Englandand Wales due to a higher MACR reducing criminalisation of children, this doesnot come without its consequences. For example, in 2015 there were a series ofworrisome attacks throughout Brazil on children below the age of criminalresponsibility accused of crimes (7)during a period of severe political turmoil following therejection to lower the minimum age of criminal responsibility from 18-16 to beable to criminalise child offenders, which lost due to concern over children’swelfare in highly dangerous and overcrowded Brazilian prisons (8).

These child attacksindicate that both the police and the public took justice into their own handsin light of lack of response from their Criminal Justice System as a result ofthe MACR being set so high at 18. Therefore, as suggested by these cases inBrazil, by raising the minimum age of criminal responsibility in England andWales, one potential danger in light of public opposition, if also fuelled bywidespread political reports and anger could result in victimisation of juveniledelinquents by those in society who believe that a higher MACR providesopportunity for offenders to evade the course of justice. Thus, it should beconsidered that raising the age of criminal responsibility in England and Walesis not a legal measure that should be taken lightly as instead of a resolutionto incarcerating young children, the Criminal Justice System could result ininadvertently victimising youth instead.  Despite theseconcerns however, with an MACR of just 8 years of age, Scotland has proven thata lower minimum age of criminal responsibility can be successful in preventing juveniledelinquency. This is shown through the statistical outcome of the annual numberof youth referrals and hearings on offencegrounds throughout Scotland, which has dropped significantly from 17, 361 in theyear 2005-2006 to 2, 891 by the end of 2015 (9). Therefore, thissuggests that if the minimum age of criminal responsibility was increased inEngland and Wales, this would not necessarily increase the already high numberof juvenile delinquents as youth would perhaps be more deterred from committingcrimes through education and other means from a much younger age when perhapschildren are more impressionable. However, this is not to say that England andWales should reform the minimum age of criminal responsibility to an age lower thanthat of 10 years but perhaps indicates that England and Wales are not wrong tohave a lower minimum age of criminal responsibility than the majority of othercountries in the Western World as this trend could corroborate that a lowerMACR discourages criminal activity due to serious penal repercussions being applicableto children from 10 years of age.  In comparison to England and Wales, Australia also have an MACR of 10years of age but in tandem with this, Australian law throughout all territories, invokes the legal principle of doliincapax between the ages of 10-14.

This principle now retracted from English and Welsh law, presumes that a childis incapable of crime and criminal acts in the face of the law between the agesof 10-14 as they lack the mens rea, whichas a result means that despite the MACR being 10 years of age, Australianjuvenile delinquents below the age of 14 cannot be prosecuted for a crimethrough the Criminal Justice System unless the Crown can prove beyond allreasonable doubt that the child had the capacity to know that they should nothave done the criminal act (10). This highlightsthat the legal principle of doli incapaxcould perhaps resolve issues seen to arise in Brazil of violence towards youthas the MACR is set so high at 18, meaning that with the reintroduction of doli incapax in England and Wales, theMACR could remain the same at 10 years of age but children could be protectedmore in law through use of doli incapaxin court. This could be a viable resolution to the protection of children as italso appeases heated political tension that could arise within society with theraising of the MACR as youth could still be convicted of crimes, particularlyheinous crimes, although it is more difficult to prosecute them, protectingyoung children from the isolation of incarceration but means that juveniledelinquents guilty of crimes with a more serious criminal nature won’t evadethe course of justice when justice is deemed by a jury. Furthermore, the use ofdoli incapax in Australia seems to besuccessful as in the year 2015/2016 thetotal number of juvenile delinquents of ages 10–17 came to a total of 54, 974offenders (11), a staggering 33, 626less recorded offenders than in England and Wales in the same year. Moreover, inthe same year, only 214 children aged 10 to 12 years had a an official offencelogged against them (10).

What legal factors are there that affectthe debate? Criminalrecords will affect children into adulthood. Since England and Wales do nothave relaxed laws concerning the disclosure of childhood convictions, the ageof criminal responsibility needs to be raised to protect those who have made wrongdecisions in their childhood to increase effects of rehabilitation in prison. According to the Youth JusticeStatistics for England and Wales 2015/2016, the majority of offences that arecommitted by children arrested are arrested on convictions of a lesser criminalnature with 14% convicted of handling stolen goods and theft, 12% convicted ofcriminal damage and 8% convicted of drugs related crimes (5). Therefore, it should be argued that by having the MACR set at such a low age, the current Criminal Justice System is in danger of preventing adults frommeeting full potential due to illegal actions made in early childhood, before fulladult maturity has been reached. This conclusion is corroborated by statisticspublished in The Independent taken from the Westminster Justice Select CommitteeReport that in 2014/2015, 26% of standard Disclosure andBarring Service (DBS) checks and 23% of enhanced checks made by prospectiveemployers were related to people who were under 18 at the time of theirconviction (9), thus undermining the purpose of youth justice to rehabilitate young offendersso that they can mature to become law abiding adult citizens as criminalrecords including offences made before the age of 18 are flagged by DBS checks.

A resolution to this issue since Parliament blocked the motive to tighten lawsconcerning disclosure of childhood convictions, would be considering increasingthe age of criminal responsibility to protect those 10 year olds who havecommitted crimes from re-entering the Criminal Justice System oncerehabilitated due to missing out on opportunities such as employment as theywould have never entered the Criminal Justice System in the first place. However, although this seems to be a viable resolution, it should also be consideredthat if the age of criminal responsibility is raised to an age higher than 10, those that do commit heinous crimes such as murder at 10 years of age will befree from punishment and retribution and thus this invokes the question, isthis just and fair? In the case of James Bulger,