

Developmentally Immature Children and Young People:
Understandings,
Neuroscience & Criminal Responsibility

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Abstract

In England and Wales, developmental immaturity is not recognised as a factor deserving of exculpation from criminal responsibility for those who suffer from it and have a complete lack of capacity or a substantially impaired capacity. The explored cognitive scientific research reveals that developmental delays resulting in cognitive impairment can profoundly alter the brain's structure and function that support a child/young person's mental competence and behaviour. Developmental immaturity has been found to negatively affect their capacities to resist peer influences, foresee risks, think about the long-term consequences of their actions, control their emotions and regulate their impulsive actions. Yet, developmental immaturity is not uniformly represented in English law; weight is attached to its impact on the child/young person's culpability in mitigation for sentencing. However, developmental immaturity does not form the basis of excuse from criminal responsibility in England and Wales.

The thesis will show that the defence of diminished responsibility supported developmental immaturity as the basis of a partial excuse for individuals who suffered from it and killed under Section 2 of the Homicide Act (1957). However, under Section 52 of the Coroners and Justice Act (2009), those with developmental immaturity are excluded from successfully pleading the defence because it falls outside the scope of a "recognised medical condition." The empirical case study and examination of the "expert" problem in the thesis will reveal that the definitional requirements of Section 2 as amended detrimentally impact developmentally immature children/young people who kill (aged 10 to 17 years of age). They are convicted of murder and sentenced to a starting point of 12 years in detention because Section 2 as amended is unavailable to them as a defence at trial. In the long term, those who suffer developmental immaturity and kill without "a recognised medical condition" will be convicted of murder unless specific developmental immaturity defences are introduced into English law, offering individuals with developmental delays and cognitive impairment an excuse from criminal responsibility.

The thesis concludes by setting out two developmental immaturity defences that might help address the "expert" problem for developmentally immature persons who kill. It will also provide final remarks about which future diagnostic tools are promised to provide more accurate methods of diagnosis of medical conditions to plead the defence of diminished responsibility.

The main contribution is the identification of a subgroup of children/young people who cannot successfully plead the defence of diminished responsibility. Neuroscientific evidence is vital in identifying these persons and supporting the argument that developmental immaturity should form the basis of specific defences for those who suffer from it and commit crimes.

Declaration

No portion of the work referred to in the thesis has been submitted to support an application for another degree or qualification of this or any other university or institute of learning.

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Chapter 1

Introduction

The thesis aims to show that developmental immaturity is a factor deserving of exculpation from criminal responsibility. The explored cognitive scientific evidence will reveal that the brain fails to develop, which correlates with delays in development resulting in cognitive impairment, can profoundly alter the brain's structure and function during adolescence, supporting a child/young person's mental competence and behaviour. It will be established that developmental immaturity negatively affects children/young people's capacities to foresee risks, resist impulses and control their actions. Developmental immaturity¹ is defined by the American Psychological Association as "the status of a child who exhibits a delay (usually temporary) in reaching developmental landmarks without clinical or historical evidence of damage to the central nervous system. The child may appear younger than their chronological age in physical development, gross and fine motor abilities, language development, social awareness, or any combination of these."² The thesis has employed this definition because the American Psychological Association is universally recognised by psychologists and psychiatrists as providing international diagnostic classifications and definitions of mental conditions. Developmental immaturity is considered in mitigation when determining their sentence because "... their emotional and developmental age is of at least equal importance to their chronological age (if not greater)."³ However, developmental immaturity does not form the basis of excuse from criminal responsibility in England and Wales.⁴

An empirical case study and examination of the "expert" problem in the thesis will show that the old law of the defence of diminished responsibility under Section 2 supported developmental immaturity as the basis of a partial excuse. Developmentally immature individuals who suffered developmental delays resulting in cognitive impairment satisfied the requirements of an "abnormality of mind" that "substantially impaired his mental responsibility."⁵ However, the current defence of diminished responsibility does not accept developmental immaturity as a "recognised medical condition" under Section 2 as amended, even though cognitive impairment may arise from developmental delays. Consequently, developmentally immature children/young people who kill (aged 10 to 17) are convicted of murder and sentenced to detention because they cannot plead the defence successfully. This will continue unless the thesis's proposed defences are introduced into English law, providing developmentally immature individuals with cognitive impairment[s] an excuse from criminal responsibility.

¹ Developmental immaturity is discussed in greater detail from section 2.5.

² APA Dictionary, (Accessed, February 2023) <https://dictionary.apa.org/developmental-immaturity>

³ Sentencing Council, *Sentencing Children and Young People* para 1.5. (Accessed March 2023)

<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/>

⁴ It is important to highlight the relationship between criminal responsibility and sentencing, a person cannot be sentenced for a crime without being held criminally responsible for their conduct (be convicted).

⁵ *R v Abbott* [1964] 1 Q.B 489.

1.1 Background

The minimum age of criminal responsibility (MACR) is set at 10, which is enshrined in Section 50 of the Children and Young Persons Act (1933).⁶ However it is not linked to the “... age at which a child who commits an offence is considered to have attained the emotional, intellectual and mental maturity to understand their actions, can be formally charged and held responsible in a criminal procedure.”⁷ The legal assumption commonly associated with Section 50 states, “it shall be conclusively presumed that no child under the age of ten years can be guilty of any offence.” Over the years, the words of Section 50 have come to embrace a twofold understanding: the first, young children aged nine years and below are assumed insufficiently mature⁸ to be held criminally liable for committing a crime; the second, a child aged 10 to 13 and a young person aged 14 to 17 years⁹ are mature enough to be held criminally liable for committing a crime.¹⁰ The latter understanding supposes a child/young person should be blamed and punished if they commit a crime given their mental state (e.g., intention to bring about a harmful outcome or awareness of a specific risk) as they have the necessary capacities to carry out that offence.¹¹

Through such an assumption, Coppola, who comments on criminal responsibility generally, observed that their “guilt is assessed (and punishment is administered) when a person not only performed a wrongful act but also committed that act with a culpable mind.”¹² The problem with this twofold understanding is that a developmentally immature child/young person who suffers from cognitive impairments can be held criminally responsible¹³ for committing a crime. Although, their degree of immaturity results in cognitive impairment¹⁴ and causes them to lack total capacity or substantial impairment of legally relevant capabilities.

⁶ As amended by Section 16(1) of the Children and Young Persons Act (1963).

⁷ McAlister, S, Carr, N, Dwyer, C, Lloyd, K, *Raise the Age? Children's attitudes towards the minimum age of criminal responsibility* (2017) 113 Access Research Knowledge Update (ARK, Northern Ireland) p. 1.

⁸ A child is defined “as anyone who has not yet reached their 18th birthday.” This aligns with Article 1 of the United Nations Convention on the Rights of the Child, which states “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” A child is defined as “... those under the age of 14 ...” by the Magistrates, see further, Judicial College, *Youth Court Bench Book*, (June, 2020) p. 1.

⁹ A young person “means a person who has attained the age of fourteen and is under the age of eighteen years” under Section 107 of the Children and Young Persons Act (1933), as amended by Section 107(1) of the Criminal Justice Act (1991).

¹⁰ Crofts, T, “Catching up with Europe: Taking the age of criminal responsibility seriously in England” (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 267-291; Fitz-Gibbon, K, “Protections for Children Before the Law: An Empirical Analysis of the age of Criminal Responsibility, the Abolition of Doli Incapax and the Merits of a Developmental Immaturity Defence in England and Wales” (2016) 16 *Journal of Criminology and Criminal Justice* at 393-394; Brown, A, Charles, A, “The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach” (2019) *Youth Justice* 1-19; Elliott, C, “Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice” (2011) 75 *Journal of Criminal Law* 289-308.

¹¹ Duff, R. A, “Punishing the Young” in Wiejers, I, Duff, R. A, *Punishing Juveniles* (Hart Publishing, Oregon, Portland, 2002) pp116-117.

¹² Coppola, F, *The Emotional Brain and the Guilty Mind: Novel Paradigms of Culpability and Punishment* (Hart Publishing, Oxford, 2020) p. 10.

¹³ Criminal responsibility is “when a criminal court convicts the defence of an offence, he is held responsible for his conduct. And if the defendant is not responsible for committing that offence, a criminal court would be wrong to convict him of it.” Tadros, V, *Criminal Responsibility* (Oxford University Press, New York, 2005) p. 1.

¹⁴ Cognitive impairment is where a person suffers from “as an ongoing impairment in adaptive functioning, and ... an ongoing impairment in comprehension, reason, judgment, learning or memory, and the impairment results from damage to or dysfunction, developmental delay or deterioration of the person's brain’ that may arise from a range of conditions.” Crofts, T, Wake, N, “Diminished responsibility determinations in England and Wales and New South Wales: whose role is it anyway?” (2021) 72(2) *Northern Ireland Legal Quarterly* 350.

The importance of a lack of capacity finds support in the leading idea of doctrinal law that criminal responsibility “... should be only imposed on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences.”¹⁵ This notion mandates that criminal responsibility is contingent on the individual possessing “the right kind”¹⁶ of moral, cognitive and volitional capacities to be held criminally responsible. As Lacey argued, as a person is “answerable to the normative demands of the criminal law ...” through “... specific actions [that lie] in human capacities of cognitive – knowledge of circumstances, assessment of consequences – and volition – powers of self-control.”¹⁷ The law recognises that not all persons who commit offences satisfy the relevant mental state if they lack total capacity or substantial impairment due to their young age or suffering from an accepted mental condition¹⁸ (e.g., a medical disorder¹⁹ or illness).²⁰ Specifically, the law reflects this notion by providing young children with exemption with the MACR or those above the MACR exculpation from criminal responsibility for cognitive impairment with a legal defence such as the defence of diminished responsibility.²¹ An Australian definition of a medical condition has been chosen because the Section 2 (as amended) defence was modelled after the New South Wales defence of diminished responsibility, which also requires an “recognised medical condition” and is employed in the same way.²²

From this perspective, criminal responsibility “... represents a normative paradigm of the human mind”²³ and individuals must be endowed with a set of legally relevant capacities (e.g., rationality and control) to comply with legal rules, which, if broken, require that they be blamed and punished in criminal law. Thus, developmental immaturity should excuse a person from responsibility because those who suffer from it have cognitive impairment[s] and are deprived of legally relevant capacities necessary for criminal responsibility. More specifically, a developmentally immature

¹⁵ Ashworth. A, *Principles of Criminal Law* (Oxford University Press, Oxford, 4th Edition, 2003) p.158.

¹⁶ Vincent. N. A, “Blame, desert and compatibilist capacity: a diachronic account of moderateness in regards to reason-responsiveness” (2013) 16 *Philosophical Explorations* 178.

¹⁷ Lacey. N, “Space, time and function: intersecting principles of responsibility across the terrain of criminal justice (2007) 1 *Criminal Law and Philosophy* 236; See, generally, Vincent. N, “On the Relevance of Neuroscience to Criminal Responsibility” (2009) 4 *Criminal Law and Philosophy* 77-85; Tadros (2005) p. 44.

¹⁸ A medical condition is “a disease, condition or injury incurred by an individual.” Australian Institute of Health and Welfare (Accessed May 2023) <https://meteor.aihw.gov.au/content/491653#:~:text=Property%3A-Medical%20condition,illness%20and%20For%20Injury%20event>

¹⁹ A medical disorder is defined as “... by a clinically significant disturbance in an individual’s cognition, emotional regulation, or behaviour. It is usually associated with distress or impairment in important areas of functioning. There are many different types of mental disorders. Mental disorders may also be referred to as mental health conditions. The latter is a broader term covering mental disorders, psychosocial disabilities and (other) mental states associated with significant distress, impairment in functioning, or risk of self-harm.” World Health Organization (Accessed February, 2023) <https://www.who.int/news-room/factsheets/detail/mental-disorders>

²⁰ A medical illness is defined as “... health conditions involving changes in emotion, thinking or behavior (or a combination of these).” APA (Accessed February, 2023) <https://www.psychiatry.org/patients-families/what-is-mental-illness>

²¹ Morse. S, “Excusing the Crazy: The Insanity Defense Reconsidered” (1985) 58 *Southern California Law Review* at 780; Fischer. J. M, Ravizza SJ. M, *Responsibility and Control* (Cambridge University Press, New York, 1998) pp.1- 27; Morse. S, “Rationality and Responsibility” (2000) 74 *Southern California Law Review* 251-268; Maher. G, “Age and Criminal Responsibility” (2004) 2 *Ohio State Journal of Criminal Law* 493-512; Loughnan. A, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford University Press, Oxford, 2012) p. 3-4; Delmage. E, “The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective” (2013) 13 *Youth Justice* 102-103. See, further, section 2.2-2.3. It is important to note that Morse, Fischer and Ravizza, and Maher are not specifically commenting on English law, however, criminal responsibility more generally and are American and Scottish specialists. Their arguments/critiques are essential to the thesis because they show a consensus in doctrinal law that someone who lacks legally relevant capacities should not be held criminally responsible for their actions.

²² See further chapter 4.

²³ Coppola (2020) p. 11.

child/young person has a lower degree of maturity than the norm for an individual of their age, resulting in cognitive impairment, and they possess a degree of immaturity that "... is not so extreme as to constitute a recognised medical condition."²⁴ Yet, developmental immaturity does not form the basis of an excuse from responsibility in England and Wales, even though some people who commit crimes are developmentally immature and suffer cognitive impairment.

While general immaturity was an excusable condition of the defence of *doli incapax* (although there was a rebuttable presumption), which operated a presumption and completely excused all those aged 10 to 13 who did not know that their actions were seriously wrong when they committed an offence because of their young age and immaturity.²⁵ Unless the prosecution proved that the child had foreseen the serious nature of their actions when they committed the offence (rebutted the presumption).²⁶ The rebuttable presumption no longer operates as it was abolished in Section 34 of the Crime and Disorder Act (1998), removing the prosecutor's right to challenge a child's ability to know the difference between right and wrong by presenting contrary evidence for reasons to be outlined in section 2.6. The House of Lords confirmed in *R v JTB* [2009]²⁷ that Section 34 abolished the entirety of the defence, including its rebuttable presumption.²⁸

In current legal practice, developmental immaturity is irrelevant as a precondition of "abnormality of mental functioning" under the defence of diminished responsibility, a mental condition defence in doctrinal law based on the idea that a person who kills and lacks capacity due to mental impairment should have reduced criminal responsibility.²⁹ Under Section 52 of the Coroners and Justice Act (2009), Section 2, as amended, the defence operates as partially inculpatory and exculpatory, Loughnan remarked, because "the individual seeking partial inculpation via diminished responsibility is constructed as abnormal."³⁰ The defence partially excuses by reducing a person's criminal liability (a conviction of murder to voluntary manslaughter) and not criminal responsibility because a mental condition substantially impaired their mental functioning making their thinking abnormal.³¹

Evidence of a "recognised medical condition" is a requirement of Section 2 as amended, not developmental immaturity, which limits the remit of the defence of diminished responsibility. It requires that a person kill and suffer an "abnormality of mental functioning" arising from "a recognised medical condition" that substantially impairs their ability to perform one or more things outlined in Section 52(1A). Those things are the ability to understand the nature of their conduct, form a rational judgment or exercise self-control.³² Section 2 as amended is framed narrowly to exclude a person who suffers developmental immaturity³³ from successfully pleading it because developmental delays are not considered "... so extreme as to constitute a recognised medical

²⁴ Law Commission, *Criminal Liability: Insanity and Automatism Discussion Paper* (HMSO, London, 2013) para. 9.10. See sections 2.4-2.5.

²⁵ See sections 2.4-2.5.

²⁶ Keating, H, "How Should the Criminal Law Respond to the 'Special Status' of Children?" in Child. J. J, Duff. R. A, *Criminal Law Reform Now* (Hart Publishing, Oxford, 2021) p. 170.

²⁷ *R v JTB* [2009] *UKHL* 20.

²⁸ See section 2.6.

²⁹ Law Com (2013) para 9.5-9.6.

³⁰ Loughnan (2012) p. 26.

³¹ *Ibid.*

³² See section 2.9 for an in-depth discussion of the defence.

³³ This is a criticism of the defence because it excludes children, young persons and adults who kill and suffer developmental immaturity for successfully pleading Section 2 as amended.

condition,”³⁴ but rather a byproduct of adolescence.³⁵ As a result, children/young people who kill and suffer from it are convicted of murder and sentenced to detention³⁶ regardless of whether they might suffer a total lack or substantial impairment of the things outlined in Section 52(1A).³⁷

To address this issue, the Law Commission in 2013 proposed a new complete and general defence of “not criminally responsible by reason of developmental immaturity” for those who kill and suffer developmental delays.³⁸ However, legal commentators and the thesis maintain that it would only permit those who suffer complete incapacity and commit a crime to plead it successfully. A developmentally immature person who kills and suffers a substantial impairment of mental capacity would be excluded from successfully pleading it simply because they possess the reduced capacity to form a rational judgment, appreciate the wrongness of their actions or exercise self-control.³⁹

In a recent attempt to reform the law relating to the MACR, Lord Dholakia introduced another private member’s Bill before Parliament (the House of Lords) to increase the MACR to 12 years of age, the Age of Criminal Responsibility Bill 2019-2021. In 2013, during the House of Lords’ second reading of the 2012-13 version of the Bill, he claimed that there is a scientific basis for increasing the MACR because:

There is now a significant body of research evidence indicating that early adolescence (under 13-14 years of age) is a period of marked neurodevelopmental immaturity, during which children’s capacity is not equivalent to that of an older adolescent or adult. Such findings cast doubt on the culpability and competency of early adolescents to participate in the criminal process and this raises the question of whether the current minimum age of criminal responsibility, at ten, is appropriate.⁴⁰

Lord Dholakia acknowledged the effects of immaturity and brain development on children’s behaviour as a basis for increasing the MACR.⁴¹ Bateman also opposes the low 10-year age threshold because “children too young to attend secondary school may ... be arrested and detained at a police station. They can be prosecuted and, if convicted, will receive a criminal record that, for some purposes, must be declared indefinitely.”⁴² However, the Bill has been tabled.⁴³ The MACR remains fixed at 10 years and holds that a 10-year-old child is to be held culpable for committing an offence, even if they are developmentally immature, for reasons to be discussed in Chapter 2.

The fact that some suffer developmental delays and a degree of immaturity that results in them lacking the ability to rationalise or take self-control over their actions is not a factor the criminal

³⁴ Law Commission (2013) para. 9.10.

³⁵ Fitz-Gibbon (2016) 404.

³⁶ As of April 2022.

³⁷ Law Commission, *Partial Defences to Murder* (HMSO, London, No. 290, Final Report, 2004) para. 5.102. It is essential to acknowledge developmentally immature adults are also excluded from pleading Section 2 as amended and might be convicted of murder unless they can plead an alternative defence such as loss of control or self-defence.

³⁸ Law Commission (2013) para. 9.1.

³⁹ De Than. C, Elvin. J, “How should the criminal law deal with people who have ‘partial capacity’?” in Livings. B, Reed. A, Wake. N, *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (Cambridge Scholar Publishing, Newcastle upon Tyne, 2015) pp. 311-12; McDiarmid. C, “After the age of criminal responsibility: a defence for children who offend” (2016) 67(3) *The Northern Ireland Legal Quarterly* 337-340; Childs and Duff (2021) p. 170.

⁴⁰ Hansard, House of Lords, HL Debate, (8th of November, 2013) at col. 476.

⁴¹ See section 3.2.

⁴² Bateman. T, *Criminalising Children for No Good Purpose: The Age of Criminal Responsibility in England and Wales* (National Association for Youth Justice, London, 2012) p.1.

⁴³ As of April 2023.

law widely acknowledges in exculpatory defences within legislation and common law.⁴⁴ A developmentally immature child/young person who kills is culpable for their actions, even if it explains their actions in the killing and lack of capacity. As a result, the thesis will argue that there is space and support (legal⁴⁵ and scientific)⁴⁶ for introducing two developmental immaturity defences in England and Wales for children and young people who kill while suffering from it, resulting in a total lack of capacity or substantial impairment arising from cognitive impairment.⁴⁷

1.2 Contribution

The main contribution of the thesis is that developmental immaturity is a justifiable basis for an excuse from criminal responsibility because those who suffer from it have developmental delays resulting in cognitive impairment. The cognitive science research to be explored will show that developmental delays and cognitive impairment can detrimentally affect how a child/young person thinks and behaves. More specifically, it will be demonstrated that developmental immaturity negatively impacts their capacities to foresee risks, resist peer influences, appreciate the significance of their actions, control their actions and regulate their impulses.

The problem is that developmental immaturity does not form the basis of a specific excuse from criminal responsibility in England and Wales. A case study and examination of the “expert” problem in the thesis will establish that the current defence of diminished responsibility excludes developmentally immature persons who kill from successfully pleading it under Section 2 as amended. Developmentally immaturity is not accepted as “a recognised medical condition” under Section 2 as amended; thus, those (specifically aged 10-17 years)⁴⁸ who suffer from it and kill and are convicted of murder and sentenced to detention. Yet, the defence of diminished responsibility under Section 2 permitted developmentally immature individuals who killed to plead the defence successfully.⁴⁹ Such persons will continue to be convicted of murder unless the thesis’s proposed defences are introduced into English law, providing developmentally immature individuals with cognitive impairment an excuse from criminal responsibility.

The thesis will consider a legal cause for the existence of the ‘expert’ problem, namely, that Parliament narrowed the scope of Section 2 as amended to such an extent that the defence purposively excludes those who suffer from developmental delays that result in cognitive impairment from successfully pleading it, unlike Section 2.⁵⁰ As a result, the thesis will propose the introduction of two developmental immaturity defences to protect those children/young people who suffer from it and satisfy the *mens rea* for murder, even though they lack substantial impairment or complete incapacity of legally relevant capacities when they kill. The first is a complete and general

⁴⁴ See, further, sections 2.4 to 2.11 and chapter 5.

⁴⁵ See chapters 2, 4 and 5.

⁴⁶ Refer to chapters 3, 4 and 5.

⁴⁷ See section 5.5 for a detailed discussion of the thesis’s proposed defences.

⁴⁸ The age group of concern in the thesis.

⁴⁹ [1964] 1 Q.B 129.

⁵⁰ One of the Government’s reasons for rejecting the Law Commission’s proposed limb was that there were no issues in children’s cases with pleading the old defence of diminished responsibility, see subsection 4.5.2.

defence that excuses those (adults and children/young people) who suffer developmental delays and a total lack of legally relevant capacities for criminal responsibility. The second is a partial and specific defence to murder that provides a voluntary manslaughter conviction to developmental immaturity persons who suffer substantial impairment of legally relevant capacities. It will be shown that both these defences should be enacted to help those who encounter the ‘expert’ problem to avoid a murder conviction and the mandatory life sentence with an excuse from criminal responsibility.

In addition to the primary contribution, the thesis will argue that the *mens rea* for murder does not consider the effect developmental immaturity might have on a child or young person’s criminal responsibility. The *mens rea* for murder requires that a defendant intended to kill or cause serious injury (grievous bodily harm), where this cannot be proved “the jury should be directed that they are not entitled to find the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty ... as a result of the defendant’s actions and that the defendant appreciated that such was the case.”⁵¹ Suppose there is evidence that a developmentally immature child/young person purposively intended to kill or foresaw serious harm as a virtual certainty of their actions. In that case, the jury can convict this person of murder, regardless of whether they appreciated the significance of the killing and actions in causing the death of another person. Thus, the thesis will show that there is space for a developmentally immature defence for those who satisfy the *mens rea* for murder but lack the understanding/appreciation of their actions in causing death and the significance of killing with an examination of case law and doctrinal law.

1.3 Methodological Restrictions of Contribution

The main constraints of the thesis’s contribution are the limitations of the scientific insights and case law search of reported cases. The scientific constraints are the limitations of brain scan imaging techniques and data in neuroscience. The restricted access to trial reports and relevant cases are the search constraints of the results.

It is essential to acknowledge that “neuroscience is the study of the cognitive processes that underlie human behaviour.”⁵² It derives from the idea that studying the mind and behaviour can be achieved through examining the brain to explain why people think and act in specific ways.⁵³ It has substantially contributed to understanding cognitive development during adolescence by showing that the brain is highly plastic during this life stage and does not fully mature until early adulthood.⁵⁴ However, numerous branches of study exist within the field, from behavioural, cognitive and developmental to computational neuroscience. It has developed so that researchers now explore the

⁵¹ R v Woollin [1999] 1 A.C 82 at 83.

⁵² Rosenthal, H, “Scanning for Justice: using Neuroscience to Create a More Inclusive Legal System” (2018) 50 *Columbia Human Rights Law Review* 296.

⁵³ Farah, M, “Neuroethics: The Ethical, Legal and Societal Impact of Neuroscience” (2012) 63 *Annual Review of Psychology* 572-573.

⁵⁴ Spear, L. P, “The Adolescent Brain and Age-Related Behavioral Manifestations” (2000) 24 *Neuroscience & Biobehavioral Reviews* 447.

nervous system, structure, function and development using different technologies and methods to study groups of individuals, such as developmentally immature children/young people.

Some scientists interview children/young people convicted of murder and ask structured questions to gather a detailed history of their lives before their actions in the killing.⁵⁵ Others look at neurocognitive biomarkers, including functional and structural brain scans (fMRI and MRI), to predict antisocial behaviour and psychopathy in developmentally immature/ children/young people and those who develop abnormally. For example, Kiehl and others used fMRI brain scans and genetic biomarkers to show that some child killers and rapists were psychopaths.⁵⁶ However, some brain imaging studies do not triangulate evidence from other studies, such as behavioural insights.⁵⁷ Subsequently, the thesis cannot explore all the methodological limitations within the field; it will focus on the limitations of neuroimaging evidence because brain imaging studies dominate the cognitive science research explored in Chapter 3. Many scientists and legal scholars also consider neuroimaging a category of devices that will provide future accurate and early diagnoses of mental conditions in individuals through advancements in fMRI and genetic screening,⁵⁸ which will be discussed in section 3.9 and Chapter 6.

In the neuroscientific research to be explored in Chapter 3, scientists employ functional neuroimaging tools because they are "... nonsurgical devices and methodologies that allow measurement of living brain activity"⁵⁹ during adolescence. fMRI is a device used to localise "areas of critical perceptive, motor, and cognitive functions so that these abilities are less likely to be destroyed during tumor or tissue resection."⁶⁰ It also shows how the brain processes information in response to a specific stimulus across different ages throughout adolescence, which helps researchers isolate differences between individuals of the same age and sex who develop normally or abnormally.

However, as Bell and Racine observed, "... since fMRI operates under the premise that measured brain activity is a reflection of areas of the brain engaged in or involved in carrying out a task, conventional fMRI and the resulting brain images are bound to the context of the task."⁶¹ This means that the images and data that capture the child/young person's task performance "... are interpreted as the neural correlates of that behavior"⁶² for that specific group of individuals based on age and sex. For instance, developmentally immature children/young persons have a higher degree of

⁵⁵ Lewis. D. O, Moy. E, et al., "Biopsychosocial Characteristics of Children who Later Murder: A Prospective Study" (1985) 142 *American Journal of Psychiatry* 1161-1167; Bailey. S, Thornton. L, Weaver. A. B, "The first 100 admissions to an adolescent secure unit" (1994) 17 *Journal of Adolescence* 207-220. Bailey. S, "Sadistic and Violent Acts" (1997) 2 *Child Psychology & Psychiatry* 92-102; Bailey. S, "Adolescents who murder" (1996) 1 *Journal of Adolescence* 21.1 *Journal of Adolescence* 21.

⁵⁶ Kiehl. K. A, Smith. A. M et al., "Temporal lobe abnormalities in semantic processing by criminal psychopaths as revealed by functional magnetic resonance imaging" (2004) 130 *Psychiatry Research* 27-42; Aharoni. E, Vincent. C et al., "Neuroprediction of Future Rearrest" (2013) 110 *Proceedings of the National Academy of Sciences* 6223-6228.

⁵⁷ Blakemore. S. J, Burnett. S, Dahl. R. E, "The Role of Puberty in the Developing Adolescent Brain" (2010) 31 *Human Brain Mapping* 926-933.

⁵⁸ Von Polier. G, Vloet. T, Herpertz-Dahlmann. B, "ADHD and Delinquency – a developmental perspective" (2012) *Behavioral Sciences and the Law* 121-139; Morse. S, Newsome. W, "Criminal responsibility, criminal competence, and prediction of criminal behaviour" in Morse. S, Roskies. A, *A Primer on Criminal Law and Neuroscience* (Oxford University Press, New York, 2013) p. 178; Singh. I, Sinnott-Armstrong. W, Savulescu. J, *Bioprediction, Biomarkers and Bad Behavior* (Oxford University Press, New York, 2013).

⁵⁹ Brown. E. T, Murphy. E, "Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental State" (2010) 62 *Stanford Law Review* 1127.

⁶⁰ Ibid. at 1128.

⁶¹ Bell. E, Racine. E, "Enthusiasm for Functional Magnetic Resonance Imaging (fMRI) Often Overlooks Its Dependence on Task Selection and Performance" (2009) 9 *American Journal of Bioethics-Neuroscience* 23.

⁶² Brown (2010) at 1143.

immaturity than the norm of a person of the same age, which might predispose them to suffer a lack of rationality and control. However, variable individual differences, such as the rate and speed of brain development between developmentally immature children/young persons, are not considered beyond comparing groups based on age, sex and type of brain development. Hence, it is impossible to discern from the explored studies, the degree of (in)capacity a developmentally immature child/young person who kills might suffer because each develops at their speed and rate without individual psychiatric assessments.⁶³ The thesis must therefore caution the reader when analysing the explored brain scan data and future promises of its use in this body of work. These studies provide insight into brain development through a narrow lens using one or more diagnostic devices (e.g., fMRI or MRI).

The primary restraint of the case law search is the statutory reporting restrictions in English criminal law, which prevents the identification of children/young people. The law requires that children (10 to 13 years of age) and young persons (aged 14-17 years) charged with murder or manslaughter are tried in the Crown Court in England and Wales contrary to Sections 51A(2), (3)(a) and 12 of the Crime and Disorder Act (1998). However, an automatic statutory reporting restriction prevents public access to criminal cases involving children/young people presided by the Crown Court unless the case satisfies one of several exceptions.⁶⁴ As a result, only a few reported cases are tried by the Crown Court and come under the reporting exceptions under Section 49(5)-(7) of the CYPA (1933). The evidence in these cases would unlikely create a reasonable sample size of relevant children/young people following a specific case law search of Crown Court judgments. Thus, the case search parameters were readjusted to appeal cases because the public can access criminal decisions involving children/young people presided by the Court of Appeal and the Supreme Court. Appeal cases are another exception to the automatic reporting restriction rule.⁶⁵

A further restraint is that a small handful of children/young people every year appeal against conviction or sentence of murder; thus, the sample of appeals against conviction of murder is small. Hence, case law involving adult offenders convicted/sentenced to murder and manslaughter by reason of the defence of diminished responsibility will support the arguments presented in the thesis.

1.4 Diminished Responsibility Focus

The primary focus of the thesis is the defence of diminished responsibility in England and Wales.⁶⁶ More specifically, the first statutory version of the defence as it operated from the 21st of March 1957 to the 4th of October 2010 under Section 2 of the Homicide Act (1957). Also, the current version of the defence has been operational since the 4th of October 2010 under Section 52 of the

⁶³ Frith. C, Frith. U, "What Can We Learn from Structural and Functional Brain Imaging?" in Rutter. M. J and Bishop. D, et al, *Rutter's Child and Adolescent Psychiatry* (Wiley-Blackwell Publishing, 5th Ed, 2008) p.137. See further, sections 3.5, 3.8 and 3.9.

⁶⁴ A list of the exceptions is provided in Jacobson. J, Talbot. J, "Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children (Prison Reform Trust, 2009) p. 54; Sections 39 and 49 of the Children and Young Persons Act (1933)(CYPA), section 45 the Youth Justice and Criminal Evidence Act (1999) and European Convention on the Rights of the Child, Articles 3 and 8).

⁶⁵ Judicial College, *Reporting Restrictions in the Criminal Courts April 2015* (Revised May 2016) (Judicial College, London, 2016) p. 15.

⁶⁶ See chapter four for the definitional requirements of the defence.

Coroners and Justice Act (2009).⁶⁷ A successful diminished responsibility plea (under both versions) requires that the defendant satisfy the *actus reus* and *mens rea* requirements of the offence of murder. For the offence of murder, it must be proven beyond a reasonable doubt that the defendant unlawfully killed another person with “an intention to cause death or grievous bodily harm to the victim.”⁶⁸

If the defendant fails to satisfy the definitional requirements of the defence of diminished responsibility,⁶⁹ they are convicted of murder and sentenced to life imprisonment (termed ‘detention’ for children/young people). The term that a defendant must serve for murder is life, but the period differs depending on their age at the time of conviction. Children/young people convicted of murder are sentenced to detention, with a starting point of 12 years, contrary to Schedule 21 (6) of the Sentencing Act (2020). By contrast, adults convicted of murder, aged between 18 and 21 years, are sentenced to a starting point of 15 years under Schedule 21, section 5 of this Act (2003). Those convicted of murder, aged 21 years and above, are sentenced to a starting point of a whole life order, per Schedule 21, Section 2(b) of this Act (2020).

The period that the defendant serves for a murder conviction also differs depending on the aggravating and mitigating factors of the case. Schedule 21 Sections 7-11 of this Act (2020) lists the statutory aggravating and mitigating factors the court must consider in determining the defendant’s sentence length. Mitigating factors include “an intention to cause serious bodily harm rather than to kill,” the defendant’s mental disorder or mental disability that reduced his degree of culpability and the defendant’s age at the time of the killing.⁷⁰ Aggravating factors include the defendant’s degree of planning or premeditation, the victim’s vulnerability (i.e., age or disability) and suffering inflicted on the victim by the defendant before their death.⁷¹

Suppose the child/young person satisfies the definitional requirements of Section 2 as amended. In that case, they are convicted of voluntary manslaughter by reason of the defence of diminished responsibility and sentenced to detention of no more than 2 years if the offence is punishable by 14 years or more in adult custody.⁷² The period that a child/young person convicted of manslaughter serves is discretionary and determined by the trial judge considering any aggravating and mitigating factors.

In addition to the above sentencing factors, the court must apply special considerations to children/young persons convicted of offences. Section 37 of the Crime and Disorder Act (1998) requires that the consideration of the two primary aims of the youth justice system when dealing with them. Firstly, the youth justice system must act with the view of preventing them from offending and secondly and must act to prevent offending.⁷³ This requires that the court consider their welfare and make any necessary changes to maintain it. For example, consider the possible adverse effects of the court environment on their welfare and make reasonable adjustments, such as

⁶⁷ See textual amendment F1 for section 2 of the Homicide Act (1957) (Accessed, January 2021, <https://www.legislation.gov.uk/ukpga/Eliz2/5-6/11/section/2>).

⁶⁸ R v Adams [1957] Crim LR 365, R v Cox [1992] BMLR 38; R v Woollin [1999] 1 Cr App R 8 (HOL), R v Matthews (Darren John) [2003] EWCA Crim 192, DPP v Smith [1961] AC 290 (HL).

⁶⁹ Or any other relevant legal defence such as the defence of insanity or defence of loss of control.

⁷⁰ Schedule 21, Section 10 (a)-(g).

⁷¹ Schedule 21, Section 9 (a)-(g).

⁷² Section 250 of the Sentencing Act (2020).

⁷³ Sentencing Council, *Sentencing Children and Young People Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery*, *Definitive Guide* (Sentencing Council, 2017) paragraph 1.1.

informal dress, under section 44 of the Children and Young Persons Act (1933).⁷⁴ In addition to the mitigating factors listed above, the court must also specifically consider the child/young person's chronological age, "emotional and developmental age and maturity ..."⁷⁵

The statutory framework for sentencing children/young people is essential to the thesis because a defendant's sentence must be proportionate to the seriousness of the convicted offence. The Sentencing Council is clear that the court should not impose significant restrictions on the liberty of the defendant other than what is necessary and must assess the child/young person's degree of criminal responsibility by the harm caused and consider any relevant aggravating and mitigating factors (e.g., their developmental immaturity).⁷⁶

1.5 Sources and Methodology

The thesis brings together legal and scientific disciplines. The amalgamation of these disciplines will require separate doctrinal engagement and exploration before coming together. Each field conducts research based on different ideas, philosophies and methodological approaches. The integration of these disciplines is original; criminal law and neuroscience have not been integrated in this way to examine the English law's treatment of developmentally immature children/young people who kill and the defence of diminished responsibility. To my knowledge, Section 2 as amended has not previously been investigated through a neuroscientific lens to show that developmentally immature children/young people cannot successfully plead it by applying relevant appeal case law.

At the beginning of the thesis, the critical explorations of developmentally immature children/young people will be largely separate and specific to each discipline: Chapter two (the legal) and Chapter three (the neuroscientific). The thesis will combine these legal and neuroscientific analyses of developmentally immature children/young people from Chapter four. This will provide the thesis with a solid foundation to examine why these individuals cannot successfully plead Section 2 as amended.

A range of primary and secondary sources are used in the thesis. The focus of each chapter and the questions considered determine the sources used, which will differ throughout the thesis. Chapter two will comprise legal doctrine, legislation, Ministry of Justice, and Law Commission reports. Chapter three will incorporate neuroscientific evidence and studies on adolescent brain development. Chapters four, five and six will contain all the above, including the case study of appeal cases.

As identified in section 1.3, statutory reporting restrictions are the primary reason for my small case sample for this study. The research predominately focuses on cases of appeal against conviction of murder found from a case law search of LexisNexis and Westlaw's legal databases. The sample size reflects the fact that very few children/young people every year are convicted of murder and even fewer appeal against conviction of murder in England and Wales.⁷⁷ In English law, the appeal

⁷⁴ Also enshrined in section 58 of the Sentencing Act (2020).

⁷⁵ Sentencing Council, (2017) paragraph 1.5.

⁷⁶ Ibid. See, section 4.8.

⁷⁷ For the statical data on the number of children convicted of murder, see subsections 4.2.1 and 4.3.1. For the number of reported appeal cases, see Table 2

process has an application stage that requires appellants to adhere to strict time limits and rules. To appeal against conviction, the person convicted of the offence must apply to the court serving a notice of appeal no more than 28 days after the date of the conviction or sentence.⁷⁸ Given that an application of appeal can be submitted outside the 28-day time limit,⁷⁹ the search parameters for the case study included reported applications for leave to appeal (both new and renewed) initiated before and after the 28-day time limit. The thesis has included another group of cases, appeals against sentence of murder and manslaughter by reason of the diminished responsibility defence (section 2 and Section 2 as amended). This was critical to generate a large sample size of cases to examine developmentally immature children/young people who kill and the defence of diminished responsibility.

The period of focus of the case study is 1957 to 2019. This period is essential to the thesis because it captures developmentally immature children/young people who pleaded the defence of diminished responsibility (unsuccessfully and successfully) from the enactment of Section 2 of the Homicide Act (1957) to date (2019) when Section 2 was amended with new definitional requirements. Insights gathered from the Court of Appeal's decisions regarding the child/young person's mental state and developmental immaturity support the central argument that these individuals cannot successfully plead Section 2 as amended, and the law should introduce two developmental immaturity defences to excuse them from criminal responsibility. The Court of Appeal's decisions in these cases were during the operational years of Section 2 and Section 2 as amended;⁸⁰ thus, the thesis will use these cases to examine the applicability of the current defence of diminished responsibility in Chapters four and five.⁸¹

The methodology for my case law search terms is outlined in Appendix A. From 1957 to 2019, the research identified 25 reported cases involving developmentally immature children/young people aged 10 to 17 years that appealed to the Court of Appeal (Criminal Division) against their conviction or sentence of murder or manslaughter by reason of the defence of diminished responsibility (Section 2 or Section 2 as amended). This age band was selected because a young person is defined "as a person who has attained the age of fourteen and is under the age of eighteen years" under Section 107 of the Children and Young Persons Act (1933), as amended by Section 107(1) of the Criminal Justice Act (1991). A child is defined as "a person under the age of 14" under Section 117 of the Crime and Disorder Act (1998). The search returned 13 appeals against conviction of murder, 12 appeals against sentence of murder and 4 appeals against sentence of manslaughter by reason of the defence of diminished responsibility; see the below table.

Table 1. The number of reported cases by decade and appeal type:

Year	Convictions of Murder	Sentences of Murder	Sentences of Manslaughter by reason of Diminished responsibility
1957-1967	0	0	2

⁷⁸ Part 35 of the Criminal Procedure Rules October 2020.

⁷⁹ Section 2 of the Criminal Appeals Act (1995).

⁸⁰ From 1957 to the 3rd of October 2010. Section 52 of the Coroners and Justice Act (2009) came into force on the 4th of October 2010.

⁸¹ From the 4th of October to December 2019.

1968-1978	1	0	0
1979-1989	0	0	0
1990-2000	3	0	1
2001-2011	5	9	0
2012-2019	4	3	1
Total	13	12	4

Each judgment was carefully read to identify whether the appellant was developmentally immature during the offence and trial proceedings. This was important to eliminate unrelated cases from the sample; I was able to exclude cases that indicated that the appellant unlikely encountered the ‘expert’ problem during court proceedings from applying the following:

- 1) Did the medical evidence prove that the appellant’s developmental immaturity might have affected their mental state when committing the offence or during trial proceedings?
- 2) Did the medical evidence reveal that the appellant presented with symptoms of medical conditions at the time of committing the offence or during trial proceedings?
- 3) Was the defence of diminished responsibility considered, investigated, or advanced at trial?
- 4) Did the fresh evidence show that the appellant was developmentally immature and presented symptoms of mental conditions at the time of committing the offence or during trial proceedings?
- 5) Did the fresh evidence provide valid medical diagnoses of mental conditions for the appellant when committing the offence or during trial proceedings with a history of developmental immaturity?
- 6) Did the medical evidence give conflicting expert opinions over which mental condition[s] the appellant suffered (if any) and their developmental immaturity at the time of committing the killing?
- 7) Did the medical evidence indicate that the medical experts found it difficult or could not diagnose the appellant with a medical condition because of their developmental immaturity at the time of committing the killing?

The criteria (these questions) were based on the features of developmentally immature children/young people provided by the latest neuroscientific evidence on adolescent brain development to be explored in Chapter three.⁸² I have applied the criteria to 25 cases from the case law search. I eliminated irrelevant cases from the sample, reducing the number of relevant cases to 15.

Table 2. The relevant appeals cases included in my sample: cases with some reference to the appellant’s ‘young age’ and ‘developmental immaturity’ affecting their mental states at the time of the offence or trial proceedings.

⁸² See sections 3.6-3.9.

Case	Appeal Type (Against)	Age of Defendant at the time of the offence
<i>R v Speake</i> (1957) 41 Cr.App.R.22.	Sentence of Manslaughter by reason of the defence of diminished responsibility	17 years
<i>R v Abbott</i> [1964] 1 Q.B 489.	Sentence of Manslaughter by reason of the defence of diminished responsibility	16 years
<i>R v Secretary of State for Home Department Ex Parte Venables and Thompson</i> [1997] 2 W.L.R 67.	Conviction of Murder	10 and 11 years
<i>R v LH, SD</i> [2001] EWCA Crim 1344.	Conviction of Murder	14 and 15 years
<i>R v Parchment</i> [2003] EWCA 24.	Conviction of Murder & Sentence	15 years
<i>R v Friend</i> [2004] EWCA Crim 2661.	Conviction of Murder	17 years
<i>Attorney General's Reference (No.127 of 2006): R v H</i> [2007] EWCA Crim 53	Sentence of Murder	15 years
<i>R v Farrelly</i> [2009] EWCA Crim 2173.	Sentence of Murder	16 years
<i>R v Osbourne</i> [2010] EWCA Crim 547.	Conviction of Murder	14 years
<i>R v Ferdinand and others</i> [2014] All ER (D) 187 (June).	Conviction of Murder & Sentence	17 years
<i>R v Burton and Campbell</i> [2015] EWCA Crim 394.	Sentence of Manslaughter by reason of the defence of diminished responsibility and Murder	14 and 16 years
<i>R v Markham</i> [2017] EWCA Crim 739	Sentence of Murder & Manslaughter by reason of the defence of diminished responsibility	Both 15 years
<i>R v L</i> [2019] EWCA Crim 1326.	Conviction of Murder	15 years

Table 3. The irrelevant appeals cases excluded from my sample: cases with no reference to the appellant's 'young age' and 'developmental immaturities' affecting their mental states at the time of the offence or trial proceedings.

Case	Appeal Type (Against)	Age of Defendant at time of offence
<i>R v T (Robert Martin)(A Juvenile)</i> [2000] WL 1791487.	Conviction of Murder	17 years
<i>R v Nicholas Mcfarlane</i> [2000] WL 491330.	Conviction of Murder	Unknown

<i>R v Stephen Lesley Downing</i> [2002] EWCA Crim 263.	Conviction of Murder	17 years
<i>R v Isa Mcbean</i> [2002] 1 Cr. App. R. (S.) 98.	Conviction of Murder	17 years
<i>R v Lambert (tariff recommendations)</i> [2002] All ER(D) 159 (May)	Sentence of Murder	Unknown
<i>Waiter v United Kingdom</i> [2002] All ER (D) 136 (Dec).	Sentence of Manslaughter by reason of the defence of diminished responsibility	16 years
<i>R v Burgess (Marcus McAlister)</i> [2002] EWCA Crim 1804.	Sentence of Murder	17 years
<i>R v (Ben) Hand, Daniel Charles Ricketts</i> [2003] 2 Cr. App. R. (S.) 68.	Sentence of Manslaughter by reason of the defence of diminished responsibility	16 and 17 years
<i>R v Friend</i> [2004] EWCA Crim 2661.	Conviction of Murder	17 years
<i>R (on application of Smith) v Secretary of State for the Home Department</i> [2005] UKHL 51.	Sentence of Murder	17 years
<i>R v Osbourne</i> [2010] EWCA Crim 547.	Conviction of Murder	14 years
<i>R v Lunkulu and Others</i> [2015] All ER (D) 70 (Aug).	Sentence of Murder	17 years
<i>R v H (PD)</i> [2016] EWCA Crim 1659.	Conviction of Murder	15 years

I excluded *R v T*, *R v Mcfarlane*, *R v Downing*, *R (on application of Smith) v Secretary of State* and *R v H (PD)* because these cases did not refer to evidence that the appellant's developmental immaturity affected their mental states at the time of the offence or during trial proceedings (point one). *R v Mcbean* and *R v Friend* were excluded because the appellant's grounds of appeal were irrelevant to the search criterion. The following cases were omitted because there was no reference to criteria (1), (2) or (3): *R v Lambert*, *Waiver*, *R v Burgess*, *R v Hand*, *R v Osbourne* and *R v Lunkulu*.

After reading the remaining 15 reported appeal cases in the sample (see Table 2), 3 of the 15 cases (*Abbott*, *Markham*, and *L*) merited critical examination for the following four reasons. Firstly, each case summarises the case facts with a detailed ruling by the Court of Appeal. Secondly, the Court of Appeal's judgment in each case directly references the appellant as developmentally immature at the time of the offence/or during trial proceedings, which might have affected their mental state. Thirdly, the evidence revealed that the appellant most likely suffered symptoms of medical conditions at the time of the offence. Medical experts presented conflicting opinions about which medical conditions the appellant suffered (if any) when committing the crime. Fourthly, each case provides a well-documented chronological timeframe of the appellant's medical assessments

and the medical expert's conclusions throughout the various stages of the trial process.⁸³

Table 4. Three cases are to be explored in chapters four and five.

Case	Appeal Type (Against)	Age of Defendant at time of offence
<i>R v Abbott</i> [1964] 1 Q.B 489.	Sentence of Manslaughter by reason of the defence of diminished responsibility	16 years
<i>R v Markham</i> [2017] All ER (D) 91 (Jun); [2007] EWCA Crim 739	Sentence of Murder & Manslaughter by reason of the defence of diminished responsibility	Both 15 years
<i>R v L</i> [2019] EWCA Crim 1326.	Conviction of Murder	15 years

1.6 Overview

Chapter two will explore the leading ideas of criminal responsibility that underpin the key conditions of the responsible person in modern doctrinal law and how culpability is attributed. This is essential to show the role of mental capacity in exculpatory defences in doctrinal law and legal practice. The chapter will then consider how developmental immaturity factors into responsibility assessments and affects children/young people who suffer from it. It is to be revealed that developmental immaturity is a factor deserving of excuse in the paradigm of the responsible person, but this thinking is not translated into English legal practice.

The chapter will provide a historical analysis of key policies and case law to show how developmentally immature children/young people who kill have been treated throughout time. It is to be demonstrated that the English legal landscape has negatively changed for developmentally immature children/young persons who kill regarding their legal treatment in responsibility assessments. Specifically, the MACR remains unchanged and fixed at ten years of age. Section 2 as amended does not allow developmentally immature children/young persons who kill and lack legally relevant capacities to plead the defence successfully. Hence, a developmentally immature child/young person who kills and lacks legally relevant capacities is convicted of murder and sentenced to detention.⁸⁴

Chapter three will frame neuroscience as a broad research field of investigation that has evolved to reveal advancements in diagnostic tools and neuroscientific knowledge with relevancy in criminal law for developmentally immature children/young people who commit crimes. Then, it will consider what is scientifically meant by 'adolescence' by studying the concept's development, from its psychological origin to its current multidisciplinary classification. Evidence from adolescent development studies – cognitive neuroscience, psychology, psychiatry, sociology and behaviour –

⁸³ With the exception of *R v Abbott* for reasons explained in sections 4.3 and 4.7.1

⁸⁴ As of July 2022.

will reveal that developmentally immature children/young persons are susceptible to cognitive impairment due to how their brains change and mature during adolescence from examining normal and abnormal development.⁸⁵ More specifically, the chapter will show that they have a higher degree of developmental immaturity than the norm for individuals of their age; however, their degree of cognitive impairment is not significant enough to warrant a formal diagnosis of a medical condition. These insights aid the thesis in understanding how such persons cannot successfully plead Section 2 as amended even though they might lack substantial impairment of one or more of the capacities outlined in Section 52(1A).

The chapter will then consider how medical experts formally diagnose children/young people with medical conditions using current diagnostic tools and methods as evidence of “a recognised medical condition” under Section 2 as amended. It will be revealed that developmental immaturity makes it challenging for medical experts to find the cause of any symptoms of mental conditions observed. They tend to prefer labelling them as developmentally immature and wait until they are older and more mature. Nonetheless, without evidence that they suffered from “a recognised medical condition,” they cannot successfully plead Section 2 as amended. The chapter will conclude by exploring which diagnostic tools (biomarkers and enhanced fMRI) scientists believe will have greater accuracy and precision in identifying developmentally immature children/young people from those formally diagnosed with a medical condition. It will be argued that biomarkers and enhanced fMRI will have implications such as invalidity and mislabelling, which might be detrimental to some children/young people because they are already susceptible to criminality and developing mental conditions.⁸⁶ This analysis is important to the thesis because it reveals how children/young people with mental conditions might be diagnosed in the future, and the extent to which the identified diagnostic tools might affect the development of those provided with such diagnoses.

The defence of diminished responsibility and the ‘expert’ problem will form the major focus of Chapter four. This chapter will present the case that developmentally immature children/young people cannot successfully plead Section 2 as amended because of the ‘expert’ problem with an analysis of neuroscientific insights into adolescent brain development and case law. A comparative exploration of both versions of the defence will show that Section 2’s broad definitional requirements permitted them to plead the defence successfully, and Section 2 as amended narrow definitional requirements exclude them. To prove this, the chapter will critically explore the operation of both versions of the defence to ascertain how each version function[ed] for developmentally immature children/young people who kill[ed].

Chapter five will consider several key reform proposals within English law seeking to acknowledge that developmental immaturity is a factor that affects a child/young person’s ability to satisfy legally relevant capacities necessary for criminal responsibility. It will begin by examining the Law Commission’s 2006 recommendation that developmental immaturity should have formed the basis of Section 2 as amended to determine whether it could have addressed the ‘expert’ problem. The thesis will argue that the Government were right to reject it because it would have had negative label ramifications on developmentally immature children/young people who pleaded it successfully. The chapter will also consider the Law Commission’s 2013 proposed reform for a separate defence of developmentally immature people. It will be argued that the Law Commission

⁸⁵ Definitions of normal and abnormal are provided in section 3.4.3.

⁸⁶ Refer to section 3.9 for an examination of this point.

framed the defence so narrowly that it would only accept those who lack complete legally relevant capacities due to developmental immaturity. The degree of their cognitive impairment will determine whether such a person would be afforded a successful plea, which is problematic.

As a result, the thesis proposes the introduction of two defences: the first, a partial and specific defence to murder for those who suffer developmental immaturity who kill, and the second, a complete and general defence for those who suffer from it and lack total capacity. This proposal derives from the Law Commission's 2013 discussion paper's recommendation of a complete defence to murder of "not criminally responsible by reason of developmental immaturity." It will be argued that there is a need for both defences because developmentally immature persons suffer varying degrees of (in)capacity of legally relevant capacities.

In the final pages, there will be an analysis of the Government's past reluctance to introduce Lord Dholakia's recommended Bills to increase the MACR to 12 years; it will be defended that it is unlikely Parliament will increase the MACR in the distant future. Thus, the chapter will reveal that proposing the thesis's two developmental immaturity defences are more beneficial, for it would offer those who suffer from it an excuse from criminal responsibility.

Chapter six will return to the thesis's arguments about the 'expert' problem to conclude that Section 2 as amended should not be modified for developmentally immature children/young people who kill in English law. It will be reiterated that developmental immaturity is a factor deserving of excuse in the paradigm of the responsible person. Thus, it should form the basis of two developmentally immature defences (a partial defence of murder and a complete general defence) to excuse those who suffer from it and commit offences.

Chapter 2

Children, Murder, and the Defence of Diminished Responsibility: An Analysis of Legal Doctrine and Practice

2.1 Introduction

Chapter one has framed how the English criminal justice system treats developmentally immature children and young persons who kill. Many individuals interested in English criminal law have observed the identified problems in Chapter one. Legal academics to the Supreme Court have acknowledged that the MACR of 10 years of age is internationally low and that the abolition of the defence of *doli incapax* has left a gap in the landscape of English legal defences.⁸⁷

A relationship between developmental immaturity, young age and children/young people exists, influencing doctrinal and philosophical considerations about responsibility. Most contemporary legal doctrinal ideas of criminal responsibility are based on legal requirements of capacity – e.g., cognition, control and personal autonomy.⁸⁸ Cognition, control and autonomy are key capacities of the leading theory of criminal responsibility because of how these capacities are engaged in criminal conduct, form the basis of the *mens rea* of murder⁸⁹ and ground the defence of diminished responsibility.⁹⁰

This chapter will analyse the leading idea of criminal responsibility (the key conditions of the responsible person in modern doctrinal law) and how culpability is attributed. It is important to the thesis to understand the role of mental capacity in exculpatory defences in doctrinal law and legal practice. The chapter will then consider how developmental immaturity factors into responsibility assessments and affects the child/young person's capacity for blame and culpability. A historical analysis of key policies and case law will show changes in how developmentally immature children/young people who kill have been treated. This examination is necessary to understand how the English legal landscape has changed for developmentally immature children/young persons who kill regarding their legal treatment of culpability. Finally, the chapter will examine the current treatment of those who kill aged 10 to 17 years in these contexts. These analyses are essential to underpin the key arguments of the thesis that developmentally immature children/young persons are unfairly convicted of murder and sentenced to detention because there is no specific developmental immaturity defence that they can plead.

⁸⁷ Child and Duff (2021) 170; Delmage (2013) 102-103; Brown (2019) 1-19.

⁸⁸ See, generally, Tadros, V, "The Scope and the Grounds of Responsibility" (2008) 11 *New Criminal Law* 91-118.

⁸⁹ The *mens rea* definition of murder is provided in section 2.8.

⁹⁰ Refer to section 2.9.

2.2 The Dominant Idea of Criminal Responsibility

Examining the leading theory of criminal responsibility that is relevant to the thesis requires a brief discussion of the key ideas of responsibility in contemporary legal doctrine. Competing accounts of criminal responsibility from character to harm make up contemporary ideas of criminal responsibility in the legal literature.⁹¹ However, this thesis is primarily concerned with the leading capacity-based notions of responsibility for the reasons discussed in Chapter one.⁹²

As discussed in section 1.1, the leading idea of criminal responsibility in contemporary legal doctrine is based on action and human capacity. It focuses on blameworthiness, answerability and a person's ability to engage in criminal conduct. Therefore, responsibility "depends on something deeper than action: what lies behind or produces the actions for which defendants are formally convicted and punished."⁹³ Also, as discussed in Chapter 1, a responsible person is "... answerable to the normative demands of the criminal law ..." through "... specific actions [that lie] in human capacities of cognitive – knowledge of circumstances, assessment of consequences – and volition – powers of self-control."⁹⁴ This idea of capacity-based responsibility depends on a person retrospectively satisfying the relevant mental state (*mens rea*) and conduct (*actus reus*).⁹⁵ A person who satisfies these elements is blamed and convicted of an offence in law because they meet "... the conditions given which, people can be held responsible for"⁹⁶ in criminal law.⁹⁷

However, the law recognises that not all persons who commit offences satisfy the relevant mental state if they are of a specific young age. For instance, it is unfair to blame and punish a young child who is insufficiently mature and incapable of satisfying the offence's relevant mental state (*mens rea*).⁹⁸ Thus, the law exempts any young child, aged nine years or below, from responsibility who commits an offence in English law.⁹⁹ Similar logic applies to those who lack complete mental capacity or have substantial impairment of legally relevant faculties; it is also considered unfair to blame and punish persons incapable of satisfying the appropriate mental state of the offence due to suffering a recognised medical condition. Accordingly, an individual who cannot understand the nature of their actions due to suffering a medical condition at the time of the crime is excused from criminal responsibility.¹⁰⁰ Under the defence of insanity, a defendant must suffer from "a defect of reason" caused by "a disease of the mind" that causes him/her to either not be aware of what they are doing, or he/she is not aware of what they are doing is wrong at the time of committing an offence to satisfy the defence.¹⁰¹ To successfully plead Section 2 as amended, a defendant must be

⁹¹ For example, Lacey, Duff and Coppola.

⁹² It is important to note that the development of contemporary principles/ideas of criminal responsibility have been influenced by philosophical, social sciences, socio-political and historical approaches. Lacey argues that such principles/ideas cannot be fully understood without considering the shifts between different principles/concepts. See, generally, Lacey, N, "In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory" (2001) 143 *Modern Law Review* 350371. The idea of criminal responsibility relevant to the thesis is the dominant idea of criminal responsibility founded on capacity, also defended by Lacey in Lacey (2007) 236.

⁹³ Duff, R. A, "Choice, Character, and Criminal Liability" (1993) 12 *Law and Philosophy* 345.

⁹⁴ Lacey (2007) 236.

⁹⁵ Ashworth, A, *Principles of Criminal Law* (Oxford University Press, Oxford, 4th Edition, 2003) p.158.

⁹⁶ Duff, R. A, "Who is responsible, for what, to whom" (2004) 2 *Ohio State Journal of Criminal Law* at 441.

⁹⁷ Maher (2004) 494.

⁹⁸ Section 50 of the Children and Young Persons Act (1933).

⁹⁹ Refer back to section 1.1.

¹⁰⁰ *R v Sullivan* [1984] 1 AC 156.

¹⁰¹ *Ibid*.

charged with murder and suffer from an “abnormality of mental functioning” arising from “a recognised medical condition” that “substantially impaired D’s ability to do one or more things mentioned in subsection (1A)” and provide “an explanation for D’s acts and omissions in doing or being party to the killing.” In addition, the defendant’s “abnormality of mental functioning” must provide “an explanation for D’s conduct if it causes, or is a significant contributory factor causing, D to carry out that conduct.”¹⁰²

Criminal responsibility subsequently goes beyond the relevant *mens rea* by identifying conditions that can exempt or excuse specific persons of responsibility with a defence such as diminished responsibility, insanity or duress.¹⁰³ As discussed earlier, an exemption excludes a person from blame and punishment for committing an offence. By contrast, finding a complete excuse (e.g., duress and insanity) eliminates a person from responsibility (blame and punishment) for their past criminal conduct. A finding of a partial excuse (e.g., diminished responsibility) holds a person partially responsible and liable for their past criminal behaviour because they satisfy the relevant *mens rea* of the offence, even though they have impaired capacity due to suffering from a recognised mental condition, to be discussed in section 2.9.¹⁰⁴

A significant body of literature in contemporary legal scholarship debates which conditions should be relevant to reconciling responsibility in criminal law.¹⁰⁵ Identifying these legally relevant capacities for criminal responsibility is essential to support the legal arguments in this thesis about developmentally immature children/young people and exculpation, which is the focus of the examination in the next section.

2.3 Framing Criminal Responsibility: Choice, Capacity and Fair Opportunity

Most contemporary legal theorists argue that criminal responsibility is grounded in capacity – specifically, conditions of individual autonomy (choice) and rationality (cognitive capabilities). In the modern legal/philosophical theory of responsibility, these conditions form the basis of choice/capacity theory, also known as the ‘responsibility principle’ or the ‘voluntarism principle.’¹⁰⁶ Voluntarist accounts of responsibility argue that a person is criminally responsible for their actions if they choose to break the law, possess the capacity to act and have a fair opportunity to refrain from breaking the law.¹⁰⁷

At a doctrinal level, voluntarism is essential in criminal law because it explains the leading idea of responsibility (the requisite conditions). Many contemporary capacity/choice accounts of criminal responsibility argue that it is only fair to blame and punish a person who exercises a rational choice and commits an offence because they violate the minimal moral restraints of the criminal law. Voluntarist legal theorists view choice (autonomy) as a condition of responsibility because it is generally accepted that those blamed and punished are appropriate subjects of moral

¹⁰² Section 52(1) of the Coroners and Justice Act (2009).

¹⁰³ These examples are not an exhaustive list but some of the prominent examples.

¹⁰⁴ Maher (2004) 493-512; Delmage (2013) at 102-103.

¹⁰⁵ See, generally, sections 2.2-2.3.

¹⁰⁶ Moore. M, “Choice, Character, and Excuse” (1990) 7 *Social Philosophy and Policy* 31.

¹⁰⁷ Duff (1998) 376; Hart (2008) p. 22.

responsibility.¹⁰⁸ Kant's theory of moral worth and justifiability has influenced this idea of choice and is a key condition of the leading theory of responsibility in contemporary criminal law doctrine.¹⁰⁹ Kantian theory argues that it is only morally justifiable for the law to appropriately respond by punishing a person who chose to break the law and whose actions result in legal wrongdoing. This means that a child/young person cannot be held responsible for their choice to break the law if that choice to act was not within their control, as Duff explained, because "it cannot be ascribed to me as its responsible agent."¹¹⁰ Under this theory, any action that goes beyond their personal choice to act (break the law) does not belong to them. In other words, they should not be held responsible if they could not freely choose to act in a specific way and had no control over bringing about their desired outcome.

Herbert Hart provides the leading account of choice theory. Hart believed that the role of choice in criminal responsibility is "a choosing system" that "guide[s] individuals' choice as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose."¹¹¹ Understanding choice as a "choosing system" is synonymous with Kantian theory and the general principle of moral responsibility that "a person is not to be blamed for what he has done if he could not help doing it."¹¹² The responsible individual is considered a deliberately autonomous person (a moral agent) and, in certain circumstances, is not considered criminally liable if they cannot refrain from acting in a way that breaks the law (as discussed above).

In legal practice, choice as a choosing system is fundamental because it provides criminal law with a basis for establishing legal rules via a person's choice to act, which further instructs the law when to intervene in their lives if they break such rules. According to Coppola, "the criminal law is [therefore] not merely a means of social control but instead a system of rules that imposes itself to human beings and gives them reasons for the choices that they make."¹¹³ Herring supports this view; he argued that "people remain generally free to live their lives as they wish" until they break the law by committing an offence, which makes the law progressive.¹¹⁴ Until this point, Hart reasoned, that the state should only intervene in a person's life if there is "proof that the person punished broke the law by an action which was the outcome of her free choice."¹¹⁵ In this case, evidence that the person who chose to break the law was sufficiently capable of acting (e.g., the ability to construct and execute plans) with a fair opportunity to avoid committing criminal conduct.¹¹⁶ For this reason, a person who lacks mental capacity cannot choose to break the law as they are not viewed as a deliberately autonomous person with a fair opportunity to refrain from committing an offence in doctrinal law. Thus, a person who suffers "a recognised mental condition" that causes them to lack

¹⁰⁸ Arenalla. P, "Character, choice and moral agency: The relevant of character to our culpability judgements" (1990) 7 *Social Philosophy and Policy* 59-83; Morse. S, "Criminal responsibility and the disappearing person" (2006) 1 *Cardozo Law Review* 2555.

¹⁰⁹ Moore. M, *Placing Blame* (Oxford University of Press, Oxford, 1997) p. 549.

¹¹⁰ Duff (1993) 374.

¹¹¹ Hart (2008) p.44.

¹¹² Ibid. p.174.

¹¹³ Coppola (2020) p.18.

¹¹⁴ Herring. J, "Entering the Fog: On the Borderlines of Mental Capacity" (2008) 83 *Indiana Law Journal* 1620.

¹¹⁵ Hart (2008) p.22.

¹¹⁶ Lacey. N, Pickard. H, "From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm" (2013) 33 *Oxford Journal of Legal Studies* 17; Vargas. M, *Building Better Beings: A Theory of Moral Responsibility* (Oxford University Press, New York, 2013) p. 201.

complete capacity to understand the nature of their conduct is deemed incapable of comprehending legal rules and cannot choose to break them in doctrinal law.¹¹⁷

Contemporary legal theorists frame capacity as normative competence based on a person's cognitive and control capacities to engage in certain behaviours.¹¹⁸ Cognitive capacities include instrumental reasoning, knowledge, comprehension and abstract thinking. For example, control capacity is "the capacity to exert control over alternative courses of actions and conform behaviour to the law."¹¹⁹ Control capacity reflects a person's rationality to act, ability to resist impulses and refrain from breaking the law based on the circumstances.¹²⁰ Cognition and control are considered necessary capacity conditions of responsibility in modern criminal law doctrine.¹²¹ This is because, as Hart argued, a person's blame and punishment depend on having the capacity "to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made."¹²² In Hart's view, a person who does not understand the nature of legal rules to conform to their actions cannot be guided by the law and act in line with these rules.¹²³ Applying Hart's logic, a developmentally immature child who does not understand that their actions in the killing were criminally and morally wrong therefore cannot be said to act and follow the legal rule that it is an offence to kill another person intentionally. This thinking is important to the thesis because if a child/young person who kills lacks this kind of legally relevant capacity to be held criminally responsible for murder, they should be regarded as having reduced criminal responsibility.

However, Section 2 as amended does not accept developmental immaturity as a factor that can cause persons to lack legally relevant capacities and explain their actions in the killing. Thus, Section 2 as amended does not comply with the idea that partial exculpation is justified for individuals based on the elements identified by Hart. Developmentally immature children/young people are criminally responsible for their actions in the killing, even if they lack legally relevant capacities (e.g., the ability to understand the serious nature of their actions), which will be examined in section 2.9 and Chapter four.¹²⁴

The relationship between cognitive and control capacities has been extensively debated in legal scholarship. Most legal theorists who specialise in USA and Italian law view cognitive capacity (e.g., rationality) as a functional condition of control. This means that a person with a reasonable degree of practical rationality to act should also have the capacity to control their actions and be held criminally responsible for committing an offence.¹²⁵ For example, a developmentally immature

¹¹⁷ Hart argues "what is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities. Where these capacities and opportunities are absent, as they are in different ways in the varied cases of accident, mistake, paralysis, reflex action, coercion, insanity, etc., the moral protest is that it morally wrong to punish because 'he could not have helped it' or 'he could not have done otherwise' or 'he had no real choice.'" Hart (2008) p.152.

¹¹⁸ See, generally, Wolf. S, *Freedom within Reason* (Oxford University Press, New York, 1990); Wallace. R. J, *Responsibility and the Moral Sentiments* (Harvard University Press, Cambridge, 1994); Fischer and Ravizza (1998); Nelkin. D, *Making Sense of Freedom and Responsibility* (Clarendon Press, Oxford, 2011); McKenna. M, "Reasons- Responsiveness, Agents, and Mechanisms" (2013) 1 *Oxford Studies in Agency and Responsibility* 151-83.

¹¹⁹ Coppola (2020) p. 19.

¹²⁰ Ibid.

¹²¹ Morse (1985) 782.

¹²² Hart (2008) p.227.

¹²³ Ibid; Morse. S. "Immaturity and Irresponsibility" (1997) 88 *Journal of Criminal Law and Criminology* 25.

¹²⁴ See section 2.8 and, more generally, chapters 4 and 5.

¹²⁵ Fischer and Ravizza (1998) pp. 7-8 and 73; Coppola (2020) p. 19. See, generally, Morse. S, "Culpability and Control" (1994) 1 *University of Pennsylvania Law Review* 1587-1660.

child/young person who cannot understand the nature of their actions and resist their impulses does not possess the legally relevant capacities for responsibility and should not be held liable for committing a crime.¹²⁶

Contemporary legal theorists also argue that responsibility requires a fair opportunity to do otherwise. The idea is that a person cannot be held criminally responsible if they do not have a fair opportunity to avoid committing an offence. Hart posited that this person would unlikely have a fair opportunity to do otherwise if they cannot exercise legally relevant capacities.¹²⁷ Although Hart does not distinguish between the roles of cognitive and control capabilities like other legal theorists such as Horder (to be discussed). Moore observed that Hart's account remains popular because:

Hart's answer was different. What makes choice impossible or very difficult is either an incapacity in the agent or the lack of fair opportunity to use a non-defective capacity. Hart thus subdivides the ability presupposed by his sense of 'could' into two components. One relates to the equipment of the actor: does he have sufficient choosing capacity to be responsible? The other relates to the situation in which the actor finds himself: does that situation present him with a fair chance to use his capacities for choice so as to give effect to his decision?¹²⁸

Hart argued that a fair opportunity to act depends on a person's capacity to choose to act and the situation in which they act.¹²⁹ If a person does not have a situational fair opportunity to exercise their capacities to choose and refrain from breaking the law (e.g., killing), they should not be held criminally responsible. Contemporary legal theorists have therefore criticised Hart's account because it is contingent on "a fair chance" that the person may find themselves in a situation where they can choose to act and decide or refrain from breaking the law. For Horder, chance has no place in responsibility assessments as blame should not be concerned with whether a person has a fair opportunity to act and avoid committing an offence based on the situation that they find themselves in.¹³⁰

Thus, applying Horder's logic, the exemption of an insane person or young child's actions is justified because they lack the mental capacity for responsibility, not the situation in which they find themselves. There is no basis for an insane person or young child to be exempted from responsibility because they did not have a fair chance to avoid committing an offence.¹³¹ It does not make sense to him that a person needs a fair opportunity (to act or refrain from breaking the law) to be held criminally responsible or excused. Horder claimed there is no place for "the absence of choice or of capacity to choose"¹³² in legal practice because it does not align with the defences of loss of control and duress.

Horder, therefore, presented a different account to Hart. Namely, the person's ability to rationalise and control their actions should influence whether they have a fair opportunity to act otherwise rather than the situation that they find themselves because:

¹²⁶ R v Camplin [1978] 1 All ER 1236

¹²⁷ Hart (2008) 152.

¹²⁸ Moore (1997) 554.

¹²⁹ Morse (2000) 252-255; Duff (2004) 444-446; Morse (2006) 2551.

¹³⁰ Horder, J, "Criminal Law: Between Determinism, Liberalism, and Criminal Justice" (1996) 49 *Current Legal Problems* 167-168.

¹³¹ Ibid. at 168-169.

¹³² Ibid.

What is presupposed when one examines the sufficiency of someone's reasons is not that he or she had alternatives (there can be alternatives that provide no reasons for action, and reasons for action without alternatives); what is presupposed is that that person was in evaluative control of his/her reasons as well as of his/her conduct. To be in evaluative control is to be in a position to revise or reassess one's reasons, as the need arises (even if it would normally never occur to one to do this), and guide one's conduct accordingly.¹³³

Under this account, a person with control over their actions and the capacity to revise and reassess their reasons has a fair opportunity to do otherwise. A person who cannot reassess their reasons for acting and control their actions has no fair opportunity to do otherwise and is not criminally responsible. For instance, if a developmentally immature child/young person is substantially impaired and therefore cannot re-evaluate their plan to kill and revise their actions, doctrinally-speaking, they have no fair opportunity to act. Following this logic, if there is expert evidence to support this lack of capacity, they should not be criminally responsible for their actions in the killing because they lack the capacities to revise, reassess, control and guide their actions.¹³⁴

In either account, a fair opportunity to act otherwise highlights the importance of the person's mental and physical capacities to make a rational choice to act (in any situation) for criminal responsibility. These accounts are based on the idea of fairness. To summarise, cognition and control are essential conditions of responsibility, though a fair opportunity to act is subject to debate. Several legal theorists argue that responsibility depends on a person having the requisite capacities and a fair opportunity to do otherwise when committing an offence. This is because it is unfair to hold anyone who lacks legally relevant capacities criminally responsible for their past criminal conduct if they did not choose to break the law due to lacking rationality and control over their actions. In the next section, the chapter will showcase how children/young people who kill are treated in legal practice based on their age and developmental immaturity.

2.4 Children/Young People, Developmental Immaturity, Age and Excuse: A Brief History

The construction of the child needing protection and special treatment due to their age dates back to the late 19th century, which also marked the creation of a distinct legal system for treating those under 16 years of age separately from adults under the Children Act (1908).¹³⁵ This Act reflected the legal notion and position of the period that children/young persons were considered vulnerable and endowed special status/rights to recognise their young age and general immaturity. For example, Section 103 of the Act abolished the rule that those below 16 years of age could be sentenced to death for a murder conviction. Instead, they were detained, "in such place and under such conditions as the Secretary of State may direct and while so detained shall be deemed to be in legal custody."¹³⁶ Overall, this Act fundamentally recognised that welfare-based interventions

¹³³ Ibid. at 170.

¹³⁴ Ibid.

¹³⁵ The Michael Sieff Foundation, *1908-2008: The Children Act 100 years on young defendants today*, (Report on the Conference hosted on Tuesday the 28th of April, 2009 at Church House, Westminster, London, published July 2009) p. 4; Case. S, *Youth Justice A Critical Introduction* (Routledge, Oxon, 2018) pp.30-31.

¹³⁶ Section 105 of the Children Act (1908).

rather than punitive measures were the best approach to address the needs of those under 16 who committed murder.¹³⁷

After that, the perspective of children as innocent persons in need of protection became the paradigm for the Government's approaches to those who offend. The Government insisted that the welfare principle be placed in a statute to guarantee that the courts effectively considered the child's best interests and any welfare concerns. Section 44 of the Children and Young Persons Act (1933) placed the child's best interests and welfare considerations at the forefront of the youth justice system, which remains effective in current law. The primary function of Section 44 is to direct the court to consider the child/ young person's welfare by acting in their best interests. Such a welfarist perspective places significant weight on the court to make decisions that align with their best interests, such as removing them from undesirable surroundings.¹³⁸

Section 53(1) of the CYPA (1933) abolished the death penalty for those below 18 years of age, as amended by Section 1(5) of The Murder (Abolition of Death Penalty) Act (1965).¹³⁹ Section 53(2) of this Act provided that where a child/young person was convicted of an offence outlined in 2(aa), "the court may sentence the offender to be detained for such period not exceeding the maximum term of imprisonment with which the offence is punishable in the case of an adult as may be specified in the sentence; and where such a sentence has been passed the child or young person shall, during that period . . . be liable to be detained."

Legal commentators praised this Act for emphasising the importance of the welfare principle and providing special treatment for children/young persons convicted of murder, for example, Bowerman argued that the Act was progressive because it significantly limited the type and length of punishment for those convicted of murder.¹⁴⁰ However, there was a noticeable punitive shift in how they were treated in the criminal justice system in the 1990s, with the killing of 2-year-old James Bulger by Jon Venables and Robert Thompson, (aged 10-year-old) being a catalyst for this change.¹⁴¹

The crime "profoundly shocked the nation"¹⁴² because it occurred at a time "amidst a more fundamental shift towards a neoliberal form of governance which encouraged greater individual responsibility and was less tolerant of indiscipline."¹⁴³ The media vilified Venables and Thompson before and after the trial; the Daily Mail wrote that "the boys who murdered James Bulger are evil

¹³⁷ Home Office, *Report of the Departmental Committee on the Treatment of Young Offenders* (HMSO, The Moloney Report, London, 1927) p. 6; Arthur. R, "Protecting the best interests of the child: A comparative analysis of the youth justice systems in Ireland, England and Scotland" (2010) 18 *International Journal of Children's Rights* 218-219.

¹³⁸ Section 44 requires that "every court in dealing with a child or young person who is brought before it, a either . . . an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provisions made for his education and training."; Eekelaar. E, "Beyond the welfare principle" (2002) 14 *Child and Family law Quarterly* at 237.

¹³⁹ "A person convicted of an offence who appears to the court to have been under the age of eighteen years at the time the offence was committed shall not, if he is convicted of murder, be sentenced to imprisonment for life, nor shall sentence of death be pronounced on or recorded against any such person; but in lieu thereof the court shall . . . sentence him to be detained during Her Majesty's pleasure."

¹⁴⁰ H. B, "Children and Young Persons Act, 1933 by A. E Ikin: The Law of Child Protection by E. E. Bowerman" (1934) 5 *The Cambridge Law Journal* 284.

¹⁴¹ Wake. N, Arthur. R, Crofts. T, Lambert. S, "Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation" (2021) *Public Law* at 153-154.

¹⁴² *Venables v News Group Newspapers Ltd* [2019] EWHC 494 (*Fam*); [2019] *E.M.L.R.* 17 at 1.

¹⁴³ Byrne. B, Brooks. K, *POST YOT Youth Justice Working Paper 19/2015* (Howard League for Penal Reform, London, 2015) p.4.

freaks of human nature who were fixated on killing and causing disaster.”¹⁴⁴ The Sun issued a coupon to the public that could be completed and sent to the Home Secretary; it went as follows: “Dear Home Secretary, I agree with Ralph and Denise Bulger that the boys who killed their son James should stay in jail for LIFE.”¹⁴⁵ In agreement with the public and media’s punitive stance was Prime Minister John Major, who proclaimed that “society needs to condemn a little more and understand a little less.”¹⁴⁶ The thesis will discuss this case’s effect on the court’s determination of children/young people’s sentences for murder convictions in greater detail in section 2.11.

In light of the above case, there was a punitive incentive for the New Labour Party to reimagine youth justice policy, how children/young persons who committed criminal offences were treated following Bulger and the 1997 general election, which the Party won in a landslide.¹⁴⁷ After the election, the New Labour Government published a White Paper titled “No More Excuses: A New Approach to Tackling Youth Crime in England and Wales” in 1997, stating that they should be treated like adults without an excuse for their age and immaturity. The Government’s “no more excuses” agenda hinged on the criminalisation, conviction and punishment of those who committed crimes. It promoted their image as an offender whose choice to commit the offence was sufficient to reconcile criminal responsibility and punish them. Such thinking specifically removed the early 19th-century legal understanding of the child/young person as a vulnerable person needing protection through exculpation from criminal responsibility. The Government abolished the longstanding 14th-century defence of *doli incapax* for reasons to be discussed in section 2.6.¹⁴⁸ The Government also changed how they were sentenced for murder following the Bulger case, which will be explored in section 2.11.

In the next section, it will be shown that the Government’s ‘no more excuses’ agenda and landmark cases such as James Bulger¹⁴⁹ and *R v JTB*,¹⁵⁰ shaped the current treatment of those who kill in legal practice, specifically, with the removal of the defence of *doli incapax*. Such has ultimately continued to sustain the narrative that developmentally immature children/young people should be held responsible for their actions in the killing.

2.5 Children/Young Persons, Developmental Immaturity, Age and Excuse

As discussed in this thesis, developmental immaturity in legal doctrine is accepted as a factor that can affect a person’s ability to exercise legally relevant capacities of responsibility.¹⁵¹ Thus, developmental immaturity should excuse a person from responsibility because their developmental immaturity (perhaps also their young age) deprives them of the necessary mental capacities for criminal responsibility. As Hart argued, “...those whom we punish should have had, when they

¹⁴⁴ Daily Mail, 17th of February 1993 p. 6; Quoted by McDiarmid. C, *Childhood and Crime* (Dundee University Press, Dundee, 2007) p.17.

¹⁴⁵ Referenced in Haydon. D, Scraton. P, “‘Condemn a Little More, Understand a Little Less’: The Political Context and Rights Implications of the Domestic and European Rulings in the Venables-Thompson Case” (2007) 27 *Journal of Law and Society* at 433.

¹⁴⁶ John Major, interview with the Mail on Sunday (21st of February 1993) p. 8.

¹⁴⁷ House of Commons, *General Election Results, 1 May 1997 No.68* (House of Commons Information Office, London, 1999) p.2.

¹⁴⁸ See, generally, Wake, Arthur, Crofts (2021) at 145-162.

¹⁴⁹ It must be noted that this case occurred under the John Major conservative government.

¹⁵⁰ *R v JTB* [2009] UKHL 20.

¹⁵¹ Refer back to sections 1.1, 2.2 and 2.3.

acted the normal capacities, physical and mental, for doing what the law requires ...”¹⁵² However, developmental immaturity is not the basis of excuse in England and Wales for children/young persons who suffer developmental delays.

General immaturity was an excusable (although rebuttable) condition of the defence of *doli incapax*; such presumed that a young child did not know that their actions were seriously wrong at the time of committing the offence because of their young age. The defence recognised that those between 10 and 13 years may not have known enough about the criminal law’s legal rules when they acted to avoid breaking the law because of these factors. Thus, the defence offered them complete exculpation unless the prosecution proved that they had foreseen the serious nature of their actions (that they knew their actions were seriously wrong) when committing the offence (rebut the presumption).¹⁵³ The rebuttable presumption of the defence will be discussed in greater detail in section 2.6.

General immaturity is the basis of exemption and is determined by the legal criteria of a MACR. Section 16 of the CYPA states that “it shall be conclusively presumed that no child under the age of 10 years can be guilty of an offence.”¹⁵⁴ The rationale for exemption is that a child’s young age makes them immature and thus incapable of satisfying the legally relevant mental capacities necessary for responsibility. In legal practice, an exemption applies to all accused children aged nine years and below because they are considered too young to be emotionally, mentally and intellectually mature enough to be blamed and punished.¹⁵⁵ These children are regarded as *doli incapax* because they are believed to be “incapable of committing evil” and cannot be held criminally responsible.¹⁵⁶ This notion’s origins date back to the 14th century with the emergence of the presumption in the defence of *doli incapax* in English law. As discussed, the defence presumed that those below a specific age were substantially immature and thus incapable of satisfying the *mens rea* of an offence for criminal responsibility. Contemporary criminal law has come to recognise that the notion is synonymous with the MACR, as those aged nine years and below are considered incapable of satisfying the *mens rea* of the offence for the same reason.¹⁵⁷

Children aged nine years and below who kill do not deserve to be blamed and punished for committing an offence. The image of these persons is that their young age does not allow them to understand legal rules, control their actions and refrain from breaking the law. The legal perspective of ten-year-old children’s immaturity and responsibility fundamentally differs from those aged nine years and below. Also, children aged ten years who kill are perceived as autonomous and rational persons who can understand legal rules, control their actions and refrain from breaking the law. Thus, they are treated sufficiently mature (emotionally, mentally, and intellectually) to satisfy the legally relevant capacities necessary for responsibility.¹⁵⁸ What this means, Smith observed, is that

¹⁵² See section 2.3.

¹⁵³ Child and Duff (2021) p. 170.

¹⁵⁴ At common law, the age of criminal responsibility was 7. This was increased to 8 years then 10 years in 1963. (section 50 of the Children and Young Persons Act (1933) as amended by section 16 of the Children and Young Persons Act (1963).

¹⁵⁵ UN Committee on the Rights of the Child, *General Comment No.24 (201x)*, replacing *General Comment No.10 (2007)* para. 32-33. See, section 1.1.

¹⁵⁶ Arthur. R, *Young Offenders and the Law, How the Law Responds to Youth Offending* (Routledge, Oxon, 2010) p. 43.

¹⁵⁷ *R v JTB* (on appeal from the Court of Appeal Criminal Division) Sessions 2008-09 [2009] UKHL 20; [2008] EWCA Crim 815 at p.2.

¹⁵⁸ Duff. R. A, “Punishing the Young” in Weijers. I, Duff. R. A, *Punishing Juveniles Principle and Critique* (Hart Publishing, Portland, Oregon, 2002) pp. 116-120.

a 9-year-old child is “... completely irresponsible on the day before his tenth birthday, and fully responsible as soon as the jelly and ice-cream have been cleared away the following day.”¹⁵⁹

Though an international instrument specifying a global MACR is absent in current law, the UNCRC recommended an absolute minimum age of 14 years per General Comment No. 24. The Beijing Rules require that a state adopt a MACR that is not “set at too low an age level, bearing in mind the facts of emotional, mental and developmental immaturity.”¹⁶⁰ The Committee explained that it is not in a young child’s best interests to criminalise and expose them to the full rigours of the law because a state must safeguard those who lack legally relevant capacities and make decisions to protect their welfare in court proceedings.¹⁶¹

The MACR in England and Wales is among the lowest compared to Europe. The widely accepted view is that the MACR in this country is “so out of line with prevailing practice in Europe [and] is difficult to understand and defend.”¹⁶² In Scotland, children are exempted from responsibility below 12 years of age.¹⁶³ In Austria, the MACR is fixed at 14.¹⁶⁴ In Denmark, persons cannot be held criminally liable for an offence under 15 years of age.¹⁶⁵ Subsequently, in recent years, Parliamentary officials, scientists and legal commentators advocated that the current MACR is fixed too low in this country because it does not respect the child’s best interests and reflects the latest neuroscientific insights on adolescent brain development. There is substantial scientific evidence that those aged 10 years lack the legally relevant capacities to be held responsible for committing an offence. For example, the Royal Society revealed:

Neuroscience is providing new insights into brain development, revealing that changes in important neural circuits underpinning behaviour continue until at least 20 years of age. The curves for brain development are associated with comparable changes in mental functioning (such as IQ, but also suggestibility, impulsivity, memory or decision-making), and are quite different in different regions of the brain. The prefrontal cortex (which is especially important in relation to judgment, decision-making and impulse control) is the slowest to mature. By contrast, the amygdala, an area of the brain responsible for reward and emotional processing, develops during early adolescence. It is thought that an imbalance between the late development of the prefrontal cortex responsible for guiding behaviour, compared to the early developments of the amygdala and associated structures may account for heightened emotional responses and the risky behaviour characteristic of adolescence.¹⁶⁶

The Youth Justice Working Group also observed that “there is now a significant body of research indicating that early adolescence (under 13-14 years of age) is a period of marked neurodevelopmental immaturity, during which children’s capacity is not equivalent to that of an older adolescent or adult.”¹⁶⁷ The scientific evidence clearly shows that those below 13 cannot make effective rational decisions and control their actions. They are less likely to think about the consequences of their actions and are more susceptible to impulsive actions due to their reduced

¹⁵⁹ Smith. A.T.H, “Doli Incapax under Threat” (1994) 53 *Cambridge Law Journal* at 427.

¹⁶⁰ Age of Criminal Responsibility (Scotland) Act (2019).

¹⁶¹ Article 3 para. 1 of the Convention of the Rights of the Child; UN *General Comment No.24 (201x)*, replacing *General Comment No.10* (2007) para. 32-33.

¹⁶² House of Lords, House of Commons Joint Committee on Human Rights, *The UN Convention on the Rights of the Child*, Tenth Report of Session 2002-3 (House of Lords and House of Commons, The Stationary Office, London, HL Paper 177, 2003) p. 18.

¹⁶³ The Age of Criminal Responsibility (Scotland) Act (2019).

¹⁶⁴ Sections 1(1)-2) and 4(2) of the Juvenile Court Act (1988) (*Jugendgerichtsgesetz*).

¹⁶⁵ Section 15 of the Criminal Code (*Bekendtgørelse af straffeloven*).

¹⁶⁶ The Royal Society, *Brain Waves Module 4: Neuroscience and the law* (The Royal Society, London, 2011) p.13.

¹⁶⁷ Youth Justice Working Group, *Rules of Engagement: Changing the Heart of Youth Justice* (The Centre for Social Justice, Westminster, 2012) p.201.

degree of control. As the Royal Society explained, this is because there are key changes in the “neural circuits underpinning behaviour [that] continue until at least 20 years of age” due to developments in the prefrontal cortex and amygdala. From this perspective, a 13-year-old who kills and cannot understand the serious nature of their actions should not be held criminally responsible for murder, but this is not the case in English law.

There is also a clear differentiation of capacity between developmentally immature children/young people and those who develop normally that the MACR threshold does not accommodate. The primary distinction between developmentally immature children/young persons and those who develop normally is an objective comparison of their level of maturity for the same chronological age. In most cases, the developmentally immature child/young person will have a higher degree of developmental immaturity than the norm for an individual of their age and possess a degree of immaturity that “... is not so extreme as to constitute a recognised medical condition”¹⁶⁸ even if they lack substantial mental impairment or a total lack of capacity.

Suppose a 12-year-old child’s immaturity is higher than the norm for a child of this age because they are developmentally immature and lack a legally relevant mental capacity (e.g., the inability to understand the serious nature of their actions). In that case, this person should not be held criminally responsible for committing the relevant offence because to be held criminally accountable; they must possess specific mental capacities (cognitive and control) and find themselves in a situation where they have a fair opportunity to avoid wrongdoing. However, the MACR is fixed low enough so that developmentally immature children who kill (aged ten years) are held criminally responsible if they satisfy the definitional elements of murder.

In response, Lord Dholakia introduced five Bills into Parliament for discussion, the latest being the Age of Criminal Responsibility Bill [HL] (2019-21), which proposed to substitute ‘twelve’ for ‘ten’ in Section 50 of the CYPA (1933). Lord Dholakia’s justification for increasing the age threshold is that the law must protect developmentally immature individuals from criminal responsibility because they lack mental capacities.¹⁶⁹ The Royal Society acknowledged that the current MACR is unsuitable for them because “a child is accountable in the same way as an adult for their behaviour, and is deemed sufficiently mature to stand trial and to engage in legal processes (the child is ‘fit to plead’)” in current law.¹⁷⁰ The Royal Society has proposed an increase of twelve years because it does not reflect the latest neuroscientific insights into brain development. The Royal Society recommended that the MACR should be above twelve years as “... it is clear that at the age of ten the brain is developmentally immature, and continues to undergo important changes linked to regulating one’s own behaviour”¹⁷¹ Yet, successive Governments remain resolute that it will not reform the MACR, despite Lord Dholakia’s attempts to increase it.

The Conservative Government’s rationale for not reforming the existing legislation is that “children aged ten and above are, for the most part, able to differentiate between bad behaviour and serious wrongdoing and should therefore be held accountable for their actions.”¹⁷² From this perspective, developmentally immature children/young people who kill are perceived as capable persons (with the identified abilities) and can be blamed for murder. Although the Youth Justice

¹⁶⁸ Law Commission (2013) para. 9.10.

¹⁶⁹ Hansard, *Age of Criminal Responsibility Bill [HL]* volume 783 (Second Reading, Friday 8th of September 2017).

¹⁷⁰ The Royal Society (2011) p.13.

¹⁷¹ Ibid. p.14.

¹⁷² Hansard, House of Lords (29th of January, 2016) col 1574.

Working Group revealed that no scientific evidence exists proving that “a ten-year-old is substantially more developmentally mature, thus more able to participate in criminal proceedings, than a nine-year-old.”¹⁷³ However, Lord Dholakia’s latest Bill has been tabled, and there are no plans to increase the MACR above ten years.¹⁷⁴

In summary, immaturity (normal developing and developmental immaturity) is *no longer* considered a good reason to excuse a child who kills because they cannot foresee the serious nature of their actions in the killing. Successive government policy is that a person as young as ten who commits an offence is capable (of understanding, rationalising and controlling their actions) of taking responsibility for their actions. In this regard, the absence of a developmental immaturity defence and the 10-year MACR in legal practice is justifiable. Despite considerable criticism by legal scholars, scientists and members of Parliament that such does not reflect the latest neuroscientific findings, and the MACR directly contravenes with the UNCRC’s guidance to act in the child’s best interests.

2.6 The Abolition of the Defence of *Doli Incapax*

Although the defence of *doli incapax* was abolished, contemporary legal literature has explored its origins and purpose as an age-specific exculpatory defence in the hope that a similar defence be introduced into legal practice. As discussed, a developmental immaturity defence is not available in current English legal practice for those who kill and lack legally relevant capacities. Lord Dholakia attempted unsuccessfully to increase the MACR, above ten years, by introducing the Criminal Responsibility Bill.¹⁷⁵ Yet, the MACR remains fixed at ten. This section will show that abolishing the defence contributed to how the current law unfairly treats children/young people who kill. An analysis of its development is essential, for it showcases how those who committed offences were treated before and after its abolition.

The origins of the defence in English law date back to the 14th-century common law. The defence was founded on the Latin phrase ‘*doli incapax*,’ corresponding to the “privileged of infancy.” It was exemplified by the presumption that those aged 10 to 13 years could not “discern between good and evil at the time of the offence committed”¹⁷⁶ (between right and wrong) and were “incapable of committing an offence” because they could not satisfy the requisite *mens rea* of the offence. The presumption operated as “a benevolent safeguard”¹⁷⁷ by providing complete exculpation to those in the age bracket who lacked general maturity and capacity to appreciate the consequences of their actions.¹⁷⁸

The defence was for individuals who did not know their actions were serious when committing the offence.¹⁷⁹ Under the rebuttable presumption, the prosecution could rebut the presumption by proving beyond a reasonable doubt that the child, at the time of the charged offence, was aware that

¹⁷³ The Youth Justice Working Group (2012) p.201.

¹⁷⁴ House of Lords, *Age of Criminal Responsibility Bill [HL]* (HL Bill 3 of 2017-19) Library Briefing for Lords Stages (House of Lords, London, 18th of August, 2017) p. 4.

¹⁷⁵ Refer back to sections 1.1 and 2.5.

¹⁷⁶ Hale. M, *History of the Pleas of the Crown, Volume 1* (Little Britain, 1800) pp. 25, 27-28.

¹⁷⁷ *C v Director of Public Prosecutions* [1996] AC 1 at 33.

¹⁷⁸ *R v JTB* [2009] UKLHL 20 at 15.

¹⁷⁹ See *R v Sydney Smith* (1845) 1 Cox 260, *A v DPP* (1992) *Crim LR* 34.

their actions were seriously wrong and satisfied the requisite elements of the crime by presenting clear and concise evidence to the court.¹⁸⁰ This was the preferred legal test, as confirmed by Salter J in *R v Gorrie* (1918)¹⁸¹ and reaffirmed by the House of Lords in *C v DPP* [1995].¹⁸² The proof of awareness of serious wrongdoing was independent of the evidence required for the *mens rea* elements of intention and recklessness. As Williams observed, there was no requirement that a person who intended to kill had to understand that their actions in the killing were seriously wrong; such a person could have been held culpable without this evidence.¹⁸³

To rebut the presumption, in the case of *C v DPP* (1995), the House of Lords revealed that the evidence “must not be the mere proof of the doing of the act charged, however horrifying or obviously wrong that act may be.”¹⁸⁴ Evidence of what the child said or did before and after committing the alleged offence, therefore, was used to rebut the presumption (e.g., degree of planning, whether they attempted to hide a crime), even though “such evidence had to be approached with care as it could be equivocal.”¹⁸⁵

In addition, evidence of a child running away after committing an offence was considered insufficient.¹⁸⁶ The House of Lords reasoned that the child who knew that their actions were seriously wrong and ran away from the scene of an offence was just as likely as an individual who was unaware that their actions were serious to run away.¹⁸⁷ Thus, the court decided that such evidence not be used to rebut the presumption that they had known that their actions were seriously wrong.¹⁸⁸

Any evidence to rebut the presumption generally came from the child’s “responses to police questioning, a psychological or psychiatric assessment, or evidence from a teacher, parent or social worker as to the child’s general ability to understand the nature of their conduct.”¹⁸⁹ Finding credible evidence to rebut the presumption was a significant problem for prosecutors who challenged the defence’s automatic assumption that the child did not know their actions were seriously wrong when committing an offence. In most cases, Wortley revealed, prosecutors had limited evidence to rebut the presumption because they had no power to compel a child to undertake a psychiatrist or psychological assessment to prove that they were aware of the serious nature of their actions. If the child refused to answer any of the questions asked by the police interviewer, a prosecutor could not rely on their responses as evidence in court to rebut the presumption. Parents and teachers were also generally reluctant to give evidence against a child to rebut the presumption as doing so might have threatened their relationship with them and their parents.¹⁹⁰

¹⁸⁰ Ibid. at 8; [1996] AC 1. It is worth noting that there was considerable discussion by the courts about what type of understanding (moral or legal) was required for the defence before accepting the ‘serious wrongdoing’ test. The courts considered whether the presumption could be rebutted with evidence such as a child’s understanding of doing a wrong, the difference between right and wrong or recognition that their actions constituted a crime. For an analysis of these different tests, see McDiarmid (2013) 149-152.

¹⁸¹ *R v Gorrie* (1918) 83 J.P at 136.

¹⁸² *C (a minor) v DPP* [1995] 2 WLR 38.

¹⁸³ Williams. G, *Criminal Law: The General Part* (Stevens & Sons Ltd, UK, 2nd Edition, 1961) p. 814.

¹⁸⁴ *C v DPP* [1995] at p. 38.

¹⁸⁵ Wortley. N, “Merely Naughty or Seriously Wrong? ‘Childish Sexual Experimentation’ and the Presumption of *Doli Incapax*: *R v PF* [2017] EWCA Crim 983” (2017) 81 *Journal of Criminal Law* at 347; Crofts. T, “The common law influence over the age of criminal responsibility – Australia” (2016) 67(3) *Northern Ireland Legal Quarterly* 292.

¹⁸⁶ *R v Manley* (1844) 1 Cox 104

¹⁸⁷ [1995] 2 WLR 38 at p. 39.

¹⁸⁸ Crofts (2016).

¹⁸⁹ Wortley (2017) at 347.

¹⁹⁰ Ibid.

In the 1990s, the defence was significantly criticised by legal commentators and the judiciary, culminating in several unsuccessful removal attempts and its abolition in Section 34 of the Crime and Disorder Act (1998). The first attempt to repeal the defence was in 1994 by the Divisional Court in *C v DPP* [1994]. In giving his judgment, Laws J articulated that the defence was “perverse” and “contrary to common sense” as “it tend[ed] to absolve from criminal responsibility the very children most likely to commit criminal acts.”¹⁹¹

For instance, in the case of *JBH and JH (Minors) v O’Connell* [1981],¹⁹² co-defendants’ boys, aged 13 and 11 years of age, were convicted on the ground that ordinary boys of the same ages would have known that their actions were wrong. The prosecution provided no evidence that they knew their actions were seriously wrong when committing the offence. On appeal, the Divisional Court quashed the defendants’ convictions because the magistrate had erred when he assumed that they held the equivalent understanding of ordinary developing boys of 13 and 11 years.¹⁹³ Thus, the Divisional Court in *C v DPP* temporarily removed the defence; then, the House of Lords overruled the Divisional Court’s judgment in 1995 on appeal and reinstated it.¹⁹⁴

The second attempt to remove the defence was by the New Labour Government. The Government believed it could no longer be operationally justified because it was archaic, illogical and unfair.¹⁹⁵ In 1997, the then Shadow Home Secretary Jack Straw MP stated that:

At present, we have medieval law - *doli incapax* - which assumes that youngsters 10-13 are “incapable of evil” unless the prosecution can prove the reverse. This legal presumption makes it very difficult for youth courts to convict young offenders and start the process of changing their offending behaviour. This doctrine defies common sense. Most young people aged 10-13 are clearly capable of knowing the difference between right and wrong. I propose to change the law so that the assumption will be that if a 10-13 year old commits a crime it will be assumed that they knew it was wrong. It would be open to the defence in a particular case to argue that the child did not know the difference between right and wrong (for example, if the child had serious learning handicaps).¹⁹⁶

The New Labour Government’s outlook was that most children knew that their actions were seriously wrong and, therefore, should be held criminally responsible and punished if they committed an offence. This Administration reasoned that “to respond effectively to youth crime, we [must] stop making excuses for children who offend.”¹⁹⁷ Although the Government knew that diminished or a complete lack of legally relevant capacities is a precursor of young age and that “as they develop, children must bear an increasing responsibility for their actions, just as the responsibility of parents gradually declines but does not disappear – as their children approach adulthood.”¹⁹⁸ The Government punitively decided such persons deserved to be punished like adults for committing wrongdoing because “no young person should be allowed to feel that he or she can

¹⁹¹ *C v DPP* [1994] 3 *All ER* 190 at pp. 9 and 11.

¹⁹² *JBH and JH (Minors) v O’Connell* [1981] *Crim LR* 632.

¹⁹³ [2009] *UKHL* 20 at [19]; Ashworth, A, “Abolishing the presumption of incapacity: *C v DPP*” (1994) 6 *Journal of Child Law* 175-176.

¹⁹⁴ [1995] 2 *WLR* 383; See also, Cavadino, P, “Goodbye *doli*, we must leave you?” (1997) 9 *Child & Family Law Quarterly* 166-168.

¹⁹⁵ House of Commons, *The Crime and Disorder Bill [HL]* [Bill 167 of 1997- 98]: *Youth Justice, Criminal Procedures and Sentencing* (Research Paper 98/43, Home Affairs Section, House of Commons Library, London, 6th of April 1998) p.51.

¹⁹⁶ Home Office, *White Paper, No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (HMSO, London, Cm 3809, 1997) p. 1.

¹⁹⁷ *Ibid.* at para. 4.1.

¹⁹⁸ *Ibid.*

offend with impunity? Punishment is important as a means of expressing society's condemnation of unlawful behaviour and as a deterrent.”¹⁹⁹ To solidify this assumption, this Government removed the defence under Section 34 – it provides that “the rebuttable presumption of criminal law that a child aged ten or over is incapable of committing an offence is hereby abolished.”²⁰⁰

Although the origins of the defence's abolition in part date back to the New Labour Government's core rationale that it was contrary to common sense, the court's interpretation of the relationship between the defence and rebuttable presumption implied that Parliament's intentions under Section 34 were unclear.²⁰¹ The literal interpretation of Section 34 is that “the rebuttable presumption of criminal law that a child aged ten or over is incapable of committing an offence is hereby abolished.” The rebuttable presumption was abolished, and the defence remained. Section 34 removed the prosecutor's remit to challenge such a child's incapacity to know the difference between right and wrong by presenting contrary evidence.

Thus, the courts scrutinised the relationship between the defence, rebuttable presumption and Parliament's intentions under Section 34, culminating in several appeals against conviction and the House of Lords' leading judgment in *JTB*. As discussed, the Divisional Court in *C v DPP* [1994] justified the abolition of the defence because it was outdated and contrary to common sense for the above reasons. The court preferred considering the defence rather than as separate entities. Several years later, however, the Divisional Court reversed its opinion in *DPP v P* [2007].²⁰² In this case, the court established that Parliament recognised the defence and rebuttable presumption as separate limbs for each served a different function.²⁰³ In reviewing the language of Section 34, Smith LJ observed that “the subject of the sentence in section 34 is ‘the rebuttable presumption of criminal law’ and the verb ‘is abolished’ can only apply to the subject. If so, it must be the presumption that has been abolished.”²⁰⁴ The court also examined Parliament's intentions for it in the Crime and Disorder Bill and reasoned that there was compelling evidence Parliament had intended for the defence to remain. Lord Falconer of Thoroton's, the Solicitor General's asserted:

The possibility is not ruled out, where there is a child who has genuine learning difficulties and who is genuinely at sea on the question of right and wrong, of seeking to run that as a specific defence. All that the provision does is remove the presumption that the child is incapable of committing wrong.²⁰⁵

Considering Lord Falconer of Thoroton's statement, Smith LJ stated, “it would be reasonable to rely on the government's intention as a guide to Parliament's intention in passing the clause into law.”²⁰⁶ The Government believed removing the defence would unnecessarily expose children to blame and punishment. Thus, the Government proposed reforming the defence and reversing the presumption, which would have placed the onus on the person to prove on a balance of probabilities that they did not know their actions were seriously wrong. In this case, the prosecution would have

¹⁹⁹ Ibid. p.1.

²⁰⁰ Section 34 of the Crime and Disorder Act (1998).

²⁰¹ No More Excuses (1997) pp. 1-2.

²⁰² *DPP v P* [2007] *EWCA* 946.

²⁰³ Crofts. T, “Children: Doli Incapax *DPP v P* [2007] *EWCA* 946 (Admin)” (2008) 72 *Journal of Criminal Law* at 8.

²⁰⁴ [2007] *EWCA* 946 at [40].

²⁰⁵ Hansard, House of Lords Debates, 16 December 1997, cols 595-596.

²⁰⁶ [1996] *AC* 1 at [43].

had the opportunity to prove beyond a reasonable doubt that the child satisfied the mental element of the charged offence; however, the Government rejected this proposal.²⁰⁷

Reflecting on the above judicial rulings, the House of Lords, in *JTB*, attempted to resolve the uncertainty around Section 34.²⁰⁸ The House of Lords ruled in favour of the Divisional Court's decision in *C v DPP* [1994]; Section 34 abolished the defence (presumption) and rebuttable presumption for those ten years and older.²⁰⁹ The House of Lords explored the mischief of Section 34 that it had intended to abolish the defence by applying the principle laid out in *Pepper v Hart* [1993].²¹⁰ The House of Lords established that Parliament intended to repeal the entirety of the defence because of rising concerns that the rebuttable presumption placed an unfair and onerous burden on the prosecution to prove the child's lack of capacity, which was discussed in greater detail above. Their Lordships pointed out that Lord Goddard's QC actions, and Parliament's rejection of his proposed amendments to the Crime and Disorder Bill, impacted their decision as it provided the House of Lords with persuasive evidence that the Government planned to abolish the entirety of the defence.²¹¹ In the committee and reporting stages of the Bill's reading in the House of Lords, Lord Goddard QC twice moved proposed amendments by the MoJ to reverse the presumption rather than abolish the defence.²¹² The MoJ suggested that the defence could remain but needed reforming to remedy the issues with its application; the MoJ recommended that the "presumption could be reversed" by transferring the burden of proof to the defence:

This would mean the court would start with the presumption that a child of ten and over but under 14 was capable of forming criminal intent. But such a child would be acquitted if the defence could prove on the balance of probabilities that they did not know that what they were doing was seriously wrong. If such a defence were made, to secure a conviction, the prosecution would have to show beyond reasonable doubt that the child did indeed know that the action was seriously wrong.²¹³

In agreement with the MoJ's recommendation was Lord Goddard QC, who removed Clause 27. He replaced it with Amendment 174, which provided that "where a child aged ten or over is accused of an offence, it shall be a defence for him to show on the balance of probabilities that he did not know that his action was seriously wrong."²¹⁴ He initially thought that "... the complete abolition of the *doli incapax* rule is wholly inappropriate"²¹⁵ because the MACR is low, and the Government were indifferent to increasing the threshold age above ten years of age.

Lord Goddard also believed reforming the presumption would have been a suitable remedy to counteract the low MACR. He further reasoned that if the presumption remained, *albeit* reversed, it would continue to serve the defence's core function of providing those, aged between 10 and 13

²⁰⁷ House of Commons (1998) p.52.

²⁰⁸ [2009] UKHL 20. For commentary on *JTB*, see further Stone, N, "Legal Commentary" *Juveniles with Adult Co-Accused: Venue for Trial and Sentence* (2012) 10(2) *Youth Justice* 174.

²⁰⁹ In this case, the appellant (who pleaded guilty to several counts of sexual activity with other young boys when aged 12 years) appealed to the House of Lords as he required advice "that he had not known that what he was doing wrong, a defence that he was *doli incapax*." The trial judge concluded that the defence of *doli incapax* was not available to the appellant since it had been abolished by Section 34.

²¹⁰ *Pepper v Hart* [1993] AC 593, [1993] 1 All ER 42, [1992] STC 898.

²¹¹ [2009] UKHL 20 at [29].

²¹² Ministry of Justice, *Tackling Youth Crime: A Consultation Paper* (Home Office, Communication Directorate, London, 1997) para. 3-18.

²¹³ [2009] UKHL 20 at [29] and [40].

²¹⁴ Hansard, House of Lords Debates, 12th of February (1998), col 1316.

²¹⁵ *Ibid*.

years, who were incapable of understanding the serious nature of their actions with exculpation from responsibility.²¹⁶ As Arthur suggested, “this is exactly the type of situation in which the presumption could have acted as a safeguard.”²¹⁷ Despite Lord Goddard’s validation of the MoJ’s reverse presumption proposal, he removed Amendment 174 due to its unpopularity with other members of the House. 111 out of 180 members of the House decided that the presumption should be abolished, and 48 responded in favour of the MoJ’s proposal.²¹⁸ The House of Lords dismissed JTB’s appeal and ruled that Section 34 abolished the defence and rebuttable presumption.

The effect of this decision, as Elliott observed, is that they are exposed to the criminal justice system and treated like adults; they are not automatically assumed incapable of understanding the serious nature of their actions on the grounds of young age, general immaturity and developmental immaturity.²¹⁹ Instead, they are considered to have the ability to satisfy the prerequisite *mens rea* of the offence committed and be convicted and sentenced.²²⁰

Although children/young persons’ vulnerabilities are no longer recognised in a complete exculpatory defence, it is essential to acknowledge that special measures are available for defendants who kill due to their youth and mental conditions in the criminal courts. The fitness to plead procedure is a special measure that exemplifies vulnerable defendants; it is a legal test that identifies those with disabilities who may require reasonable adjustments at trial or who are unfit to plead because they have mental impairments²²¹ under Section 4 of the Criminal Procedure (Insanity) Act (1964)(CP).²²²

While contemporary legal commentators²²³ have substantially criticised the scope and application of the fitness to plead procedure because it fails to identify young defendants who cannot make autonomous and effective decisions.²²⁴ These criticisms have fundamentally contributed to a deeper understanding of the problems with the current unfitness to plead procedure to such an extent that the Law Commission proposed it is reformed.²²⁵

A defendant’s right to effectively participate in their trial is a fundamental right protected by Article 6 of the ECHR. The court in *SC v UK* [2005] reasoned that a defendant “if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court.”²²⁶ In this case, an 11-year-old child defendant

²¹⁶ Ibid.

²¹⁷ Arthur. R, “Youth, Mental Incapacity and the Criminal Justice System” in Livings, Reed and Wake (2015) p.412.

²¹⁸ Hansard, House of Lords Debate, 12th of February (1998), col 1324; [2009] *UKHL* 20 at [40] per Lord Carswell.

²¹⁹ Elliott (2011) at 289.

²²⁰ As of February 2022. Note that the PSCS Act had not received royal assent.

²²¹ It is worth noting that Section 1(2) of the Mental Health Act (1983), as amended by Section 1(2) of the Mental Health Act (2007), defines a mental disorder as “any disorder or disability of the mind.” A learning disability is defined as “a state of arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning” under Section 4 of the Mental Health Act (1983) as amended by Section 1(4) for the Mental Health Act (2007).

²²² Law Commission, *Unfitness to Plead Volume 1: Report No 364* (Law Com, The Stationary Office, London, 2016) para. 1.13.

²²³ Howard. H, “Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission’s Proposals for a New Capacity Test” (2011) 75 *Journal of Criminal Law* 194-203; Mason. J, “Unfitness to Plead, Insanity and the Law Commission: Do We need a Diagnostic Threshold?” (2021) 85 *Journal of Criminal Law* 268-279.

²²⁴ Law Commission, Report No 364 (2016); Law Commission, *Unfitness to plead. Volume 2: Draft Legislation No 364*. (Law Com, The Stationary Office, London, 2016).

²²⁵ Because of space limitations, I cannot explore these problems and the Law Commission’s proposed reforms, even though legal commentators generally welcomed these revised changes;²¹⁴ thus, my discussion focuses on outlining the current procedure and recognising how it protects the vulnerabilities (e.g., learning difficulties, developmental immaturities and young age) of child defendants. This discussion is essential to the chapter to sketch out how the youth justice system works in the case of those under 18 who kill.

²²⁶ *SC v United Kingdom* (2005) 40 *E.H.R.R.* 10; [2005] 1 *F.C.R.* 347; [2005] *Crim. L.R.* 130 at [29].

charged with attempted robbery had a limited attention span and intellectual capability between 6 and 8 years. The defendant could not comprehend the jury's role and cognise that he might serve a custodial sentence if found guilty of an offence.

Here, a medical expert found him fit to plead because the proceedings were explained in a way he could understand, and he was tried when he should not have been. Subsequently, he appealed against the court's decision to the ECHR, where the court was found to be in breach of Article 6. The ECHR court acknowledged that a child/young person does not need to understand or be capable of understanding every point in the proceedings, however:

Effective participation' in this context presupposed that the accused has a broad understanding of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, of necessary with assistance ... should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.²²⁷

The United Nations Convention on the Rights of Persons with Disabilities provides equal recognition of disability in the law. It requires member states "recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" (Article 12(2)).²²⁸ This recognition is important because judges must consider the child defendant's maturity, development (intellectual and emotional) and age when preparing for their trial.²²⁹ The Practice Direction states that "all possible steps should be taken to assist the defendant to understand and participate in the proceedings and the ordinary trial process should, so far as necessary, be adapted to meet those ends."²³⁰ Specifically, the Law Commission noted that "a defendant under the age of 18 would have to have "a level of intellectual ability or social functioning" which compromised his or her ability to participate effectively in the proceedings to be eligible for assistance."²³¹

The fitness to plead procedure in the Crown Court²³² establishes a defendant's fitness to plead and effective participation during the trial for indictable offences. As discussed in Chapter one, most cases involving children/young people are tried in the Youth Court for summary offences, but serious crimes are tried in the Crown Court. This means children/young people tried in the Crown Court for murder can raise the issue of unfitness to plead. Section 4 of the CP allows the court to assess their mental and physical state to determine whether they are "under a disability," which would prevent them from being tried.

A single judge determines whether the defendant is "under a disability"²³³ based on evidence from at least 2 registered medical practitioners.²³⁴ If it is determined that the defendant is "under a

²²⁷ At [25].

²²⁸ Article 12(2) of the United Nations Convention on the Rights of Persons with Disabilities (2006) (Accessed July 2022) <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>.

²²⁹ Child and Duff (2021) p. 170.

²³⁰ Practice Direction (Criminal: Consolidated) [2002] *All ER* 904.

²³¹ Law Com, Report No. 364 (2016) para. 2.18.

²³² There is no corresponding fitness to plead procedure for trials in the Youth Court, despite legal criticism and substantial evidence that participation issues are prevalent in the Youth Court. See, further, Arthur. A, "Giving Effect to Young People's Right to Participate Effectively in Criminal Proceedings" (2016) 28 *Law Quarterly Review* 223-238.

²³³ As amended by Section 22 of the Domestic Violence, Crime and Victims Act (2004).

²³⁴ Medical practitioners must be approved under Section 8(2) of the Mental Health Act (1964) as amended by Section 7 of the Criminal Procedure (Insanity and Unfitness to Plead) Act (1991).

disability,” the judge will decide whether modifications are feasible to allow them to effectively participate at trial.²³⁵ If it is determined that modifications cannot be made, Section 4A of the CP provides that a hearing be convened to establish whether the defendant “did the act or made the omission” with which they are charged.

The common law test for determining a defendant’s fitness was established in *R v Pritchard* (1836)²³⁶ and further developed in *R v M* [2003].²³⁷ The criteria address a defendant’s cognitive capacities (intellectual abilities) to engage in their trial and are context-specific; M lists six abilities necessary for effective participation at trial. To be deemed fit to plead, a defendant must show that they are capable of: (1) understanding the charge(s); (2) deciding whether to plead guilty; (3) challenging jurors; (4) giving in evidence in their defence; (5) instructing their defence; (6) following the course of the trial proceedings.²³⁸

The following section will consider the legal consequences of the House of Lords’ decision in *JTB* in greater detail in the context of subjective *mens rea*. This is important to frame the subjective approach to *mens rea* of intention in legal practice and how developmental immaturity features in considerations of responsibility. Because of space limitations, it cannot explore *mens rea* in substantial detail; thus, my analysis will focus on the key issues that have captured contemporary legal debates and leading judgments about the *mens rea* of intention (notably *JTB*), developmental immaturity, young age and children/young persons over the years. These discussions are central to the thesis because such contribute to a deeper understanding of how developmentally immature children/young people who kill are treated in English criminal law and the need for a developmental immaturity defence.

2.7 The Process for Charging Children and Young Persons of Murder

In current legal practice, children/young people and adults receive legal advice from their defence; however, when charged with murder, they are treated differently to adults. The best interests of the child and welfare principle are paramount; the effect is that special statutory charging procedures apply to persons below 18 years of age.

When deciding to charge children/young people, the Crown Prosecution Service must have regard for the principal aims of the youth justice system to prevent them from offending (Section 37(1) of the Crime and Disorder Act (1998)) and protect their welfare under the UNCR.²³⁹ All participants in the youth justice system (e.g., police and prosecutor) must endeavour to achieve these aims.²⁴⁰

The Code for the Crown Prosecutors (the Code) guides prosecutors on the principles that must be applied when making decisions about charging suspected children and young persons with

²³⁵ Law Com, Report No.30 (2016) para. 1.77.

²³⁶ *R v Pritchard* (1836) 7 C&P 303.

²³⁷ *R v M* [2003] All ER (D) 199.

²³⁸ Ibid.

²³⁹ See, generally, European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights Right to a fair trial* (Council of Europe, April 2022) https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf.

²⁴⁰ Crown Prosecution Service, *Youth Offenders, Legal Guidance, Youth Crime* (Accessed May 2022) <https://www.cps.gov.uk/legal-guidance/youth-offenders>.

criminal offences.²⁴¹ It defines a “suspect” as an individual “who is under consideration as the subject of formal criminal proceedings.” As discussed, the Code for Crown Prosecutors defines a ‘child’ or ‘young person’ as a person under the age of 18 years.²⁴²

The Code also ensures that the prosecutor’s decision to bring charges is independent, consistent and fairly made “at every stage of a case.”²⁴³ However, if the accused does not satisfy the *mens rea* or *actus reus* for murder, the Crown Prosecution Service should not charge an individual because a successful prosecution is unlikely. The Code clarifies that prosecutors must consider their maturity and chronological age when deciding whether to charge them with an offence. It is generally accepted in the Code that “the younger the suspected child, the less likely it is that a prosecution is required”, as it may not be in the public interest to charge a young suspect who lacks maturity, as discussed in the case of *SC*.²⁴⁴ However, some circumstances require charging the child/young person, regardless of their young age and degree of immaturity, because it is in the public interest to prosecute due to the seriousness of the offence committed, “the suspect’s past record suggests that there are no suitable alternatives to prosecution; and the absence of an admission means that out-of-court disposals that might have addressed the offending behaviour are not available.”²⁴⁵

In such cases, it highlights the need for the introduction of a developmental immaturity defence (to be discussed in greater detail in chapter 5) because their degree of immaturity should correspond to them not being tried by the CPS for a crime in circumstances such as *SC*. On the other hand, the public interest to prosecute on account of the seriousness of the offence takes precedence over any immaturity considerations, and a developmentally immature child/young person can be charged with murder. A developmental immaturity defence would allow such persons the opportunity to receive an excuse from criminal responsibility for their actions in the killing due to their developmental immaturity. It is therefore vital to the thesis that those charged with murder are not diverted away from the criminal justice system because they would not be given the opportunity to plead one of the proposed defences if they were introduced into law, to be discussed in greater detail in Chapter 5.

In cases of murder, the prosecutor must decide whether a child/young person is to be charged as it is an indicatable-only offence.²⁴⁶ The prosecutor must apply all relevant policies and legislation when deciding whether to charge, as failure to do so may result in proceedings for a judicial review.²⁴⁷ They must also resolve any evidential weakness and stop the investigation as soon as it becomes apparent that the suspect will not satisfy the evidential stage or public interest elements of the Full Code Test.²⁴⁸

In deciding to charge or divert a child/young person, the prosecutor must apply the case’s evidence to the Full Code Test under Section 4 of the Criminal Justice Act (2003). Two elements of the Full Code Test must be satisfied to charge those suspected of murder; (1) “there must be sufficient evidence to provide for a realistic prospect of conviction” and (2) charging the suspect must be “in the public interest to prosecute.” The prosecutor must apply these two Code elements

²⁴¹ The Code is produced by the Director of Public Prosecutions under Section 10 of the Prosecution of Offences Act (1985).

²⁴² See section 1.1.

²⁴³ Director of Public Prosecutions, *The Code for Crown Prosecutors* (October 2018) para. 2.2.

²⁴⁴ *Ibid.* para. 4.14.

²⁴⁵ *Ibid.* para 4.14(d).

²⁴⁶ The Code (2018) para. 3.2-3.8.

²⁴⁷ *R v Chief Constable of Kent and Another ex parte L, R v DPP ex parte B* (1991) 93 *Cr App R* 416.

²⁴⁸ The Code (2018) para. 3.4-3.6.

to every person suspected of an offence; the law does not differentiate between children, young persons and adults within the full code test.²⁴⁹

In reviewing the case's evidence, the prosecutor must decide whether there is a realistic prospect of conviction to charge the child/young person with murder. The prosecutor is expected to consider the circumstances of the case (e.g., the aggravating and mitigating features), relevant information and the implications of any defence provided by the suspect. The prosecutor also must determine whether a court would decide that the evidence is inadmissible and the weight of the evidence (accuracy and credibility).²⁵⁰ If the prosecutor decides that there is sufficient evidence and a realistic chance of conviction, they will consider whether it is in the public interest to charge them with murder.

In deciding the public interest of the case, the prosecutor must consider the following questions:

- a) How serious is the offence committed?
- b) What is the level of culpability of the suspect?
- c) What are the circumstances of and the harm caused by the victim?
- d) What was the suspect's age and maturity at the time of the offence?
- e) What is the impact on the community?
- f) Is prosecution a proportionate response?
- g) Do sources of information require protecting?²⁵¹

Concerning the child/young person, the prosecutor must specifically consider their young age and maturity at the time of the killing to establish their degree of criminal responsibility for questions b) and d). If they live in a children's home (foster home or secure training centre), the prosecutor must also consider the following ten factors:

1. Disciplinary/behaviour policy of the Children's home?
2. Why have the Police been involved and is it as agreed in the behaviour policy?
3. Any informal/disciplinary action already taken by the home?
4. Any apology/reparation?
5. Victim's views?
6. Social workers' views?
7. Care plan for looked after child?
8. Recent behaviour at the home/previous incidents
9. Information about the incident from the looked after child (eg information interview at home)
10. Any aggravating or mitigating factors?²⁵²

If the prosecutor cannot satisfy the elements of the Full Code Test to charge the suspect, they can alternatively apply the Threshold Test to charge them with murder.²⁵³ Under the Threshold Test, five conditions must be satisfied to charge a person suspected of murder if the prosecutor fails to satisfy these requirements, the suspect cannot be charged and must be released. The first condition of the test is that "there are reasonable grounds to suspect that the person to be charged has committed the offence." Also, the prosecutor must assess all available evidence of the case, the

²⁴⁹ Hannibal. M, Mountford. L, *Criminal Litigation* (Oxford University Press, Oxford, 17th Edition, 2021) pp.472-473.

²⁵⁰ The Code (2018) para. 4.6-4.8.

²⁵¹ Ibid. para. 4.14.

²⁵² Director of Public Prosecutions, *The Code for Crown Prosecutors* (October 2018) para. 2.2.

²⁵³ The Code (2018) para. 5.1-5.2.

suspect's defence (if any) and relevant information to determine whether they committed the offence. On reviewing the evidence and appropriate materials, the prosecutor must be satisfied that these documents could sufficiently be "i. put into an admissible format for presentation in court; ii. reliable; and iii. credible."²⁵⁴

The second condition of the Test is that "further evidence can be obtained to provide a realistic prospect of conviction." The prosecutor must show that there are reasonable grounds to continue the police investigation to collect additional evidence to build a solid and realistic prosecutorial conviction under the Full Code Test. Overall, the prosecutor must determine the following to satisfy this condition:

- i. The nature, extent and admissibility of any likely further evidence and the impact it will have on the case;
- ii. The charges that all the evidence will support;
- iii. The reasons why the evidence is not already available;
- iv. The time required to obtain the further evidence, including whether it could be obtained within any available detention period;
- v. Whether the delay in applying the Full Code Test is reasonable in all the circumstances.²⁵⁵

Under the third condition of the Test, the prosecutor must establish that "the seriousness or circumstances of the case justifies the making of an immediate charging decision."²⁵⁶ The fourth condition of the Test is that "there are continuing substantial grounds to object to bail in accordance with the Bail Act 1976 and in all the circumstances of the case it is proper to do so." Here, the prosecutor must consider any risks associated with the suspect if they are denied bail, such as those posed to the public or a specific person if the suspect.²⁵⁷ The fifth and final condition of the Test is that "it is in the public interest to charge the suspect;" the second element of the Full Code Test is based on the relevant and available materials at the time.²⁵⁸

If the prosecutor decides that the child/young person is to be charged with murder applying either one of the above tests, the procedure upon charge is that they must be charged in the presence of an appropriate adult under Section 38 of the Police and Criminal Evidence Act (1984)(PACE). Under Code C para 1.7A of this Act, the purpose "of the appropriate adult is to safeguard the rights, entitlements, and welfare of juveniles and vulnerable persons." An appropriate adult must act in a supportive capacity; duties range from advising and assisting them to understanding their rights. An appropriate adult can be their parent, guardian, social worker or an adult above 18 years of age who is not an on-duty police officer.²⁵⁹

In summary, a child/young person's age, and immaturity (general or developmental) are essential factors in deciding whether to charge them with murder. The prosecutor cannot charge them with this offence without considering the identified factors and the Full Code Test (or the Threshold Test). These factors are given special attention in the charging process because of the longstanding

²⁵⁴ Ibid. para. 5.3-5.4.

²⁵⁵ Ibid para. 5.5-5.7.

²⁵⁶ Ibid para. 5.8.

²⁵⁷ Ibid. para. 5.9.

²⁵⁸ Ibid. at para. 5.10.

²⁵⁹ Code C para 1.7 of the PACE.

legal rule that those below 18 years of age should be treated differently than adults.²⁶⁰ In this regard, the Code and relevant legislation protect the best interests and welfare of children/young people.

2.8 The Subjective Approach to *Mens Rea* for Children and Young Persons.

Analysing the current subjective approach to *mens rea* of intention requires a brief discussion of its principle and function in criminal law. Here, it will be analysed how the current subjective approach to *mens rea* of intention determines whether to hold a person criminally responsible for killing another person and their degree of foreseeable harm. It will also be demonstrated how this approach factors children/young persons' developmental immaturity to assess criminal responsibility — followed by some general observations about how the House of Lords' decision in *JTB* changed and affected assessments of *mens rea*. It will demonstrate that the current subjective approach to the *mens rea* of murder cannot consider developmental immaturity's effect on the child/young person's culpability.

Mens rea is a legal concept in criminal law. It is generally described as the prerequisite 'mental' element of the offence and is structured around questions of fact and proof.²⁶¹ The leading position in criminal law doctrine is that most offences require evidence of a person's mental state and actions to establish fault.²⁶² This position claims that a person is culpable for their actions because they caused an outcome they intended, knew of, were aware of or indifferent to.²⁶³ In the case of murder, the prosecutor must determine whether the defendant has the required mental element of the offence at the time of committing the *actus reus* to show guilt.²⁶⁴

It is worth noting that the search for the most appropriate *mens rea* terms to determine a defendant's degree of culpability has led to substantial explorations in the legal literature.²⁶⁵ This thesis proposes to concentrate on the arguments that have dominated modern legal debates on intention and murder, as these views have garnered the most attention over the years. Many leading judgments concerning murder involve adult defendants, not children/young persons in English law; thus, these prominent cases will ultimately inform this chapter's descriptive analysis.

Mens rea is divided into two main approaches, which play distinctive roles in assessing culpability: subjective and objective *mens rea*.²⁶⁶ Subjective *mens rea* (a subjective test) examines "the defendant's actual awareness of the outcome: what did he foresee and how likely did he think

²⁶⁰ Refer back to CYPA (1933).

²⁶¹ Moore, M, *Placing Blame: A Theory of the Criminal Law* (Oxford Scholarship Online, 2010) pp. 403-419; Herring, J, *Criminal Law* (Oxford University Press, Oxford, 10th Edition, 2022) p. 174.

²⁶² Chan, W, Simester, A, "Four Functions of *Mens Rea*" (2011) 70 *The Cambridge Law Journal* 381.

²⁶³ Simester, A. P, Spencer, J. P, Stark, F, Sullivan, G. R, Vigro, G. J, *Simester and Sullivan's Criminal Law Theory and Doctrine* (Hart Publishing, Oxford, 7th Edition, 2019) p. 137-138; Horder, J, *Ashworth's Principles of Criminal Law* (Oxford University Press, Oxford, 2022) p.192

²⁶⁴ Simester et al., (2019) 137-138.

²⁶⁵ Child, J, Hunt, A, "Beyond the Present-Fault Paradigm: Expanding *Mens rea* Definitions in the General Part" (2022) 42 *Oxford Journal of Legal Studies* 438-467.

²⁶⁶ Furey, J, *A Consistent Approach to Assessing Mens Rea in the Criminal Law of England and Wales* (PhD Thesis, submitted to the University of Exeter, 2010) p. 22.

that outcome was? It blames him for choosing to cause or risk causing that outcome.”²⁶⁷ Objective *mens rea* (the objective test) sets “an objective standard of care of foresight that the defendant is expected to measure up to and thus blames him for failing to attain that standard.”²⁶⁸ Both approaches are adopted in current criminal law and are used in different ways depending on the elemental *mens rea* of an offence.²⁶⁹ A subjective approach is employed for assessing the *mens rea* of murder.

The concept of intention can be normative and descriptive; both expressions are ascribed to the theory that pertains to the *mens rea* of murder and culpability.²⁷⁰ Direct intention is narrowly defined in the *mens rea* of murder as a person’s ‘purpose’ or ‘aim’ that causally explains their actions.²⁷¹ Establishing a purpose or aim provides a resolve in criminal law as it leads to assessing the practical reasoning of the person who brings about a specific result (wrongdoing) with their actions.²⁷² For example, the actions of the person who kills his terminally ill wife explain the consequence of their actions to bring about the purpose of ending her suffering. This is important for murder because the *mens rea* “requires proof of an intention to kill or an intention to cause grievous (serious) bodily harm” to be held guilty.²⁷³ A person cannot be guilty of murder if they unlawfully cause the death of another person without intending to kill or cause serious bodily harm.

The concept of intention also includes foresight. A person can intend to bring about a specific consequence if they believe it to be a virtually certain result of their actions. A person, therefore, does not need to purposively intend to bring about a killing so long as they foresee serious harm as a virtually certain effect of their actions, which is included in the *mens rea* of murder. A person can be held guilty of murder for intending to cause serious bodily harm, and their actions result in the killing of another person.²⁷⁴

In normative terms, the concept of intention and foresight figures into responsibility attributions of murder because of the serious wrongdoing (death) resulting from a person’s intentional mental state and actions. Most legal theorists associate conviction and punishment with blame for the wrongdoing (resultant harm). As such, intention plays a blameworthy role in criminal law, particularly murder, as the view is that intention renders a clear basis for reconciling responsibility.²⁷⁵

For Hart, a person who intends to act can fully utilise their knowledge, exercise control and freely choose to commit a wrongdoing, which are legally relevant capacities necessary for

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ I will not be exploring *mens rea* approaches adopted in criminal law beyond subjective intention because such are outside the scope of the thesis. It is also worth noting that how these approaches have been applied to specific offences (e.g., criminal damage) is the focus of significant debate in contemporary legal scholarship.

²⁷⁰ The scope of intention has been extensively debated in the legal literature because there is no consensus on what the concept of intention should involve and whether it is a normative and/or a descriptive notion. Whether the concept is normative and/or descriptive is beyond the scope of the thesis. I am only concerned with framing the current subjective approach to the *mens rea* of murder because the thesis’s focus is an examination of murder, the defence of diminished responsibility and developmentally immature children/young persons who kill. Subsequently, I will not be commenting on the legal debate any further.

²⁷¹ It is important to note that other expressions are employed in addition to those identified in both moral and legal doctrines to describe the concept of intention, which includes belief, desire and motive. See, further, Malle. B, Nelson. S, “Judging *Mens Rea*: The Tension between Folk Concepts and Legal Concepts of Intentionality” (2003) 21 *Behavioral Sciences and the Law* 563-580.

²⁷² Moore. M. S, “Intention, Responsibility, and the Challenges of Recent Neuroscience” (Draft paper) p.1.

²⁷³ Law Commission, *A New Homicide Act for England and Wales?* (HMSO, London, No. 177, Consultation Paper, 2005) para. 2.2.

²⁷⁴ Finnis, J, “Intention and Side-Effects” in Frey. R. G, Morris. C, *Liability and Responsibility: Essays in Law and Morals* (Cambridge University Press, Cambridge, 1991), pp.32-64.

²⁷⁵ Horder. J, “Intention in the Criminal Law – A Rejoinder” (1005) 58 *Modern Law Review* at 679.

responsibility.²⁷⁶ Duff holds a similar view. For Duff, a person who intentionally acts “most closely and dispositionally identifies herself with her action, for which she can hence be held accountable.”²⁷⁷ Thus, “intentional conduct, in other words, constitutes the paradigm of self-determined action.”²⁷⁸ A person with the knowledge and capacity to intentionally choose, formulate and carry out their plan to kill is considered criminally culpable for their actions as they have the capacity and autonomy to achieve their aims/purpose of killing another person.²⁷⁹

The relationship between intention and foresight has given rise to legal debate. Because of space limitations, this chapter cannot examine each issue in detail; thus, it will focus on the critical point that explicitly affects developmentally immature children/young persons who kill because the concept of intention is narrowly defined in the *mens rea* of murder. In legal practice, the golden rule is that the trial judge instructs a jury to give an ordinary meaning of intention.²⁸⁰ The courts have argued that these terms have no apparent practical distinction, even though the House of Lords claimed that foresight, as understood in the *mens rea* of murder, does not confer the same meaning as intention.²⁸¹ Lord Scarman in *R v Hancock and Shankland* reasoned that foresight is a “probability of a [resultant] consequence.” As a result, the jury can use a defendant’s foresight to prove their intention to kill or cause really serious harm, for it is a definitional *mens rea* requirement of murder. He argued, “if that consequence was foreseen the greater the probability is that the consequence was also intended.”²⁸²

This interpretation of foresight as a subspecies of intention forms part of the leading *mens rea* definition of murder, as refined by *R v Woollin*.²⁸³ Lord Steyn in *Woollin* confirmed that “the effect of the critical direction [in *R. v Nedrick*] is that a result foreseen as virtually certain is an intended result.”²⁸⁴ The *mens rea* of murder includes two requirements: direct intention and indirect intention (foresight). The first involves the prosecution proving beyond a reasonable doubt that killing is the defendant’s aim or purpose. The second requirement focuses on the defendant’s awareness and knowledge, whether they foresaw that a virtually certain consequence of their actions is serious harm or death to another person.

The effect of the *Woollin* direction is that a further condition of foresight has been included in the *mens rea* of murder. Foresight allows the jury to ‘find’ whether “D intended to v and an alternative condition which can contribute to a finding of intent to v if that sufficient condition is absent.”²⁸⁵ Thus, if the jury finds that the child/young person defendant foresaw that death or serious harm was a virtually certain consequence of their actions, what follows is a murder conviction.

²⁷⁶ Lacey, N, “A Clear Concept of Intention: Elusive or Illusory?” (1993) 56 *Modern Law Review* 622; Hart (2008) 152.

²⁷⁷ Lacey (1993) at 622.

²⁷⁸ Ibid.

²⁷⁹ Refer back to section 2.3.

²⁸⁰ The House of Lords has explained in *R v Moloney* [1985] AC 905 at 926: “the golden rule should be that, when directing a jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury’s good sense to decide whether the accused acted with the necessary intent, unless the judge is convinced that, on the facts and having regard to the way the case has been presented to the jury in evidence and argument, some further explanation or elaboration is strictly necessary to avoid misunderstanding.”

²⁸¹ Similar observations were in the following cases: *Hyam v DPP* [1975] AC 55; [1985] AC 905; *R v Hancock and Shankland* [1986] AC 455.

²⁸² [1986] AC 455 at 473.

²⁸³ *R v Woollin* [1999] A.C. 82.

²⁸⁴ [1999] A.C. 82 at p.93.

²⁸⁵ Tadros, V, “The Homicide Ladder” (2006) 69 *Modern Law Review* at 605.

The problem with finding foresight is that the scope of the *mens rea* of murder is narrow. The requirement of intention has been circumscribed only to include aim, purpose (direct intention) and foresight of death or serious injury (indirect intention). As observed by the courts, there is no distinction between intention and foresight within the *mens rea* of murder. A child/young person can be convicted of murder if they foresaw death or serious harm as a virtually certain consequence of their actions, even though they might suffer immaturity and thus are more susceptible to committing murder on account of peer or family pressure and being carried away by the moment.

This is evident in *R v Wilson* [2007].²⁸⁶ In this case, a 13-year-old boy assisted his father in killing a neighbour by retrieving an axe (as requested) and hitting the victim in the head with a metal pole. Wilson denied that he was provoked and knew what he was doing (he did not suffer from diminished responsibility), even though he was encouraged by his father to join in attacking the victim. At trial, Wilson raised the defence of duress so he could claim that “he was so carried away by his father’s uncontrolled mood that he did not form the necessary intention.”²⁸⁷ Duress requires that a person is under the imminent threat of serious injury or death to him/her or a person close to them. Duress is not a defence of murder;²⁸⁸ thus he was convicted of murder because he satisfied the necessary *mens rea* for murder, and he appealed on the ground that he did not intend to kill or cause serious harm to the victim as he was under duress.

Although the Court of Appeal dismissed Wilson’s case because the defence of duress is not available in cases of murder and could not be applied by him, this case raised general concerns about the breadth of intention and lack of consideration of the effect of immaturity on children/young people following *JTB*. While it is important to appreciate that the *mens rea* for murder maybe narrow, for example, McDiarmid commented that “if we take the concept of ‘intention’, even the very youngest children may come quite quickly to the idea of doing something (say, crying) to bring about something else (say, comfort or food), rather than doing this merely instinctively.”²⁸⁹ It is difficult to see how it can be adapted to accommodate children/young people because all that is legally required to satisfy the *mens rea* of murder is that a person intended to kill or cause really serious harm. The problem is not that some children/young persons can foresee serious harm due to their actions and satisfy the *mens rea* for murder, but that they may lack an understanding of what it means to kill because they might be easily persuaded to join in a killing and then be carried away in the moment as in Wilson. As the Law Commission remarked, “a child who admits intending ‘to kill’ may not have understood the full significance of killing.”²⁹⁰

As a result, it is important to the thesis that the effects of immaturity be considered at the culpability stage because children/young people who suffer from it or developmental immaturity may lack legally relevant capacities (e.g., exercise self-control) and still satisfy the *mens rea* for murder. To convict a person of murder, it need only be proven beyond reasonable doubt that the person charged with murder foresaw death or serious harm as a virtually certain consequence of their actions. However, as the Court of Appeal stated in *Wilson*, “our criminal law holds that a 13-year-old boy is responsible for his actions ... absent always any question of diminished responsibility, and applies whether the Defendant is a principal in the first or the second degree.”²⁹¹

²⁸⁶ *R v Wilson* [2007] *EWCA Crim* 1251.

²⁸⁷ *Ibid* at [11].

²⁸⁸ *Ibid*. [18]

²⁸⁹ McDiarmid, C, “An Age of Complexity: Children and Criminal Responsibility in Law” (2013) 13 *Youth Justice* at 153.

²⁹⁰ Law Com No.177 at para. 6.80.

²⁹¹ [2007] *EWCA Crim* 1251 at [18].

In 2006, the Law Commission claimed that “it is unrealistic and unfair to assume that all children aged 10 or over who kill must have had the kind of developed sense of judgment, control and understanding that makes a first degree murder conviction the right result (provided the fault element was satisfied).”²⁹² Thus, the Law Commission proposed several homicide law reforms so that children/young people who kill and lack legally relevant capacities are excused from responsibility rather than convicted of murder. As shown in section 2.10, despite substantial support by legal commentators, parliamentary officials and judges to excuse them, developmental immaturity as a factor affecting their responsibility has been absent from exculpatory defences, more specifically, a developmental immaturity defence in English law.

2.9 Diminished Capacity and Excuse: The Defence of Diminished Responsibility

The defence of diminished responsibility is a mental condition defence in doctrinal law based on the leading idea that a person who kills and lacks mental capacity should be excused from criminal responsibility. This defence sits between the concepts of culpability and responsibility, including “subcategories of exculpatory and non-exculpatory mental incapacity doctrines.”²⁹³

As discussed, the defence is a partial excuse that reduces a person’s criminal liability because they suffered an “abnormality of mental functioning” arising from “a recognised medical condition” that substantially impairs their ability to perform one or more of the things outlined in Section 52(1A). Thus, they are convicted of voluntary manslaughter instead of murder for killing another person in recognition of the fact that they suffered diminished capacities at the time of the killing whilst also satisfying the definitional elements of murder.²⁹⁴ However, as the Law Commission articulated, developmentally immature children/young persons under 18 years of age who kill and suffer substantial impairment of one or more legally relevant capacities contained in Section 52(1A) should be able to successfully plead the defence because they were previously excluded under Section 2.

The defence of diminished responsibility is a specific defence to murder under Section 2 as amended of the Coroners and Justice Act (2009).²⁹⁵ Amendments to the defence²⁹⁶ mean that the plea is now available here:

(1) In section 2 of the Homicide Act 1957 (c. 11) (persons suffering from diminished responsibility), for subsection (1) substitute—

²⁹² Law Com No.304 para. 5.131.

²⁹³ Loughnan (2012) p. 27.

²⁹⁴ Loughnan, A, “Mental Incapacity Doctrines in Criminal Law” (2012) 15 *New Criminal Law Review* 18-19; Howard, H, “Diminished Responsibility, Culpability and Moral Agency: The Importance of Distinguishing the terms” in Livings et al., (2015) p. 318.

²⁹⁵ The revised law and Law Commission’s proposed moderation of the defence is discussed in detail in chapter 4.

²⁹⁶ The current defence replaced the wording of the old defence in section 2(1) of the Homicide Act (1957):

“[w]here a person kills is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.”

“(1) A person (“D”) who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—

(a) arose from a recognised medical condition,

(b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and

(c) provides an explanation for D's acts and omissions in doing or being a party to the killing.

(1A) Those things are—

(a) to understand the nature of D's conduct;

(b) to form a rational judgment; (c) to exercise self-control.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.”

(2) In section 6 of the Criminal Procedure (Insanity) Act 1964 (c. 84) (evidence by the prosecution of insanity or diminished responsibility), in paragraph (b) for “mind” substitute “mental functioning.

Under Section 2 as amended, a defendant is constructed as a “person ... who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning.”²⁹⁷ The effect of the term “person” is that an individual who suffers an “abnormality of mental functioning” arising from “a recognised medical condition” can successfully plead the defence. Thus, any person aged above the minimum age of criminal responsibility can plead the defence if they are charged with murder. This makes the Section 2 as amended defence different to the defence of *doli incapax*, as a defendant did not have to be a specific age at the time of committing the offence to plead it, to be discussed in section 2.5. All that is required is that a person proves that they suffer an “abnormality of mental functioning” arising from “a recognised medical condition” that substantially impaired one or more legally relevant capacities to successfully plead the Section 2 as amended defence.²⁹⁸

The relationship between “abnormality of mental functioning” and “a recognised medical condition” is pivotal in Section 2 as amended; it signals clearly that a person must suffer from an “abnormality of mental functioning” to rationalise or control their actions caused by an accepted medical condition. Several legal commentators and Parliamentary officials endorsed the inclusion of “abnormality of mental functioning” arising from “a recognised medical condition,” which replaced the phrase “abnormality of mind” and parenthesis (bracketed words) in Section 2. Baroness Murphy supported these changes because:

Overall the concept of abnormal mental functioning is better than the current concept of abnormality of mind because it emphasises processes rather than a static idea. I strongly favour this adjustment because it offers a legislative route towards ensuring that conditions put forward in the defence come within accepted diagnostic criteria. I think we will move towards the World Health Organisation's ICD-10 criteria, or those specified by the American Psychiatric Association's Diagnostic and Statistical Manual-- we currently use number 4. That will avoid the idiosyncratic diagnoses that have been offered in the past by many experts ...²⁹⁹

²⁹⁷ Coroners and Justice Act (2009) Explanatory Notes, Chapter 1, Section 52 para. 327. Refer to section 52(1) of the Coroners and Justice Act (2009).

²⁹⁸ Childs and Duff (2021) p. 171.

²⁹⁹ Hansard, HL Vol.712, col.177 (June 30, 2009).

“Abnormality of mental functioning” arising from “a recognised medical condition” may have broadened the scope of the defence to include physical and psychological causes, which were previously excluded under the parenthesis of Section 2.³⁰⁰ Numerous legal commentators have still criticised³⁰¹ Section 2 as amended because it is fundamentally different from past reform proposals that wished to clarify and develop the wording of Section 2 rather than advocate radical change,³⁰² these criticisms will be explored in section 4.4.

In current legal practice, the courts consider “abnormality of mental functioning” arising from “a recognised medical condition” purely as a psychiatric question.³⁰³ However, the courts have interpreted the phrase “a recognised medical condition” in such a way that a successful plea requires “a defined and demonstrable condition which is medically recognised.”³⁰⁴ This has placed significant weight on the medical expert’s testimony to determine “the ultimate issue – whether the defendant’s ability, etc., was substantially impaired and thus whether the plea should succeed.”³⁰⁵ The effect is that the jury now cannot depart from expert evidence when there is other evidence, especially if that evidence is “too tenuous or taken at its highest, insufficient (set in the light of the uncontradicted evidence) to permit a rational rejection of the defence of diminished responsibility.”³⁰⁶

The explanation requirement of a defendant’s actions is based on causation. It examines the contribution of a defendant’s “abnormality of mental functioning” to their actions in the killing by evaluating whether there is an appropriate link between his/her “abnormality of mental functioning” and actions in the killing.³⁰⁷ The original wording of Section 2 merely stated that the “abnormality of mind” had to substantially impair the defendant’s mental responsibility for their actions in doing or being party to the killing.³⁰⁸

As a result, this led to some legal criticism of Section 2 because Parliament did not clarify whether a defendant’s “abnormality of mind” had to be the ‘cause’ of their actions in the killing.³⁰⁹ The introduction of the above requirement clarified the need for a causal link between a defendant’s mind and actions for a successful plea of the defence of diminished responsibility. Accordingly, under Section 2 as amended, the “abnormality of mental functioning [must] provide[s] an explanation for D’s conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct” to plead it successfully. If not, then the defendant is convicted of murder because it cannot be established that their “abnormality of mental functioning” explains their actions in the killing.

³⁰⁰ Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the law* (Ministry of Justice CP19/08, 2008) para. 49; Kennefick, L, “Introducing a New Diminished Responsibility Defence for England and Wales” (2011) 74 *Modern Law Review* 756-757. To be discussed in more detail in sections 4.8.

³⁰¹ Including this thesis.

³⁰² It must be noted that the wording of Section 2 as amended is the most like the Law Commission’s proposal in Law Com Report No.304 (2006).

³⁰³ Loughnan, A, Ward, T, “Emergent authority and expert knowledge: Psychiatry and criminal responsibility in the UK” (2014) 37 *International Journal of Law and Psychiatry* 34; R v Foy [2020] EWCA Crim 270.

³⁰⁴ Mackay, R, “The Coroners and Justice Act 2009 – partial defences to murder (2) The new diminished responsibility plea” (2010) *Criminal Law Review* 295.

³⁰⁵ Ibid.

³⁰⁶ R v Brennan [2014] EWCA Crim 2387; [2015] 1 W.L.R 2060; [2015] 1 Cr. App. R. 14 at [65].

³⁰⁷ Kennefick (2011) 761.

³⁰⁸ Section 2 of the Homicide Act (1957).

³⁰⁹ [1960] 3 WLR 440 at 443-444; Kennefick (2011) 760-761.

The narrowness of Section 2 as amended definitional requirements has generated significant legal concern.³¹⁰ In 2006, the Law Commission recommended that the defence be drafted to partially exculpate a person suffering from a broad range of conditions and proposed developmental immaturity had to be a condition of the defence.³¹¹ As highlighted above, the Law Commission reasoned that developmentally immature individuals under 18 who kill and suffer substantial impairments of one or more legally relevant capacities contained in Section 52(1A) should successfully plead the defence due to being excluded from pleading Section 2. However, this limb was rejected in 2008 by the Government and is not contained in Section 2 as amended.³¹² The Government reasoned that Section 2 as amended should only partially excuse those who kill and suffer from an “abnormality of mental functioning” arising from “a recognised medical condition.”

Hence, a successful plea of Section 2 as amended requires a valid medical condition of a substantial impairment of a person’s inability to understand their actions, form a rational judgment or exercise control. The person’s “abnormality of mental functioning” must provide “an explanation for D’s conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.” The effect of Section 2 as amended is that a developmentally immature individual who suffers a substantial impairment of the ability to understand the nature of their conduct, form a rational judgment or exercise control cannot successfully plead the defence as their “abnormality of mental functioning” does not arise from “a recognised medical condition,” but developmental delays. This is an issue for developmentally immature children/young persons for the reasons to be discussed in greater detail in the next section.

2.10 Children/Young People who Kill and the Defence of Diminished Responsibility

In criminal law, contemporary legal theorists accept that developmental immaturity is relevant to determining the criminal responsibility of young people/children who commit crimes. Developmental immaturity reduces or completely impairs a person’s ability to satisfy the legally relevant capacity for criminal responsibility. As a result, developmental immaturity should be applied and represented in criminal law. However, developmental immaturity is not uniformly represented in criminal law; it is irrelevant as a precondition of “abnormality of mental functioning” under the defence of diminished responsibility.

As discussed in section 2.4, a person must suffer an “abnormality of mental functioning” arising from “a recognised medical condition,” which substantially impairs their capacity to do one or more of the things outlined in Section 52(1A); and explain how their “abnormality of mental functioning” significantly contributes to their actions in the killing to plead it successfully.

Under Section 2 as amended, the Government anticipated that there would be interpretational flexibility by including “a recognised medical condition” (e.g., physical, psychiatric and psychological

³¹⁰ See chapter 4 for an in-depth examination of the problems with the defence of diminished responsibility.

³¹¹ Law Com Report No.304 (2006) para. 5.125.

³¹² This is discussed in detail in chapter 5.

conditions). With this flexibility, the term could be interpreted broadly to extend to existing and emerging “conditions such as learning disabilities and autistic spectrum disorders which can be particularly relevant in the context of juveniles.”³¹³ The Government believed that the defence of diminished responsibility would therefore be available to those who kill and suffer physical medical conditions (e.g., a temporary hypoglycaemic state induced by diabetes), developmental disorders (e.g., autism spectrum disorder) and conditions (e.g., learning difficulties) categorised as “a recognised medical condition” by the World Health Organisation and the American Psychiatric Association.³¹⁴ However, the Government’s vision for the defence having interpretational flexibility with “a recognised medical condition” has not been fully realised in legal practice.

In *R v Osbourne* [2010], the Court of Appeal discussed in *obiter* the possibility that neurodevelopmental disorders such as attention deficit hyperactivity disorder (ADHD) may fall within the scope of “a recognised medical condition” in cases involving children/young persons.³¹⁵ However, in this particular case, the Court of Appeal held that his level of ADHD putting it as high as they could did not substantially impair his ability to exercise self-control and dismissed his appeal against conviction of murder.³¹⁶ Despite the court’s willingness to accept such evidence, there is no case law precedent of a child/young person successfully pleading Section 2 as amended based on evidence of a neurodevelopmental disorder or a learning difficulty.³¹⁷

Another problem with the inflexibility of “a recognised medical condition” is that it excludes developmental immaturity as an accepted condition. The DSM accredited developmental immaturity as having a role in the progression of neurodevelopmental disorders, a category of disorders characterised “by the onset of personal, social, academic, and job-related functioning impairments in the “developmental period.”³¹⁸ However, developmental immaturity has no formal recognition under Section 2 as amended, despite the scientific evidence revealing that a child/young person who suffers developmental delays has a high degree of developmental immaturity than the norm for a person of the same age. A developmentally immature child/young person will suffer a higher degree of immaturity with respect to the following attributes of adolescence:

Defective Risk Assessment: Adolescents differ from adults in their perception and attitude toward risk. Due to their relative lack of knowledge and experience, they may be less aware of risks than adults. Teens also tend to overestimate rewards and underestimate risks, and accordingly, may be less risk averse.

Vulnerability to Peer Influence: Adolescents are more vulnerable to peer influence than adults. They may make choices in response to direct peer pressure or out of a desire to secure peer approval.

Distorted Temporal Perspective: Adolescents generally focus on short-term consequences and discount the future more than adults. This difference may be due to their more limited life experiences or cognitive limitations that inhibit their ability to fully understand future consequences.

Difficulty with Self-Management: Adolescents are more impulsive than adults and may have more difficulty

³¹³ Ministry of Justice (2008) para. 55.

³¹⁴ See, for example, American Psychiatric Association, <https://www.psychiatry.org/patients-families/specific-learningdisorder/what-is-specific-learning-disorder> (Accessed April 2022).

³¹⁵ [2010] EWCA Crim 547 at 26.

³¹⁶ *Ibid* at 36.

³¹⁷ As of April 2022.

³¹⁸ National Juvenile Defender Center, *What Juvenile Defenders should know about the DSM-5* Resource Brief for Juvenile Defenders (National Juvenile Defender Center, Washington DC, 2014) p.2.

controlling their own behavior. Teens may also have more trouble regulating their moods and emotions.³¹⁹

However, their cognitive impairment arising from developmental immaturity of the above mentioned is insufficient to warrant a diagnosis of “a recognised medical condition,” as developmental immaturity is not accepted as a medical disorder, illness or condition. It falls outside the scope of “a recognised medical condition” under Section 2 as amended. Hence, developmentally immature children/young people who kill and lack legally relevant capacities are not eligible to successfully Section 2 as amended and receive a partial excuse from criminal responsibility with a manslaughter conviction. Instead, they are convicted of murder and sentenced to the minimum term in detention unless they can successfully plead a different defence (e.g., defence of loss of control).³²⁰

In 2006, the Law Commission was concerned that developmentally immature children/young people who kill would be convicted of murder under the law as enacted in 2009 because Section 2 was “designed with adults in mind” and made “no allowance for “normal” developmental immaturity of a child or young person.”³²¹ As the Law Commission argued (for reasons considered in chapter 5) that developmentally immature children/young people who killed and suffered a substantial impairment of their mental responsibility could not satisfy an “abnormality of mind;” thus, were excluded from successfully pleading Section 2.³²² The Law Commission was ultimately concerned that this issue would continue under Section 2 as amended, with them falling outside the scope of the definitional requirements of the defence. It is important to note that the Law Commission’s proposed defence is different to the law enacted in 2009; specifically, the Law Commission recommended that a person should be guilty of second-degree murder if their capacity was “... substantially impaired by an abnormality of mental functioning arising from a recognised medical condition, developmental immaturity in a defendant under the age of eighteen, or a combination of both ...”³²³ Section 2 as amended excludes a defendant who suffers from developmentally immaturity without “a recognised medical condition” from successfully pleading the defence.

To remedy what the Law Commission thought was an issue with Section 2, they proposed that “developmental immaturity should become in itself a ground on which a verdict of diminished responsibility can be brought in.”³²⁴ The Law Commission argued that the defence should be broad enough to cover “an abnormality of mental functioning arising from a recognised medical condition, *[and] developmental immaturity in a defendant under the age of eighteen, or a combination of both.*”³²⁵ This would have enabled a developmentally immature person below 18 years of age who kills and suffers a substantial impairment of a legally relevant capacity (e.g., the ability to

³¹⁹ Miller-Wilson. L. S, “Law and Adolescence: Examining the Legal and Policy Implications of Adolescent Development Research for Youth Involved in the Child Welfare, Juvenile Justice, or Criminal Justice Systems” (2009) 79 *Temple Law Review* at 321-322.

³²⁰ It is important to note that Professor Bailey proposed a FACTS assessment template to the Law Commission to assess whether the child/young person defendant in homicide cases is developmentally immature. She suggested that the 3rd edition of the Weschler Intelligence Scale for Children (WISC-III), the Welscher Objective Reading Dimensions (WORD) and ICD-10 be used alongside a series of test to examine their abilities in literacy, mental state, and cognitive functioning. See Appendix F, “Assessment Process in Child Homicide Cases” in Law Com (2006) pp.247-260.

³²¹ Law Commission (2005) para. 4.12.

³²² This problem is discussed in more depth in chapter 4.

³²³ Law Com, Report No.304 (2006) para. 9.20.

³²⁴ Law Commission, *A new homicide act for England and Wales?* Consultation Paper No.177 (Law Commission, London, 2006) para 6.84.

³²⁵ Law Com, Report No.304 (2006) para. 9.20.

understand the nature of their conduct or exercise control) to plead the defence under Section 2 as amended successfully. The Law Commission believed that it was unfair to continue to convict a developmentally immature child/young person who kills and lacks legally relevant capacities of murder simply because they could not plead Section 2 as amended.

However, the Government firmly rejected this recommendation. It argued that the magnitude of the Law Commission's concern did not warrant the inclusion of this limb within Section 2 as amended for reasons to be discussed in detail in Chapter four.³²⁶ The objective of the current defence of diminished responsibility is to provide a partial excuse to persons who kill and suffer "an abnormality of mental functioning" arising from "a recognised medical condition," which causes substantial impairment of a legally relevant capacity under Section 52(1A).

Legal commentators have criticised the Government's rejection of the Law Commission's proposal because developmentally immature children/young persons who kill cannot successfully plead the defence of diminished responsibility. Toulson argued that the Government's rationale for excluding it within the defence is peculiar because "if a 12 year old killer has the developmental age of a 12 year old, it is ... not something which the jury can take into account." However, he further observed, "the bizarre result [of the defence is] that if a 25 year old killer has the developmental age of a 12 year old, ... the jury may take into account because it would be a recognised medical condition."³²⁷

Toulson makes clear is that developmental immaturity in a child/young person is not applicable under the defence, even though it is accepted for an adult with the same developmental age, as it is proof of their "recognised medical condition." Consequently, a developmentally immature child/young person who kills and suffers the same substantial impairment of a legally relevant capacity (e.g., form a rational judgment) as the developmentally immature 25-year-old with "a recognised medical condition" cannot successfully plead the defence. By contrast, a 25-year-old developmentally immature adult can successfully plead the defence if they prove that they satisfy the other definitional requirements of Section 2 as amended.³²⁸

The Law Commission subsequently raised and considered whether a new complete defence of "not criminally responsible by reason of developmental immaturity" for those who kill should be introduced in English criminal law in 2013.³²⁹ It is important to note that this paper is not a fully worked out Law Commission proposal but is part of a larger discussion paper on automatism and insanity. As such it has opened the door for the possibility of such a defence in English law and the appeal for the Law Commission to commission a full paper on the workability of it in legal practice. The Law Commission proposed that the defence should apply to those who are "wholly incapable of rationally forming a judgment, appreciating the wrongfulness of his or her acts, or controlling his or her physical actions, as a result of his or her developmental immaturity."³³⁰ In theory, the Law Commission claimed such a defence would be available to developmentally immature children/young people currently excluded from successfully pleading Section 2 as amended.

³²⁶ MoJ (2008) para. 52-55.

³²⁷ Toulson. L. J, "Can the courts provide a more holistic response to developmental immature young defendants without compromising justice?" (Presentation to the Michael Sieff Foundation, London, 28th of April, 2009) p. 5-6.

³²⁸ I will critically explore the full extent of this problem for children and young people in chapter 4 with an analysis of case law.

³²⁹ Law Commission (2013) para. 9.1.

³³⁰ Ibid. at para 1.126.

However, this proposal has been criticised by many legal commentators who endorsed the inclusion of the ‘developmental immaturity’ limb within Section 2 as amended.³³¹ These legal commentators generally argue that the defence would be too narrow since it would only apply to persons who lack complete capacity. As already discussed earlier in this section, most developmentally immature children/young persons do not typically lack a total loss of rationality and control.³³²

As highlighted in section 2.4, the scientific evidence suggests that a developmentally immature child/young person typically suffers diminished capacities, not a complete loss. Thus, a developmentally immature child/young person who kills and suffers substantial impairment of a legally relevant capacity (as opposed to a complete loss of capacity) would not be found “not criminally responsible by reason of developmental immaturity.” Although the Law Commission’s proposal has not been introduced in criminal law, the definitional requirements of this proposed defence will be discussed in greater detail in Chapter 5. I will also provide observations about the narrow scope of the defence if introduced into legal practice. These analyses will be necessary to underpin the legal arguments in the thesis to be presented in Chapter 5 about reform and the need for two separate defences of developmental immaturity.

In summary, the defence of diminished responsibility is a mental condition excuse; a person who kills must prove to the court that they suffer an “abnormality of mental functioning” arising from “a recognised medical condition.” As a result, it is unavailable as an excuse to a child/young person who suffers developmental immaturity (e.g., delays) and kills because it does not fall within the scope of an “abnormality of mental functioning” arising from “a recognised medical condition.” It is a partial and specific defence to murder that justifies a partial excuse based on evidence of “abnormality of mental functioning” arising from “a recognised medical condition, not developmental immaturity.

2.11 Sentencing Factors of Developmental Immaturity for Children/Young People Convicted of Murder

A child/young person’s developmental immaturity is not essential in determining their culpability for murder, but it is considered necessary for sentencing. Specifically, the court can consider a child/young person’s lack of maturity,³³³ behavioural problems (e.g., impulsivity) and vulnerabilities (e.g., special education needs, inexperience, negative influences and emotional

³³¹ De Than and Elvin (2015) 311-12; Childs and Duff (2021).

³³² See, further, section 5.5.

³³³ The Sentencing Council’s Definitive Guideline on *Sentencing Children and Young People* recognises developmental immaturity as a mitigating factor because: “although chronological age dictates in some instances what sentence can be imposed (see section six for more information) the developmental and emotional age of the child or young person should always be considered and it is of at least equal importance as their chronological age. It is important to consider whether the child or young person has the necessary maturity to appreciate fully the consequences of their conduct, the extent to which the child or young person has been acting on an impulsive basis and whether their conduct has been affected by inexperience, emotional volatility or negative influences.” (para 1.5, accessed February 2023, <https://www.sentencingcouncil.org.uk/overarching-guides/magistratescourt/item/sentencing-children-and-young-people/>)

volatility) in mitigation to determine the minimum term (i.e., tariff) of their sentence.³³⁴ The justification for considering these factors is that they are considered less responsible than adults for committing offences because of their developmental immaturity and young age and should be given a reduced sentence to reflect their lower degree of culpability.

As discussed, treating them differently to adult offenders because they are less developed and more vulnerable – is an essential welfarist principle in English law and international law.³³⁵ Article 3 of the UNCRC states that “the best interests of the child shall be a primary consideration in all actions concerning children.” This means that a child/young person must be sentenced proportionality to the seriousness of an offence and their degree of development to safeguard them against lengthy sentences in detention, which would deprive them of their liberty.³³⁶ As a result, the UNCRC recommended that a custodial sentence should only be given as “a measure of last resort and for the shortest appropriate period of time”³³⁷ when the offence is severe and there is no other appropriate sanction.

Over the years, Parliament introduced several statutory provisions that have “formed part of an elaborate legislative scheme which reflected a general policy of treating young offenders quite differently from older ones”³³⁸ and adults in line with Articles 3 and 6 of the ECHR. This policy of treating children/young people differently than adults’ dates to the early 19th -century with the Children Act (1908). Section 103 of this Act abolished the rule that those below 16 years could be sentenced to death for a murder conviction, which was considered unfair. Section 103 provided that they be detained “in such a place and under such conditions as the Secretary of State may direct and while so detained shall be deemed to be in legal custody.”

Section 53(1) of the CYPA (1933), for the same reason, extended this provision to those aged 18 years and below, as amended by The Murder (Abolition of Death Penalty) Act (1965). The current provision is contained in Section 90 of the Powers of Criminal Courts (Sentencing) Act (2000), which provides that:

Where a person convicted of murder or any other offence the sentence for which is fixed by law as life imprisonment appears to the court to have been aged under 18 at the time the offence was committed, the court shall ... sentence him to be detained during Her Majesty’s pleasure.

Though Sections 103 and 53(1) excluded children/young persons from being sentenced to death for murder, these statutory instruments have been criticised for failing to identify the release process for determining their minimum term. The major problem with Section 2 of this Act (1965) was that it only provided generic guidance that “no person convicted of murder shall be released ... on licence ... unless the Secretary of State has prior to such release consulted the Lord Chief Justice ... together with the trial judge if available.” Stone observed that this aspect of their sentence was “simply left to the Secretary of State to resolve”³³⁹ and the trial judge. As a result, Parliament offered further guidance on how the Home Secretary could exercise their discretion by enacting Section

³³⁴ Sentencing Council (2017) paras. 1.15-16, 2.6 and 4.10.

³³⁵ Refer back to section 2.5.

³³⁶ von Hirsch, A, Ashworth, A, Roberts, J, *Principles Sentencing Readings on theory and Practice* (Hart Publishing, 3rd Edition, Oxford, 2009) p. 299.

³³⁷ Committee on the Rights of the Child, *General Comment No.24 (201x), replacing General Children’s rights in juvenile justice* (2019) para. 84.

³³⁸ Simpson, A. W. B, *Prem Singh v. United Kingdom* (unreported), 21 February 1996; 1994/503/589, E.C.H.R. p.22.

³³⁹ Stone, N, “Children who Murder: Indeterminate Sentencing in Law and Practice” (2018) 18 *Youth Justice* at 83.

35(2) of the Criminal Justice Act (1991). Section 35(2) clarifies that the Home Secretary could release a child/young person on license, but only if the Parole Board recommended their release and “after consultation with the Lord Chief Justice of England together with the trial judge if available.”³⁴⁰

Although Parliament intended to provide the Home Secretary with an appropriate direction to determine the minimum term that a child/young person must serve in detention before being released on parole, the wording of Section 35(2) was erroneous with the inclusion of the terms “after consultation with” and resulted in the Home Secretary having absolute discretion in release decisions.³⁴¹ Under Section 35(2), the Home Secretary was given the statutory power to disregard any endorsements for a lower minimum term and early release by the trial judge, Lord Chief Justice and Parole Board.

The Home Secretary’s unparalleled reach is evident in the case of the two boys (aged ten years) who kidnapped and killed two-year-old boy, James Bulger, *R v Secretary of State for the Home Dept, ex p Venables, R v Secretary of State for the Home Dept, ex p Thompson* [1997].³⁴² This case attracted significant publicity concerning the minimum term as the trial judge recommended that both boys be sentenced to 8 years in detention to satisfy the requirements of deterrence and retribution for murder. The trial judge justified his reasoning as follows:

Very great care will have to be taken before either defendant is allowed out into the general community. Much psychotherapeutic, psychological and educational investigation and assistance will be required. Not only must they be fully rehabilitated and no longer a danger to others but there is a very real risk of revenge attacks upon them by others ... If the defendants had been adults I would have said that the actual length of deterrence necessary to meet the requirements of retribution and general deterrence should have been eighteen years. However, these two boys came from homes and families with great social and emotional deprivation. They grew up in an atmosphere of matrimonial breakdown where they were exposed to, saw, heard, or suffered abuse, drunkenness and violence ... In my judgment the appropriate length of detention necessary to meet the requirement of retribution and general deterrence for the murder, taking into account all its appalling circumstances and the age of the defendants when it was committed is eight years ... Eight years is “very very many years” for a ten- or eleven- year-old. They are now children. In eight years’ time they will be young men.³⁴³

Considering the aggravating features of the case, the Lord Chief Justice thought that Venables and Thompson should have received a higher term than proposed by the trial judge. He recommended to the Home Secretary that the defendants should have served a minimum term of 10 years in detention for killing James Bulger before being released on parole.³⁴⁴

Though the Home Secretary reviewed these recommendations by the trial judge and the Lord Chief Justice, he ultimately decided that they should receive a minimum term of 15 years before being released on parole because there was significant public concern that the defendants would not be sentenced punitively for their heinous actions in the killing. Over 20,000 members of the public signed petitions, and the Home Secretary was sent written correspondence stipulating that Venables

³⁴⁰ Section 35(2) of the Criminal Justice Act (1991).

³⁴¹ Note that Section 28 of the Crime (Sentences) Act (1997) transferred the power of the Home Secretary to decide the release of children and young persons convicted of murder to the Parole Board.

³⁴² *R v Secretary of State for the Home Dept, ex p Venables, R v Secretary of State for the Home Dept, ex p Thompson* [1997] 3 All ER.

³⁴³ House of Lords, *Judgment – Reg. v Secretary of State for the Home Department, Ex parte V. and Reg. v. Secretary of State for the Home Department, Ex parte T* (House of Parliament, Session 1997-98, 12th of June 1997).

³⁴⁴ Fionda, J, “Case Commentary, *R v Secretary of State for the Home Department ex parte Venables and Thompson*, The age of innocence? - the concept of childhood in the punishment of young offenders” (1998) 10 *Child & Family Law Quarterly* at 78.

and Thompson be given lengthy and punitive sentences for killing a 2-year-old boy. Although he received recommendations from the judiciary, the Home Secretary ignored them to pacify the public.³⁴⁵

Following the Home Secretary's decision, the defendants appealed to the Court of Appeal, challenging the lawfulness of the Home Secretary's verdict in 1996, which resulted in the Divisional Court upholding their grounds of appeal. The Home Secretary then appealed to the Court of Appeal successfully on the lawfulness of this decision, which resulted in him further appealing to the House of Lords in *R v Secretary of State for the Home Department, ex parte Venables and Thompson* [1998].³⁴⁶

Here, the House of Lords ruled that the best interests of the child under Section 44 of the CYPA (1933) demanded that a different approach be taken to determine the sentences of children and young persons convicted of murder.³⁴⁷ Their Lordships also claimed that the Home Secretary had acted procedurally unlawfully when he sentenced Venables and Thompson with a 15-year tariff. The House of Lords stated that the Home Secretary's sentence was "disproportionately long" for two 10-year-old defendants and was "without due regard to the needs of rehabilitation" enshrined in Section 44.³⁴⁸ As Lord Woolf commented, the tariff was wholly inappropriate because it amounted to "150% of the applicants' lives so far."³⁴⁹ Their Lordships further stated that the Home Secretary gave in to the pressures of public opinion when setting the 15-year tariff and should have remained detached. Accordingly, the House of Lords quashed the Home Secretary's appeal.³⁵⁰

In response to the House of Lords ruling, the Home Secretary established a new sentencing policy for children/young persons convicted of murder to address the unlawfulness of his actions in this case. The Department of the Home Secretary would continuously review all tariffs set by his office reflecting the child/young person's rehabilitative progress during detention and their general immaturity. He also requested that the representatives of Venables and Thompsons make further statements to the Department so that he could provide them with new minimum terms before being released on parole.

Consequently, Venables and Thompson presented their case to the European Court in *V. v United Kingdom* (2000).³⁵¹ They argued that the Secretary of State breached several rights encapsulated in the ECHR when he reached his decision. Specifically, the defendants' Article 6(1) right to a fair trial; their Article 3 right that prohibited torture, inhuman and degrading treatment or punishment; and their Article 5 right to liberty and security. The European Court held that the Secretary of State violated these Articles.³⁵²

It is beyond the scope of the thesis to discuss how the Home Secretary infringed on their human rights and why the ECHR concluded that these rights were violated. What is essential to the thesis is that the ECHR's decision prompted the Government to implement policy changes to change how

³⁴⁵ Stone (2018) at 84.

³⁴⁶ [1998] AC 407.

³⁴⁷ Fionda (1998) at 77.

³⁴⁸ *T v United Kingdom* (1999) 7 BHRC 659 at 24.

³⁴⁹ [1997] 2 WLR 67 at p 92.

³⁵⁰ (1999) 7 BHRC 659 at 24.

³⁵¹ *V. v United Kingdom* (2000) 30 EHRR 121.

³⁵² (1999) 7 BHRC 659 at pp. 2-4; Hollingsworth, K., "Judicial approaches to children's rights in youth crime" (2007) 19 *Child and Family Law Quarterly* 48-50.

children/young persons convicted of murder were sentenced to dilute the discretionary power held by the Home Secretary.³⁵³

Following the ECHR's ruling, the Government introduced legislation,³⁵⁴ specifically, the Criminal Justice Act (2003)(CJA), to change how a child/young person's minimum term is determined and who establishes their tariff. Section 269 of this Act (2003) (now replaced by Section 416(1) of the Sentencing Act (2020) provides that the trial judge must specify the minimum term that a child/young person is to serve in detention before the Parole Board considers their release. The trial judge is no longer required to submit sentence recommendations to the Home Secretary for them to establish a minimum term.

The trial judge has the discretion to determine the appropriate length that a child or young person must serve in detention, having sole regard for the aggravating and mitigating factors of the case (now under Schedule 21 Section 9-10 of the Sentencing Act (2020), which precludes the trial judge from being swayed by sociopolitical issues.³⁵⁵ The trial judge must consider mitigating factors such as "an intention to cause serious bodily harm rather than to kill," the defendant's mental disorder³⁵⁶ or mental disability that reduced his degree of culpability and the defendant's age at the time of the killing.³⁵⁷ Aggravating factors include the defendant's degree of planning or premeditation, the victim's vulnerability (i.e., age or disability) and the suffering inflicted on the victim by the defendant before the victim's death.³⁵⁸ A child/young person's minimum term will differ depending on the case's mitigation and aggravating factors (listed above).

While the CJA resolved the issues raised in Bulger by changing the landscape of how children/young persons are sentenced for murder, it brought to light other problems with sentencing legislation. Specifically, the length of the 12-year starting point and tariff that those between 10 and 17 years convicted of murder must serve in detention.³⁵⁹ The Joint Committee on Human Rights observed that the sentence imposed on children/young persons is "effectively a life sentence, as the offender serving detention during Her Majesty's Pleasure will never be released from prison if a parole board does not consider it safe for them to be released."³⁶⁰ This is a fundamental issue because a child/young person must serve a set number of years in detention before the Parole Board is eligible to review whether it is safe for them to be released into society on license.³⁶¹ The problem, Judge LJ observed, in *Attorney General's Reference No. 126 of 2006 (H.)*. [2007]³⁶² with applying Schedule 21 is that there is:

³⁵³ For an analysis of the ECHR's ruling see, Haydon, D, Scarton, P, "Condemn a Little More, Understand a Little Less": The Political Context and Rights Implications of the Domestic and European Rulings in the Venables-Thompson Case" (2000) 27 *Journal of Law and Society* 416-448.

³⁵⁴ See also Section 82A of the Powers of Criminal Courts (Sentencing) Act (2000), now repealed by Section 416(1) of the Sentencing Act (2020).

³⁵⁵ *R v Secretary of State for the Home Department, ex parte Furber* [1998] 1 *All ER* 23 at 26-27.

³⁵⁶ The Sentencing Council's "Sentencing offenders with mental disorders, developmental disorders, or neurological impairments" came into effect on the 1st of October 2022 and defines a developmental disorder as "conditions which may be apparent at birth, but always have early enough onset that the individual never quite fitted within the average behavioural range. Behaviour has three main components – thinking (cognitions), feeling (emotions, affect) and actions. Autism, generalised or specific intellectual (learning) disabilities, and personality disorders are examples." Annex A.

³⁵⁷ Schedule 21, section 10 (a)-(g).

³⁵⁸ Schedule 21, section 9(a)-(g).

³⁵⁹ Dated June 2022.

³⁶⁰ Joint Committee on Human Rights, *Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People* (Parliament Publications, 23rd of September 2021) para. 28.

³⁶¹ As of June 2022

³⁶² *Attorney General's Reference No. 126 of 2006 (H.)*. [2007] 2 *Cr. App. R. (S.)* 59.

No mathematical table can be produced which calculates the culpability of a young offender with any specific age, and no list, however carefully drawn up, can provide an accurate reflection of the way in which a young offender may or may not have learned from or been damaged by the experiences to which his young life has been exposed.³⁶³

The trial judge has the discretion to fix a significantly higher minimum term for a child/young person above the 12-year minimum starting point based on their subjective consideration of the aggravating features of the case. In this case, H was aged 14 years of age at the time of conviction and was sentenced by the Court of Appeal to serve a minimum term of 15 years in detention, three years higher than the starting point for killing a fellow student aged 11 years. The Court of Appeal thought that the victim's disability (mental incapacity) warranted a higher tariff as Sch.21 provided explicitly that the court must consider "the fact that the victim was particularly vulnerable because of age or disability"³⁶⁴ as an aggravating factor of the case. Similarly, in the case of *R v Cornick* [2015],³⁶⁵ the defendant (aged 15 years) was convicted of murder for fantasising and killing a female schoolteacher at his school with a knife. The trial judge observed that the aggravating features of the case "would [have] attract[ed] a starting point of 25 years" if he had been an adult, not a young person. Considering the facts (C's guilty plea and adjustment disorder), the Court of Appeal sentenced him to a reduced fixed term of 20 years.³⁶⁶ As a consequence, Stone argued that the current law is "decidedly arbitrary" because it operates with a:

One-size-fits-all approach [that] specifies a common 'starting point' of 12 years for the purposes of tariff determination, irrespective of whether the murder would have attracted a whole life order or 15 years for an adult perpetrator, with unfettered upwards or downwards range, taking account of the aggravating and mitigating factors set out in Schedule 21, extending to at least 25 years (as in *Cornick*, a decision strongly suggesting some element of denunciation, before credit for plea), thus determining that a detainee is ineligible for release until mid-life.³⁶⁷

Therefore, Harris observed that the current sentencing guidelines "requires a more thoughtful and considered approach which, while starting with the seriousness of the offence, places the emphasis on individualisation and a closer examination of culpability."³⁶⁸ In light of these criticisms, the Government proposed two legislative changes to the sentencing of children/young people convicted of murder, which are laid out in Sections 127-128 of the Police, Crime, Sentencing and Courts Act (2022)(PCSC). The Government indicated that the PCSC would do the following:

- Change how discretionary life sentence minimum terms are calculated to ensure that the minimum term served in custody reflects the seriousness of the offence.
- Change the minimum term starting points for murder committed as a child to ensure that the seriousness of the offence is taken into account and there is less of a gap between older children and young adults.³⁶⁹

³⁶³ Ibid. at p. 2.

³⁶⁴ Schedule 21, Section 10(b) of the Criminal Justice Act (2003).

³⁶⁵ *R v Cornick* [2015] 1 Cr. App. R. (S.) 69.

³⁶⁶ See Stone (2018) at 86.

³⁶⁷ Ibid. at 92.

³⁶⁸ Harris, L, "Sentencing: *R v Markham* (Stan Lucas)" (2017) 9 *Criminal Law Review* at 732.

³⁶⁹ Ministry of Justice, *A Smarter Approach to Sentencing* Consultation Paper 292 (HMSO, London, September 2020) p.86.

As discussed, in current legal practice, children/young persons convicted of murder are sentenced to the starting point of 12 years in detention.³⁷⁰ In determining an appropriate sentence, the court must set out the minimum term that they will serve in detention before being considered by the Parole Board for release into society. While the court has some degree of flexibility with the starting point for the minimum term, the courts can set a lower or higher tariff than the minimum starting point based on the relevant mitigating and aggravating factors (e.g., the defendant’s maturity learning difficulties and behaviour towards the victim) of the case.³⁷¹ As a result, the Government stated that “the limitations of the current system mean that offenders very close to the age of 18 can receive a significantly shorter sentence than offenders only a few months older would.”³⁷² The Government’s justification for changing the starting point is that “the fixed 12-year starting point for children does not account for the seriousness of the crime, nor does it reflect the different stages of development children go through between the ages of 10 and 17” to create a criminal justice system that is fairer.³⁷³ Thus, Section 127 provides that:

Starting points for murder committed when under 18

In Schedule 21 to the Sentencing Code (minimum terms in mandatory life sentences), for paragraph 6 substitute—

“5A(1) This paragraph applies if—

- (a) the offender was aged under 18 when the offence was committed, and
- (b) the offender was convicted of the offence on or after the day on which section 127 of the Police, Crime, Sentencing and Courts Act 2022 came into force.

(2) The appropriate starting point, in determining the minimum term, is the period given in the entry in column 2, 3 or 4 of the following table that corresponds to—

- (a) the age of the offender when the offence was committed, as set out in column 1, and
- (b) the provision of this Schedule that would have supplied the appropriate starting point had the offender been aged 18 when the offence was committed, as set out in the headings to columns 2, 3 and 4.

³⁷⁰ Section 90 of the Powers of Criminal Courts (Sentencing) Act (2000).

³⁷¹ Refer back to Schedule 21.

³⁷² MoJ (2020) p.81.

³⁷³ Ibid. p. 91.

1	2	3	4
<i>Age of offender when offence committed</i>	<i>Starting point supplied by paragraph 3(1) had offender been 18</i>	<i>Starting point supplied by paragraph 4(1) had offender been 18</i>	<i>Starting point supplied by paragraph 5 had offender been 18</i>
17	27 years	23 years	14 years
15 or 16	20 years	17 years	10 years
14 or under	15 years	13 years	8 years

6(1) This paragraph applies if—

(a) the offender was aged under 18 when the offence was committed, and

(b) the offender was convicted of the offence before the day on which section 127 of the Police, Crime, Sentencing and Courts Act 2022 came into force.

(2) The appropriate starting point, in determining the minimum term, is 12 years.

The Government claimed that these changes will be fairer to young persons “closer to the age of 18, will have higher starting points, while younger children will have lower starting points to reflect their reduced maturity and development.”³⁷⁴ The Government’s justification for sentencing 17-year olds to a longer starting point than children is that “a 17-year-old, a week before they turn 18, is likely to have more concept of responsibility than a 11-year-old.”³⁷⁵ Under the PCSC Act, there will be three starting points for children/young persons sentenced for murder based on age and will replace the starting point of 12-years in detention. The Government indicated that these new minimum terms “will introduce a more gradual shift to adult sentences, reducing the gap that currently exists” and should give “courts the discretion to set a tariff higher or lower than the starting point should the circumstances of the case warrant it.”³⁷⁶ From the trial judge’s perspective, this reform will make the sentencing of children/young persons convicted of murder more flexible to accommodate their degree of (im)maturity with the seriousness of the crime committed. However, it is not yet clear how the Act will achieve what the Government has envisioned for children/young persons until it becomes law, the date of which is still to be confirmed.³⁷⁷

³⁷⁴ Ibid. at p.92.

³⁷⁵ Joint Committee on Human Rights (September 2021) para. 34.

³⁷⁶ MoJ (2020) p.93.

³⁷⁷ 28th of June 2022.

While the Government believes there is some degree of attractiveness with these gradient terms, Section 127 was criticised by legal commentators because it may not be fairer in legal practice than the current law. For instance, the Youth Justice Board stated that:

The Bill creates a distinction between younger and older children, so bringing 16 and 17 year-olds into scope for minimum terms does not treat them as individuals and does not take into account their childhood or developmental stage; it treats them as if they are adults.

That is at odds with the convention, which very clearly defines that a child is anyone under the age of 18. There is no sliding scale below the age of 18 at which it is acceptable to treat somebody as more or less of a child; it is everybody under the age of 18.³⁷⁸

The Youth Justice Board argued that these starting points need to adequately reflect the varying degrees of development and immaturity of those aged between 10 and 17 years. The problem is that most under 18 years sentenced for murder are between 15 and 17 years old. During 2017 and 2019, there were 101 sentences for murder; 2% were between 12 and 14 years, 59% were between 15 and 17 years, and 39% were young adults aged 18 to 20.³⁷⁹ This means that most young persons sentenced for murder “would face longer tariffs as a result of these changes, although some younger children may receive shorter tariffs,” which the Board believed was unfair.³⁸⁰ Until this Act is enforced, the Youth Justice Board’s arguments cannot be analysed further.

In addition, Section 128(27A-27B) of this Act will carry forward the existing law for the minimum term review for persons sentenced to detention during Her Majesty’s Pleasure. However, this Section will change when a child/young person’s term is reviewed whilst serving their sentence. In current law, those under 18 are entitled to a review halfway through their minimum term. According to the Howard League:

Young people can only have their minimum term reduced if they have a significant change in maturity and outlook, if continued detention would seriously undermine their development in ways which cannot be mitigated in prison, if there is new evidence about the circumstances of the offence or if they have made exceptional progress in prison.³⁸¹

Section 128(27A)(4) will make it possible for them to apply for a further review “2 years after an unsuccessful review at the halfway point.”³⁸² The Government stated that this change is essential as it will ensure all tariffs reflect how they mature and change throughout their detention. In addition, the Government proposed that the number of parole reviews will be reduced as soon as the defendant turns 18 to inform any “accelerated development and maturation” that “adults do not go through.”³⁸³ The Government anticipates that these changes will provide a fairer criminal justice system:

³⁷⁸ Joint Committee on Human Rights, *Oral evidence: Legislative scrutiny of the Police, Crime, Sentencing and Courts Bill, and youth justice*, HC 451 9 (Houses of Parliament, Wednesday 30th of June 2021) p.4.

³⁷⁹ Home Office, *Youth Measures in the Police, Crime, Sentencing & Courts Bill: Equalities Impact Assessment* (13th of May, 2021) (Accessed May 2022) <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021equality-statements/youth-measures-in-the-police-crime-sentencing-courts-bill-equalities-impact-assessment>.

³⁸⁰ Joint Committee on Human Rights (September 2021) para. 31.

³⁸¹ Howard League for Penal Reform, *Written Evidence (PCS0396)* (Accessed May 2022) <https://committees.parliament.uk/writtenevidence/36293/html/>

³⁸² MoJ (2020) p.94.

³⁸³ Ibid.

That recognises that offenders who were sentenced to DHMP as children but have since turned 18 in custody are now adults and have passed the age where significant development occurs, while still accounting for the fact that they were children and still maturing when the crime was committed and they were sentenced.³⁸⁴

These changes are also envisioned to reduce the stress on bereaved families during the review process since they “are contacted every time a review is initiated, and to provide them with greater certainty.”³⁸⁵ However, Claudia Sturt of the Youth Justice Board remains unconvinced and has proposed different measures. She stated that:

An example might be to establish with bereaved families how often they wish to be contacted and then to provide them with periodic updates rather than updates triggered by processes. In that way we can take into account their preferences for frequency. We need to make sure that contact with those families is high quality, empathetic and honest, because those are the factors that will help to promote healing for those families within this process, but I feel very strongly that removing opportunities for review of tariff lengths is not the solution to dealing with the grief and distress of bereaved families.³⁸⁶

The Government has intended to overhaul how children/young persons are sentenced for murder between 10 and 17 years. Whilst this Act has received some support, there has also been criticism of its future effectiveness and fairness compared to the current law. Unfortunately, these changes and their future impact cannot be explored any further until the PCSC Act comes into force.

2.12 Conclusion

In this chapter, what has emerged is that developmental immaturity is a factor deserving of excuse in the paradigm of the responsible person but not in English legal practice. Developmental immaturity is depicted as a factor that can diminishingly affect a person’s autonomy, practical rationality and fair opportunity to avoid wrongdoing. The assumption is that it is unfair to blame and punish a developmentally immature child/young person who lacks legally relevant capacities. This view is widely accepted by legal commentators, Government officials and judges who have been the guiding force of proposed policy reforms. However, developmental immaturity is not the basis of an exculpatory defence for those who suffer from it.

The defence of *doli incapax* was abolished in 1998; the current defence of diminished responsibility does not allow developmentally immature children/young persons who kill and lack legally relevant capacities to plead the defence successfully. The MACR remains unchanged and fixed at ten years of age. Consequently, a developmentally immature child/young person who kills and lacks legally relevant capacities (e.g., the ability to form a rational judgment) is convicted of murder and sentenced to the starting point of 12 years in detention.³⁸⁷ This is a problem because there is no specific developmental immaturity defence for children/young people who can form the intention to kill or cause really serious harm yet lack the understanding and appreciation of the significance of killing another person.

³⁸⁴ Ibid.

³⁸⁵ MoJ (2020) p.94.

³⁸⁶ Joint Committee on Human Rights (2021) p.9.

³⁸⁷ As of July 2022.

The next chapter will continue the analysis of developmentally immature children/young people within the dimension of neuroscience. The purpose of Chapter three is to emphasise how criminal law has come to embrace neuroscience and show the extent to which neuroscience supports the view that developmental immaturity is a basis of excuse for children/young people who suffer from it. It will also demonstrate the effects of developmental immaturity on the child/young person's capacity and behaviour by examining the latest neuroscientific findings on adolescent brain development.

Chapter 3

Neuroscientific Insight of Developmental Immaturity, Adolescent Development and Behaviour

3.1 Introduction

The dominant idea of responsibility is that criminal responsibility is founded on mental capacity – specifically, individual autonomy and practical rationality.³⁸⁸ Voluntarist accounts argue that persons are criminally responsible for their past criminal conduct if they rationally and freely choose to break the law and disregard the opportunity to act otherwise than they did. The choice to act and the capacity to reason are essential to criminal law doctrine (and the offence of murder).³⁸⁹ Where someone who intended to kill or cause really serious harm deliberately chose to act, it would be fair to blame and punish a person charged with murder. However, a person who kills and suffers an “abnormality of mental functioning” arising from “a recognised medical condition” that substantially impairs their ability to understand the nature of their conduct has still chosen to break the law in the basic sense by killing another individual. Consequently, the defence of diminished responsibility provides such a person with partial exculpation and inculpation (a manslaughter conviction) because their substantial impairment[s] contributed to their actions in the killing in England and Wales.³⁹⁰

Over the years, criticism has ensued because this idea of criminal responsibility has not been uniformly supported and implemented in English law for developmentally immature children/young persons who kill. The view is that developmental immaturity is a reasonable justification for an excuse because persons charged with murder who suffer from it might lack legally relevant capacities.³⁹¹ Thus, contemporary legal commentators and this thesis argue that it is unfair to blame and punish such persons who lack practical rationality and individual autonomy for their past criminal conduct in criminal law.³⁹² However, developmental immaturity is not recognised as an excusing condition from criminal responsibility in English legal practice, more specifically, within

³⁸⁸ See, sections 2.2 and 2.3.

³⁸⁹ Duff (2004) 444-446; Hart (2008) p. 44, 117 and 227; Coppola (2020) p. 18.

³⁹⁰ Refer back to section 2.8.

³⁹¹ Elliott (2011) at 289. See the definition of developmental immaturity on p. 1.

³⁹² Refer back to section 2.3 and 2.8.

Section 2 as amended.³⁹³ Accordingly, developmentally immature children/young persons who kill are convicted of murder and sentenced to serve in detention the starting point unless they can plead another defence.³⁹⁴

This chapter will show that neuroscience began as a broad research field of scientific investigation that evolved to reflect advancements in diagnostic tools and neuroscientific knowledge with applicability in law. Then, it will consider what is scientifically meant by ‘adolescence’ by surveying the concept’s development, from its psychological origin to its current multidisciplinary classification as a period of immaturity. Insights from adolescent development studies – cognitive neuroscience, psychiatry, psychology, sociology and behaviour – will reveal that developmental immaturity influences children/young people’s emotional choices, decisions and behaviour. Neurobiological changes in the frontal lobe significantly affect their cognitive and emotional capacities (e.g., understanding emotional cues) during adolescence. For example, their abilities are to reason, hold attention, respond to inhibition, exercise self-control, process speed and emotionalise. These insights are essential to the thesis as these studies ground the argument that developmental immaturity is a justifiable basis for an excuse from criminal responsibility.

3.2 Neuroscience and the Study of the Brain

‘What is neuroscience?’ is a question of scientific research that reflects the scale and depth of findings published in the field. Zhang highlighted the difficulty of defining neuroscience; he “ask[ed] neuroscientists to define the area that they are studying and one is bound to get a different answer every time.”³⁹⁵ As a result, several definitions of ‘neuroscience’ have been presented in the discipline because a generally acknowledged definition is absent in modern literature. Because of space limitations, the thesis cannot explore all these definitions; therefore, it will define neuroscience in terms of cognitive neuroscience because the cognitive sciences underpin the thesis’s discussion of developmental immaturity and brain development.

Modern scientists generally accept that “neuroscience is the study of the cognitive processes that underlie human behaviour.”³⁹⁶ It derives from the notion that studying the mind and behaviour can be achieved through examining the brain to explain why people think and act in specific ways,³⁹⁷ and “the newest kid on this particular scientific block is cognitive neuroscience ...”³⁹⁸ Cognitive neuroscience is “an investigative field that seeks to understand how the mind arises from the central nervous system, in particular the brain.”³⁹⁹ Cognitive neuroscience is an interdisciplinary field that links it with the social sciences, psychiatry, psychology, biology and political sciences “by focusing on the biological mechanisms underlying cognition, with a specific focus on the neural substrates

³⁹³ See the Law Commissions proposal for a new complete defence of “not criminally responsible by reason of developmental immaturity” in section 2.10. See also, chapter 4.

³⁹⁴ House of Lords (2017) p.4. See, section 2.4, 2.8 and 2.9.

³⁹⁵ Oberst Ruttimann. J, “The many fields of neuroscience: shifting from synapses to society” (4th of November, 2011) *Science* p.2.

³⁹⁶ Rosenthal (2018) 296.

³⁹⁷ Ibid; Farah (2012) 572-573.

³⁹⁸ Greene. J, Cohen. J, “For the law, neuroscience changes nothing and everything” (2004) 359 *Philosophical Transactions of the Royal Society of London, Series B, Biological Sciences* 1775.

³⁹⁹ Erickson. S. K, “Blaming the Brain” (2017) 27 *Minnesota Journal of Law, Science & Technology* 42.

of mental processes and their behavioural manifestations.”⁴⁰⁰ Neuroscience has significantly contributed to understanding cognitive development by revealing the mechanisms underpinning behavioural observations psychologists and psychiatrists make. More specifically, neuroscience has contributed to the knowledge of cognitive development by proving that the brain is highly plastic during adolescence and does not fully mature until early adulthood.⁴⁰¹ Research into cognitive, emotional and social processes rapidly developed in the latter part of the 20th century with the advancement of functional neuroimaging; thus, it is essential to acknowledge significant growth in the field before this period, as evidenced by the sizable literature.

The origin of neuroscience dates to ancient times.⁴⁰² Contemporary scientists have primarily come to understand it significantly developed as a scientific field from studying the biological underpinnings of the brain, mind (mental states) and behaviours of persons by scientists in the 18th and 19th centuries. The works of scientists such as Angelo Mosso, Pierre Paul Broca and Franz Gall revolutionised our understanding of how the relationship between the mind and the brain affects a person’s behaviour and developed technologies to study its inner workings.⁴⁰³ For instance, Franz Gall conducted a comparative study of cadaver skulls of murderers to carnivorous animal skulls. He discovered that murderers and predatory animals shared “... a prominence strongly swelling out immediately over the external opening of the ear...,” which is attributable to violence and aggression.⁴⁰⁴ Following specific examinations of the neurobiological structure/appearance of cadaver brains and skulls, scientists could interpret persons’ cognitive (in)capabilities and behaviours.

As highlighted, another critical development of neuroscience is the 20th century with the advancement in brain imaging technologies such as positron emission tomography (PET) and fMRI.⁴⁰⁵ These technologies led scientists, for example, to isolate brain activity and processes in 3D format when people performed psychological tasks such as mental problems. For Farah, “these advances enabled the rapid growth of cognitive neuroscience in the 1990s”⁴⁰⁶ because scientists could view 3D images and subtract fMRI data from specific brain areas/time points when a participant’s thinks and responds (e.g., behaviour) to stimuli during a mental task.⁴⁰⁷ From the images and data, scientists can reveal critical “... differences between brain states that conveys valuable information about human mentation.”⁴⁰⁸

⁴⁰⁰ Ibid.

⁴⁰¹ Spear (2000) at 447.

⁴⁰² Gross. C. G, *A Hole in the Head: More Tales in the History of Neuroscience* (MIT Press, Cambridge MA, 2009) p. 1.

⁴⁰³ Rose. S, *The Future of the Brain: The Promise and Perils of Tomorrow’s Neuroscience* (Oxford University Press, New York, 2006) at pp. 113-116, 165-173, 187-212; See, generally, Cobb. M, *The Idea of the Brain* (Profile Books, London, 2020).

⁴⁰⁴ Prof. Angelo Mosso (1846–1910) (1946) 157 *Nature* 689-690; Ghosh. S. K, “Camillo Golgi (1843-1926): scientists extraordinaire and pioneer figure of modern neurology” (2020) 31 *Anatomy & Cell Biology* 385-392; Society for Neuroscience, *The Creation of Neuroscience* (accessed October 2022) <https://www.sfn.org/about/history-of-sfn/the-creation-of-neuroscience/~media/SfN/Images/History%20of%20SfN/pdf/HistoryofSfN.ashx>;

⁴⁰⁵ First the positron emission tomography (PET) machine followed by functional magnetic resonance imaging machine (fMRI). See, further, Raichle. M. E, “A brief history of human brain mapping” (2008) 32 *Trends in Neuroscience* 118; Goodenough. O. R, Tucker. M, “Neuroscience Basics for Lawyers” (2011) 62 *Mercer Law Review* 945-1335.

⁴⁰⁶ Farah (2012) at 575.

⁴⁰⁷ Neuroscience is divided into numerous branches of study from behavioural neuroscience, and developmental neuroscience to computational neuroscience. Accordingly, it is important to acknowledge that neuroscience has developed to such an extent neuroscientists research the nervous system, structure, function, development and abnormalities in different ways with numerous methods. See, for example, Panksepp. J, Solms. M, “What is neuropsychanalysis? Clinically relevant studies of the minded brain” (2012) 16 *Forum Special Issue: Cognition in Neuropsychiatric Disorders* 6-8.

⁴⁰⁸ Erickson (2017) at 44; see further, Crawford. M. B, “The Limits of Neuro-Talk” (2008) 19 *New Atlantis* at 65.

Brain imaging methods were popular during the 1990s to study cognition (e.g., memory and language) and supported insights from psychology and psychiatry with a functional examination of the biological underpinnings of brain activity. Although the focus moved to the study of emotion, combining the tools of cognitive and social neurosciences from the mid-1990s, neuroimaging has continued to play a dominant methodological role⁴⁰⁹ because of advancements in functional and structural imaging devices, such as diffusion tensor imaging and voxel-based morphometry. It has helped “... realize the potential of functional imaging to illuminate the functioning of the brain as a whole system.”⁴¹⁰ Consequently, studies revealed that emotional and cognitive developments are directly linked to the brain and behaviour to the extent that they influence a child/young person’s decision-making and actions. In particular, “the frontal lobes home to key components of the neural circuitry underlying “executive functions” such as planning, working memory, and impulse control, are among the last areas of the brain to mature; they may not be fully developed until halfway through the third decade of life.”⁴¹¹

While some of these insights confirmed long-standing assumptions in psychology, psychiatry and sociology, such as “... the slow maturation process that plays out in the social context is mirrored by a slow maturation process at the neural level”⁴¹² during adolescence. Recent legal literature has acknowledged the future value of looking to the cognitive sciences (i.e., how cognitive processes influence a person’s mental functioning and behaviour) from a developmental perspective to help answer questions critical to criminal law and legal doctrine.⁴¹³

It is important to note that there are numerous ways that the cognitive sciences can aid future work in criminal law (e.g., doctrine and legal practice). Because of space limitations, the thesis cannot explore all the contributions the cognitive sciences can make in criminal law about developmentally immature children/young persons.⁴¹⁴ Thus, it will analyse key discussions and ideas about how the cognitive sciences might aid future criminal law work on mental capacity and criminal responsibility for children/young persons. This is important because these discussions/ideas fundamentally contribute to a deeper understanding of adolescent brain development and highlight cognitive science’s significant value to criminal law.⁴¹⁵

⁴⁰⁹ It is important to acknowledge that brain imaging technologies play an important role in modern neuroscientific studies for the reasons provided; thus, brain imaging data/insights will significantly contribute to the discussion of adolescent brain development (e.g., frontal lobe development) findings within this chapter. Brain imaging might be considered a key method in the study of adolescent brain development, for the reasons established and has generated a significant body of scientific literature. However, it is important to appreciate that scientists (e.g., neuroscience and psychiatry) employ other methods to study adolescent brain development such as conduct such as systematic standardised approaches. For instance, psychiatrists conduct interviews where they ask a series of structured questions to gather a detailed description (e.g., history) of the child or young person which helps them to identify diagnostic criteria.

⁴¹⁰ Le Bihan. D, Mangin. J. F, Poupon. C, Clark. C. A, Pappata. S, et al. “Diffusion tensor imaging: concepts and applications” (2001) 13 *Journal of Magnetic Resonance Imaging* 534-546; Farah (2012) at 575.

⁴¹¹ Johnston. S. B, Blum. R. W, et al., “Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy” (2009) 45 *Journal of Adolescent Health* 216.

⁴¹² Aronson. J, “Neuroscience and Juvenile Justice” (2009) 42 *Akron Law Review* 917.

⁴¹³ Walsh (2011); Arthur (2012); Lamb. M. E, Sim. PY. M, “Developmental Factors Affecting Children in Legal Context” (2013) 13(2) *Youth Justice* 131-141.

⁴¹⁴ There many ways and forms the cognitive sciences and criminal law do and can intersect. For example, lessons from neuroscience have been used in criminal law doctrine to inform the legal debate (e.g., folk psychology) about whether free will is an illusion. Furthermore, this debate may differ according to the topic of concern (e.g., whether determinism is a threat to responsibility or what effect free will have on responsibility) or more broadly (e.g., if scientific explanations have a role to play in criminal law). Therefore, any exploration of how the cognitive sciences might aid interdisciplinary work in criminal law has the potential to become messy and complex. See, further, Moore. M, *Mechanical Choices: The Responsibility of the Human Machine* (Oxford University Press, New York, 2020); Linden. D, “Possibilities and Limitations of Neuroscience in the Legal Process” in Lightart. S, van Toor. D, Kooijmans. T, Douglas. T, Meynen. G, *Neurolaw Advances in Neuroscience, Justice & Society* (Palgrave Macmillan, ebook, 2021) pp. 3-5.

⁴¹⁵ This value is discussed in chapter 4 and 5.

Though Walsh offers a rather conservative and cautious view of the future prospective relevance of the cognitive sciences (e.g., neuroscience) to criminal law for children/young persons, she points out that there is policy interest in the cognitive sciences. Her viewpoint is essential to the thesis because it is also believed that one of the most valuable contributions of the cognitive sciences is to inform policy reform in English law.⁴¹⁶ She articulated that:

Neuroscientists posit a direct correlation between brain structure, brain activity and behaviour; thus, it is apparent why their findings are of interest to the legal system and to criminal justice policy makers. To date, such curiosity has been most discernible in the United States, though, as will be demonstrated, neuroscience is creeping into both policy and media discourse in England and Wales. Given the history of political transfer between these two nations—particularly when it comes to issues of social control (cf. Garland 2001)—preempting the emergence of such ideas in this country appears prudent. Neuroscience is ‘sitting at the courtroom door’ and law and policymakers of the (near) future will ... However, caution should be exercised before embracing these lines of argument too enthusiastically: as with all tools, neuroscience can be used in ways that both contribute to human flourishing, along with potentially diminishing it.⁴¹⁷

According to Walsh, neuroscience and criminal law are separate disciplines; however, they are essential to criminal law because of what the sciences might reveal about the relationship between the brain, mind, behaviour and criminality. Notably, Walsh acknowledged that this interest has resulted in the cognitive sciences playing a specific and key role in reforming policy in youth justice. One of the most prominent developments was in the United States Supreme Court case of *Roper v Simmons* (2005).⁴¹⁸ In this case, the court abolished the death penalty for those convicted of murder under 18 years of age based on an affidavit submitted by the American Psychological Association and American Medical Association. The affidavit revealed that the prefrontal cortices of adolescents are underdeveloped; thus, they are less able to control their impulses than adults. The defence argued, “[a]dolescents’ behavioural immaturity mirrors the anatomical immaturity of their brains. To a degree never before understood, scientists can now demonstrate that adolescents are immature not only to the observer’s naked eye, but in the very fibres of their brains.”⁴¹⁹ The Supreme Court subsequently decided it was unjust to punish those under 18 years convicted of murder with death and replaced it with detention.

While the *Roper* case is a USA judgment and carries no legal weight in England and Wales, legal practitioners and theorists have acknowledged it as an excellent example of policy reform using neuroscience, expressly, how the English law should treat children/young persons who commit crimes.⁴²⁰ What is important about *Roper* is that it was used as evidence to support arguments for the future relevancy of neuroscience in the English criminal justice system and underpin proposals for reform such as increasing the MACR.⁴²¹ As discussed in Chapter 2, the MACR remains fixed at 10 years of age and is comparatively low compared to European states. According to Walsh,

⁴¹⁶ I will discuss this in greater detail in chapters 5 and 6.

⁴¹⁷ Walsh (2011) 21-22.

⁴¹⁸ *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

⁴¹⁹ *Ibid* at [46]. It is important to note that the court did not specifically refer to neuroscientific evidence in making its decision, numerous legal theorists and practitioners believe it carried substantial weight in the Court’s judgment to overturn the death penalty for those under 18 years. See, further, Rosenthal. H, “Scanning for Justice: Using Neuroscience to Create a More Inclusive Legal System” (2018) 50 *Columbia Human Rights Law Review* 303.

⁴²⁰ Walsh (2011) 21-22; McDiarmid (2013) 146.

⁴²¹ Walsh (2011); Arthur. R, “Rethinking the Criminal Responsibility of Young People in England and Wales” (2012) 1 *European Journal of Crime, Criminal Law and Criminal Justice* 13-29; McDiarmid (2013); Crofts. T, Delmage. E, Janes. L, “Deterring Children From Crime Through Sentencing: Can It Be Justified?” (2022) *Youth Justice* 1-19.

“growing appreciation that the human brain is not fully formed until people are in their twenties contributes to a better understanding of the aspects of adolescent behaviour that most often bring them to the attention of the youth justice system ...”⁴²² The cognitive sciences have shown that children/young persons have diminished capacities, though they may have the capacity to make abstract moral decisions, they cannot make fully informed decisions during the commission of an act.⁴²³ They are also predisposed neurologically to risk-taking behaviours that break legal norms and rules because of underdeveloped frontal lobes, which are “... among the last areas of the brain to mature ...”⁴²⁴

Although the Government has yet to make plans to reform the MACR by increasing the threshold age above 10 years,⁴²⁵ the cognitive sciences reinforce the argument that most children/young people have impaired capacity for rational thought and judgment, including reduced impulse control. Thus, this evidence is playing a key supportive role in the reform debate about whether the MACR should be raised and what that age should be.⁴²⁶ As McDiarmid observed, because “neuroscientific research provides some support for such a proposal,”⁴²⁷ for it confirms that they mature at different rates and some might not become criminally responsible at 10 years.⁴²⁸ By helping to expose the harshness and unjustness of implementing a low MACR, future cognitive sciences might provide a more in-depth understanding of children/young person’s capacities that, in turn, leads to a compelling argument for reform, which will be discussed further in Chapter 6.⁴²⁹

Another way the cognitive sciences could aid the future interdisciplinary work of English criminal law for children/young persons is by supporting defence reform. As discussed in section 2.10, the Law Commission concluded that a “not criminally responsible by reason of developmental immaturity” defence should be introduced to protect developmentally immature persons who kill and suffer a total loss of legally relevant capacities in 2013.⁴³⁰ The Law Commission relied significantly on the latest scientific research to argue that developmental immaturity was a justifiable basis for a complete and general legal excuse. The Law Commission reasoned that “there is clearly an important age-related element to developmental immaturity”⁴³¹ because children/young people lack mental capacities. Crucially, the Law Commission further remarked, “... youth is not a pathological condition equivalent to a medical condition ...”⁴³² even though it causes them to lack the same legally relevant capacities as mentally disordered individuals who plead Section 2 as amended successfully. Chapter 5 will examine these aspects of the Law Commission’s proposed defence in more detail to highlight how the cognitive sciences can support this future interdisciplinary work in criminal law.

⁴²² Walsh, C., “Youth Justice and Neuroscience A Dual-use Dilemma” (2011) 51 *British Journal of Criminology* 23.

⁴²³ Crofts, T., “Will Australia Raise the Minimum Age of Criminal Responsibility?” (2019) 43 *Criminal Law Journal* 31.

⁴²⁴ Johnston, S. B, Blum, R. W, et al., at 216; see also, Haines, K, Case, S, Smith, R, et al., “Children and Crime: In the Moment” (2021) 21 *Youth Justice* 280-281.

⁴²⁵ Refer back to section 1.1

⁴²⁶ See section 5.5.

⁴²⁷ McDiarmid (2013) at 154.

⁴²⁸ Walsh (2011) 21-22; McDiarmid (2013) 146.

⁴²⁹ This argument is merely supposition; it is not clear what it will take for the Government to raise the MACR. Croft believes that there needs to be a “... combination of an emotional response and a scientific, research-based call for change may be just what it takes to lead to a change in the MACR.” See, further, Crofts (2019) at 39-40.

⁴³⁰ Law Com (2013) at para 9.1; see section 2.10.

⁴³¹ Ibid. at para 9.16.

⁴³² Ibid. 9.20.

Concerning the English criminal trial, the cognitive sciences have been presented as medical evidence (e.g., MRI, fMRI, EEG)⁴³³ in the courtroom for numerous reasons, though some have not been successful.⁴³⁴ Neuroimaging evidence and neuropsychological tests have revealed that a defendant suffered a mental condition that rendered him unfit to participate in trial proceedings effectively.⁴³⁵ Additionally, neuroimaging and neurocognitive evidence have been utilised to show that defendants should be convicted of manslaughter rather than murder under Section 2 as amended.⁴³⁶

In the future, the cognitive sciences will continue to be useful in determining whether a defendant suffers from “a recognised medical condition” under Section 2 as amended.⁴³⁷ As discussed in section 2.9, a successful plea of the defence requires medical experts (e.g., clinical psychologists and psychiatrists) to comment on “the ultimate issue – whether the defendant’s ability, etc., was substantially impaired and thus whether the plea should succeed.”⁴³⁸ Their expert opinions will also be important to establishing whether a child/young person is developmentally immature when they commit a crime for the purposes of pleading one of the two proposed defences to be discussed in Chapter 5. However, it is essential to acknowledge that there is limited applicability in using the cognitive sciences as evidence in criminal trials. The key problems with psychiatric diagnosis and brain scans for children/young persons will be discussed in section 3.8, and the future role of the cognitive sciences in criminal law in Chapter 6. The next section will provide a neuroscientific deconstruction of the human brain. This is important to show the reader how the fully matured adult brain is structured and functions before critically examining it during adolescence.

3.3 A Neuroscientific Deconstruction of the Brain

The human brain contains four lobes – frontal, parietal, occipital and temporal – divided further by grooves and ridges called sulci.⁴³⁹ The brain comprises regions and subcortical structures (e.g., hippocampus, basal ganglia, amygdala, anterior cingulate cortex, ventral striatum and prefrontal cortex (PFC)).⁴⁴⁰ Each lobe/region/structure is connected by a neural network comprising millions

⁴³³ Catley and Claydon’s studied the use of neuroscientific evidence in criminal trials in England and Wales. They found 204 reported cases in which the accused utilised neuroscience as evidence during 2005 to 2012. See, further, Catley, P, Claydon, L,

⁴³⁴ Hallett, N, “To what extent should psychiatric witnesses comment on criminal culpability” (2020) 60 1 *Medicine, Science and the Law* at 67; The Royal Society (2011) pp. 11-18.

⁴³⁵ R v Friend [2004] EWCA Crim 2661; R v Mohammed Sharif [2010] EWCA Crim 1709.

⁴³⁶ R v Hendy [2006] EWCA 819.

⁴³⁷ Because of space limitations, I have not explored all the contributions the cognitive sciences can make to answering questions about legal doctrine and criminal law in relation to developmentally immature children and young persons. Thus, I have analysed key discussions and ideas about how the cognitive sciences might aid future criminal law work on mental capacity and criminal responsibility linking psychiatry and frontal lobe development. Specifically, policy reform (the MACR and introduction of a new defence) and in the courtroom as medical evidence with the prefrontal cortex. This is important because these discussions/ideas fundamentally contribute to a deeper understanding of brain development during adolescence. Additionally, highlight the significant value of cognitive science to criminal law.

⁴³⁸ Mackay (2010) at 295.

⁴³⁹ Blakemore, S. J, *Inventing Ourselves* (Penguin Random House, London, 2018) p. 52.

⁴⁴⁰ Ibid.

of nerve connections, allowing each region to communicate by sending and receiving information.⁴⁴¹ At a functional level,⁴⁴² the hippocampus is responsible for storing and recalling our long and short-term memories.⁴⁴³ The basal ganglia control our bodily movements and fine motor skills.⁴⁴⁴ The amygdala is responsible for regulating our emotions and controlling our physical arousal responses.⁴⁴⁵ The anterior cingulate cortex has several functions, such as maintaining how we show empathy and which emotions we use to make decisions.⁴⁴⁶ The ventral striatum controls how we experience the world through touch, smell, and taste.⁴⁴⁷ The PFC is responsible for multiple high order executive functions such as planning, making decisions, rationalising, and attention regulation.⁴⁴⁸ The cerebellum controls the posture and balance of the human body.⁴⁴⁹

Brain regions and subcortical structures are composed of grey and white matter. Grey matter consists of axons, blood vessels, neurons (synapses) and neuronal cell bodies.⁴⁵⁰ Grey matter is thickly coated and found in the brain's deepest and most outer areas, primarily the cortex. White matter is nerve fibres and axons coated in pale fatty tissue called myelin; white matter is throughout the brain.⁴⁵¹

3.4 Understanding Adolescence: Definitions, History, and the difference between Normal and Abnormal Development

3.4.1 Definitions of Adolescence

Over the centuries, several definitions/descriptions of ‘adolescence’ with chronological age brackets have been offered across disciplines, though an accepted definition/description is absent in modern literature. Sawyer and Azzopardi have highlighted the difficulty in providing a coherent definition of adolescence, stating that:

More than 50 years ago, WHO proposed that adolescence spanned from 10 to 20 years of age, noting that although it commenced with puberty, the endpoint was less well defined. The UN Convention on the Rights of the Child

⁴⁴¹ Ibid at p.53.

⁴⁴² For a comprehensive overview of the executive function of the brain see, Hirstein. W, Sifferd. L, Fagan. T. K, *Responsible Brains* (The MIT Press, Cambridge, MA, 2018) pp. 21-41.

⁴⁴³ Stuchlik. A, *The Hippocampus - Plasticity and Functions* (Intech Open, London, 2018) p. 1.

⁴⁴⁴ See, generally, Jagaroo. V, *The Basal Ganglia Novel Perspectives on Motor and Cognitive Function* (Springer International, Switzerland, 2016).

⁴⁴⁵ Spear. L. P, “Adolescent Neurodevelopment” (2013) 52 *Journal of Adolescent Health* S9-10.

⁴⁴⁶ Stevens. F. L, et al., “Anterior Cingulate Cortex: Unique Role in Cognition and Emotion” (2011) 23 *Journal of Neuropsychiatry and Clinical Neurosciences* 121.

⁴⁴⁷ See, generally, Gottfried. J. A, *Neurobiology of Sensation and Reward* (CRC Press, New York, 2011).

⁴⁴⁸ (n.430) at S8-9.

⁴⁴⁹ Jimsheleishbili. S, Dididze. M, *Neuroanatomy, Cerebellum* (StatPearls Publishing LLC, Florida, 2022) p. 1.

⁴⁵⁰ Warfield. S, Dengler. J, et al., “Laboratory Investigation: Automatic Identification of Gray Matter Structures from MRI to Improve the Segmentation of White Matter Lesions” (1995) 6 *Journal of Image Guided Surgery* 326; Pappas. S. “Why is Gray Matter Grey?” (2010) *Live Science Contributor* (Accessed September 2020) <https://www.livescience.com/32605-why-is-graymatter-gray.html>.

⁴⁵¹ Oishi. K, Zilles. K, Amunts. K, et al., “Human brain white matter atlas: Identification and assignment of common anatomical structures in superficial white matter” (2008) 43 *Neuroimage* 447-448.

defines a child as an individual aged 0–18 years and, in time, the UN has come to formally define adolescence as the period between 10 and 19 years of age. Across different countries, cultures, and contexts this definition continues to be met with surprise, both about when adolescence starts (the notion that a 10 year-old person is a child, not an adolescent) and when it ends (the belief that a 19-year-old person is already an adult).⁴⁵²

Modern disciplines (e.g., psychology, neuroscience, sociology, criminology, behaviour and education) agree that adolescence is a period of physical maturity (e.g., sexual maturity and increased height);⁴⁵³ brain development (e.g., structure and function of the brain);⁴⁵⁴ cognitive development (e.g., logic and reasoning);⁴⁵⁵ emotion (e.g., impulse control and decreased mood swings);⁴⁵⁶ maturation of psychosocial orientation and skills (e.g., effective communication and develop a personal identity, gain awareness of gender and sexual orientation);⁴⁵⁷ morality (e.g., a period to learn about social and legal norms).⁴⁵⁸

According to some scientists, adolescence is a transitional period of development that prepares a young person to live life as an adult culturally, physically, psychologically and socially. However, adolescence is also considered a period of immaturity, diminished capacities and behavioural problems as persons are less able to think and control their actions in response to external stimuli due to reduced impulse control. This predisposes them to undertake sensation-seeking and risk-taking activities to provoke emotions of fear and happiness to satisfy their inhibitions.⁴⁵⁹

To summarise, adolescence is a phase of life between childhood and adulthood; it is defined broadly as a time-limited period of biological growth, and cognitive and psychosocial development that affects a young person's behaviour. Given that the start and endpoint of adolescence are ambiguous, and to avoid perplexing the reader, it will employ the description by the modern scientists (on the previous page) and view adolescence broadly as a period of positive development and immaturity that occurs between 9 and 26 years of age.

3.4.2 Modern Theories of Adolescence

Numerous theories have been proposed in the literature, providing varying understandings of adolescence. Early modern ideas studied adolescence through an integrated scientific lens, such as biology, cognition, and sociology, and thus offer narrower definitions to more recent theories. By contrast, current views adopt a multi-disciplinary approach to studying adolescence, with

⁴⁵² Sawyer. S. M, Azzopardi. P. S, Wickremarathne. D, Patton. G. C, "The age of adolescence" (2018) 2 *The Lancet Child and Adolescent Health* 223.

⁴⁵³ See, generally, American Psychological Association, *Developing adolescence: A reference for professionals* (American Psychological Society, Washington DC, America, 2002).

⁴⁵⁴ Giedd. J. N, "The amazing teen brain" (2015) 312 *Scientific American* 32-37.

⁴⁵⁵ See, generally, Piaget. J, Inhelder. B, *The psychology of the child* (Basic Books, New York, 2000).

⁴⁵⁶ See, generally, Rosenblum. G, Lewis. M, "Emotional Development in Adolescence" in Adams. G, Berzonsky. M. D, *Blackwell Handbook of Adolescence* (Blackwell Publishing, Malden, 2003) pp. 269-289.

⁴⁵⁷ See, generally, Neinstein. L. S, *Adolescent health care: A practical guide* (Lippincott, Philadelphia, 4th Edition, 2002); Harrison. T. W, "Adolescent homosexuality and concerns regarding disclosure" (2003) 73 *Journal of School Health* 107-112.

⁴⁵⁸ See, generally, Kohlberg. L, "Stages of moral development as a basis for moral education" in Munsey. B, *Moral development, moral education, and Kohlberg* (Religion Education Press, Birmingham, 1980) pp. 15-100.

⁴⁵⁹ Steinberg, L, Albert. D, Cauffman. E, et al., "Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model" (2008) 44 *Developmental Psychology* 1763-64.

contributions from biological to neuroscientific studies. In these theories, adolescence emerges as a construct with chronological parameters for specific developmental processes, which will be discussed in greater detail in sections 3.4.3 and 3.5.⁴⁶⁰

While most of the leading theories explored in the literature agree that adolescence is a multifaceted development period, it is considered an evolving concept informed by the latest scientific evidence (i.e., psychosocial, emotional, behavioural, cognitive, biological and neuroscientific studies).⁴⁶¹ Because of space limitations, the thesis cannot examine all these theories; thus, it will identify critical ideas that have contributed to the modern understanding of adolescence. This exploration is essential to the thesis because it shows how the cognitive sciences have deepened current understandings of adolescence in contemporary literature and showcases the complexity of it as a phase of growth, change and immaturity.

In the 20th century, studies investigated adolescence as a biological and cognitive phenomenon.⁴⁶² Psychologists (such as Hall, Freud and Erickson) undertook such studies and viewed adolescence as a period of significant physical change and cognitive deficit affecting peoples behaviours.⁴⁶³ By this logic, as a biological and cognitive phenomenon, adolescence was understood as a pubertal period of development to sexual maturity and “a period of storm and of stress, as a time of universal and of inevitable upheaval.”⁴⁶⁴ At a cognitive level, these studies assumed adolescence was a period of adaption, improved logic and reasoning as the mind’s cognitive processes matured.⁴⁶⁵

While earlier theories were “characterized by so-called grand models that purportedly pertained to all facets of adolescent behaviour and development (e.g., Erikson, 1959; Freud, 1958; Hall, 1904).”⁴⁶⁶ From the 1960s, criminology, sociology and psychology studies viewed adolescence as more than a period of biological (pubertal changes) and cognitive development in which children/young people behaved. These studies indicated that adolescence was also a phase for social experiences and psychological maturation, such as learning to deal with peer pressure and developing a stable sense of self.⁴⁶⁷ However, research strictly focused on identifying the critical milestones of development and was divided between scholars who concentrated on the fundamental processes of adolescence (primarily psychologists).⁴⁶⁸ Such studies were concerned with describing the life span of adolescence and understanding key aspects/processes that contribute to development through the interaction of biology, cognition, behaviour, psychology and sociology. Finding

⁴⁶⁰ It is important to note that most of the studies explored in the modern literature that has developed the study of adolescence are American. See, generally Dubas. J. S, Miller. K, Petersen. A. C, “The study of adolescence during the 20th century” (2003) 8 *History of the Family* 375-397; Curtis. A, “Defining Adolescence” (2015) 7 *Journal of Adolescent and Family Health* 481-520.

⁴⁶¹ Steinberg. L, Lerner. R, “The Scientific Study of Adolescence: A Brief History” (2004) 24 *Journal of Early Adolescence* 52.

⁴⁶² Moshman. D, *Adolescent Psychological Development* (LEA Publishers, New Jersey, 1999) pp. 1-7.

⁴⁶³ Hall. G. S, *Adolescence: Its psychology and its relations to physiology, anthropology, sociology, sex, crime, religion, and education* (1904, Volumes 1 & 2, Appleton-Century-Crofts, Norwalk, CT); Freud. A, “Adolescence” (1958) 13 *Psychoanalytic Study of the Child* 255-278; Erikson. E. H, “Identity and the life cycle” (1959) 1 *Psychological Issues* 50-100.

⁴⁶⁴ Steinberg (2004) 46. See, generally, Hall (1904).

⁴⁶⁵ See, also, Inhelder. B, Piaget. J, *The Growth of logical thinking from childhood to adolescence* (Basic Books, New York, 1958).

⁴⁶⁶ Steinberg and Lerner (2004) at 46.

⁴⁶⁷ See, generally, Douvan. J. D, Adelson. J, *The adolescent experience* (John Wiley, New York, 1966); Lerner. R. M, Steinberg. L, et al., *Handbook of Adolescent Psychology* (Wiley, Hoboken, New Jersey, 2nd Edition, 2004) p. 1-10.

⁴⁶⁸ Lerner. R. M, Boyd. M, Kiely. M. K, Napolitano. C. M, Schmid. K. L, “The History of the Study of Adolescence” (2011) 11 *Encyclopaedia of Adolescence* at 171.

revealed a trajectory and timing for adolescent development based on biological, cognitive, sociological and psychological phases.⁴⁶⁹

According to Hamburg, adolescence is a distinctive life course that provides a time-limited window to understand how a person between 8 and 18 adapts and copes in different social contexts (e.g., school).⁴⁷⁰ Under this account, adolescence is as a transitional period of biological, cognitive and psychological changes where persons become self-sufficient and independent. Family, peer groups and societal expectations are critical in this crucial transition because “... the number and nature of changes and challenges occurring simultaneously during adolescence require the individual to develop effective coping strategies to function effectively.”⁴⁷¹

Hamburg revealed that some stress in a person’s life is good because it promotes positive development and growth during adolescence.⁴⁷² However, encountering too many social challenges/experiences during adolescence can create significant stress for those with inadequate coping strategies and affect their development, resulting in substance abuse and depression.⁴⁷³ For Hamburg, a person’s social activities and experiences inform the development of adolescence just in the same way as biological, cognitive and psychological processes.

These accounts emphasised the importance of positive psycho-social developments; studies revealed that positive social interactions could result in healthy development, which forms part of the current understanding of adolescence. This is important to the thesis, as the Law Commission noted because developmentally immature children/young persons who commit crimes may have experienced adverse interactions (e.g., abuse and neglect) and:

... Typically have additional vulnerabilities, for example, learning disabilities and mental health problems, stemming from adverse developmental experiences. These vulnerabilities serve. “in addition to developmental immaturity, to constrain the ability to act freely and maturely, raising further questions about culpability.”⁴⁷⁴

A significant change to the understanding of adolescence occurred in the late 1990s to early 2000s. While the reasons for the change remain the subject of considerable debate, the modern literature acknowledges that evidence of individual developmental differences between persons and the brain’s structural and functional plasticity have informed current theories. As Steinberg and Lerner et al., emphasised:

Contemporary scholarship on adolescence both reflects and extends the emphases on individual-context relations, developmental systems, plasticity, diversity, longitudinal methodology, and application that were crystallized and integrated within the second phase of the development of the scientific study of adolescence. The study of adolescence today, though, represents the exemplar within developmental science, wherein

⁴⁶⁹ McCandless. B. R, *Adolescents* (Dryden Press, Hinsdale, IL, 1970); Hamburg. B, “Early adolescence: A specific and stressful stage of the life cycle” in Coelho. G, Hamburg. A, Adams. J. E, *Coping and Adaption* (Basic Books, New York 1974) pp. 101-125; Bandura. A, *Social Learning Theory* (Prentice Hall, New Jersey, 1976).

⁴⁷⁰ Hamburg (1974) 101-125.

⁴⁷¹ Peterson. A, Hamburg. B, “Adolescence: A developmental approach to problems and psychopathology” (1986) 17 *Behavior Therapy* 480-481.

⁴⁷² *Ibid.* at 486.

⁴⁷³ *Ibid.* at 487- 495.

⁴⁷⁴ Law Com (2013) at para. 9.13.

excellent conceptual and empirical work is undertaken with a collaborative orientation to making a contribution both to scholarship and to society.⁴⁷⁵

Although the psychological and social aspects of development remained the focus of theories of adolescence in the literature, understandings promoted positive and healthy growth. Lerner and Boyd et al., further emphasised that “the key unit of analysis in understanding the development of the person was his or her relation with both more molecular (e.g., biological) and more molar (social group, cultural, and historical) levels of organization.”⁴⁷⁶ Studies focused on the healthy and problematic consequences on individual capacity, strength and behaviour during this period.⁴⁷⁷ Thus, adolescence was defined broadly to reflect individual variability and development benchmarks (biological, neurological, cognitive, behavioural, cultural and psycho-social maturation). Notably, adolescence was viewed as a “... gradual period of transition from childhood to adulthood”⁴⁷⁸ between 9 and 24 years. In neuroscience, the beginning of adolescence was defined by pubertal status, age, and grade level, with the onset of puberty beginning in females from 7 and 13 years of age and from 9 and 13.5 years of age in males.⁴⁷⁹

Current research on adolescent development has also contributed to new understandings of adolescence by identifying substages. Adolescence is chronologically accepted in contemporary literature as a transitional period between childhood and adulthood with 3 substages: early, middle and late adolescence. Although there is still a general lack of consensus in the modern literature on the ages at which these chronological substages begin and end, as Curtis observed:

Nienstein et al. (2009), a frequently consulted clinical authority, designates early adolescence as approximately 10 to 13 years, middle adolescence as approximately 14 to 16 years, and late adolescence as approximately 17 to 21 years. Steinberg (2002) previously identified adolescent sub-stages as early (10 to 13 years), middle (14 to 18 years), and late (19 to 22 years), however more recent publications (2014) include youth up to 25 within the construct of adolescence.⁴⁸⁰

Modern theories of adolescence generally acknowledge that numerous changes occur during these substages, which “... include physical growth and biological development, increasing cognitive sophistication, and changes in psychosocial skills.”⁴⁸¹ Individual maturational differences contribute to their normal functioning, including maturity and developmental problems such as emotional dysregulation, behaviour and cognition. For instance, anger may result in reckless or antagonistic behaviour in those with developmental immaturity to address and control their anger emotionally and cognitively.

In summary, contemporary theories recognise the importance of scientific advancement and the growth in the literature to develop an understanding of adolescence by asserting that it is an evolving definition. Thus, adolescence has remained broadly defined as a transitional, individualistic and flexible period between the ages of 9 to 25 years. Adolescence is divided into three substages and

⁴⁷⁵ Steinberg and Lerner (2004) at 52.

⁴⁷⁶ Lerner and Boyd et al., (2011) at 174.

⁴⁷⁷ See, for example, Casey. B. J, et al., “A Developmental Functional MRI Study of Prefrontal Activation during Performance of a Go-No-Go Task” (1990) 9 *Journal of Cognitive Neuroscience* 835-847.

⁴⁷⁸ Spear (2000) at 417.

⁴⁷⁹ Galvan. A, *The Neuroscience of Adolescence* (Cambridge University Press, New York, 2017) p. 3.

⁴⁸⁰ Curtis (2015) at 219-20.

⁴⁸¹ Galvan (2017) p. 1.

studied with these categories; it is important to appreciate that it is also investigated in terms of developmental immaturity, normal and abnormal development. Accordingly, the thesis must define normal and abnormal brain development and explain how developmental immaturity can be identified in children/young people. This is important to support the arguments in Chapters 4 and 5 that developmental delays impact the mental capabilities of children/young people who kill and should form the basis of two separate exculpatory defences in English law.

3.4.3 Definitions of Normal and Abnormal Brain Development

In modern scientific literature, many definitions of normal brain development have been offered across the disciplines, though a consensus is yet to be reached. Because of space limitations, it is impossible to explore all these definitions; thus, this section will examine the key dimensions that ground understandings of normal and abnormal brain development that assist in identifying children/young persons who develop normally in neuroscience. Before doing so, it is essential to note that brain development is not exclusively limited to adolescence; it occurs across the lifespan and is influenced by genetics, biology and the environment.⁴⁸²

The term “normal” in the literature generally corresponds to specific processes and milestones central to the maturation of the brain, such as cognition, neural structure and function.⁴⁸³ Cognitive neuroscientists and psychologists agree that normal development in adolescence is a transitional period of typical changes and growth.⁴⁸⁴ In adolescence, abnormal brain development is characterised as atypical variation and growth in children and young persons.⁴⁸⁵ These changes occur in distinct ways and are generally driven by different models of adolescence (e.g., cognition, genetics and behaviour); thus, what is defined as ‘normal’ brain development differs slightly depending on the researcher’s focus.⁴⁸⁶

For example, Frith and Frith understand normal brain development as a predictable normal variation (structural and functional) process in healthy children/young persons.⁴⁸⁷ By contrast, Blakemore and Robbins defined it “... as the period of life that starts with the biological changes of puberty and ends at the time at which the individual attains a stable, independent role in

⁴⁸² Ibid. pp. 2 and 7.

⁴⁸³ Ibid. at p. 7.

⁴⁸⁴ It is important to acknowledge that brain development occurs throughout childhood, adolescence and adulthood, and each development period is essential to reaching complete brain maturity and competence in adulthood. Johnson, S, Giedd. J. N, “Normal Brain Development and Child/Adolescent Policy” in Clausen, J, Levy, N, *Handbook of Neuroethics* (Springer, 20th Edition, 2015) p. 1723.

⁴⁸⁵ Frith and Frith (2009) at 138.

⁴⁸⁶ For instance, Casey, Getz and Galvan’s imbalance model postulates that “the neurochemical, structural, and functional composition of the brain proceeds on distinct timelines, such that some brain regions exhibit the changes earlier in development than other brain regions.” The result is that there is an imbalance of how these brain regions bias behaviour due to “differential engagement across different stages of development. This information is used to identify changes in the behaviour of normal developing adolescents based on the activation and function of brain regions (e.g., PFC and striatum) critical to behavioural regulation. See, Casey, B. J, Getz, S, Galvan, A, “The adolescent brain” (2008) 28 *Developmental Review* 62-77; Casey, B. J, “Beyond simple models of self-control to circuit-based accounts of adolescent behaviour” (2015) 66 *Annual Review of Psychology* 295-319.

⁴⁸⁷ Frith and Frith (2009) 134-144.

society.”⁴⁸⁸ What is key here about developing normally, Casey and Simmons et al, observed, is that “... not only do individuals develop cognitive competency as they mature, they also develop social and emotional competencies. Thus, reaching adult capacity is not a single process but rather consists of multiple processes that can interact in complex ways.”⁴⁸⁹ From this perspective, normal adolescent brain development should not be strictly viewed as a biological, structural and functional process that ceases with social independence, as defined by Blakemore, Robbins, Frith and Frith. Instead, it is a multidimensional process influenced by genetics, social, cognitive, behavioural and psychological changes/maturity.

To identify children/young persons who develop normally, Frith and Frith claimed that “ideally one would like to start studying the development of the brain, in terms of structure and function straight from birth at frequent intervals”⁴⁹⁰ by analysing brain imaging longitudinal data. However, cross-sectional data of a child/young person’s brain is not as informative as longitudinal data that captures them at specific points in time. As Casey and Simmons et al, explained, the problem is that brain imaging studies take considerable time and effort. While some neuroscientists have undertaken longitudinal brain imaging studies, they further remarked, “... it is impractical to subject healthy children to lengthy scanning procedures before middle to late childhood.”⁴⁹¹ Consequently, researchers tend to prefer short scanning sessions using neuroimaging tools (e.g., MRI and fMRI) with individuals and systematic studies⁴⁹² to study normal brain development during adolescence, despite the identified evidential issues.⁴⁹³

For example, Blakemore and Choudhury have used MRI and fMRI imaging to study normal brain development during adolescence in children and young people. They found that white matter volume increases and grey matter volume decreases in the prefrontal cortex, marking puberty's onset. These changes also occur through the remainder of adolescence into early adulthood and are based on age and sex, to be discussed in greater detail in section 3.6.⁴⁹⁴

The issue, Frith and Frith claimed, with using functional devices to study the brain is that “... such findings are difficult to interpret without a theory of what the observed changes mean.”⁴⁹⁵ They further remarked that researchers using brain imaging tools require additional evidence from other disciplines and sources to inform/interpret their scanning data, such as genetic, cognitive and behavioural tests and cognitive theory.⁴⁹⁶ Such as Cohen et al., who gathered brain imaging data

⁴⁸⁸ Blakemore. S. J, Choudhury. S, “Development of the adolescent brain: implications for executive function and cognition” (2006) 47 *Journal of child psychology and psychiatry and allied disciplines* 296-298; Blakemore. S. J, “Decision-Making in the Adolescent Brain” (2012) 15 *Nature Neuroscience* at 1184.

⁴⁸⁹ Casey. B. J, Simmons. C, Somerville. L. H, Baskin-Sommers. A, “Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders” (2021) 5 *Annual Review of Criminology* at 326.

⁴⁹⁰ Ibid. at 135.

Ibid. at 137.

⁴⁹² Giedd. J. N, Blumenthal. J, et al., “Brain Development during Childhood and Adolescence: A Longitudinal MRI Study” (1999) 2 *Nature Neuroscience* 861-863; Paus. T, “Mapping brain maturation and cognitive development during adolescence” (2005) 9 *Trends in Cognitive Sciences* 60-68.

⁴⁹³ Kraemer. H. Yesavage. J. A, Taylor. J. L, Kupfer. D, “How can we learn about developmental processes from cross- sectional studies, or can we?” (2000) 157 *American Journal of Psychiatry* 163-171; Toga. A. W, Thompson. P. M, Sowell. E. R, “Mapping brain maturation” (2006) 29 *Trends in Neuroscience* 148-159.

⁴⁹⁴ Blakemore and Choudhury (2006). Similar work has been conducted by Dosenbach. N. U, Nardos. B, Cohen. A. L et al., “Prediction of individual brain maturity using fMRI” (2010) 329 *Science* 1358-16; Casey and Simmons et al., (2021) at 329-330.

⁴⁹⁵ Frith and Frith (2009) at 137. Frith and Frith also note similar issues with functional studies because changes in brain activity associated with normal structural changes are difficult to interpret. See, further, Frith and Frith (2009) at 138.

⁴⁹⁶ Ibid. at 140. Researchers also use mixed method approaches from other disciplines to study abnormal brain development because children/young persons with developmental immaturity, a mental disorder, illness or condition generally exhibit atypical frontal lobe brain changes (functional and anatomical) during adolescence. See, further, Rapoport. J, Castellanos.

and behavioural test results to reveal that cognitive capacity and brain function in the prefrontal cortex differs depending on the emotional and social contexts of the developing normally child/young person. Their study also found that complete adult capacity is not evident until the early 20s in these contexts.⁴⁹⁷

In summary, normal brain development is identifiable based on age and sex-related pathways of typical functional and structural changes in children/young persons; nevertheless, it is a complex process influenced by numerous factors (e.g., genetics and puberty). Given that developmentally immature children/young people suffer a significant degree of immaturity than the norm for a person of the same age, their degree of incapacity is not significant enough to warrant a diagnosis of a medical condition. Yet, they might suffer the same symptoms as the developing abnormally child/young person diagnosed with a medical condition. Therefore, it is essential to frame how they are identified in the literature because developmental immaturity can intersect with normal and abnormal brain development.⁴⁹⁸

3.5 Which Children and Young Persons

It has been argued that developmental immaturity has a role in the progression of neurodevelopmental disorders. It was explained that a child/young person with developmental delays might lack legally relevant capacities like the developing normally child/young person, such as vulnerability to peer influences and defective risk assessment.⁴⁹⁹ It was also highlighted that they suffer a higher degree of developmental immaturity than the norm for a person their age. Their degree of incapacity, however, is not significant enough to warrant a formal diagnosis of a medical condition, illness or disorder.⁵⁰⁰

This tells us that the line between normal and abnormal development is ambiguous for these children/young people and is reflected in the scientific literature. Research offers numerous factors that might influence children/young persons to kill, from sociological to psychological explanations and neurological impairments.⁵⁰¹ Whilst these insights are informative, there are several problems with using these studies to identify developmentally immature children/young persons who are the focus of the thesis. An issue is that the literature contains too many factors that might influence a child/young person; this makes it difficult to find which factor might influence them to kill. The literature does not provide a set list of contributing factors for developmentally immature children/young people who kill, and then another list for children/young persons who develop normally who kill, and abnormally developing individuals.

F, Gogate. N, et al., "Imaging normal and abnormal brain development: new perspectives for child psychiatry" (2001) 35 *The Australian and New Zealand Journal of Psychiatry* at 272.

⁴⁹⁷ Cohen. A. O, Bonnie. R. J, Taylor-Thompson. K, Casey. B. J, "When does a juvenile become an adult: implications for law and policy" (2016) 88 *Temple Law Review* 769-788.

⁴⁹⁸ See further the case analysis from section 4.7.

⁴⁹⁹ See section 2.10.

⁵⁰⁰ Refer back to sections 2.10 and 3.4.3.

⁵⁰¹ Hays J. R, Solway. K. S, Schreiner. D, "Intellectual characteristics of juvenile murderers versus status offenders" (1978) 43 *Psychological Reports* 80-82; Lewis et al (1985) 1161-1167; Bailey and Thornton et al., (1994) 207-220; Bailey (1997) 92-102; Allely. C. S, Minnis. H, et al., "Neurodevelopmental and psychosocial risk factors in serial killers and mass murderers" (2014) 19 *Aggression and Violent Behavior* 288-301.

For example, Myer and colleagues conducted neurological studies of male children/young persons who were arrested for murder; they found that these individuals displayed childhood neuropsychiatric and family characteristics. However, they did not indicate how these children/young persons developed during adolescence. Instead, they showed that they exhibited a combination of biopsychosocial factors (e.g., violence during childhood and severe physical abuse) and suffered symptoms of mental conditions such as ADHD, conduct disorder or learning difficulties.⁵⁰² Thus, applying this factor to explain and identify those suffering developmental immaturity that kill would be impossible.⁵⁰³

Another problem is that these studies produce correlations between specific persons and their actions to identify the problems a child/young person had previously experienced. Such causal links are not considered sufficiently accurate for isolating a small subgroup – the above-relevant persons – within the populace of those who kill. As Turner and Anderson et al., observed, although brain imaging “studies still highlight the role of frontal and temporo-limbic brain areas, but they are not sufficient to discriminate homicide from other violent outcomes or from other psychiatric disorders per se.” They further revealed that “one recent study from our team reported that incarcerated adolescent boys who had committed homicide showed reduced gray matter in medial and lateral anterior temporal lobe and insula, relative to other serious offenders (Cope et al. 2014).”⁵⁰⁴ These causal explanations are commonly associated with children/ young persons who commit a broad range of serious and violent crimes, not just murder. Parental neglect is also widely recognised in the scientific literature (i.e., criminology, psychology, and sociology) as a contributing factor in those who commit antisocial behaviour and homicides.⁵⁰⁵ Accordingly, this makes these factors an imprecise method to identify the relevant subgroup.⁵⁰⁶

The thesis aims to identify a subgroup of developmentally immature children/young persons who kill because these individuals are excluded from successfully pleading Section 2 as amended.⁵⁰⁷ Therefore, it makes sense that the thesis focuses on children/young people who kill with developmental delays and do not receive formal medical diagnoses of medical conditions relevant to Section 2 as amended rather than use factors (e.g., problems) to find children/young people. This is because most children/young people who suffer these issues will not become killers, although most children/young people who engage in killing will have suffered factors such as neglect and neurological abnormalities. The reason for identifying the subgroup in this way, as indicated, is that Section 2 as amended requires that defendants suffer an “abnormality of mental functioning” arising

⁵⁰² Myers. W. C, Kempf. J. P, “DSM-III-R classification of Homicidal Youth – help or hinderance? (1990) 51 *Journal of Clinical Psychiatry* 239-242; Myers. W. C, Scott. K, “Psychopathic and Conduct Disorder Symptoms in Juvenile Murderers” (1998) 2 *Homicide Studies* 160-175.

⁵⁰³ I will discuss the issue of identifying developmentally immature children/young persons from those who develop abnormally in greater detail from 3.7.

⁵⁰⁴ Sajour-Turner. A, Anderson. N. E, Widdos. M, Nyalakanti. P, Harenski. K, Harenski. C, Koenigs. M, Decety. J, Kiehl. K. A “Aberrant brain gray matter in murderers” (2020) 14 *Brain Imaging and Behavior* 2051.

⁵⁰⁵ Agnew. R, “Building on the foundation of general strain theory: Specifying the types of strain most likely to lead to crime and delinquency” (2001) 38 *Journal of Research in Crime and Delinquency* 319-361; Pardini. D. A, Lochman. J. E, Frick. P. J, “Callous/unemotional traits and social-cognitive processes in adjudicated youths” (2003) 42 *Journal of American Academy of Child & Adolescent Psychiatry* 364-371; Way. I, Urbaniak. D, “Delinquent histories of adolescents adjudicated from criminal sexual conduct” (2008) 23 *Journal of Interpersonal Violence* 1197-1212.

⁵⁰⁶ Bailey (1996) at 27.

⁵⁰⁷ See, sections 1.1, 2.10 and 4.7.

from the evidence of “a recognised medical condition” to plead Section 2 as amended successfully.⁵⁰⁸

However, developmentally immature children/young persons who kill suffer a broad range of symptoms of mental conditions.⁵⁰⁹ It would be counterproductive to identify them with a specific mental disorder (e.g., autism spectrum disorder) because not all these individuals suffer the same symptoms and degree of developmental immaturity, which might produce a smaller sample size. Thus, it will focus on medical conditions that grounded successful diminished responsibility pleas under Section 2 (e.g., personality disorder). Additionally, because Parliament specifically referenced, neurodevelopmental disorders can successfully support a Section 2 as amended plea.⁵¹⁰

3.6 Normal Brain Development

The neuroscientific literature on adolescent brain development is vast. It contains various studies, such as the normal brain development of white matter, mental conditions and the neurobiological influences of abnormal development.⁵¹¹ Therefore, it is only possible to consider some studies and topics of interest published due to limited space in the thesis to examine adolescent brain development critically. Developmental immaturity is the least explored type of adolescent development in the scientific literature because it differs from one individual to the next, and those with it might develop normally or abnormally.

This section will explore the key insights of the latest research on normal brain development to map how the atypical brain matures during adolescence and early adulthood. This analysis is essential; it is important to understand how the normal development of neurocognitive processes and frontal lobe structural changes play key roles in adolescent decision-making and behaviour. More crucially, these insights will support the legal arguments in Chapter four about the inapplicability of Section 2 as amended and proposals for reform in Chapter five.

Although normal adolescent development is characteristically recognised as a phase of cognitive improvement, Blakemore reveals, “it also marks a period of increased rates of antisocial and risky behaviours and mental illness”⁵¹² when puberty commences. Giedd et al. postulated that “... moving parts [in the brain] get broken”⁵¹³ during adolescence; thus, there is a discernable increase in mental conditions such as anxiety, eating disorders and depression. However, as Blakemore acknowledged, adolescence is a complex phase of development. It cannot be understood in terms of broken parts because social learning, genetics, the environment, synaptic pruning and cognition influence it.⁵¹⁴

⁵⁰⁸ Refer back to section 2.9.

⁵⁰⁹ Bailey (1996) at 20; Steinberg, L, “A behavioral scientist looks at the science of adolescent brain development” (2010) 72 *Brain and Cognition* 160-164.

⁵¹⁰ Refer back to section 2.10.

⁵¹¹ Walsh (2010) at 21-39.

⁵¹² Blakemore, S. J, “The Social Brain in Adolescence” (2008) 9 *Nature Neuroscience* at 274.

⁵¹³ Giedd, J. N, Keshaven, M, Paus, T, “Why do many psychiatric disorders emerge during adolescence?” (2008) 9 *Nature Review Neuroscience* 954.

⁵¹⁴ Blakemore, S. J, Robbins, T, “Decision-Making in the Adolescent Brain (2012) 15 *Nature Neuroscience* 1184-91; Blakemore (2006) 296-312; Blakemore (2008) 267-77.

Thus, it is important to consider adolescent brain development as a multi-faceted phase because the brain is highly plastic and undergoes significant changes beginning biologically around eight years of age, with the onset of puberty.⁵¹⁵

“Puberty itself is a multi-faceted construct with many genetic and environmental determinants, as well as robust gender differences making it extremely difficult to specify a precise onset of adolescence simply via chronological age.”⁵¹⁶ Puberty is a neurobiological process that starts when the brain becomes flooded with sexual hormones (oestrogen and testosterone). This process awakens the brain and jolts the limbic system into activating and organising dormant neural circuits carried forward into adolescence from childhood. From this pubertal jolt, synaptic pruning commences, which alters the overall density, volume, and thickness of white and grey matter structures.⁵¹⁷

Synaptic pruning has two core functions to eliminate and strengthen synapses. During adolescence, the brain must stop all overproduced and irrelevant synapses to prepare structurally for complete maturity in early adulthood.⁵¹⁸ It must also strengthen nerve connections between brain regions, essential to prepare the brain functionally to perform a broad range of high-order executive functions in adulthood.⁵¹⁹ The brain regions most implicated in adolescence by synaptic pruning are the limbic system, the hippocampus, the amygdala, the PFC, the anterior cingulate cortex (ACC), the ventral striatum and the ventromedial PFC (vmPFC). Modern research has highlighted sex differences in these brain structures’ growth and maturation trajectories. In the frontal and parietal lobes, cortical grey matter volume sharply increases in these brain regions at around 12 years of age and appears to decrease shortly after;⁵²⁰ white matter volume increases gradually throughout childhood, adolescence, and adulthood.⁵²¹ During middle and late adolescence, structural changes are region-specific and occur on a micro-subcortical level.⁵²² The amygdala has an expected peak maturity at 15 years of age in males and 19.7 years in females. The hippocampus has a predicted peak maturity in males and females at 17.3 years of age. The PFC takes the longest to reach peak maturity as it is the most structurally complex. It is responsible for performing the high-order functions highlighted in section 3.3. The PFC has an expected peak maturity age of around 20 to 25 years in both males and females.⁵²³

These brain areas develop and work together during adolescence; as Casey and Simmons explained, it “... does not involve one or even two changes in brain structure and function but rather a series of changes in multiple brain networks during adolescence that extend into young

⁵¹⁵ See, also, Crone, E. A., Dahl, R. E., “Understanding adolescence as a period of social-affective engagement and global flexibility” (2012) 13 *Nature Review Neuroscience* 636-65; Smith, A. R., Chein, J., Steinberg, L., “Impact of socio-emotional context, brain development, and pubertal maturation on adolescent risk-taking” (2013) 64 *Hormonal Behaviour* 323-32.

⁵¹⁶ Pfeifer, J., Blakemore, S., “Adolescent social cognitive and affective neuroscience: Past, present, and future” (2012) 7 *Social Cognitive and Affective Neuroscience* 1.

⁵¹⁷ Blakemore et al., (2010) 926-933.

⁵¹⁸ Paus, T., “Mapping brain maturation and cognitive development during adolescence” (2005) 9 *Trends in Cognitive Sciences* 62.

⁵¹⁹ Giedd et al., (2008) at 948.

⁵²⁰ Giedd, J. N., Blumenthal, J., et al., “Brain Development during Childhood and Adolescence: A Longitudinal MRI Study” (1999) 2 *Nature Neuroscience* 861-863; Casey, B. J., Giedd, J., Thomas, K., “Structural and functional brain development and its relation to cognitive development” (2000) 54 *Biological psychology* 243.

⁵²¹ Giedd, J. N., Snell, W., Lange, N., “Quantitative Magnetic Resonance Imaging of Human Brain Development: Ages 4-18” (1996) 6 *Cerebral Cortex* 551-60.

⁵²² Ibid.

⁵²³ Gogate and Giedd et al., (2001) 272-281; Paus (2005) 62.

adulthood.”⁵²⁴ Studies show that these structural changes influence adolescents’ social cognition, decision-making, emotional processing and reactivity. While it is well known by psychologist sociologists and neuroscientists that children/young persons during adolescence show incremental improvements in mental competence. For instance, they mature enough to coordinate their subjective views with other people’s perspectives, think logically, disregard distracting information and process information.⁵²⁵ However, they exhibit heightened risk-taking and sensation seeking because of “...the slow development of the brain regions necessary for cognitive control, subsuming response selection, top-down control and inhibitory processes, and including prefrontal cortex (PFC).”⁵²⁶

Several studies revealed that adolescents prefer to make decisions that provide an instant reward. Using the same scenario, participants had to choose between the following rewards: large, instant, small or delayed ranging from money to sweets. In all studies, adolescents adopted a more impulsive response, they selected the instant option and demonstrated increased activity in the left vmPFC. Decreased activity in the ventral striatum and other regions was also evident and age-dependant in those aged 11 to 31.⁵²⁷ Casey and Simmons et al., explained that “this development reflects a shift from reliance on limbic emotional circuitry to more prefrontal control circuitry, with intervening phases of development within and between subcortical (limbic) and cortical (prefrontal) circuits from early adolescence to adulthood.”⁵²⁸ Whilst adults also showed activity in the vmPFC and ventral striatum during the task, this activity was not as prominent in adolescents performing it. Adults preferred to avoid losses than acquire instant reward gains, and they took their time to consider each option’s value and consequences before making a rational decision.⁵²⁹

“Emotions affect and inform decision-making both directly and indirectly”⁵³⁰ in ‘hot’ (high arousal and emotional) situations such as gambling and ‘cold’ (non-emotional and low arousal) contexts when feelings inform the decision process in a less demanding situation.⁵³¹ According to Blakemore and Robbins, the above insights revealed that emotions considerably affect the child/young person who develops normally ability to make ‘cold’ decisions because the vmPFC and amygdala are still developing.⁵³² Factoring their lack of life experience and knowledge, they may be less aware of risks than adults and also overestimate/underestimate risks because they make decisions based on emotion and instant rewards.⁵³³ Concerning developmentally immature children/young persons, it follows that their developmental delays will have a greater bearing on their ability to make a rational decision compared to children/young persons who develop normally

⁵²⁴ Casey and Simmons et al., (2021) at 327.

⁵²⁵ Blakemore and Robbins (2012) at 1184; Steinberg (2014) p. 36; Casey et al., (2022) at 327.

⁵²⁶ Blakemore and Robbins (2012) at 1184.

⁵²⁷ McClure. S. M, Laibson. D. I, Loewenstein. G, Cohen. J. D, “Separate neural systems value immediate and delayed monetary rewards” (2004) 306 *Science* 503–507; Kable. J. W, Glimcher. P. W, “The neural correlates of subjective value during intertemporal choice” (2007) 10 *Nature Neuroscience* 1625–1633.

⁵²⁸ Casey and Simmons et al., (2021) at 329.

⁵²⁹ Christakou. A, Brammer. M, Rubia. K, “Maturation of limbic corticostriatal activation and connectivity associated with developmental changes in temporal discounting” (2011) 54 *Neuroimage* 1344–1354.

⁵³⁰ Coppola (2021) p. 101.

⁵³¹ Blakemore and Robbins (2012) at 1185.

⁵³² Ibid.

⁵³³ Miller-Wilson (2009) at 321-322.

of the same age.⁵³⁴ For instance, they will be significantly inclined to process decisions emotionally instead of thinking about the consequences of their choices and risks, particularly in ‘hot’ contexts when they must make highly emotional decisions. As a result, they are more likely to undertake heightened risk-taking activities to seek out instant rewards and resist acting in this way due to the slow and delayed developments of these impulse-control regions and PFC.⁵³⁵

Additionally, evidence reveals that individuals who are developmentally immature and those who develop normally comply with peer pressure and act according to their peers’ beliefs and interests. The latest neuroscientific evidence supports early behavioural and developmental psychological studies that peer influence peaks at around 14 years of age and then slowly decline during the middle to late adolescence because they are more concerned with the fear of social exclusions.⁵³⁶ Research also shows that children/young people are likelier to make false confessions and experience false memories.⁵³⁷ As Blakemore and Choudhury explained, the adolescent brain is sensitive due to brain plasticity and development, “much like sound categorisation during language acquisition ... certain social cognitive skills might be much more difficult to incorporate into brain networks once they are established after puberty.”⁵³⁸

Plasticity involves the brain remodelling, repairing and redeploying regions to function more effectively to suit the individual’s social and cognitive needs. From this perspective, the “early window of opportunity” is an excellent opportunity for developmentally immature children/young people to correct any delays or abnormal changes made in childhood/adolescence to get the brain back to developing normally. For instance, the brain might need to adapt to suit the needs of specific environments they are exposed to and life experiences (i.e., trauma and stress).⁵³⁹ They might temporarily suffer symptoms of mental conditions until their brain completes the required restructuring. In others, they might suffer symptoms of mental conditions over a longer period if their brains take longer to make the necessary changes to get back to developing normally. However, it is difficult for neuroscientists to establish precisely how a child/young person’s developmental immaturity will affect their mind and behaviour.⁵⁴⁰ Moreover, how long will they suffer developmental delays resulting in cognitive impairments,⁵⁴¹ which will be discussed in greater detail in the next section.

3.7 Abnormal Brain Development

⁵³⁴ In these studies, it is not clear whether their samples included developmentally immature children/young persons; MillerWilson (2009).

⁵³⁵ Blakemore and Robbins (2012) at 1187.

⁵³⁶ Gardner, M., & Steinberg, L. “Peer influence on risk taking, risk preference, and risky decision making in adolescence and adulthood: an experimental study” (2005) 41 *Developmental Psychology* 625–635; Blakemore and Robbins (2012) at 1188.

⁵³⁷ Grove, L. J., Kukucka, J., “Do laypeople recognize youth as a risk factor for false confession? A test of the ‘common sense hypothesis’” (2021) 28(2) *Psychiatry, Psychology and Law* 185-205.

⁵³⁸ Blakemore and Choudhury (2006) 307.

⁵³⁹ Romeo, R. D., McEwen, B. S., “Stress and Adolescent Brain Development” (2007) 1094 *Annals of the New York Academy of Sciences* 202-214; Bremner, J. D., Vermetten, E., Lanius, R. A., “Long-lasting effects of childhood abuse on neurobiology” in Lanius, A., Vermetten, E., Pain, C., *The Impact of Early Life Trauma on Health and Disease* (Cambridge University Press Online, 2011) pp. 166-177.

⁵⁴⁰ Casey et al., (2000) at 244.

⁵⁴¹ Ibid.

Studies show a correlation between abnormal brain development and mental conditions in developing children and young people.⁵⁴² Specifically, changes in the brain's dopamine and serotonin levels to density and volume changes of grey and white matter structures may lead to cognitive dysfunction and patterned behaviours (e.g., antisocial behaviour) associated with mental conditions.⁵⁴³

Regarding causes of abnormal development and medical conditions, a particular issue with the evidence and current diagnostic tools is that it can be challenging to identify their underlying cause in children/young persons. Several studies identify a wide range of correlative abnormal structural changes and cognitive functioning in children/young persons with traits of mental conditions.⁵⁴⁴ For example, some studies identify factors such as the environment as a contributory cause of the child/young person's specific structural brain abnormalities and suffering of characteristics of mental conditions. The problem is that scientists do not fully understand adolescent brain development's role in developing mental conditions in children and young persons. Whether a specific structural brain alteration triggers the manifestation of a mental condition's cognitive and behavioural traits or vice-versa to identify its cause; thus, studies of abnormal development and mental conditions must be considered by legal academics with caution because they merely provide correlations, not concrete proof of their origin.⁵⁴⁵

Considering the latest version of the DSM (DSM-5) includes new diagnoses and provides "...modifications to the criteria sets for more than 70 disorders,"⁵⁴⁶ it is impossible for the thesis to explore every mental condition listed in the DSM associated with abnormal adolescent brain development and children/young persons. Thus, the thesis will focus on the underlying triggers and consequences of two mental disorders – attention deficit hyperactivity disorder (ADHD)⁵⁴⁷ and personality disorder.⁵⁴⁸ The reason for exploring these conditions is because several of the appellants in the case study to be examined in section 4.4 suffered traits of these mental disorders at the time of the killing and unsuccessfully pleaded Section 2 as amended.

A personality disorder is relevant to criminal responsibility because it is underpinned by mental capacity – whether a person has the rational judgment to deliberate and exercise self-control over their actions.⁵⁴⁹ Personality disorder is defined by the World Health Organisation (ICD-10) as:

... A variety of conditions and behaviour patterns of clinical significance which tend to be persistent and appear to be the expression of the individual's characteristic lifestyle and mode of relating to himself or herself and others. Some of these conditions and patterns of behaviour emerge early in the course of individual development, as a result of both constitutional factors and social experience, while others are acquired later in life. Specific personality disorders (F60.-), mixed and other personality disorders (F61.-), and enduring personality changes (F62.-) are deeply ingrained and enduring behaviour patterns, manifesting as inflexible responses to a broad range of personal and social situations. They represent extreme or significant deviations from the way in which the average individual in

⁵⁴² Morton, J, *Understanding Developmental Disorder* (Blackwell Publishing, Oxford, 2004) pp. 6-9.

⁵⁴³ Rapoport et al., (2001) 272-281; Krain, A. L, Castellanos, F. X, "Brain Development and ADHD" (2006) 26 *Clinical Psychology Review* 433-444; Insel, T. R, "Mental Disorders in Childhood: Shifting the Focus From Behavioral Symptoms to Neurodevelopmental Trajectories" (2014) 311 *American Medical Association* 1727-1728.

⁵⁴⁴ Singh and Rose (2009) at 204.

⁵⁴⁵ Ibid. at 202.

⁵⁴⁶ American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition, Text Revision (DSM-5-TR), <https://www.psychiatry.org/psychiatrists/practice/dsm> (Accessed January 2023).

⁵⁴⁷ The evidence in L shows that the appellant suffered symptoms of the disorder, refer to subsection 4.4.3.

⁵⁴⁸ The evidence in Markham shows that the appellant suffered symptoms of the disorder, refer to subsection 4.4.2.

⁵⁴⁹ Refrain back to sections 2.2 and 2.3.

a given culture perceives, thinks, feels and, particularly, relates to others. Such behaviour patterns tend to be stable and to encompass multiple domains of behaviour and psychological functioning.⁵⁵⁰

The ICD-10 also provides the following diagnostic criteria for personality disorder:

- (A) Markedly disharmonious attitudes and behaviour, involving usually several areas of functioning, e.g. affectivity, arousal, impulse control, ways of perceiving and thinking, and style of relating to others;
- (b) the abnormal behaviour pattern is enduring, of long standing, and not limited to episodes of mental illness;
- (c) the abnormal behaviour pattern is pervasive and clearly maladaptive to a broad range of personal and social situations;
- (d) the above manifestations always appear during childhood or adolescence and continue into adulthood;
- (e) The disorder leads to considerable personal distress but this may only become apparent late in its course;
- (f) the disorder is usually, but not invariably, associated with significant problems in occupational and social performance.⁵⁵¹

In other words, a personality disorder is a broad category of psychological traits⁵⁵² that may lead a person to violence and criminality because it affects how they feel, think and act. However, the type of personality disorder will depend on the personality and “... the nature of the maladaptive tendency of mind and pattern of behaviour.”⁵⁵³ Personality disorder is relevant to criminal law because a person who kills may be incapable of exercising self-control if they perceive a threat to their physical or mental safety. Those with personality disorders typically suffer sufficient emotional distress and strong emotions such as anger; this may make it difficult for them to resist the capacity to act violently on their impulses.⁵⁵⁴

According to Pickard, it is therefore essential to understand that “... in so far as violence offers affect regulation, refraining from violence may require a person to undergo emotional distress and bear feelings of extreme anger and shame, unless and until alternative ways of coping with these are learned.”⁵⁵⁵ Thus, their degree of self-control is key to whether such a person can make a deliberately informed choice to commit murder and refrain from doing so to be held criminally responsible for their actions.⁵⁵⁶ A personality disorder is relevant to Section 2 as amended as medical experts have accepted that it requires “a recognised medical condition” that may cause a defendant to suffer from an “abnormality of mental functioning,” substantially impairing their ability to form a rational judgment or exercise self-control. This disorder is essential to the thesis,⁵⁵⁷ as Vincent Cope et al., observed, because:

Many young people with impulsivity and serious conduct problems do not go on to be psychopathic adults as they mature; however, youth exhibiting significant and impairing patterns of both conduct problems and callous-

⁵⁵⁰ World Health Organisation, *International Statistical Classification of Diseases and Related Health Problems* (World Health Organisation, Geneva, 10th revision, 2014) <https://icd.who.int/browse10/2014/en#/F60-F69> (Accessed January 2023).

⁵⁵¹ Pickard, H, “Choice, deliberation, violence: Mental capacity and criminal responsibility in personality disorder” (2015) 40 *International Journal of Law and Psychiatry* at 17.

⁵⁵² These include, schizoid, paranoid, dissocial, emotionally unstable, histrionic, anankastic, anxious and dependant personality disorders. See, further, <https://icd.who.int/browse10/2014/en#/F60-F69> (Accessed January 2023).

⁵⁵³ Pickard (2015) at 18.

⁵⁵⁴ Ibid. at 20-21.

⁵⁵⁵ Ibid. at 20.

⁵⁵⁶ See, further, Eastman, N, Campbell, C, “Neuroscience and legal determination of criminal responsibility” (2006) 7 *Nature Reviews: Neuroscience* 311-318.

⁵⁵⁷ See further sections 4.2-4.8.

unemotional (CU) traits seem to be at highest risk for having psychopathic personality disorder as adults (Frick 2006). Youth with CU traits have a number of classic psychopathy correlates, including aggression, attachment difficulties, deficits in affective processing, and attentional deficits.⁵⁵⁸

Furthermore, the disorder has been extensively relied on by defendants (children, young persons and adults) who have pleaded Section 2 as amended, as evidenced in *Markham*,⁵⁵⁹ *Brennan*,⁵⁶⁰ and *Golds*.⁵⁶¹ Mackay and Mitchell's study of 90 cases reveals that personality disorder was one of the most diagnosed medical conditions underpinning pleas of the defence of diminished responsibility.⁵⁶² However, it is important to note that in these cases, medical experts generally disagreed about whether a defendant satisfied the diagnostic criteria of personality disorder and suffered an inability to exercise self-control or form a rational judgment. According to Mackay, "one might tentatively conclude, therefore, that in relation to both abilities (b) and (c) a diagnosis of personality disorder or depression often leads to a contested trial which in turn fails to persuade the jury on the issue of diminished responsibility with a murder conviction being returned."⁵⁶³

As discussed in section 3.6, neural vulnerability is associated with normal and abnormal brain development and developmental immaturity in those suffering traits of mental conditions. More specifically, neuropsychological studies reveal a correlation between ADHD, abnormal structural changes and adolescent neural vulnerability. ADHD is a neurodevelopmental disorder defined as an enduring pattern of hyperactivity, impulsivity and inattention.⁵⁶⁴ Studies show that those diagnosed with ADHD suffer a substantial reduction in their brain's overall volume and large-scale structural changes of neural networks between the medial frontal cortex, the temporoparietal junction and the superior parietal lobe.⁵⁶⁵

However, some children/young people suffer symptoms of ADHD temporarily for reasons discussed in section 3.6. Others suffer symptoms of the disorder over a long period which might lead to the formal medical diagnosis of ADHD in adolescence and early adulthood, but this may not be the case for some developmentally immature children/young people.⁵⁶⁶ Some who are developmentally immature and suffer symptoms of ADHD will never receive a diagnosis. As explored in section 2.10, they suffer a higher degree of developmental immaturity than the norm for a person their age. But their degree of incapacity might not be significant enough to warrant a medical condition diagnosis in later life. This suggests that ADHD for some children/young people is a transitional phase as the processes of adolescent development between childhood and adulthood have temporary implications. It also explains why some suffer symptoms of ADHD, as L discussed in section 4.7.3, without cognitive impairment and conflicting expert medical opinions. Medical

⁵⁵⁸ Vincent. G. M, Cope. L. M, King. J, Nyalakanti. P, Kiehl. K. A, "Callous-Unemotional Traits Modulate Brain Drug Craving Response in High-Risk Young Offenders" (2018) 46 *Journal of Abnormal Child Psychology* 999.

⁵⁵⁹ [2017] *EWCA Crim* 739.

⁵⁶⁰ [2014] *EWCA Crim* 2387.

⁵⁶¹ [2016] *UKSC* 61.

⁵⁶² Mackay. R, Mitchell. B, "The New Diminished Responsibility Plea in Operation- Some Initial Findings" (2017) 2 *Criminal Law Review* 18-35.

⁵⁶³ Mackay (2018) at 4-5.

⁵⁶⁴ U.S Environmental Protection Agency's, *America's Children and the Environment Neurodevelopmental Disorders*, (Health, 3rd Edition, 2015) pp. 1-2.

⁵⁶⁵ Dickstein. S. G, Bannon. K, Castellanos. F. X, et al., "The neural correlates of attention deficit hyperactivity disorder: an ALE meta-analysis" (2006) 47 *Journal of Child Psychology* 1051-1062.

⁵⁶⁶ Castellanos. F. X, Giedd. J. N, Berquin. P. C, Walter. J. M, Sharp. W, Tran. T, et al. "Quantitative brain magnetic resonance imaging in girls with attention-deficit/hyperactivity disorder" (2001) 58 *Archives of General Psychiatry* 289-295.

experts must ensure that the child/young person is not temporarily suffering symptoms of a medical condition due to undergoing normal brain development-related brain plasticity (i.e., the ‘early window of opportunity’).⁵⁶⁷

In other children/young people, it suggests that ADHD is a stable and long-lasting problem that persists throughout adolescence and into adulthood. These individuals might develop the disorder during adolescence that persist because they cannot make the necessary changes to get back to maturing in line with the normal brain development pathway, such as during the ‘early window of opportunity.’⁵⁶⁸ Again, not all developmentally immature children/young people will receive a formal medical diagnosis of a medical condition in later life.⁵⁶⁹ Neuroscientists do not fully understand what causes some individuals to develop abnormally and suffer symptoms of ADHD when others do not.⁵⁷⁰ Subsequently, proof that children/young people with ADHD traits can be identified based on specific abnormal neurobiological markers (patterns) of brain activity is unlikely until further evidence comes to light.

Concerning personality disorder, neuropsychological studies show that there is a correlation between neural vulnerability, traumatic experiences and personality disorder. As discussed, a personality disorder is defined as a pattern of impulsiveness, aggression and emotional instability. It is prevalent in approximately 0.9% of children, with a higher prevalence of 1.4 to 3.2% in 16 to 22-year-olds.⁵⁷¹ Brunner et al., found a history of parental abuse or childhood sexual violence as a trigger of abnormal development and then symptoms of personality disorder.⁵⁷² Studies reveal a correlation between the reduction in grey matter volume in the frontal lobe with trauma (parental abuse and child sexual violence) and personality disorder symptoms in children.⁵⁷³

Epigenetic studies reveal that personality disorder has very early genetic origins; it can emerge in response to an environmental experience (e.g., long-lasting effects of trauma) and alter the expression of specific genes triggering the manifestation of the disorder.⁵⁷⁴ Several personality disorder phenotypic traits have been identified in the current literature; some have focused on exploring the gene region of the glucocorticoid receptor (NR3C1) and how it relates to antisocial personality disorder. Others have studied maltreated children with high activity of the monoamine oxidase A (MAOA) gene to examine the influence of MAOA after years of suffering trauma.⁵⁷⁵ A strong correlation between genetic variations and personality disorder was revealed; studies have

⁵⁶⁷ Leccei. A, van Hulst. B. M, et al., “Can we use neuroimaging data to differentiate between subgroups of children with ADHD symptoms: A proof concept study using latent class analysis of brain activity” (2019) 21 *NeuroImage: Clinical* 1-2.

⁵⁶⁸ See section 3.6.

⁵⁶⁹ See generally chapter 4.

⁵⁷⁰ Costa Dia. T. G, Wilson. V. B, Bathula. D. R, Iyler. S. P, et al., “Reward circuit connective relates to delay discounting in children with attention-deficit/hyperactivity disorder” (2013) 23 *European Neuropsychopharmacology* 33-45.

⁵⁷¹ Bozzatello. P, Bellino. S, et al., “Early Detection and Outcome in Borderline Personality Disorder” (2019) 10 *Frontiers of Psychiatry* at 1.

⁵⁷² Leev. R. T, Barker. L. E, et al., “The effects of childhood physical and sexual abuse on adolescent weapon carrying” (2007) 40 *Journal of Adolescent Health* 551-558; Brunner. R, Henze. R, Parzer. P et al., “Reduced prefrontal and orbitofrontal gray matter in female adolescents with borderline personality disorder: Is it disorder specific” (2010) 49 *Neuroimage* 114-120.

⁵⁷³ Tebartz van Elst. L, Hesslinger. B, et al., “Frontolimbic brain abnormalities in parentis with borderline personality disorder: a volumetric magnetic resonance imaging study” (2003) 54 *Biological Psychiatry* 163-171.

⁵⁷⁴ Dammann. G, Teschler. S, et al., “Increased DNA methylation of neuropsychiatric genes occur in borderline personality disorder” (2011) 6 *Epigenetics* 1454-1462.

⁵⁷⁵ Nia. A. B, Eveleth. M. C, Gabbay. J. M, et al., “Past, present, and future genetic research in borderline personality disorder” (2018) 21 *Current Opinion in Psychology* 60-68; Gescher. D. M, Kahl. K. G, Hillemacher. T et al., “Epigenetics in Personality Disorders: Today’s Insights” (2018) 9 *Frontiers in Psychiatry* 1-20.

found serotonin receptor HTR2A and gene variant 5-HTT in adult patients with borderline personality disorder.⁵⁷⁶

This suggests that some individuals are genetically predisposed to personality disorder if they suffer from childhood traumatic experiences. In these persons, personality disorder will not be a transitional phase caused by the ‘early window of opportunity’ or neural vulnerability associated with normal adolescent brain development.⁵⁷⁷ These studies are important to the thesis because each supports the argument that those with developmental delays might be abnormally developing, but their degree of immaturity might not result in a formal diagnosis of a “recognised medical condition.” However, the defence of diminished responsibility excludes them from successfully pleading it.

3.8 Identifying Developmentally Immature Children/Young Persons: Limitations of Current Diagnostic Tools

Adolescent brain development, both normal and abnormal, has important cognitive implications for children/young persons. Adolescent brain development can cause them to suffer developmental immaturity and symptoms of mental conditions based on factors such as neural vulnerability, individual trajectories of development and epigenetics. As a result, the thesis must examine the methods used by medical experts to diagnose persons with mental conditions and the methodological problems they encounter with developmentally immature persons. This is essential as these problems underpin the ‘expert’ problem, which is the focus of Chapter 4.

There are numerous diagnostic tools that medical experts use to diagnose individuals with mental disorders, from psychometric tests to neuroimaging scans. For space reasons, however, it is only possible to explore the most employed diagnostic tools and tests that medical experts have at their disposal in current medical practice, such as manuals and guidelines. I will examine the DSM because it is “a standard reference for clinical practice in the mental health field” and provides an “... available description of how mental disorder are expressed and can be recognised by trained clinicians.”⁵⁷⁸

The World Health Organisation considers the DSM a valuable diagnostic tool because it provides medical experts with “a set of symptoms and comments that have been agreed ... to be a reasonable basis for defining the limits of categories in the classification of mental disorders.”⁵⁷⁹ American Psychiatric Association (APA) observed that each mental disorder in the DSM-IV:

⁵⁷⁶ Ni. X, Bismil. R, Chan. K, et al., “Serotonin 2A receptor gene is associated with personality traits, but not to disorder, in patients with borderline personality disorder” (2006) 408 *Neuroscience Letters* 214-19; Tadic. A, Elsasser. A, Victor. A, et al., “Association analysis of serotonin receptor 1B (HTR1B) and brain-derived neurotrophic factor gene polymorphism in Borderline personality disorder” (2009) 116 *Journal of Neural Transmission* 1185-8.

⁵⁷⁷ Gescher et al., at 2.

⁵⁷⁸ American Psychiatric Association, Desk Reference to the Diagnostic Criteria from DSM-5 (American Psychiatric Association, Arlington VA, 2013) p. xii.

⁵⁷⁹ WHO, ICD-10, p. 2.

... Is conceptualized as a clinically significant behavioural or psychological syndrome or pattern that occurs in an individual and this is associated with present distress (e.g., a painful syndrome) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability or an important loss of freedom.⁵⁸⁰

According to Morton, the diagnostic tools used by the clinician and practitioner are vital because a diagnosis is not merely a formal recognition of a person's suffering; it forms part of the management, treatment and prognosis of those diagnosed. Given the importance of diagnosis, it should be no surprise that the DSM has been significantly criticised for narrowly describing disorders primarily regarding cognitive and behavioural symptoms. As Morton further remarked, because “only a fraction of the possible relevant behaviour can be observed directly by the busy clinician, and he or she has to rely on ... sources of information about the child...”⁵⁸¹ such as reports by their parents.

In agreement are Singh and Rose, they argued that errors in classifying and diagnosing children/young people result because “many ... conditions are ambiguously defined and differentiated”⁵⁸² in these diagnostic manuals. The result is that they might be mistakenly diagnosed with ADHD and prescribed a specific drug treatment when they are just anxious.⁵⁸³ While the American Psychiatric Association (APA) acknowledged clinical overlap between symptoms of several mental conditions, they reasoned that some degree of error is nonetheless expected because:

Mental disorders do not always fit completely within the boundaries of a single disorder. Some symptom domains, such as depression and anxiety, involve multiple diagnostic categories and may reflect common underlying vulnerability for a larger group of disorders.⁵⁸⁴

The problem is that diagnostic errors are everyday occurrences in medical practice involving children. Biederman's study of children with ADHD found that 30 to 60% of individuals also suffer oppositional defiant disorder (ODD) traits because these disorders share the same cognitive and behavioural symptoms.⁵⁸⁵ Similarly, Larson et al., found that 27% of children diagnosed with ADHD could also suffer from characteristics of conduct disorder.⁵⁸⁶ Chapter four will examine how these errors contribute to the ‘expert’ problem for developmentally immature children/young persons who kill under Section 2 as amended.

Another problem with using manuals is that they do not consider how adolescent development and developmental immaturity might affect children/young people's presentations of mental conditions. As discussed in section 3.6, some of these individuals might suffer significant neurological and cognitive impairments due to brain remodelling and plasticity. As a result, they make decisions and behave similarly to a child/young person who is developing abnormally and

⁵⁸⁰ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (APA, 4th Edition, 2000) p. xxxii.

⁵⁸¹ Morton (2004) p.134-135.

⁵⁸² Singh, I, Sinnott-Armstrong, W. P, “Introduction: Deviance, Classification, and Bioprediction” in Singh, Sinnott-Armstrong and Savulescu (2014) p. 3.

⁵⁸³ Morton (2004) p.135.

⁵⁸⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (APA, 4th Edition, 2000) p. xxxii.

⁵⁸⁵ Biederman, J, “Attention-deficit/hyperactivity disorder: a selective overview” (2005) 124 *Pediatrics* 71-78.

⁵⁸⁶ Larson, K, Russ, S. A, Kahn, R. S, et al., “Patterns of comorbidity, functioning, and service for US children with ADHD” (2007) 127 *Pediatrics* 462-470.

diagnosed with a specific mental condition but falls short of a formal diagnosis for reasons explained in section 2.10. Frith and Frith have postulated that they might be developmentally immature (e.g., suffer traits of mental conditions) temporarily because their brains functionally compensate by carrying out a particular task differently to avoid a long-term deficit.⁵⁸⁷

From Morton's perspective as a clinician, "... classifying a child as 'perfectly normal,' or as showing only temporary problems that he or show 'will grow out' of, 'are just as serious' as misdiagnosing developing abnormally children/young persons with the wrong medical condition."⁵⁸⁸ Suppose a psychiatrist concludes that Ben (a fictitious child) is developmentally immature rather than a person who has ADHD. According to Morton, what generally happens is that he will not receive medicine (e.g., methylphenidate) or therapy (i.e., cognitive behavioural therapy and social skills training) to relieve his symptoms. He may also be referred from one clinical to another because he falls short of a formal diagnosis and cannot be treated for the symptoms suffered.⁵⁸⁹ Thus, Frith and Frith argued that diagnostic manuals are of little help to clinicians because they are merely descriptive guides that set out mental conditions' cognitive and behavioural symptoms and cannot adequately accommodate developmental causes for each medical condition listed.⁵⁹⁰

Another issue with manuals such as the DSM is that they cannot accommodate variability between subgroups of developing children/young persons. One child (who is developmentally immature) might perform the same in cognitive tests as a child with a medical disorder. The results might identify what these children share in common, such as the same cognitive impairments. However, it opens the door for misdiagnosis and error in a diagnostic setting because the difference between those who suffer developmental immaturity and those with mental disorders depends on their degree of (in)capacity.⁵⁹¹ This suggests that the DSM, alongside cognitive testing, are not a precise diagnostic tool in medical practice. It is problematic for those who kill and plead the defence of diminished responsibility, as discussed in Chapter 2, because Section 2 as amended requires evidence from a medical expert that they suffer an "abnormality of mental functioning" arising from "a recognised medical condition" that substantially impaired their ability to perform one of three capacities. A developmentally immature child/young person might kill and lack one of the identified legally relevant capacities. However, their degree of (in)capacity is not serious enough to warrant a diagnosis of "a recognised medical condition." They will be convicted of murder because they cannot successfully plead Section 2 as amended, which will be discussed in greater detail in Chapter 4.

While the emergence of neuroscientific research (neuroimaging evidence) as a basis of valid proof of mental disorder has led some intuitions, such as the National Institutes of Mental Health (NIMH), to move away from using the DSM, given its validity issues.⁵⁹² Neuroimaging tools, Frith and Frith stated, "are exciting tools for studying the development of brain structure and function throughout the life span. They can throw new light on developmental disorders and psychiatric

⁵⁸⁷ Frith and Frith (2009) at p.138.

⁵⁸⁸ Morton (2004) pp.134-135.

⁵⁸⁹ Attention deficit hyperactivity disorder (ADHD) <https://www.nhs.uk/conditions/attention-deficit-hyperactivity-disorderadhd/living-with/> (Accessed January 2023).

⁵⁹⁰ Frith and Frith (2009) at p.138

⁵⁹¹ Refer back to section 2.10.

⁵⁹² Insel, T, "Transforming Diagnosis" *NIMH Director's Blog* (29th of April, 2013) <http://www.nimh.nih.gov/about/director/index.shtml>. Accessed June 2021.

conditions with their origin in childhood.”⁵⁹³ For example, structural imaging scans can identify significant anatomical abnormalities such as cysts and malformations (abnormal structures); functioning imaging can reveal “underdeveloped or disrupted synaptic connectivity at currently undetectable levels.”⁵⁹⁴ Spelke remarked that these images can help to identify neural signatures associated with specific cognitive processes (a pattern of brain activity).⁵⁹⁵ However, there are several methodological limitations with using neuroimaging scans to diagnose those with mental conditions.

One problem is that neuroimaging findings are limited to identifying the underlying abnormal functional and structural processes of a subgroup of individuals suffering symptoms of a specific mental disorder. As Campbell and Eastman argued, “it is not the case that specific inferences, or predictions, regarding the individual can validly be drawn on the basis of observed statistically significant differences between a group to which the individual belongs and a relevant control group.”⁵⁹⁶

Another problem is that neuroimaging findings do not prove that those with structural and functional brain abnormalities should be diagnosed with medical conditions. This is because neuroimaging scans cannot accurately identify the cause of brain abnormalities, for it might be the case that the person is exhibiting abnormalities due to undertaking compensatory adaptations during the ‘early window of opportunity’ and is thus developmentally immature. As Frith and Frith observed, “abnormalities of the developing brain are always likely to involve abnormal connectivity because it is connectivity that is modified by maturation and experience.”⁵⁹⁷ For instance, Plessen and Gruner et al., found that abnormalities (abnormal activity in the PFC) in children that suffer from the tics of Tourette syndrome reflect adolescent compensatory adaption rather than the underlying cause of the syndrome.⁵⁹⁸ This suggests that abnormal brain activity in some children/young people is not the cause of a medical condition but indicative of their individualised pathway of brain development and developmental immaturity. The next section will consider methods some scientists have identified that will provide accurate and early diagnoses of mental conditions in individuals.⁵⁹⁹

3.9 The Future of Identifying Children/Young Persons with Mental Conditions

Developmentally immature children/young persons who kill might be developing normally or abnormally. They may suffer structural neurological abnormalities and symptoms of mental conditions; however, medical experts do not formally diagnose them because “their degree of immaturity “is not so extreme as to constitute a recognised medical condition.”⁶⁰⁰ Although a

⁵⁹³ Morton (2004) p.134.

⁵⁹⁴ Glannon. W, “The Limitations and Potential of Neuroimaging in the Criminal Law” (2014) 18 *The Journal of Ethics* 154.

⁵⁹⁵ Spelke, E. S, “Developmental neuroimaging: a developmental psychologist looks ahead” (2002) 5 *Developmental Science* 392-396.

⁵⁹⁶ Campbell. C, Eastman. N, “The Limits of Legal Use of Neuroscience” in Singh and Sinnott-Armstrong (2014) p. 97.

⁵⁹⁷ Frith and Frith (2009) p. 138.

⁵⁹⁸ Plessen. J. K, Gruner. R, Lundervold. A, et al., “Reduced white matter connectivity in the corpus callosum of children with Tourette syndrome” (2006) 47 *Journal of Child Psychology and Psychiatry* 1013-1022.

⁵⁹⁹ See, generally, Singh et al., (2013).

⁶⁰⁰ Law Com (2013) para 9.10.

growing body of research reveals that those with formally diagnosed mental conditions and past developmental immaturity have structural brain abnormalities, there might also be a genetic origin. Morse and Newsome believed that the diagnostic categories of mental conditions will become more refined, medical diagnoses will be more precise as the research evolves, and neuroimaging tools will become more advanced.⁶⁰¹ Accordingly, von Polier et al., argued that it will be possible to accurately identify individuals at risk of developing mental conditions with bio-prediction using markers (e.g., genetic screening and neuroimaging).⁶⁰² Rutter defined a biomarker “... as a biological feature that can be objectively measured and that serves as an indicator of normal or pathogenic biological processes, or a pharmacological response to a therapeutic intervention.”⁶⁰³ As discussed in section 3.9, neuroimaging has not developed to the point that it can predict the development of mental conditions in children/young persons because “the mapping from brain acting to mental process to behaviour, remain complex and poorly understood.”⁶⁰⁴ However, research into behavioural genetics is producing promising results; studies show that some mental disorders are heritable in individuals with specific genetic pathways (genomes), such as the MAOA gene and conduct disorder.⁶⁰⁵ Gunter et al., have argued that:

Despite the considerable amount of scientific energy focused on identifying specific genetic factors operant in the genesis of Disorders ... behavioural genetics has yet to elucidate particular genetic pathways that lead to the development of the disorder, or devise molecular tests that may inform diagnosis or treatment.⁶⁰⁶

Gunter et al., claimed this might have something to do with the fact that there is a “long and tortuous path from the genome to behaviour.” Despite the current technological limitations of biomarkers, some researchers are looking towards the future, particularly Singh and Rose, because “biomarkers promise to be the most powerful psychiatric tool since the discovery of antipsychotic drugs – a biological means of predicting not only the development of a disorder but also its course and outcome.”⁶⁰⁷ This is significant because biomarkers could identify those at risk of developing medical conditions with severe behavioural issues, such as conduct disorder, before the individual experiences any symptoms. It is believed that those at risk of developing medical conditions (disorders and illnesses) might benefit from early and specialised treatments before symptoms manifest, preventing severe behavioural issues.⁶⁰⁸

An advantage pointed out in the literature is that neuroimaging and genetic screening for biomarkers could detect early-on those who will become involved in serious criminality (e.g., murder).⁶⁰⁹ According to Walsh, “... identifying (and intervening with) those who will persist with serious criminality can be seen as the Holy Grail of youth justice policy.”⁶¹⁰ Longitudinal studies show that children with early onset antisocial behaviour are at risk of developing life-long and

⁶⁰¹ Morse (2013) p. 178.

⁶⁰² Von Polier (2012) 121-139.

⁶⁰³ Rutter, M, “Biomarkers: Potential and Challenges” in Singh, Sinnott-Armstrong and Savulescu (2013) p. 188.

⁶⁰⁴ Royal Society (2011) p. 13.

⁶⁰⁵ Walsh (2010) p. 48

⁶⁰⁶ Gunter, T, Vaughn, M, Philibert, R, “Behavioral genetics in antisocial spectrum disorders and psychopathy” (2010) 28 *Behavioral Sciences and the Law* 148.

⁶⁰⁷ Singh and Rose (2009) at 202.

⁶⁰⁸ Ibid. at 206-207.

⁶⁰⁹ Glannon (2014) at 164.

⁶¹⁰ Walsh, C, “Bioprediction in Youth Justice” in Singh, Sinnott-Armstrong and Savulescu (2013) p. 43.

persistent antisocial problems that may lead to serious criminality, including psychiatric and physical health problems. Viding and McCrory have shown that a subgroup of those with early onset antisocial behaviour will also develop callous-unemotional traits (e.g., lack of guilt and empathy).⁶¹¹ Adults with these traits and antisocial behaviour are subsequently labelled psychopaths in criminal law.⁶¹² These studies reveal that psychopathic traits are heritable and contribute to the abnormal development of the prefrontal-ACC-amygdala in children/young persons. Furthermore, children with these traits and early-onset antisocial behaviour may be capable of serious violence and premeditation, including developing psychopathy in later life.⁶¹³

Singh and Rose, however, caution against the future use of “information about a biomarker ...” as it “... can help to build a risk profile for a particular condition or set of behaviours.”⁶¹⁴ The concern is that “... biomarkers alone, taken out of context of environmental influences, are unlikely ever to provide complete explanations for children’s behaviour or a forecast of how children’s lives will unfold.”⁶¹⁵ Behavioural genetic research (like neuroimaging studies) generates group data and statistics; thus, Glannon wrote, “one cannot draw a direct inference from the behaviour of a population or group to individual behaviour.”⁶¹⁶ From this perspective, the probability that the child or young person might develop a medical condition during their life course based on the presence of a specific gene is, therefore, not a certainty. Subsequently, Rutter explained, “inferences based on biomarker findings must be shown to be robust and valuable at an individual level. This more of a challenge than many people appreciate.”⁶¹⁷ Nonetheless, bioprediction has garnered interest and has been dubbed “the Holy grail” by legal practitioners and academics in modern literature. The issue, Walsh observed, is that:

It is foreseeable that, once a person has been branded as a risk through a positive (or rather negative) genetic test or brain scan for predisposition to antisocial behaviour, state overreactions to normal childhood transgressions become “justified,” with every minor infraction held up as “proof” of dangerousness. Conversely, it can reasonably be argued that basing predictions on both behavior *and* biology might help to avoid a disproportionate response. No predictive system is without its pitfalls ...⁶¹⁸

Suppose a child had a genetic test revealing a biomarker for antisocial behaviour; they were at risk of developing psychopathy in adulthood. It may seem morally beneficial to detect subgroups within the general childhood population at risk of developing psychopathy because it is linked to violence and potential criminality. As Glannon wrote, pharmacological intervention at an early age might prevent this person from committing future harm and crimes.⁶¹⁹ However, it is disadvantageous to place a child in a group with other potential psychopathic individuals at risk of developing future psychopathic tendencies. However, this label comes with negative assumptions about their future

⁶¹¹ Viding, E, McCrory, E, “Genetic Biomarker Research of Callous-Unemotional Traits in Children: Implications for the Law and Policymaking” in Singh et al., (2013) p.153-168.

⁶¹² Hare, D. J, Neumann, C. N, “The PCL-R Assessment of Psychopathy: development, structural properties, and new directions” in Patrick, C, *Handbook of Psychopathy* (Guildford Press, New York, 2006) pp. 39 -79.

⁶¹³ Frick, P. J, Viding, E, “Antisocial behaviour from a developmental psychopathology perspective” (2009) 21(4) *Development and Psychopathology* 1111-1131.

⁶¹⁴ Singh and Rose (2009) at 205.

⁶¹⁵ Ibid.

⁶¹⁶ Walsh (2013) p.43.

⁶¹⁷ Rutter (2013) p. 189.

⁶¹⁸ Walsh (2013) p. 49.

⁶¹⁹ Glannon (2014) at 164.

behaviour and mental state during adulthood, namely, that they could become violent and exhibit a lack of guilt and empathy. Singh and Rose fear that imposing on the child the label of a future psychopath will become “self-reinforcing,” potentially harming their development because of the social and psychological implications attached as there is a high probability that a child might not even go on to exhibit psychopathic tendencies. Still, if he/she believes that in the distant future, they might just become a psychopath because they undertake actions of a self-fulfilling prophecy, they may become one in later life.⁶²⁰

What if the child becomes traumatised from the therapies and treatments used to treat their future psychopathic tendencies? What might happen to those at risk of developing mental disorders and committing future criminality treated with pharmaceuticals is uncertain. It is not yet clear what the adverse social and psychological consequences might be on those identified at risk of developing mental disorders and committing future crimes in early childhood/adolescence. As Singh and Rose observed, there are many unknowns about the effects of biomarkers on individuals, for instance, “How will people feel about themselves given their risk profile, and will others perceive them differently? Will ‘risk’ and ‘potential’ eventually dominate ideas of personal identity, health status and opportunity in rigid, coercive or stigmatizing ways?.”⁶²¹ Further research is needed to explore the implications of biomarkers to understand their impact on those at risk of acquiring a medical condition in adulthood, particularly developmentally immature children/young persons.

3.10 Conclusion

This chapter is important to the thesis for it showed that some developmentally immature children/young persons are susceptible to developmental delays resulting in cognitive impairment due to how their brains change and mature during adolescence. Those who develop normally with developmental delays can temporarily suffer symptoms of mental conditions because of “the early window of opportunity,” as the brain is at one of its most vulnerable stages during adolescence. However, neuroscientists reveal that most deviations during this period will be minimum, and individuals will reach complete brain maturation/mental competence within the anticipated age and sex-related predictions. By contrast, those who develop abnormally with developmental delays also suffer cognitive impairment, but over a longer period on account of their pathway of development, environment and genetics. This group suffers developmental immaturity and cognitive impairment over a longer period and is more likely to receive a formal diagnosis of a medical condition when they are older and mature. This is essential to the thesis for it proves that some developmentally immature children/young people who kill might be without “a recognised medical condition” and thus cannot successfully plead Section 2 as amended.

There are two distinctive factors of developmentally immature children/young people who suffer developmental delays. First, they have a higher degree of developmental immaturity than the norm for individuals of their age. Second, their degree of immaturity is not significant enough to warrant a formal diagnosis of a medical condition. However, the second factor is difficult to establish and

⁶²⁰ Singh and Rose (2009) at 204.

⁶²¹ Ibid.

has led some medical experts to misdiagnose individuals as developmentally immature when they in fact suffer symptoms of a medical condition. As explored, in isolation, neuroimaging devices (e.g., fMRI), observations and the DSM are not precise diagnostic tools in medical practice to distinguish those with medical conditions from developmentally immature children/young persons.

Neuroimaging devices, albeit popular, generate data that shows individuals' underlying abnormal functional and structural processes, which is not concrete proof that they are suffering from a medical condition, for reasons explored in sections 3.7 to 3.8.⁶²² In diagnostic manuals, there is much clinical overlap between mental conditions, with many sharing the same cognitive and behavioural characteristics which may result in diagnostic errors.

Although several scientists predict that future advancements in diagnostic tools, such as biomarkers and neuroimaging, will create greater precision and accuracy in identifying those with a medical condition (illness or disorder) from an early age. However, these diagnostic advancements are envisaged to have methodological limitations and implications beyond invalidity and mislabelling for children/young people, which will be explored in greater detail in Chapter 6. The next chapter will critically examine the legal consequences for developmentally immature children/young persons who kill and lack legally relevant capacities with pleading Section 2 as amended.

⁶²² Section 3.8.

Chapter 4

A Critical Examination of the Defence of Diminished Responsibility: The Expert Problem

4. 1 Introduction

The preceding chapters framed how developmentally immature children/young persons aged between 10 and 17 years who kill are treated in English criminal law. The issue from the analysis is that developmental immaturity does not ground the basis of an excuse from criminal responsibility in England and Wales. The latest neuroscientific evidence reveals that developmental delays resulting in cognitive impairment significantly affect a developmentally immature child/young person's decisions, emotions, behaviours and brain development. Thus, the evidence supports the argument that developmental immaturity should form the basis of a specific excuse from criminal responsibility. However, this chapter will show that this idea is not uniformly represented in homicide law; specifically, the defence of diminished responsibility, as Section 2 as amended excludes those who suffer developmental immaturity and kill from successfully pleading the defence because of the 'expert' problem identified in Chapter one.⁶²³

The purpose of this chapter is to comparatively explore how each version (Section 2 and Section 2 as amended) of the defence works[ed] for those who suffer developmental immaturity and kill[ed]. These analyses are essential to the thesis as the empirical evidence and case law will show that most developmentally immature children/young people suffer developmental delays resulting in cognitive impairment due to the "expert" problem. As a result, their culpability is reduced or completely eliminated because they lack the ability to reason, resist peer influences and control their impulses. However, those who kill cannot satisfy the requirement of "a recognised medical condition" under Section 2 as amended because developmental immaturity does not necessitate a formal diagnosis of a medical condition. Thus, they are convicted of murder and sentenced to a mandatory life sentence because they are excluded from successfully pleading the current defence of diminished responsibility. By contrast, from examining *R v Abbott*, *R v Markham* and *R v L*, it will be revealed that Section 2's definitional requirements were framed broadly and permitted developmentally immature children/young people who killed to plead the defence of diminished responsibility successfully.

4.2 The Definitional Requirements of Section 2

⁶²³ Refer to section 1.2 for a description of the diagnostic issue.

The substantial elements of the old defence are contained in Section 2 of the Homicide Act (1957) and are no longer operational.⁶²⁴ Under Section 2(2) of this Act, defendants had the burden of proving that they satisfied its definitional requirements on a balance of probabilities.⁶²⁵ If successful, defendants were convicted of voluntary manslaughter rather than murder and sentenced by the trial judge at their discretion.⁶²⁶

Under Section 2, a defendant who proved they suffered an “abnormality of mind” arising “from a condition of arrested or retarded development of mind or any inherent cause or induced by disease or injury)” that “substantially impaired his mental responsibility” successfully pleaded the defence of diminished responsibility. The effect of the phrase an “abnormality of mind” was that a person who suffered a substantial impairment of his mental responsibility arising from one of the things listed in the parenthesis could successfully plead the defence and receive a voluntary manslaughter conviction rather than murder.⁶²⁷

During a Parliamentary debate of the Homicide Bill in 1956-1957, the Government claimed that the parenthesis provided a clear separation of “bordering on insanity” conditions resulting in a “defect of reason” under the defence of insanity with those that caused an “abnormality of mind” under Section 2.⁶²⁸ The parenthesis also excluded conditions such as “the mere outburst of rage or jealousy”⁶²⁹ because emotional outbursts were not considered acceptable conditions to cause an “abnormality of mind” under Section 2.⁶³⁰ As Lord Parker CJ in *R v Byrne* [1960]⁶³¹ wrote the parenthesis:

... [A]ppears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.⁶³²

However, Section 2 was significantly criticised by legal commentators because its definitional requirements were broad, resulting in vague phrasing. For instance, Griew posited that “abnormality of mind” had a narrow meaning in law because the parenthesis provided a short list of conditions that were the cause of a person’s “mental defectiveness.” In his view, this limited the remit of the defence because it was only available to those who suffered an “abnormality of mind” that arose from an “arrested or retarded development of mind or any inherent cause or induced by disease or injury.”⁶³³ Ultimately, trial judges were supposed to allow juries to apply their understandings of

⁶²⁴ Refer back to section 1.1 for the definitional requirements.

⁶²⁵ Ibid.

⁶²⁶ Law Commission (2003) para. 7.4-7.5. It is important to note that defendants receive legal advice from their defence team, refer back to section 2.7.

⁶²⁷ It is worthwhile noting that the origins of “abnormality of mind” date back to the definition of ‘mental defectiveness’ in Section 1(2) of the Mental Deficiency Act 1927. This definition provided that a condition must have been present “from birth or from an early age” and was not restricted to childhood illness or brain injury. See, generally, Jones, K, *A History of the Mental Health Services* (Routledge and Kegan Paul, London, 1972) p.204.

⁶²⁸ H.C. Deb. vol. 561, col. 320 (Attorney-General), 28th of November (1956); cf. H.L. Deb. vol. 202, col. 358 (Lord Chancellor), 7th of March (1957).

⁶²⁹ H.C. Deb. vol. 561, col. 320.

⁶³⁰ Ibid.

⁶³¹ *R v Byrne* [1960] 3 All ER 1.

⁶³² [1960] 3 All ER 1 at 4 per Lord Parker.

⁶³³ Griew, E, “The future of diminished responsibility” (1988) *Criminal Law Review* 77.

what they thought “abnormality of mind”⁶³⁴ meant within Section 2; however, this did not always happen, and judges gave directions to the jury, as evidenced in *R v Seers* [1984].⁶³⁵

In this case, the appellant, an adult at the time of the killing, appealed against his conviction of murder because the trial judge misdirected the jury with a definition of “abnormality of mind” adapted from Lord Parker’s above direction in *Byrne*.⁶³⁶ In fact, the trial judge directed the jury to determine whether the defendant was diminished in his responsibility if “... his mental state which, in popular language, or ordinary language, would be described as either partial insanity of being on the borderline of insanity ...” which resulted in him appealing to the Court of Appeal.⁶³⁷

The Court of Appeal held that insanity is a general exculpatory defence for those who suffer “a defect of reason” caused by “a disease of the mind” that makes them unable to comprehend “the nature and quality” of their acts or know what they did was wrong at the time of the offence.⁶³⁸ By contrast, as discussed, Section 2 had a different purpose; it was a partial and specific defence to murder and thus had no reference to the term ‘insanity’ within its definition. Subsequently, the Court of Appeal claimed that the trial judge should not have used the word “insanity” to direct the jury to an “abnormality of mind.”⁶³⁹ Lord Parker CJ made it clear in *Byrne* that under Section 2:

“Abnormality of mind,” which has to be contracted with the time-honoured expression in the M’Naghten Rules “defect of reason,” means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.⁶⁴⁰

The Court of Appeal decided that the appropriate direction was for the jury to use their common sense, as Parliament had originally intended, to establish whether the appellant satisfied the definitional requirements under Section 2.⁶⁴¹ The Court of Appeal further remarked that if the jury had applied their common sense to an “abnormality of mind,” Seers may have satisfied the defence. Hence, the Court of Appeal substituted his murder conviction for manslaughter by reason of Section 2 and varied his sentence accordingly.⁶⁴²

Another problem with the defence was that “... there was a great deal of variation in how the same conditions were classified by different doctors.”⁶⁴³ From a study of several psychiatric reports assembled by the Director of Public Prosecution for prosecution between 1966 and 1977, Dell found that 90% of these cases involved men diagnosed with schizophrenia or affective psychoses. Doctors described their “abnormality of mind” as arising from a “disease,” not an injury, inherent cause,

⁶³⁴ It is important to note that Spriggs and Dunbar are just two examples where trial judges provided different directions on “abnormality of mind” and not an exhaustive list. *R v Spriggs* [1958] 1 W.L.R 162, [1958] 1 Q.B 270; *Reg v Dunbar* [1957] 2 All E.R 737.

⁶³⁵ *R v Seers* [1984] 1 W.L.R 1008.

⁶³⁶ *R v Seers* [1984] 79 Cr App R 261; [1960] 3 All ER 1 at 4.

⁶³⁷ *R v Spriggs* [1958] 1 QB 270 at [11].

⁶³⁸ Loughnan, A, “Manifest Madness: Towards a New Understanding of Insanity Defence” (2007) 70 *Modern Law Review* at 379.

⁶³⁹ *R v Golds* [2016] UKSC 61, [2017] 1 All ER 1005 at 1061.

⁶⁴⁰ [1960] 3 All ER 1 at 4.

⁶⁴¹ Stuart-Cole, E, “Substantially confused? The paradox of Golds” (2017) 81 *Journal of Criminal Law* at 104.

⁶⁴² [2016] UKSC 61, [2017] 1 All ER 1005 at 1062.

⁶⁴³ Dell, S, *Murder into Manslaughter* (Oxford University Press, New York, 1984) p. 39.

arrested or retarded development.⁶⁴⁴ In these cases, she found that the courts were reluctant to offer further guidance on the parenthesis unless it was vital. This means that the ultimate issue of whether a defendant satisfied the definitional requirements of Section 2 largely fell to the medical expert's understanding and interpretation of an "abnormality of mind" and the parenthesis.⁶⁴⁵

Section 2 also included the phrase "substantially impaired his mental responsibility for his acts or omissions in doing or being party to the killing," which concerned the defendant's degree of mental impairment at the time of the killing. It required that a defendant suffer an "abnormality of mind" that "substantially impaired" their capacity to control their actions, make a rational judgment, understanding and perception of mental responsibility for their liability to be reduced.⁶⁴⁶ It is worthwhile noting that the Butler Committee in *Report of the Committee on Mentally Abnormal Offenders* (1975) supported the inclusion of "mental responsibility" because it underscored the core function of the defence, reducing a defendant's conviction to voluntary manslaughter due to their "abnormal mental symptoms."⁶⁴⁷

"Substantially impaired" was also explicitly designed for the jury to use their common sense to decipher its meaning.⁶⁴⁸ However, trial judges differed in how they defined "substantially" to the jury as Parliament similarly did not provide the courts with any elucidation of its meaning within Section 2.⁶⁴⁹ For example, in *R v Simcox* [1964],⁶⁵⁰ the trial judge directed the jury to consider whether the defendant suffered a "moderate" impairment of his mental responsibility.⁶⁵¹ By contrast, in *R v Lloyd* [1967],⁶⁵² the trial judge directed the jury to consider if the defendant's impairment had been substantial; he stated that it "... does not mean total ... at the other end of the scale it does not mean trivial or minimal. It is something in between ..."⁶⁵³

In summary, there is clear evidence that the definitional requirements were vague and framed broadly by Parliament under Section 2. This led some legal commentators to criticise the defence of diminished responsibility. However, what will be shown in the next section is that this lack of clarity was, in fact, beneficial to those who killed and suffered developmental immaturity. They were able to plead the defence successfully and receive manslaughter convictions, which is not the case under the current version of the defence. The thesis will also explore the varying definitions of the phrase in the context of developmentally immature children/young persons in greater detail in the proceeding section.

⁶⁴⁴ Ibid.

⁶⁴⁵ It is important to note that the courts have given rare guidance in cases such as *R v Sanderson* (1994) 98 Cr.App.R. 325 and *R v O'Connell* [1997] Crim.L.R. 683. See, also, Mackay. R. D, "The abnormality of mind factor in diminished responsibility" (1999) (Feb) *Criminal Law Review* 117-125.

⁶⁴⁶ Griew (1988) at 81.

⁶⁴⁷ Home Office, *Report of the Committee on Mentally Abnormal Offenders* (Home Office, Her Majesty's Stationary Office, London, 1975) para. 19.4.

⁶⁴⁸ *R v Byrne* (1960) 44 Cr. App.R. 246; *R v Simcox* (1964) Crim.L.Rev 402.

⁶⁴⁹ This was confirmed in *R v Egan* [1992] 4 All ER 470, 95 Cr App Rep 278, [1993] Crim LR 131.

⁶⁵⁰ *R v Simcox*, The Times, February 25, 1964.

⁶⁵¹ Stuart-Cole (2017) at 102.

⁶⁵² *R v Lloyd* [1967] 1 Q.B 175.

⁶⁵³ Ibid. at 176.

4.3 “Abnormality of Mind” and “Substantially Impaired His Mental Responsibility” with Developmentally Immature Children/Young Persons

The previous section showed how the courts interpreted an “abnormality of mind.” It was demonstrated that the phrase was subjected to judicial debate because it and the parenthesis lacked clarity and elucidation.⁶⁵⁴ This section will frame how the courts interpreted the above with developmentally immature children/young persons who killed and pleaded Section 2 with an examination of *R v Abbott* [1964].⁶⁵⁵ This analysis is essential to support the argument in section 4.1 that Section 2’s definitional requirements were framed broadly, which allowed a developmentally immature person who killed to plead the defence successfully.

In this case, Abbott was convicted and sentenced to be detained during Her Majesty’s pleasure (under Section 53(1) of the CYPA (1933) as amended by Section 9(3) of the Homicide Act (1957)), which provided that:

A person convicted of an offence who appears to the court to have been under the age of eighteen years at the time the offence was committed shall not, if he is convicted of murder, be sentenced to imprisonment for life, nor shall sentence of death be pronounced on or recorded against any such person; but in lieu thereof the court shall (notwithstanding anything in this or in any other Act) sentence him to be detained during Her Majesty’s pleasure, and if so sentenced he shall be liable to be detained in such place under such conditions as the Secretary of State may direct.⁶⁵⁶

The Court of Appeal held that a “period” under Section 52(3) was specified as life and varied his sentence accordingly; however, the court deferred the decision about the second appeal issue to the Home Secretary concerning the period that Abbott must serve in detention for life. The court reasoned that the medical evidence was insufficient to establish the period he needed to serve in detention due to his medical condition. Consequently, Lord Parker CJ requested further evidence from Dr. Williams so that the Home Secretary could determine whether detention was appropriate for Abbott and, if so, how long he should serve.⁶⁵⁷

The case facts are as follows, Abbott, a tea boy at a cement factory, aged 16 years, pleaded guilty to manslaughter by reason of Section 2 because he entered Crabb’s store (who also worked in the same place) and struck him numerous times on the head with a hammer and stole his wages. He then found paraffin, scattered it around the store, set light to the paraffin, locked the store door and left Crabb inside. A person noticed the fire and rescued Crabb; however, he died en route to the hospital. Abbott denied any knowledge of his involvement in the crime but later admitted that he had not intended to kill Crabb, only scare him because the victim had made a sexual advance towards him.⁶⁵⁸

The appellant presented evidence of a medical condition at trial from three doctors (Dr Walter Neustatter and Dr Scott, consultant psychiatrists and Dr Selby, the Principal Medical Officer at

⁶⁵⁴ Refer back to section 4.2.

⁶⁵⁵ [1964] 1 Q.B 489.

⁶⁵⁶ *R v Abbott* [1963] 1 ALL ER 738.

⁶⁵⁷ [1963] 2 WLR 1011 at 1015.

⁶⁵⁸ Ibid.

Brixton Prison) and his mother to ground his plea of Section 2. Abbott's mother revealed that he suffered epileptic fits four years before the killing and received medical treatment in hospital; the most recent fit was approximately three weeks before May 3 (1962), the date of his indictment for murdering Crabb. Considering the medical evidence, Lord Parker CJ stated:

... [T]hat they had all formed the same conclusion about the appellant's mental condition, namely, that his immaturity, associated with a history of epilepsy, would produce an abnormality of mind such as substantially to impair his mental responsibility for his act.⁶⁵⁹

The jury subsequently returned a guilty verdict of manslaughter, and Hinchcliffe J sentenced him to be detained during Her Majesty's pleasure.⁶⁶⁰ The then Home Secretary referred this case to the Court of Appeal in February 1963 because:

In passing this sentence, the judge was presumably acting under section 53 (2) of the Children and Young Persons Act, 1933, which provides that in certain circumstances the court may sentence an offender convicted of manslaughter to be detained for such period as may be specified in the sentence. Whereas section 53 (1) provides that a person under 18 convicted of a capital offence shall be sentenced to be detained during Her Majesty's pleasure, subsection (2) does not provide that a child or young person [1963] 2 WLR 1011 at 1013 convicted of any offences set out in the subsection may be sentenced to be so detained, and the Secretary of State is uncertain whether such a sentence can lawfully be passed in the absence of express statutory authority.⁶⁶¹

While the Court of Appeal agreed with Hinchcliffe J that he had no alternative but to order Abbott to be detained in detention due to his young age under Section 53(1), Lord Parker CJ observed that "it is quite clear that in the case of a conviction of a young offender for murder that is not only a proper sentence but the only sentence available."⁶⁶² The court stated Hinchcliffe J had erred when he failed to specify the period Abbott must serve in detention; thus, the Court of Appeal was tasked with determining a reasonable period he should have served in detention contrary to Section 53(2).⁶⁶³ Lord Parker CJ was cautious about imposing the period that Abbott should serve in detention because:

This is a case where on the medical evidence, in particular that of Dr. Williams at Wakefield Prison, the appellant requires close medical supervision to ascertain (1) the best treatment for his epilepsy; (2) long observation to determine whether his basic personality abnormality is due to an adolescent phase in a basically unstable individual or whether he is a psychopathic personality. In those circumstances, the court agrees that imprisonment as such is,

⁶⁵⁹ R v Abbott [1963] 2 WLR 1011 at 1012.

⁶⁶⁰ Ibid.

⁶⁶¹ The Court of Appeal stated that "the question may also arise whether an indeterminate period can be specified when the court purports to act under section 53 (2). In this connection the Secretary of State thinks it right to observe that, while it would appear to be open to a court of assize or quarter sessions under the existing law to impose a sentence of imprisonment for life on a person between the ages of 15 and 17, as an alternative to an indeterminate period of detention under section 53 (2) of the Act of 1933, the court will be precluded from passing a sentence of imprisonment on such a person when section 2 (2) of the Criminal Justice Act, 1961, is brought into force." Ibid.

⁶⁶² [1963] 2 WLR 1011 at 1014.

⁶⁶³ [1964] 1 Q.B. 489 at 494. It is worth noting that Section 2(1) of the Criminal Justice Act (1961) was due to be enforced on the 1st of August 1963, which provided elucidation of "such period" in Section 53(2). Namely, the "period" a child or young person serves should not exceed "... the maximum term of imprisonment with which the offence is punishable in the case of an adult ..." for murder.

if not unsuitable, at any rate less suitable than being detained in such place and on such conditions as the Secretary of State may direct.⁶⁶⁴

The court's observations suggest that their Lordships were concerned with the future risk he might pose to the general population if released on parole too early. Lord Parker CJ's view infers that imprisonment may not have been appropriate for Abbott, considering his developmental immaturity and young age, if further evidence revealed that he had a psychopathic personality disorder. Lord Parker CJ's hesitancy is revealing because it highlights the complex nature of developmental immaturity and its impact on the mental functioning of those who suffer from it. In Abbott, the medical expert Dr. Williams's concluded that he could not identify whether he suffered from a medical condition or developmental immaturity. Dr. Williams's decided that Abbott required close medical supervision to determine the most suitable treatment for his epilepsy and ascertain whether his basic personality disorder symptoms resulted from developmental immaturity or psychopathic personality disorder.

The explored scientific evidence in section 3.7 aligns with this thinking that developmentally immature children/young people who suffer developmental delays have a degree of immaturity that causes them to lack complete capacity or substantial impairment of rationality and self-control for criminal liability. Some individuals with developmental delays can be challenging to diagnose because their degree of impairment is significant, but it is not always clear whether they suffer from developmental immaturity or a medical condition, as evidenced by Abbott.

What is important about this case is that Abbott's developmental immaturity was not detrimental to the success of his Section 2 plea because the medical evidence revealed that he satisfied its definitional requirements. As Lord Parker CJ explained, "at the trial, the medical evidence was all one way, to the effect that this young man had, associated with a history of epilepsy, an immaturity of mind which, in the view of all the doctors, produced an abnormality which substantially impaired his mental responsibility."⁶⁶⁵ Although the Court of Appeal did not specify which of the parenthesis's causes he suffered and how his mental condition affected his mental responsibility. Lord Parker CJ's examination of the trial evidence reveals that the phrase "abnormality of mind" was interpreted broadly in line with the *Byrne* direction. This seems to be the case as his guilty plea of manslaughter by reason of Section 2 was accepted, and the court was satisfied that his developmental immaturity had satisfied the parenthesis.⁶⁶⁶

What *Abbott* further reveals about the defence is that an "abnormality of mind" was designed "... wide enough to cover the mind's activities in all its aspects, ..." ⁶⁶⁷ so that developmental immaturity was capable of diminishing a person's ability to perceive acts, form a rational judgment or exercise self-control under Section 2.⁶⁶⁸ The fact that a broad approach was adopted in *Abbott* confirms that Section 2 accommodated those who suffered developmental immaturity and a

⁶⁶⁴ [1964] 1 Q.B. 489 at 493.

⁶⁶⁵ [1963] 2 WLR 1011 at 1013.

⁶⁶⁶ Given that the Court of Appeal's judgments above did not specify which cause[s] within the parenthesis Abbott satisfied. I, therefore, cannot explore the parenthesis any further other than to clarify that the jury interpreted "abnormality of mind" and the parenthesis broadly in line with the *Byrne* direction.

⁶⁶⁷ Refer back to section 4.2; [1960] 3 All ER 1 at 4.

⁶⁶⁸ See also, [1960] 3 All ER 1 at 2.

“substantial impairment of his responsibility.”⁶⁶⁹ However, without access to other case law, there can be no further analysis of “substantially impaired his mental responsibility” and developmentally immature children/young people in the thesis, for the reasons explained in section 1.3. The next section will frame the definitional requirements of Section 2 as amended and then examine how developmentally immature children/young persons who kill are treated under it.

4.4 The Role and Definitional Requirements of the Current Defence of Diminished Responsibility

As previously discussed, Parliament accepted that “abnormality of mental functioning” arising “from a recognised medical condition” were essential new features of the defence of diminished responsibility. It was previously unclear under Section 2 whether a direct relationship between the defendant’s “abnormality of mind,” mental condition and conduct should have existed to plead the defence successfully. Section 4.2 also emphasised that an “abnormality of mind” and the parenthesis were subjected to significant criticism because they were drafted narrowly, limiting the relevant medical conditions available under it.⁶⁷⁰

Initial insights from legal commentators and governmental officials about including the concept of “a recognised medical condition” in Section 2 as amended were largely positive. Mackay’s preliminary observation in 2010⁶⁷¹ was that “a recognised medical condition” appeared conceptually wider than Section 2’s parenthesis; thus, it could embrace all relevant medical conditions identified in the DSM-IV⁶⁷² and ICD-10.⁶⁷³ Most importantly, it would not be limited to the listed recognised medical conditions within these diagnostic manuals; as the MOJ conceded, the defence had been extended to physical and psychological conditions such as diabetes and sleep disorders that were previously excluded under Section 2.⁶⁷⁴ As a result, the MoJ reasoned that “a recognised medical condition” would not become as quickly outdated like the parenthesis under Section 2 because:

We remain convinced that “recognised medical condition” is the concept best suited to bringing the law up to date in a way which would accommodate future developments in diagnostic practice and encourage defences to be grounded in a valid medical diagnosis. We are mindful of the risk of opening the defence too wide should we dispense with this requirement.⁶⁷⁵

Mackay was initially uncertain about including the phrase in the new version of the defence “as it was clear that to succeed in a plea under s.2(1) the abnormality of mind had to fall within one or

⁶⁶⁹ See further section 4.8.

⁶⁷⁰ Hansard, HL Vol.712, col.177 (June 30, 2009)); H.C. Deb. vol. 561, col. 320 (Attorney-General), 28th of November (1956); cf. H.L. Deb. vol. 202, col. 358 (Lord Chancellor), 7th of March (1957); Griew (1988).

⁶⁷¹ Mackay (2010) at 294.

⁶⁷² DSM-5.

⁶⁷³ World Health Organisation, Statistical Classification of Diseases and Related Health Problems, 10th Revision, (Geneva: WHO, 2007).

⁶⁷⁴ MOJ (2008) Consultation Paper CP19/08, para.49.

⁶⁷⁵ Ibid.

more of these bracketed causes, thus restricting the plea's availability.” Under Section 2 as amended, however, he further remarked that:

There is no such restriction relating to the scope of “recognised medical condition” in s.52 of the Coroners and Justice Act 2009, so it is to the new plea's other requirements which one must turn for this ... First, although it has been suggested above that this concept is wider than its counterpart in the original s.2(1) of the 1957 Act, there is ironically a danger that--because it focuses exclusively on the need for a defined and demonstrable condition which is medically recognised--it may fail to include those “mercy killing” cases which currently qualify for a diminished responsibility plea.⁶⁷⁶

While Section 2 as amended accepts a wide range of medical conditions, as discussed in section 2.9, the courts consider “abnormality of mental functioning” arising from “a recognised medical condition” purely as a psychiatric question. The courts have construed “a recognised medical condition” insofar that a successful plea of the defence requires “a defined and demonstrable condition which is medically recognised.”⁶⁷⁷ This has put significant weight on the medical expert's evidence in determining “the ultimate issue – whether the defendant's ability, etc., was substantially impaired and thus whether the plea should succeed.”⁶⁷⁸ As highlighted, the consequence is that the jury cannot reject expert evidence if that evidence is “too tenuous or taken at its highest, insufficient (set in the light of the uncontradicted evidence) to permit a rational rejection of the defence of diminished responsibility.”⁶⁷⁹

The defence requires that there is a link between a defendant's impairment and conduct; a defendant must prove that they suffer a “substantial impairment” of one or more of the following three things: (a) understand the nature of D's conduct, (b) form a rational judgment or (c) exercise self-control to plead the defence successfully.⁶⁸⁰

Section 2 as amended also requires that the defendant explains how their “abnormality of mental functioning” contributed to their actions in the killing, which is a new addition that narrows the defence.⁶⁸¹ Critically, Mackay initially cautioned against including the causation requirement because there was no previous support in the literature for it within Section 2. He observed that Parliament had never made it clear within Section 2 whether the defendant's “abnormality of mind” had to contribute to their actions in the killing. Section 2 specified that the defendant's “abnormality of mind” had to “substantially impaired his mental responsibility” to plead it successfully; there was no statutory requirement of a causal link. Thus, the defendant who pleaded Section 2 successfully received partial exculpation based on the presence of an “abnormality” that “substantially impaired his mental responsibility,” even if that “abnormality” had not contributed to or caused their conduct. It is worth noting that the insanity defence under the M'Naghten Rules also does not include such an element; all that is required is that the defendant's “disease of the mind” cause a “defect of reason.”⁶⁸²

⁶⁷⁶ Mackay (2010) 294.

⁶⁷⁷ Ibid. at 295.

⁶⁷⁸ Ibid.

⁶⁷⁹ [2014] EWCA Crim 2387; [2015] 1 W.L.R 2060; [2015] 1 Cr. App. R. 14 at [65].

⁶⁸⁰ Refer back to the definitional requirements of Section 2 as amended in section 2.9; Law Com No.304 at para. 5.121.

⁶⁸¹ Kennefick (2011) 761.

⁶⁸² McNaghten (1843) 10 Cl. & F. 200 at 210; Mackay (2010) at 300.

4.5 “Abnormality of Mental Functioning” Arising From “A Recognised Medical Condition” and Developmentally Immature Children/Young Persons

Whether a developmentally immature child/young person who kills can satisfy an “abnormality of mental functioning” depends on how the jury interprets “a recognised medical condition,” which is evidenced in *R v Conroy* [2017].⁶⁸³ Though the case involves an appellant, who was an adult aged 18 years at the time of the killing, *Conroy* is important to the thesis because it is the authority for the court’s position that a person can plead the defence if they suffer an “abnormality of mental functioning” arising from a neurodevelopmental disorder. The appellant showed signs of being developmentally immature during his childhood/adolescence years and was diagnosed with neurodevelopmental disorders in early adulthood. This makes *Conroy* crucial to the thesis because it shows that an individual with early signs of developmental immaturity, specifically ASD and ADHD, which the American Psychological Association categorises as neurodevelopmental disorders,⁶⁸⁴ can go on to receive a formal diagnosis of a medical condition in adulthood. Also, it cements the amended Section 2 defence requirement that a defendant needs a proper medical diagnosis of “a recognised medical condition” to plead this defence successfully. If *Conroy* had only shown signs of developmental immaturity and did not have formal medical diagnoses of ASD and ADHD, he would have been unable to plead this defence successfully.

In this case, the appellant appealed against his conviction of murder because the trial judge misled the jury by directing them with the following question, “has the defendant established that it is more probable than not that his ability, either to form a rational judgment or to exercise self-control, was substantially impaired? ...”⁶⁸⁵ The pre-trial evidence revealed that he was also taken into care during his early childhood because he suffered emotional and physical abuse. Lord Justice Davis specified that “...his behaviour has been marked by incidents of violence and also of inappropriate and highly sexualised behaviour, including, amongst other things inappropriate touching and remarks, incidents of exposure and so on.”⁶⁸⁶ In due course, he was diagnosed with autism spectrum disorder (ASD), attention deficit hyperactivity disorder (ADHD) and learning difficulties. All the medical experts (Dr Sandford, Professor Fazel, Dr Rooprai and Dr Amos) agreed that *Conroy* suffered from an “abnormality of mental functioning” arising from ASD.⁶⁸⁷ However, there was a dissenting opinion about his inability to form a rational judgment; Dr Sandford remarked that *Conroy*’s decision to attack the victim to have sex with her was not irrational. Thus, there was no evidence to suggest that he had lost control, and the jury convicted him of murder.⁶⁸⁸

Although the Court of Appeal dismissed *Conroy*’s appeal because the trial judge’s summary to the jury was not a misdirection. Lord Justice Davis’s observation reveals that a person with a history of developmental immaturity and a current diagnosis of “a recognised medical condition” (a neurodevelopmental disorder) could plead Section 2 as amended successfully.⁶⁸⁹ This recognition

⁶⁸³ *R v Conroy* [2017] *EWCA Crim* 81 at 8.

⁶⁸⁴ DSM-5 (2013) pp.50 and 59.

⁶⁸⁵ [2017] *EWCA Crim* 81 at 27.

⁶⁸⁶ *Ibid.* at 8.

⁶⁸⁷ *Ibid.* at 17-18.

⁶⁸⁸ *Ibid.* at 25 and 29.

⁶⁸⁹ *Ibid.* at 27.

is critical because the parenthesis within Section 2, as previously mentioned, restricted the defence to causes of disease, injury, arrested or retarded development of the mind. The Court of Appeal remarked that a neurodevelopmental disorder is “a recognised medical condition” and can cause a defendant to suffer an “abnormality of mental functioning.” This willingness to accept neurodevelopmental disorder in the future as the basis of a successful diminished responsibility plea suggests that the Government’s vision for Section 2 as amended to be grounded by a wide range of mental conditions has been realised.⁶⁹⁰

From this perspective, knowledge about the court’s interpretation of “a recognised medical condition” is essential to children/young people who kill and suffer a neurodevelopmental disorder. One study indicates that 3 and 4% of children in the United Kingdom suffer from neurodevelopmental disorders. ADHD is the most diagnosed medical condition, affecting 1 to 2 % of all children/young people suffering with neurodevelopmental disorders in the UK). 78.7% of these ADHD sufferers exhibit symptoms of intellectual disabilities such as learning difficulties.⁶⁹¹ If a child/young person who kills with ADHD pleads Section 2 as amended, it is possible that they might successfully plead the defence and receive partial exculpation because neurodevelopmental disorders are accepted as “a recognised medical condition.” However, if they suffer symptoms of the disorder due to suffering developmental immaturity, they are excluded from pleading the defence successfully because their degree of cognitive impairment is not significant enough to warrant a diagnosis of “a recognised medical condition.”⁶⁹²

In the following section, this consideration will be explored further by examining how the courts have interpreted the requirement that the defendant’s abnormality of mental functioning” arising from “a recognised medical condition” must substantially impair their ability to do one or more things identified in section 2.10.

4.6 “Substantially impaired D’s ability to do one or more things” and Developmentally Immature Children/Young Persons

R v Golds [2016]⁶⁹³ helps us clarify how developmentally immature children/young persons who kill are treated under this aspect of the defence. *Golds* provides the leading interpretation of the meaning of ‘substantially impaired’ in the statute and thus requires discussion. In this case, the appellant appealed against conviction of murder because the trial judge misdirected the jury to use their common sense to interpret “substantial impairment.” The Supreme Court held that “substantially impaired” had not taken on a new meaning in the current defence and the direction under Section 2 remains applicable in law.⁶⁹⁴

Golds reveals that a person will not satisfy this aspect of the defence if their inability to form a rational judgment, exercise self-control or understand the nature of their conduct is not

⁶⁹⁰ Refer back to section 2.10.

⁶⁹¹ Harris, J, Madden, H, Oyston, J, et al., *A Health Needs Assessment for Children and Adults with Neurodevelopmental Conditions in Liverpool* (Public Health Institute, Liverpool John Moores University, January 2017) p. 1.

⁶⁹² Refer back to section 2.10.

⁶⁹³ *R v Golds* [2014] *EWCA Crim 748* at [1]-[3].

⁶⁹⁴ *Ibid.* at [55].

“substantially impaired” at the time of the killing.⁶⁹⁵ A person who kills will not satisfy a “substantial impairment” if their inability to do one of these things is not considered “something more than trivial” by a jury.⁶⁹⁶ The following subsection will examine how Section 2 accommodated developmentally immature children/young persons who killed and addressed the “expert” problem with an exploration of its definitional requirements.

4.7 Was Section 2 More Accommodating of Developmentally Immature Children/Young Persons Who Kill than Section 2 as amended?

This section will orientate the discussion of both versions of the defence with a critical exploration of *Abbott*, *Markham* and *L*, alongside the latest neuroscientific evidence outlined in Chapter three. Before examining the defence of diminished responsibility, the section will provide a brief overview of the facts of each case; this is important to clarify how the “expert” problem developed in each case and frame the thesis’s leading argument that Section 2 accommodated developmentally immature children/young people who killed.

4.7.1 R v Abbott

Section 4.3 highlighted that Abbott successfully pleaded the defence of diminished responsibility under Section 2. Lord Parker CJ’s commentary on the medical evidence supports the conclusion that Abbott suffered an “abnormality of mind” that substantially impaired his mental responsibility from developmental immaturity and epilepsy.⁶⁹⁷ It explained that the meaning of “abnormality of mind” offered by Lord Parker CJ in *Byrne* provided a broad and accurate picture of the person’s relevant diminished capacities and medical conditions that were applicable under Section 2.⁶⁹⁸ The phrases of an “abnormality of mind” and the parenthesis were broad enough for the courts to provide Abbott with a partial excuse of diminished responsibility based on evidence of developmental immaturity and a history of epilepsy.

Essential points to re-emphasise are that the court was concerned with the significant future risk he might pose to the general population if released too early on parole based on the expert evidence of Dr Williams, not his level of culpability. Lord Parker CJ acknowledged that imprisonment might be inappropriate for Abbott due to his developmental immaturity and young age if it came to light that he had a psychopathic personality disorder. He importantly inferred that “at the trial, the medical evidence was all one way, to the effect that this young man had, associated with a history of epilepsy, an immaturity of mind which, in the view of all the doctors, produced an abnormality which

⁶⁹⁵ Ibid.

⁶⁹⁶ Ibid. at [54]; Mackay. R, “R v Golds (Mark Richard): diminished responsibility – Homicide Act 1957 ss.2 – meaning of the word substantially” (2014) 10 *Criminal Law Review* 744-746; Mackay. R, “The impairment factors in the new diminished responsibility plea” (2018) 6 *Criminal Law Review* at 464-466.

⁶⁹⁷ See pp. 106-108.

⁶⁹⁸ [1960] 3 *All ER* 1 at 4 per Lord Parker.

substantially impaired his mental responsibility.”⁶⁹⁹ For the reasons explained, this demonstrates that an “abnormality of mind” and the parenthesis were broad enough for a person to plead the defence of diminished responsibility successfully with epilepsy, as this is an recognised medical condition, and developmental immaturity.⁷⁰⁰

The thesis also mentioned evidence of an “expert” problem in *Abbott* but did not justify the rationale for this problem’s existence in section 4.5. This thesis’s “expert” problem in *Abbott* concerns that he was a developmentally immature young person with significantly diminished capacities. As discussed, without further observation, Dr Williams could not determine if his diminished capacities were caused by developmental immaturity or a medical condition. It will show that this diagnosis would not have affected Abbott’s guilty plea under Section 2 because the definitional requirements of this version of the defence allowed developmentally immature children/young people charged with murder without “a recognised medical condition” to plead it successfully with developmental delays resulting in cognitive impairment and a history of epilepsy.

However, as discussed in section 2.10, a problem with Section 2 as amended is that the phrase “a recognised medical condition” excludes those who suffer from developmental immaturity and a history of epilepsy from successfully pleading the defence of diminished responsibility. This is because epilepsy is a physical disorder that falls under the scope of a “disease of the mind” within the defence of insanity. It is not accepted as “a recognised medical condition” under Section 2 as amended.⁷⁰¹ From analysing *Abbott*, the chapter will reveal that the appellant would be convicted of murder if he pleaded Section 2 as amended in current law because developmental immaturity is not accepted as “a recognised medical condition.” *Abbott* is the first of three cases explored in the thesis that frame the “expert” problem for developmentally immature children/young persons who kill under Section 2 as amended.

Chapter 5’s analysis of *Abbott* will examine several issues with the Law Commission’s proposed reforms outlined in section 2.10 and support the argument that Section 2 was broad enough to allow developmentally immature persons who killed to plead the defence of diminished responsibility successfully. Ultimately, the examination of *Abbott* in Chapters 4 and 5 will show that the defence of diminished responsibility under Section 2 as amended does not fully adhere to the doctrinal idea that those who lack mental incapacity should be excused from criminal responsibility.⁷⁰² This is because Section 2 as amended excludes developmentally immature persons who kill and suffer developmental delays resulting in cognitive impairment from successfully pleading the defence.

4.7.2 R v Markham

In 2016, Edwards, aged 15 years, admitted to two counts of manslaughter by reason of the defence of diminished responsibility; her pleas were rejected, and she was convicted of murder for both counts. She was convicted alongside her co-accused, Markham, also 15 years of age, for killing her

⁶⁹⁹ [1963] 2 *WLR* 1011 at 1013.

⁷⁰⁰ See section 4.3.

⁷⁰¹ *R v Sullivan* [1984] 1 *AC* 156; Loughnan (2021) p. 118.

⁷⁰² Refer back to 2.2 and 2.3.

mother and younger sister. She was sentenced to 20 years in detention under Section 269(2) of the Criminal Justice Act (2003) and appealed against both her sentences of murder.⁷⁰³

Edwards and Markham attended the same school and entered a sexual relationship. They were unhappy in their respective family homes. Edwards, who lived with her younger sister and mother, resented their relationship because she believed that her mother favoured the younger sister over her. Subsequently, she held grudges against them and planned how she would kill them with Markham.⁷⁰⁴

After two failed attempts to kill her mother and sister, they decided to try again (for a 3rd time) after school and revised their plans. On this attempt, Edwards stayed awake during the night; she heard Markham knock on the bathroom window, opened it, and let him into her home. Inside, Edwards helped Markham unpack his backpack containing four knives; she handed him the knife she had selected to kill her sister. Although Edwards decided she could not kill her sister because she lacked mental strength, it was agreed that Markham would kill both. She stayed in the bathroom while Markham killed her mother and sister in their bedrooms whilst they slept. After the killings, they stayed together in her home for 36 hours; they watched films, bathed and had sex. They were found by the police and arrested after Markham was reported missing by his parents.⁷⁰⁵

During her police interview, Edwards explained that they planned to kill her mother and sister, including her inability to kill her sister for the abovementioned reasons.⁷⁰⁶ At trial, Edwards pleaded the defence of diminished responsibility based on psychiatric evidence by Dr Indranil Chakrabarti and Dr Darren Spooner. The evidence revealed that she witnessed and was subjected to domestic violence for many years leading up to the killing in her family home. Dr Chakrabarti concluded that at the time of the offence, she suffered from adjustment disorder "... against a background of severe attachment problems, due to multiple stressors within a short time, aggravated by her relationship with Lucas. The final stressor was when she found that her belongings had been either thrown away, or been given to her sister."⁷⁰⁷ She subsequently agreed with Dr Spooner's account that Edwards was "... a person who was emotionally vulnerable and had significant attachment problem with her mother." Dr Spooner also claimed that Edwards' suffered a mental illness that significantly impaired her abilities to form a rational judgment and exercise self-control, which explained her actions in the killing.⁷⁰⁸

The prosecution sought evidence from Dr Philip Joseph, who concluded that Edwards did not suffer an "abnormality of mental functioning" arising from "a recognised medical condition;" thus, she had no basis for pleading Section 2 as amended successfully.⁷⁰⁹ The pre-sentence report revealed that she had difficulty regulating her emotions and showed no remorse. She also had an unhealthy relationship with Markham that significantly contributed to the crime.

Her age, psychiatric problems, history of emotional trauma and guilty pleas were mitigating factors considered by Haddon-Cave during sentencing. 9 aggravating factors were identified by the

⁷⁰³ [2017] EWCA Crim 739 at 1-4. For the complete list of her grounds of appeal, see 44-48.

⁷⁰⁴ Ibid. at 5-8.

⁷⁰⁵ Ibid. at 9-16.

⁷⁰⁶ Ibid. at 21-22.

⁷⁰⁷ Ibid. at 31.

⁷⁰⁸ Ibid. at 32.

⁷⁰⁹ Ibid. 33.

judge, though not an exhaustive list; these include: one victim was a young girl, her intention to kill and premeditation.⁷¹⁰ In imposing her 20-year sentence, the trial judge concluded that:

You planned it together, you re-planned it when you failed to carry it out the first and second time, you carried it out together, step by step. Whilst you, Lucas, did the actual killings, you, Kim, willed it to happen and assisted all the way through. Both of you are perfectly intelligent and knew exactly what you were doing.⁷¹¹

Thus, Edwards appealed against her murder sentences on two grounds; first, the trial judge did not consider all the aggravating and mitigating factors of the case, except for her intention to kill, based on the minimum starting point. Under Schedule 21 of the Criminal Justice Act (2003), para 11(a) requires that the defendant's intention to cause really serious harm is considered a mitigating factor of the case. Sam Green Q.C for Edwards argued that:

... However, that, in the context of moving from the appropriate starting point set out in Schedule 21, it did not, 326 because para. 11(a) of the Schedule identifies an intention to cause serious bodily harm (rather than to kill) as a mitigating feature, which presupposes that an intention to kill is built into the starting point otherwise prescribed.⁷¹²

On the second ground of appeal, Sam Green Q.C claimed that the trial judge had failed to recognise that the appellant was a young person, which should have afforded her special rights under international legislation (e.g., ECHR and Article 37 of the UNCRC) following the decision of *T v United Kingdom* [2000].⁷¹³

The Court of Appeal held that “Mr Myerson and Mr Green are right to argue that built into the starting point, even for a young offender under the age of 18 years-old, is the intention to kill; a lesser intention would have mitigated the 12-year starting point.”⁷¹⁴ Concerning Edwards's substantial degree of premeditation and planning of the murders, the court argued that “... any event substantially aggravate the murders in this case, we do not consider that this error of statutory construction will have affected the outcome to any real or substantial extent.”⁷¹⁵ The Court of Appeal further acknowledged that “the gross and unnatural betrayal of the relationship”⁷¹⁶ and the vulnerability of the victims being killed whilst asleep in their beds demonstrated the gravity of the aggravated factors of the case.

Concerning ground two, the court rejected the submission because there was no evidence that the trial judge's sentence of 21 years was excessive; he approached the starting point after considering the aggravating and mitigating factors but before giving a 5% discount for her late guilty plea. Sir Brian Leveson P remarked that Edwards was not technically entitled to any discount because she did not plead guilty; she merely admitted that she wanted to murder her sister and

⁷¹⁰ Ibid. at 39-40.

⁷¹¹ Ibid. at 42.

⁷¹² Ibid. at 44.

⁷¹³ *T v United Kingdom* [2000] 30 EHRR 121.

⁷¹⁴ [2017] EWCA Crim 739 at 48.

⁷¹⁵ *R v Markham and another* [2017] All ER (D) 91 (Jun), [2017] EWCA Crim 739 at (1). Markham appealed on three grounds of appeal. I will not discuss this appellant's grounds of appeal because Edwards is the focus of the thesis not Markham.

⁷¹⁶ [2017] EWCA Crim 739 at 48.

mother during the police interview. The Sentencing Guidelines Council (2007),⁷¹⁷ para 4.3 provides that:

The level of reduction should reflect the stage at which the offender indicated a willingness to admit guilt to the offence for which he is eventually sentenced:

(i) the largest recommended reduction will not normally be given unless the offender indicated willingness to admit guilt at the first reasonable opportunity; when this occurs will vary from case to case ...⁷¹⁸

Thus, Sam Green Q.C argued that she should have been given a similar discount of 5% for a late guilty plea because she challenged the two charges of murder by pleading Section 2 as amended based on medical evidence.⁷¹⁹

Sir Brian Leveson P agreed that the Definitive Guideline permits consideration of the circumstances surrounding the delay of a guilty plea.⁷²⁰ He stated that Edwards admitted to killing her mother and sister with intent. Her delay in admission might have arisen because "... those advising them had to grapple with whether there was some psychiatric disorder which might mitigate their responsibility, particularly bearing in mind what was known of their social and developmental backgrounds." However, he reiterated that she did not expressly admit to the murders because Edwards's raised the defence of diminished responsibility. The Crown's expert evidence disagreed with the psychiatrists on behalf of Edwards on whether she suffered "an abnormality of mental functioning" arising from "a recognised medical condition" and which accepted medical condition she had.⁷²¹

The Court of Appeal allowed the appellant's appeal. It reduced her term to 17.5 from 21 years because "... depending on the nature of any disorder or disability, adults will be in a different position to children, and more likely to be able to make informed decisions based on an assessment of the evidence." The facts of this case were deemed unusual. Edwards should not have been deprived of mitigation for a guilty plea, based on her young age and mental condition, merely because her decision may have taken longer compared to an adult.⁷²²

Edwards supports my argument that developmentally immature children/young people might have fared better under Section 2 alongside *Abbott*. *Edwards* reveals the difficulty of pleading Section 2 as amended using current diagnostic methods. *Edwards* proves that such an individual can receive conflicting expert evidence on whether they suffer "an abnormality of mental functioning" from "a recognised medical condition" at the time of the killing or developmental immaturity. More importantly, it shows that developmental immaturity can result in conflicting medical opinions about the ultimate issue of the defence resulting in an unsuccessful Section 2 as amended plea. *Edwards* will also help to support the contention that the Law Commission's proposed "developmental immaturity" limb might have accommodated children/young people in

⁷¹⁷ The Sentencing Council also state that "a reduction in sentence is appropriate because a guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence. The reduction principle derives from the need for the effective administration of justice and not as an aspect of mitigation." *Ibid.* at 63.

⁷¹⁸ *Ibid.* at 64.

⁷¹⁹ *Ibid.* at 62.

⁷²⁰ *Ibid.* at 61.

⁷²¹ *Ibid.* at 68, 70-71.

⁷²² *Ibid.* 71-72.

the relevant subgroup. If enacted, the proposed limb in Section 2 as amended might have allowed her to successfully plead the defence of diminished responsibility, despite excluding developmentally immature children/young people who kill in its current form. However, it will show why a defendant like Edwards would have been unsuccessful at pleading the Law Commission's proposed "not criminally responsible by reason of recognised medical condition" defence as it is framed as a general and complete defence.

4.7.3 R v L

In 2017, L, aged 15, was convicted of murder and sentenced to detention for 14 years for stabbing and killing a 15-year-old.⁷²³ L appealed against his conviction of murder because the fresh evidence undermined the safety of his conviction. Also, he appealed against his sentence of murder because L argued that he was entitled to a 2-year deduction in his sentence due to his unconsidered postconviction admission by the trial judge.⁷²⁴ The appellant presented fresh evidence of his denial of responsibility which, if it had been presented to the jury, would have resulted in a manslaughter conviction.⁷²⁵ The Court of Appeal dismissed the appellant's appeal against conviction on the basis that it would not have affected the jury's decision, and the trial judge had given sufficient credit to L's late admission of guilt during sentencing.⁷²⁶

The fresh evidence revealed that L suffered developmental immaturity at the time of the killing but no cognitive impairment to support an "abnormality of mental functioning" under Section 2 as amended. From an analysis of L, it will be shown that developmental immaturity is recognised as a mitigating factor to reduce a child or young person's sentence. However, the same consideration is not given to developmental immaturity when the court assesses a person's degree of culpability if the defence of diminished responsibility is pleaded at trial.

The pre-trial evidence revealed that L presented with severe conduct disorder and suffered symptoms of ADHD or PTSD at the time of the killing. A 2016 psychiatric report detailed that "it was indicated in that report that he could be described as having a "severe unsocialised conduct disorder": but that was not an inherent medical condition."⁷²⁷ Dr Church noted that L shows no evidence of cognitive impairment and confusion, despite presenting with severe conduct disorder on examination. He also observed that L suffered traits of PTSD or ADHD but concluded he did not satisfy the diagnostic criteria for a formal mental disorder diagnosis.⁷²⁸ The trial judge, during his summing up, left the issue of manslaughter for the jury to decide due to his lack of intent to kill or cause really serious harm and evidence. Nonetheless, the jury convicted him of murder.⁷²⁹

He appealed because the fresh evidence from Dr Marriott indicated that L suffered symptoms of PTSD and depression at the time of the killing. These symptoms, coupled with a history of harsh parenting, a traumatic past and developmental immaturity accounted for his denial of responsibility and diminished mental state.⁷³⁰ Professor Young, the prosecution's expert, agreed with Drs Church

⁷²³ [2019] EWCA Crim 1326.

⁷²⁴ Ibid. at 1-5 and 54.

⁷²⁵ Ibid. at 53.

⁷²⁶ Ibid. at 55.

⁷²⁷ Ibid. at 19.

⁷²⁸ Ibid. at 20-21.

⁷²⁹ Ibid. at 22.

⁷³⁰ Ibid. at 36.

and Marriott. However, he took issue with the degree of influence L's father had over his decision to plead guilty. It was summarised that L's PTSD symptoms were irrelevant to his decision to admit guilt.⁷³¹

On a side note, it is essential to acknowledge that Marriott and Young also submitted numerous articles about the individual differences associated with adolescent brain development and children/young people in criminal law.⁷³² The Court of Appeal stated that:

The courts (as, indeed, are most parents) are well aware that the brain develops, and responsibility grows, as children grow into adulthood. Put broadly, it can be accepted that children and adolescents generally are less capable decision makers than adults and that the workings of a child's brain may be different to those of an adult. It is known that teenagers are much more likely to make reckless, anti-social and irresponsible decisions without thought of the consequences. The accompanying lack of maturity is thus reflected in the Sentencing Guideline relating to young offenders. Indeed, as the courts in recent times have stressed, even reaching the age of 18 (the legal age of adulthood) does not represent some kind of "cliff edge" whereby full maturity is to be assumed. These sentiments find reflection in the various papers which Ms Brimelow produced to us. But they lend no real support to some general proposition that, assuming no cognitive deficit, teenagers are in all cases not to be considered responsible for their actions or not to be considered responsible for using knives or not to be considered responsible for their decisions during the court process.⁷³³

For these reasons, the Court of Appeal refused L's application for leave of appeal because his conviction was not unsafe. The Court of Appeal considered whether the jury's decision might have been reasonably affected by the fresh evidence if it had been adduced at trial and concluded that it would not have.⁷³⁴

Although, L does not deal with the defence of diminished responsibility as the appellant did not suffer from cognitive impairment at the time of committing murder, this case is important to the thesis because it provides that the courts do in fact recognise developmental immaturity as a mitigating factor that affects the culpability of the child/young person. If the courts accept developmental immaturity during the sentencing stage as a mitigating factor, L can be used to support the thesis's argument that it should also form the basis of an exculpatory defence for murder.

4.8 The consequences of Section 2 as amended for developmentally immature children/young people

How does the "expert" problem support the argument that Section 2 accommodated children/young people with developmental immaturity who killed? Parliament designed the definitional requirements of the defence vague so that the jury could broadly interpret it to protect those who killed with diminished capacities.⁷³⁵ As discussed in subsection 4.3, an "abnormality of mind" and "substantial impairment" were intertwined with the parenthesis; this gave the court some

⁷³¹ Ibid. at 37-38.

⁷³² Ibid. at 40.

⁷³³ Ibid. at 41.

⁷³⁴ Ibid. 52-53.

⁷³⁵ Refer to section 4.3-4.4.

clarification of the types of mental conditions that were available under it. Though Griew and Dell criticised the parenthesis because they believed that the courts required a more explicit definition of the terms “inherent causes,” “disease” and “injury” within the context of an “abnormality of mind to prevent broad interpretations by the courts.”⁷³⁶

From an analysis of *Abbott*, it is clear that Section 2’s phrasing arguably benefited developmentally immature children/young people who killed and pleaded it. An “abnormality of mind” was not bound to “a recognised medical condition” (as is the case under Section 2 as amended); thus permitted *Abbott* to plead Section 2 successfully.⁷³⁷ As Lord Parker CJ highlighted, “... the medical evidence was all one way, to the effect that this young man had, associated with a history of epilepsy, an immaturity of mind ...,” which produced an “abnormality of mind” that substantially impaired his mental responsibility.⁷³⁸ The trial judge interpreted the evidence consistently in line with Lord Parker CJ’s earlier commentary in *Byrne* that “abnormality of mind” was designed “... wide enough to cover the mind’s activities in all its aspects ...”⁷³⁹

Based on the court’s interpretation of Section 2 in *Abbott*, it is conceivable that Edwards could also have successfully pleaded it if this version of the defence had not been replaced by Section 2 as amended. The expert evidence for the defence presented the argument that Edwards suffered from an adjustment disorder that significantly impaired her ability to form a rational judgment and exercise self-control, which explained her actions in the killing.⁷⁴⁰ Like *Abbott*, the prosecution concluded that she was a developmentally immature young person with difficulty regulating emotions, psychiatric problems and a history of emotional trauma.⁷⁴¹ It is therefore possible that Edwards might have satisfied an “abnormality of mind” that “substantially impaired his mental responsibility” if the court considered and accepted that her developmental immaturity caused a “substantial impairment” that was more than merely trivial.

Whilst expert evidence for the defence concluded that L was a developmentally immature young person. L suffered no cognitive impairment even though he presented on examination with severe conduct disorder, depression, PTSD or ADHD. It is, therefore, conceivable that L might have satisfied the requirement of an “abnormality of mind” based on his developmental immaturity because the court previously accepted that it was a condition within the scope of the parenthesis in *Abbott*.⁷⁴² However, it is difficult to discern whether L’s degree of impairment would have been considered more than merely trivial without evidence that he suffered developmental delays resulting in cognitive impairment.⁷⁴³

As discussed in section 4.8, the court must consider the emotional and developmental age of the child/young person as mitigating factors in assessing their culpability to the minimum term they must serve before being released on parole. The Sentencing Council wrote:

It is important to bear in mind any factors that may diminish the culpability of a child or young person. Children and young people are not fully developed and they have not attained full maturity. As such, this can

⁷³⁶ Griew (1988) 77; Dell (1984) 39.

⁷³⁷ Refer to section 4.3.

⁷³⁸ [1963] 2 WLR 1011 at 1013.

⁷³⁹ R v Byrne [1960] 3 All ER 1.

⁷⁴⁰ [2014] EWCA Crim 748 at [1]-[3].

⁷⁴¹ [2017] EWCA Crim 739 at 33. Refer back to section 4.7.2.

⁷⁴² See section 4.7.1.

⁷⁴³ See section 4.7.3.

impact their decision-making and risky-behaviour. When considering a child or young person's age their emotional and developmental age is of at least equal importance to their chronological age (if not greater).⁷⁴⁴

It is important to consider whether the child or young person has the necessary maturity to appreciate fully the consequences of their conduct, the extent to which the child or young person has been acting on an impulsive basis and whether their conduct has been affected by inexperience, emotional volatility or negative influences.⁷⁴⁵

Cognitive scientists know that adolescent brain development can result in general immaturity or developmental immaturity in children/young people until they reach complete brain maturation.⁷⁴⁶ The Sentencing Council also acknowledged that adolescence is "... a phase which passes fairly rapidly and so the sentence should not result in the alienation of the child or young person from society if that can be avoided."⁷⁴⁷ As such, developmental immaturity is a legally accepted mitigating factor that can affect the level of culpability of the child/young person who commits a crime and is considered in determining the sentences of children/young people.⁷⁴⁸

Extending the Sentencing Council's reasoning, if developmental immaturity is a significant mitigating factor in sentencing, it should also be relevant in assessing criminal liability precisely because it significantly impairs their decision-making and self-control due to developmental delay[s]. As discussed in Chapter 3, those who suffer from it have a lower degree of maturity than the norm for individuals of their age;⁷⁴⁹ thus, developmental immaturity should form the basis of a partial exculpatory defence as it can reduce their degree of culpability, which will be considered in greater detail in Chapter 5.

However, under Section 2 as amended, any condition falling short of an appropriate and valid medical diagnosis will not satisfy "a recognised medical condition." As explained in Chapter 3, developmental immaturity is not accepted as a medical condition in diagnostic manuals (e.g., DSM5) even though it has been acknowledged that it has led some medical experts to that misdiagnose individuals as developmentally immature when they in fact suffer from a medical condition. Some individuals develop abnormally with developmental delays and suffer symptoms of mental conditions over a long period on account of their pathway of development, environment and genetics. By contrast, those who develop normally with developmental delays can temporarily suffer symptoms of mental conditions because of "the early window of opportunity," as the brain is at one of its most vulnerable stages during adolescence.⁷⁵⁰ Developmental immaturity can change the brain's structure and function that support a child/young person's mental competence and behaviour to such an extent that they find it difficult to resist peer influences and lack the capacity to foresee risks, think about the long-term consequences of their actions, control their emotions and

⁷⁴⁴ Sentencing Council (2017) para 1.5. (Accessed February 2023).

⁷⁴⁵ Ibid. at para 4.10.

⁷⁴⁶ See, generally, chapter 3.

⁷⁴⁷ Sentencing Council (2017) at para. 1.7.

⁷⁴⁸ Ibid. at para. 5.25; Schedule 21 para 5A of the Sentencing Act 2020, as amended by Section 127 and 208 of the Police, Crime, Sentencing and Courts Act (2022).

⁷⁴⁹ Law Com (2013) para. 9.10

⁷⁵⁰ American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition, Text Revision (DSM-5-TR), <https://www.psychiatry.org/psychiatrists/practice/dsm> (Accessed January 2023); see section 3.8; section 3.4.3.

regulate their impulsive actions.⁷⁵¹ Thus, developmental immaturity should form the basis of an excuse and not just be considered in mitigation during sentencing in English law.

Altogether, the legal literature and cognitive science support the claim that developmental immaturity calls for an defence because legal doctrine recognises it as a factor that can affect a person's ability to exercise legally relevant capacities of responsibility.⁷⁵² As Hart argued, "...those whom we punish should have had, when they acted the normal capacities, physical and mental, for doing what the law requires ..."⁷⁵³ *Abbott* proves that developmentally immature children/young people successfully pleaded Section 2. Lord Parker CJ accepted that *Abbott*, a developmentally immature young person, suffered an "abnormality of mind" that "substantially impaired his responsibility" at the time of the killing. *Abbott* demonstrates that developmental immaturity was used to excuse a person from responsibility under Section 2.⁷⁵⁴ However, this is no longer the case as children/young people who suffer from it are excluded from successfully pleading the defence of diminished responsibility under Section 2 as amended, as evidenced in *Edwards*.⁷⁵⁵

Another problem with Section 2 as amended is that it requires the accused "provides an explanation for D's conduct" as "a significant contributory factor in causing, D to carry out that conduct." As discussed in section 2.9, though Section 2 had no such requirement, it merely required that the accused's "abnormality of mind" had to substantially impair their mental responsibility at the time of the killing. However, as Kennefick remarked, Section 2 was criticised because "... it has never been entirely clear whether, under the existing law, the abnormality of mind must, in some sense, 'cause' the defendant to kill."⁷⁵⁶ Hence, the Law Commission recommended⁷⁵⁷ the inclusion of a causal link between the defendant's mind and actions to address this uncertainty:

We have framed the issue in these terms: the abnormality of mind, or developmental immaturity, or both, must be shown to be 'an explanation' for D's conduct. This ensures that there is an appropriate connection (that is, one that grounds a case for mitigation of the offence) between the abnormality of mental functioning or developmental immaturity and the killing. It leaves open the possibility, however, that other causes or explanations (like provocation) may be admitted to have been at work, without prejudicing the case for mitigation.⁷⁵⁸

In agreement with this conclusion was Baroness Scotland of Asthal, who debated the Coroners and Justice Bill in the House of Lords; she stated:

The Government consider it is necessary to spell out what connection between the abnormality of mental functioning and the killing is required for the partial defence to succeed. Otherwise a random coincidence would suffice. It need not be the sole cause or even the most important factor in causing the behaviour but it must be more than merely a trivial factor. We believe this gets the balance about right.⁷⁵⁹

⁷⁵¹ Refer back generally to sections 3.6-3.8.

⁷⁵² See section 2.4.

⁷⁵³ See section 2.3.

⁷⁵⁴ See sections 4.3 and 4.7.1.

⁷⁵⁵ See section 4.7.2.

⁷⁵⁶ Kennefick (2011) 761.

⁷⁵⁷ Initially, the Law Commission proposed that there needed to be a strong causal link between the accused's "abnormality of mental functioning" and actions; they suggested that "the abnormality was a significant cause of the defendant's conduct in carrying out or taking part in the killing." However, after consultation, the Law Commission claimed that it could be an issue and opted for a significant rather than a sole cause. See Law Com (2004) para. 5.97; Law Com (2016) para. 5.123.

⁷⁵⁸ Law Com (2006) para. 5.124.

⁷⁵⁹ Hansard Report, House of Lords, Vol.712, col. 190 (June 30th, 2009) per Baroness Scotland of Asthal.

While legal academics were also open to the Law Commission's recommendation,⁷⁶⁰ for example, Mackay stated that it addressed the lack of clarity under Section 2 as it now requires that one of three abilities be substantially impaired and explain their actions being a contributing cause. However, he and others have warned about how the statutory wording could lead to potential ambiguity by the courts if not interpreted appropriately, irrespective of a "recognised medical condition."⁷⁶¹ Mackay employed the following theoretical case to explain the problem:

Let us consider a hypothetical case where the psychiatric evidence is as follows. D suffers from schizophrenia and killed V while experiencing delusions to the effect that God ordered him to kill. Schizophrenia is a recognised medical condition which led to D's experiencing an abnormality of mental functioning. This in turn is likely to have impaired D's ability to form a rational judgment and so clearly provides an explanation for the killing. The prosecution psychiatrist concurs with all this but unlike the psychiatrist for the defence expresses doubts as to whether the abnormality of mental functioning was the cause or a significant contributory factor in causing D to carry out the killing. One can only hope that this sort of dispute will be rare.⁷⁶²

Mackay's concern is warranted, suppose that expert medical evidence for the defence in L revealed that he suffered a cognitive impairment arising from severe conduct disorder; thus, it is provided that an "abnormality of mental functioning" arose from "a recognised medical condition" and substantially impaired his ability to exercise self-control. However, the independent medical expert doubted whether L's "abnormality of mental functioning" derived from severe conduct disorder and was the "significant contributory factor in causing" his actions in the killing. This independent medical expert claimed that L presented with symptoms of ADHD, and these symptoms were the significant contributing factor to his actions and substantial impairment, not from suffering severe conduct disorder. In that case, it is conceivable that a jury might place considerable weight on the independent medical expert's testimony rather than the other testimony if swayed by the former evidence. If so, L's diminished responsibility plea would be rejected and convicted of murder. In such a scenario, Mackay explained, nothing can prevent a jury from making this kind of decision within Section 2 as amended. This is a potential flaw in the defence of diminished responsibility that could apply to all defendants and may require future reform to address it. However, to the best of my knowledge, this problem does not yet exist. Case law evidence would be needed to prove its presence and determine whether a common law solution rather than statutory reform would be necessary to resolve it.⁷⁶³

4.9 Conclusion

⁷⁶⁰ Yeo, S, "English Reform of Partial Defences to Murder: Lessons for New South Wales" (2010) 22 *Current Issues of Criminal Justice* 7; Mackay (2010) 298.

⁷⁶¹ Mackay (2010) at 298; Fortson, R, "The Modern Partial Defence of Diminished Responsibility" in Reed, A, Bohlander, M, *Loss of Control and Diminished Responsibility Domestic, Comparative and International Perspectives* (Routledge, New York, 2011) pp. 21-25; Baker, D, *Glanville Williams Textbook of Criminal Law*, (Sweet & Maxwell, London, 4th Edition, 2015) p. 1215.

⁷⁶² Mackay (2011) p. 18.

⁷⁶³ For example, Mackay proposes a common law solution, however, it is not yet clear whether this would resolve the issue in legal practice as it has not arose. Ibid. at pp.18-19.

This chapter has shown that developmentally immature children/young people who kill are excluded from successfully pleading Section 2 as amended. Developmentally immaturity is not accepted as a recognised medical condition; thus, those who suffer from it fall outside the scope of the definitional requirements of “abnormality of mental functioning” arising from “a recognised medical condition” and are convicted of murder. Even though under Section 16 of the CYP A (1963), these individuals are deemed emotionally, mentally and intellectually mature enough to be blamed and punished for committing criminal actions. A person can only successfully plead the defence if they suffer from “a recognised medical condition” (e.g., personality disorder) that causes an “abnormality of mental functioning,” which substantially impairs their ability to perform one of three things, as outlined in Section 52(1A).

Based on the case analysis of *Abbott*, *Markham* (Edwards), and *L*, developmentally immature children/young people who kill and lack legally relevant capacities stood a better chance of successfully pleading Section 2 than Section 2 as amended for the reasons discussed. Without reform, children/young persons who kill and suffer developmental immaturity will be convicted of murder and sentenced to a mandatory life sentence. The next chapter will explore the Law Commission’s proposed reforms (highlighted in section 2.10) and the Government’s rationale for rejecting its recommendation to include developmental immaturity within Section 2 as amended.

Chapter 5

An Examination of Proposals for Reform: The Law Commission's "Developmental Immaturity" Limb and "Not criminally responsible by reason of developmental immaturity" Defences

5.1 Introduction

The neuroscientific insights into adolescent brain development support the case law and legal criticism that Section 2 as amended is framed narrowly to exclude developmentally immature children/young people who kill from successfully pleading the defence of diminished responsibility. The scientific insights discussed in Chapter 3 suggest that a child/young person who kills with developmental delays has a higher degree of immaturity than the norm for a person of the same age. More specifically, they suffer cognitive impairment and lack legally relevant capacities (e.g., to understand the nature of their conduct and exercise self-control) or total incapacity, but their degree of (in)capacity is not significant enough to warrant a diagnosis of "a recognised medical condition."⁷⁶⁴

Legal theorists accept developmental immaturity as a factor that can affect a person's ability to exercise legally relevant capacities of responsibility, for it reduces or completely impairs a person's mental capacity.⁷⁶⁵ Yet, developmental immaturity is not the basis of excuse under Section 2 as amended; children/young people who suffer from it are convicted of murder, for the reasons explained in Chapter 4.⁷⁶⁶ This is a problem because a developmentally immature child/young person who kills might suffer an "abnormality of mental functioning" that substantially impairs their ability to perform one or more of the things outlined in Section 52(1A) or complete incapacity. However, they are excluded from pleading Section 2 as amended and thus do not receive partial exculpation from responsibility because developmental immaturity is not accepted as "a recognised medical condition" deserving of partial exculpation under it.⁷⁶⁷

The cognitive sciences importantly reveal the complexity of developmental immaturity and its effect on a child/young person's mental state and behaviour during adolescence. These insights can help the law to understand how to deal with those who suffer from it and kill more adequately by offering an excuse rather than convicting them of murder. This, in turn, would acknowledge the child/young person's developmental immaturity and substantial impairment of legally relevant

⁷⁶⁴ See chapter 4.

⁷⁶⁵ Refer back to chapter 2.

⁷⁶⁶ To reiterate, developmental immaturity is not primarily suffered by children/young people, adults can also have developmental delays as a result of developmental immaturity during their formative years thus, this argument does not just apply to children/young people.

⁷⁶⁷ See section 4.8.

capacities at the time of the killing and reflect leading doctrinal ideas of criminal responsibility. Notably, it is only fair to blame and punish a person for their actions if they choose to break the law, possess the capacity to act and have a fair opportunity to refrain from breaking the law.⁷⁶⁸ Thus, the law should consider introducing two developmental immaturity defences (a specific partial defence for murder and a general and complete defence) for those who kill and suffer from it to adhere to this doctrinal thinking.⁷⁶⁹

This chapter will consider several proposed changes within English law that seek to recognise the relevancy of developmental immaturity as a factor that affects a person's ability to satisfy legally relevant capacities for criminal responsibility. The chapter will propose the introduction of two defences: the first, a partial defence of developmental immaturity for those who suffer from it and commit murder, and the second, a complete and general defence for those who suffer developmental delays and a total lack of capacity for any crime committed. These proposals draw on the Law Commission's 2006 partial defence of diminished responsibility and 2013 discussion paper which identifies the need for a complete defence to murder of "not criminally responsible by reason of developmental immaturity" for those who kill.⁷⁷⁰ These recommendations will inform the discussion of the revised defences proposed in the thesis. The proposed revised defences seek to give those with developmental immaturity who kill and suffer substantial impairment of capacity the opportunity to receive partial exculpation from responsibility with a voluntary manslaughter conviction. Also, those with a total lack of legally relevant capacities arising from developmental immaturity a defence of complete exculpation from criminal responsibility.

Before doing so, it is essential to discuss the Law Commission's 2006 and 2013 recommendations set out in section 2.10.⁷⁷¹ This is important to understand the Government's view on developmentally immature children/young people who kill and the rationale for rejecting the Law Commission's 2006 proposal.⁷⁷² The chapter will also examine how the Law Commission's 2013 proposed complete defence (if introduced) would have aided those who suffer developmental immaturity and are charged with murder. In the final pages, the chapter will consider the lack of progress of Lord Dholakia's Bills to increase the MACR⁷⁷³ to give more prominence to the thesis's proposed defences.

5.2 The Law Commission's Proposed Limb

As discussed in section 2.10, the Law Commission intended for Section 2 as amended to include a developmental immaturity limb, which would have made it possible for "... to bring in a verdict of diminished responsibility on the grounds of the developmental immaturity of an offender who was under 18 at the time he or she played his or her part in the killing."⁷⁷⁴ The Law Commission proposed the following definitional requirements for the defence:

⁷⁶⁸ Duff (1998) 376; Hart (2008) p. 22; see, generally, section 2.8.

⁷⁶⁹ See section 2.10.

⁷⁷⁰ Law Com (2013) para. 9.1.

⁷⁷¹ Law Com (2006) para 6.84.

⁷⁷² MoJ (2008) para. 52-55.

⁷⁷³ Age of Criminal Responsibility Bill (2019-21); see section 2.4.

⁷⁷⁴ Law Com (2006) at para 9.20.

- (a) A person who would otherwise be guilty of first degree murder is guilty of second degree murder if, at the time he or she played his or her part in the killing, his or her capacity to:
- (i) understand the nature of his or her conduct; or
 - (ii) form a rational judgment; or
 - (iii) control him or herself was substantially impaired by an abnormality of mental functioning arising from a recognised medical condition, *developmental immaturity in a defendant under the age of eighteen, or a combination of both*; and
- (b) the abnormality, the developmental immaturity, or the combination of both provides an explanation for the defendant's conduct in carrying out or taking part in the killing.⁷⁷⁵

There were two reasons for including developmental immaturity within Section 2 as amended. First, "... it is unrealistic and unfair ..." to assume that most children/young people who kill are sufficiently mature to satisfy the capacity requirements of the *mens rea* element of murder.⁷⁷⁶ This is because not all children/young people who kill will have "... the kind of developed sense of judgment, control and understanding that makes a first degree murder conviction the right result (provided the fault element was satisfied)."⁷⁷⁷ For example, "a mentally sub-normal boy believes that he must follow his brother's instructions, even when they involve taking part in a killing"⁷⁷⁸ because his developmental delays substantially impaired his ability to form a rational judgment.

Second, the Law Commission stated that medical experts found it "... impossible to distinguish between the impact on D's mental functioning of developmental immaturity, and the impact on that functioning of a mental abnormality."⁷⁷⁹ It was therefore considered unfair and unrealistic to force medical experts to assess the impact of a child/young person's mental functioning arising from developmental immaturity whilst disregarding the impact of their "abnormality of mental functioning" under Section 2.

Whilst there is a scientific distinction between (1) developmentally immature children/young people and (2) those who develop abnormally with a formal medical diagnosis, as developmentally immature children/young people possess a degree of immaturity that "... is not so extreme as to constitute a recognised medical condition"⁷⁸⁰ The Law Commission was ultimately concerned that it would have been unfair in cases where the development immaturity "is not so extreme as to constitute a recognised medical condition," a diminished responsibility plea would still not be available to those who kill. As the Law Commission claimed, it remains unfair "... to force experts – as the law currently does – to assess the impact of the latter [developmental immaturity], whilst disregarding the effect of the former [mental abnormality], is wholly unrealistic and unfair."⁷⁸¹ Subsequently, the Law Commission recommended that a child/young person charged with murder should be able to plead the defence of diminished responsibility successfully with evidence of developmental immaturity or "a recognised medical condition."

⁷⁷⁵ Ibid.

⁷⁷⁶ Ibid. at para. 5.130.

⁷⁷⁷ Law Com (2006) at para. 5. 131.

⁷⁷⁸ Ibid. at para 5.120.

⁷⁷⁹ Ibid. at para. 5.128.

⁷⁸⁰ Law Com (2013) para. 9.10.

⁷⁸¹ Law Com (2006) para. 5.128.

Consequently, the Law Commission set out how a child/young person should have pleaded the proposed limb if enacted. “For example, D may wish to give evidence that his or her power to control over his or her actions was substantially impaired by a biological factor such as poor frontal lobe developmental.”⁷⁸² In the Law Commission’s view, evidence of substantial impairment of Section 52(1A) arising from developmental immaturity via a biological, social or environmental cause could sufficiently explain their substantial impairment and their actions in the killing under Section 52(1B). Concerning the biological cause, it was an important feature of the proposed defence because the Royal College of Psychiatrists stated that:

Biological factors such as the functioning of the frontal lobes of the brain play an important role in the development of self-control and of other abilities. The frontal lobes are involved in an individual’s ability to manage the large amount of information entering consciousness from many sources, in changing behaviour, in using acquired information, in planning actions and in controlling impulsivity. Generally the frontal lobes are felt to mature at approximately 14 years of age.⁷⁸³

Given that the frontal lobes mature at 14 years and their impact on the capabilities of those under this age, the Law Commission felt it necessary to incorporate a rebuttable presumption into the defence to protect individuals with substantial impairments by affording them with successful pleas and reject those who are sufficiently mature. Specifically, “... in an individual case involving a child under 14 years of age, it would be open to the prosecution to seek to rebut evidence of poor frontal lobe development by arguing that this particular D had matured to a sufficient degree to be fairly convicted of first degree murder.”⁷⁸⁴ The Law Commission believed that the jury could be trustworthy “... to reject implausible claims ..” of the defence and accept those with merit.⁷⁸⁵

Concerning social and environmental factors, the Law Commission included these influences within the defence because two reviewed studies revealed that “... these influences may, in extremely rare circumstances, lead children or young people to kill.”⁷⁸⁶ These studies showed that some children/young people who kill come from seriously disturbed homes with psychopathy, physical or sexual abuse, violence and absent parents. Thus, it was important to the Law Commission to extend the effects of developmental immaturity beyond the biological to social and environmental factors if a developmentally immature child/young person comes from a seriously disturbed home and such influences their actions in the killing.⁷⁸⁷

An initial observation of the recommendation is that some developmentally immature children/young people who kill would be in a better evidentiary position to plead the proposed defence successfully than under Section 2 as amended. Specifically, developmentally immature children/young people who suffer substantial impairments in exercising self-control, forming a rational judgment or understanding the nature of their actions.⁷⁸⁸ It is framed broad enough to capture those who suffer developmental delays and substantial impairment of legally relevant capacities that stem from biological, social and environmental influences. However, a more exhaustive picture of the proposed defence in section 5.4 will reveal several problems with it,

⁷⁸² Law Com (2006) para 5.132.

⁷⁸³ Ibid.

⁷⁸⁴ Ibid. at para. 5.133.

⁷⁸⁵ Ibid.

⁷⁸⁶ Ibid. 5.134.

⁷⁸⁷ Ibid.

⁷⁸⁸ See, generally, chapter three.

making it an unfavourable option for reform to deal with the “expert” problem examined in Chapter 4.

5.3 The Government’s Rationale for Rejecting the Proposed Limb

The Government provided two reasons for rejecting the Law Commission’s above recommendation for the defence of diminished responsibility, which is as follows:

1. We are not convinced that the absence of a provision along these lines is causing significant problems in practice – we are not aware of specific cases which have resulted in inappropriate verdicts.
2. We think that there is a risk that such a provision would open the defence too widely and catch inappropriate cases. Even if it were to succeed only rarely (as the Law Commission suggest), we think it is likely that far more defendants would at least try to run it, so diverting attention in too many trials from the key issue.⁷⁸⁹

Regarding reason one, the Government claimed that the Law Commission failed to provide substantial proof of issues with Section 2, resulting in inappropriate verdicts involving developmentally immature children/young people. In Report No.304, the Law Commission’s justification for the proposal was based solely on scientific evidence from two studies which showed how social and environmental factors might influence developmentally immature children/young people who kill: the Royal College of Psychiatrists ‘Child Defendants’ paper (2006) and Bailey’s “Adolescents who Murder” (1996) article in the *Journal of Adolescence*. The Law Commission observed that:

One study has shown that seriously disturbed children who murder have home backgrounds in which there was commonly paternal psychopathy, alcohol abuse, absence from the home, and a history of violent behaviour by fathers. Another study has shown depressive illnesses in the mothers of juvenile murderers, and histories of serious sexual and physical abuse of juvenile murderers.⁷⁹⁰

The Law Commission also cited the Royal College of Psychiatrists to demonstrate the biological implications of frontal lobe development in children/young people. Moreover, it referenced a third article in footnote 93: Boswell’s “Young and Dangerous: The Background and Careers of Section 52 Offenders (1996).⁷⁹¹ The Law Commission provided no case law to support their proposal, even though it received some positive support from legal academics and members of Parliament who reviewed it. For example, Ashworth articulated that the Law Commission’s recommendation would have been “flexible as to age and dependent on an assessment of each child” and could have broadly protected those who killed between 10 and 17 years of age. He also stated that “this approach, flexible as to age and dependent on an assessment of each child, would be a significant step forward” in recognising that developmental immaturity is a reasonable justification for excusing those who

⁷⁸⁹ MoJ (2008) at para. 53.

⁷⁹⁰ Law Com (2006) para. 5.132.

⁷⁹¹ Ibid. at para. 5.132-5.136; see also footnote 93.

suffer it and lack legally relevant capacities.⁷⁹² Lord Carlile of Berriew also endorsed the amendment for its absence from the law:

It means that any child over the age of 10 in this country is now to be held to understand the significance of their actions and that a partial defence to murder should only be available if a child meets the proposed conditions for a defence of diminished responsibility. The effect is wholly unjust. An adult of 40 with the emotional maturity of a 10 year-old will be able to plea diminished responsibility if they are diagnosed to have a recognised medical condition. On the other hand, a 10 year-old without such a recognised condition but suffering from developmental immaturity of a significant kind cannot succeed with the plea as their development has not been arrested. It is simply ongoing.

It seems to us that this is a merited defence that will ensure that the law remains just for those under 18.⁷⁹³

Similarly, Baroness Murphy recommended that the proposed limb should have formed part of the defence of diminished responsibility because:

The current legislation is unfair in restricting the availability in murder cases of a defence of reduced responsibility to adults who are mentally abnormal. Children in adolescence may, as a result of their normal, less-than-fully-mature stage of development, be incapacitated in their thoughts, emotions and actions in ways that should properly reduce the level of responsibility for their actions. Biological factors such as the functioning of the frontal lobe of the brain play an important role in the development of self-control and of other abilities. The frontal lobes are involved in the individual's ability to manage the large amount of information entering consciousness from many sources, in changing behaviour and in determining impulsivity.⁷⁹⁴

Despite such support, the Government believed that:

The term “recognised medical condition” ... [would] cover ... conditions such as learning disabilities and autism spectrum disorders... we think [recognised medical condition] ... [is] a suitable statutory mechanism for ensuring that those who have conditions of this kind have the opportunity to run the partial defence of diminished responsibility were appropriate. We are satisfied that the term “recognised medical condition” achieves this.⁷⁹⁵

From the above commentary and analysis of how the courts have thus far interpreted the phrase “a recognised medical condition” from section 4.4, a person suffering from a neurodevelopmental condition might satisfy Section 2 as amended. As discussed in section 4.5, Lord Justice Davis in *Conroy* endorsed the view that evidence of a neurodevelopmental condition (e.g., a learning disability)⁷⁹⁶ could satisfy an “abnormality of mental functioning” arising from “a recognised

⁷⁹² Ashworth, A, “Child Defendants and the Doctrines of the Criminal Law” in Chalmers, J, Leverick, F, *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, Edinburgh, 2010) p. 41.

⁷⁹³ Hansard Report, House of Lords, Vol.712, col. 174.

⁷⁹⁴ Ibid. at col 178.

⁷⁹⁵ MoJ (2008) at para. 55.

⁷⁹⁶ The American Psychiatric Association defines a learning disability as a learning disorder, and notes the interchangeable use of both terms: “... specific learning disorder is a medical term used for diagnosis. It is often referred to as “learning disorder.” “Learning disability” is a term used by both the educational and legal systems. Though learning disability is not exactly synonymous with specific learning disorder, someone with a diagnosis of specific learning disorder can expect to meet criteria for a learning disability and have the legal status of a federally recognized disability to qualify for accommodations and services in school.” American Psychiatric Association (Accessed February 2023) <https://www.psychiatry.org/patients-families/specific-learning-disorder/what-is-specific-learning-disorder>

medical condition.” However, he also stated that there must be evidence that the condition, in turn, substantially impairs their abilities to perform one or more of the things outlined in Section 52(1A) and explain his/her actions in the killing⁷⁹⁷

Although the Government rejected developmental immaturity as a condition within Section 2 as amended, partly because it was “... not aware of specific cases which have resulted in inappropriate verdicts,”⁷⁹⁸ Baroness Murphy and Lord Carlile of Berriew acknowledged the significance of excluding it for developmentally immature children/young people who kill and suffer substantial impairments of legally relevant capacities. They recognised that operating a 10-year MACR and “a recognised medical condition” within the defence of diminished responsibility meant that a developmentally immature 10-year-old would be convicted of murder. By contrast, an adult with a formal medical diagnosis for their developmental delay[s] may successfully plead Section 2 as amended because they could receive evidence from a medical expert that they suffered an “abnormality of mental functioning” arising from “a recognised medical condition” By contrast, a child/young person with the same developmental delay[s] is excluded from pleading Section 2 as amended as their degree of immaturity is too low for a formal diagnosis of “a recognised medical condition.”

Baroness Murphy also observed that frontal lobe brain development played a significant role in a developmentally immature child/young person’s ability to exercise control and decision making.⁷⁹⁹ Thus, they supported the Law Commission’s recommendation that developmental immaturity should have formed the basis of the defence of diminished responsibility, even though the Law Commission presented no evidence of inappropriate verdicts, and the Government rejected it.

Regarding the second justification, the Government reasoned that the Law Commission’s proposal could potentially “open up the defence too widely and catch inappropriate cases.”⁸⁰⁰ If we accept this opinion of the proposed defence as wide, then the Government’s understanding of developmentally immature children/young people and the defence was short-sighted and illogical. The Law Commission made it clear that:

Offenders under the age of 18 commit a very small proportion of the 850 or so homicides that occur each year (around 4%). We find it hard to imagine that more than a low proportion of the even smaller number from this group finding themselves charged with first degree murder will be in a strong position to claim that they were suffering diminished responsibility, in virtue of developmental immaturity alone. Even those who do succeed in persuading the jury of the merits of their claim – and they are likely to be the younger age group, who commit the fewest homicides – will still be convicted of second degree murder, and can be sentenced to anything up to and including life imprisonment.⁸⁰¹

The Law Commission further envisioned that “our recommendation is, therefore, likely to affect only a very few cases, and only by reducing the crime from top-tier homicide to middle-tier homicide.”⁸⁰² The Government also did not explain what kinds of cases would have been

⁷⁹⁷ [2017] *EWCA Crim* 81 at 32; see section 4.5.

⁷⁹⁸ MoJ (2008) at para. 53.

⁷⁹⁹ Hansard Report, House of Lords, Vol.712, col. 178.

⁸⁰⁰ MoJ (2008) at para. 53.

⁸⁰¹ Law Com (2006) para. 5.136.

⁸⁰² *Ibid.* at para. 5.137.

inappropriate; the report provided no further context. Accordingly, it is difficult to fully reconcile the Government's justification because no context or case law evidence was provided to support the claim that the Law Commission's proposed defence would result in such cases. Hence, a fuller picture of the Government's rationale with evidence is required to determine how the Law Commission's proposal would have caught "inappropriate cases" to support it.

5.4 The Limitations of the Proposed Limb (if enacted)

Although many legal scholars, members of Parliament and stakeholders supported the Law Commission's original proposed defence because it would have prevented developmentally immature children/young people who killed from being convicted of murder and sentenced to a mandatory life sentence.⁸⁰³ The Law Commission's recommendation was criticised significantly by several legal academics, but not for the same reasons the Government gave. For example, Elliott was concerned that including developmental immaturity within Section 2 as amended would have provided "... no solace to young people who misbehave with less serious consequences. It ties youth with a defence which is generally associated with mental ill health."⁸⁰⁴

The defence would have permitted the court to consider any social, biological and environmental influences associated with a child/young person's developmental immaturity to establish a successful plea. More importantly, such a person charged with murder may have successfully pleaded the defence and received a manslaughter conviction. Elliott argued it would not have detracted from the fact that they are different to mentally disordered persons who would have also pleaded the defence with evidence of "a recognised medical condition" to support their plea. For Elliott, developmentally immature children/young people are "... abnormal in their 'developmental immaturity' whereas actually they are typical of young children, it is the consequences of their action which is abnormal."⁸⁰⁵

This view supports the neuroscientific evidence reviewed in Chapters two and three, which reveals that they suffer developmental delays resulting in cognitive impairment that is not significant enough to warrant a diagnosis of "a recognised medical condition." From this perspective, treating developmentally immature persons under 18 as mentally disordered individuals would seem harsh. The label is tied to the defence of diminished responsibility and the mentally ill with recognised medical conditions.⁸⁰⁶ If developmental immaturity formed part of the defence, a child/young person who suffered from it and pleaded Section 2 as amended successfully may have been labelled mentally disordered, even though their degree of incapacity is not severe enough for a formal diagnosis of a medical condition. Thus, Elliott objected to the proposed defence and further stated, "... the Law Commission needs to go back to the roots of why children should be treated differently from adults ...,"⁸⁰⁷ which the thesis also believes is warranted. It is on this basis that the thesis accepts Elliott's viewpoint about the stigmatising label of the Law Commission's recommendation

⁸⁰³ For example, Baroness Murphy, Lord Carlile of Berriew and the Royal College of Psychiatrists. Written in September 2022.

⁸⁰⁴ Elliott (2011) at 303.

⁸⁰⁵ Ibid.

⁸⁰⁶ Fitz-Gibbons (2016) at 404.

⁸⁰⁷ Elliott (2011) at 303.

for the defence of diminished responsibility because it would have wrongly assumed that children/young people who merely suffer developmental immaturity without “a recognised medication” are mentally disordered. For this reason, there is a good ground for rejecting the Law Commission’s recommendation as those who kill with developmental immaturity are not mentally disordered individuals.

The breadth of the neuroscientific research reveals that developmentally immature children/young people during adolescence do not satisfy enough of the diagnostic criteria of medical conditions to receive formal diagnoses such as ADHD. It is shortsighted and scientifically incorrect to infer that developmentally immature children/young people are like mentally disordered individuals (who would also have pleaded Section 2 as amended). Developmentally immature persons suffer from developmental delays, not “a recognised medical condition,” and for the Law Commission to recommend that it should have been included within Section 2 as amended would have been unreasonable to incorrectly label children/young people who successfully pleaded it using evidence of developmental immaturity as mentally disordered offenders.

Another general criticism of the Law Commission’s proposal is its narrow definitional requirements; Section 2 as amended is a mental condition defence that provides those who kill and lack mental capacity a partial and specific excuse from responsibility. As developmental immaturity would have formed part of the defence, how it is framed means that Section 2 as amended could have had a limited impact on children/young people as a class who commit offences and suffer from it.⁸⁰⁸ Keating makes an important observation about the benefits and implications of reforming the law for children/young people. Although her conclusion concerns ‘the difference reform would make’ if the MACR were increased to 12 years, her argument is worth repeating because the Law Commission’s proposal would have had a similar impact. She stated that:

In 2014 – 15, the latest year for which results are available, compared to 2010, there are 67 per cent fewer children who were first time entrants (FTEs). The average age of FTEs was 15.2 years old in 2014 – 15. The numbers of 10 and 11 year-olds coming before the courts is small and declining: in 2014 – 15 the number of children with substantive outcomes aged 10 (at time of outcome not the crime) was 93 (4 F, 89 M) and at aged 11 was 385 (50 F, 335 M). In 2013 – 14 the corresponding figures were 116 10 year olds and 424 11 year olds.⁸⁰⁹

From reviewing these statistics, Keating argued that a supposition could be made about the effectiveness of increasing the MACR to 12 years for children/young people who commit crimes. She claimed that:

... From the relatively small number of very young children entering the formal justice system is that the age of criminal responsibility is not a significant problem – involving 1 per cent of the numbers of children and young people in the youth justice system. Such a conclusion would be unwarranted. Increasing the age of criminal responsibility to 12 would remove almost 500 young children not yet of secondary school age from the youth justice system.⁸¹⁰

Applying Keating’s logic to the proposed defence, the Law Commission’s recommendation would have had a similar limited impact on developmentally immature children/young people as a group.

⁸⁰⁸ Childs and Duff (2021) p. 178.

⁸⁰⁹ Ibid. pp.180-181.

⁸¹⁰ Ibid. at p.181.

The Law Commission made it clear that “offenders under the age of 18 commit a very small proportion of the 850 or so homicides that occur each year (around 4%);”⁸¹¹ thus would have only benefited a handful of cases who kill by reducing their conviction from murder to voluntary manslaughter.⁸¹² Suppose 10,000 developmentally immature children/young people committed crimes annually in England and Wales, but only 10 were charged with murder. Altogether, 9,990 developmentally immature children/young people would be excluded from pleading Section 2 as amended because they did not kill. By combining developmental immaturity with Section 2 as amended, the Law Commission’s recommendation in legal practice would have had a limited impact on developmentally immature children/young people as a class. This is because it would have only applied to those charged with murder or manslaughter by reason of Section 2 as amended.

Considering Keating’s commentary, the issues identified, and the scientific research explored in the thesis, reforming Section 2 as amended would have ensured that developmentally immature children/young people who kill had access to justice if they successfully pleaded it and received a reduced conviction of manslaughter. For instance, those who suffer substantial impairment of an “abnormality of mental functioning” arising from underdeveloped frontal lobes or developmental delays,⁸¹³ such as *Abbott, Edwards and L* (if there was evidence of cognitive impairment such as ADHD). However, it seems unfair to deny developmentally immature children/young people who do not murder pleading a partial excuse from criminal responsibility, which would have recognised their developmental immaturity.

A further potential problem with the Law Commission’s recommendation is whether it would have excluded children/young people who kill, develop abnormally and suffer substantial impairment of one or more of the things outlined in Section 52(1A) without “a recognised medical condition.” The Law Commission acknowledged the complexity of dealing with children/young people who kill because:

Their position is special by reason of their youth, and the criminal law must take proper account of this both in its substance and in its procedures. Children mature at different rates and it is frequently the case that children who kill come from significantly disturbed backgrounds.⁸¹⁴

The Law Commission’s comment was supported by Vizzard, who observed that:

There is a very robust evidence base which shows that children who kill are very much more disturbed than ordinary child delinquents. These children are co-morbid (have several psychiatric disorders at the same time) [have] many serious psychiatric disorders and abusive past experiences which impair their emotional and cognitive development and their moral judgement. Children who murder are, by any standards ‘unreasonable’, they are also seriously disturbed and developmentally immature.⁸¹⁵

Thus, the Law Commission explained, “... experts may find it impossible to distinguish between the impact on D’s mental functioning of developmental immaturity, and the impact on that

⁸¹¹ Law Com (2006) para. 5.136.

⁸¹² Ibid. at para. 5.137.

⁸¹³ Refer back to the Law Commission examples in the previous section.

⁸¹⁴ Law Com (2004) para. 3.131.

⁸¹⁵ Ibid. at para 3.132.

functioning of a mental abnormality.”⁸¹⁶ However, the Law Commission did not directly reference another group of children/young people, those who develop abnormally and kill without “a recognised medical condition.” The Law Commission could have considered them separately or recognised that they merited consideration in a working paper on the proposed defence as the 2013 report was merely a discussion paper. This was not the case in the 2013 discussion paper.

As discussed in sections 3.7 and 3.8, there is a correlation between ADHD, abnormal structural changes and adolescent neural vulnerability. This means that some children/young people who develop abnormally might suffer ADHD symptoms during adolescence that persist because they cannot make the necessary changes to get back to maturing in line with the normal brain development pathway. Similar to developmentally immature children and young people who also exhibit ADHD symptoms, their degree of incapacity may not be significant enough to warrant a medical condition diagnosis.⁸¹⁷ Although their abnormal brain development might significantly affect their mental functioning to exercise self-control, form a rational judgment or understand the nature of their conduct; it is uncertain whether they would also be excluded from successfully pleading the defence or if they could fall under the scope of developmental immaturity within the defence.

Moreover, Rutter, Campbell, Eastman, Frith and Frith acknowledged that current diagnostic methods are insufficiently accurate in diagnosing children/young who develop abnormally with medical conditions.⁸¹⁸ Rutter observed that neuroimaging has not developed to the point where it can predict the development of mental conditions in children/young persons because “the mapping from brain acting to mental process to behaviour, remain complex and poorly understood.”⁸¹⁹ They further appreciate that the relationship between adolescent brain development, structural neurological abnormalities and medical conditions across individuals vary and are influenced by certain variables (e.g., genetics and life experiences).⁸²⁰ It raises the question of whether experts would have found it difficult to differentiate between the impact of mental functioning of abnormal brain development and the effects on a defendant’s functioning of “abnormality of mental functioning.” The Law Commission stated that the defence would have only been available to developmentally immature children/young people or those who suffer an “abnormality of mental functioning” arising from “a recognised medical condition” who kill.

In the future, as discussed in section 3.9, even if advancements in diagnostic tools allowed medical experts to identify whether a child/young person was specifically developing normally or abnormally. Such individuals would still have been excluded from successfully pleading the Law Commission’s proposed defence; thus, convicted of murder and sentenced to a mandatory life sentence. The Law Commission designed the defence so that a successful plea would have been contingent on a person killing due to a substantial impairment from an “abnormality of mental functioning” arising from “a recognised medical condition” or developmental immaturity.

To recap, before the thesis proceeds to explore whether there is a better way to deal with developmentally immature children/young people who kill: Section 2 hinged on an “abnormality of mind” and the parenthesis. A child/young person could plead the defence of diminished

⁸¹⁶ Law Com (2006) para. 5.128.

⁸¹⁷ Singh and Rose (2009) at 204.

⁸¹⁸ Rutter (2013) 188-189; Campbell and Eastman (2014) 97; Frith and Frith (2009) 138.

⁸¹⁹ Rutter (2013) p. 188.

⁸²⁰ Refer back to section 3.8.

responsibility because it factored in developmental immaturity under an “arrested or retarded development of mind” so long as they were substantially impaired in their responsibility for the killing, as evidenced in Abbott.

Section 2 as amended excludes developmentally immature children/young people who kill from successfully pleading it despite suffering a substantial impairment of one or more of the things identified in Section 52(1A). A defendant must suffer an “abnormality of mental functioning” arising from “a recognised medical condition” that substantially impairs their ability to understand the nature of their conduct, form a rational judgment or exercise self-control. Additionally, their “abnormality of mental functioning” arising from “a recognised medical condition” must explain their actions in the killing. The Law Commission broadly framed the defence so it would have only permitted developmentally immature children/young people who kill to plead it successfully. However, they would be negatively viewed as mentally disordered individuals rather than through a developmental lens if they pleaded it successfully. It is also unclear whether it would have excluded children/young people who develop abnormally without evidence of “a recognised medical condition.”

5.5. Is there a better way to deal with developmentally immature children/young people who kill and suffer substantial impairment[s] of legally relevant capacities?

Chapters one and two noted that those held criminally responsible for their past criminal conduct are rational, can freely choose to break the law and disregard the opportunity to act otherwise than they did. It was revealed that developmental immaturity is a reasonable justification for an excuse from criminal responsibility because persons who suffer from it lack legally relevant capacities.⁸²¹ The neuroscientific evidence explored in Chapter three revealed that those who suffer from it have a higher degree of developmental immaturity than the norm for a person of their age and might lack legally relevant capacities (e.g., self-control), which has been argued may be relevant to their assessments of criminal responsibility. However, those aged 10-13 years who kill no longer have access to the defence of *doli incapax* (rebuttable presumption). On closer examination, developmental immaturity is not recognised as an excusing condition from criminal responsibility (either as a separate defence or within Section 2 as amended). Thus, developmentally immature children/young persons who kill are convicted of murder and sentenced to a mandatory life sentence unless they can plead another exculpatory defence (e.g., loss of control).⁸²²

Chapter three showed that developmentally immature children/young people suffer symptoms of mental conditions due to their developmental delays. Children/young persons who develop normally might temporarily suffer symptoms of mental conditions and developmental delays because their brains are vulnerable during adolescence and at risk of developmental deviations. Those who develop abnormally might also suffer symptoms of mental conditions and developmental delays over a long period. Given that developmentally immature children/young persons have a lower degree of developmental maturity than the norm for individuals of the same age and do not satisfy

⁸²¹ See sections 1.1, 2.2-2.6.

⁸²² Refer back to sections 2.8-2.11.

the diagnostic criteria of a mental condition.⁸²³ Using current diagnostic tools/methods, medical experts find it difficult to diagnose the cause of mental conditions and formally diagnose an accepted medical condition in those who exhibit developmental delays. Subsequently, it was argued that there is space for methodological advancement (e.g., biomarkers) and improvements to diagnostic manuals to help psychiatrists and psychologists more accurately assess persons with medical conditions in section 3.8.

Chapter four considered the consequences of the ‘expert’ problem on developmentally immature children/young people who kill with pleading Section 2 as amended. This permitted a comparative examination of how this subgroup of persons was treated under Section 2 to understand the narrowness of the current version of the defence.⁸²⁴ Under Section 2, there was no prerequisite that the defendant’s underlying condition had to be an accepted medical condition. The parenthesis necessitated that the defendant’s “abnormality of mind” had to have arisen “... from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury.”

Section 2 also did not have an explanation requirement and thus made Section 2 broad enough to allow developmentally immature children/young people who kill to plead the defence and receive a manslaughter conviction successfully.⁸²⁵ By contrast, under Section 2 as amended, “abnormality of mental functioning” is restricted to arising *only* from “a recognised medical condition” that causes the defendant to suffer a “substantial impairment” of one of three things outlined in Section 52(1A). Accordingly, only those who suffer an “abnormality of mental functioning” arising from “a recognised medical condition” will have the opportunity to plead the defence of diminished responsibility successfully.

A consideration of the Law Commission’s recommendation that developmental immaturity should form the basis of the defence of diminished responsibility was made in sections 5.2 to 5.4 to determine whether it could have addressed the ‘expert’ problem. The view of developmental immaturity as a key part of Section 2 as amended has been found in several legal accounts. For Ashworth, “this approach, flexible as to age and dependent on an assessment of each child, would be a significant step forward.”⁸²⁶ The fact that the defence would have negatively labelled those who pleaded it successfully and may exclude those who suffer developmental immaturity and develop abnormally children/young people without “a recognised medical condition,”⁸²⁷ the thesis argued that the Government were right to reject it.

The next few pages will consider the Law Commission’s 2013 proposed reform of a separate defence of developmental immaturity for people, which was highlighted in section 2.10. It is important to note that this paper is not a fully worked out Law Commission proposal but is part of a discussion paper on automatism and insanity. As such it introduced the possibility of such a defence in English law and the desirability for a full paper on it in the future.

Considering Section 2 as amended is not available to developmentally immature children/young people, the Law Commission “were concerned that that defence, in its original form, was not available to a developmentally immature person unless that immaturity amounted to an

⁸²³ See sections 3.5-3.7.

⁸²⁴ See section 3.9.

⁸²⁵ Abbott; sections 4.2-4.3.

⁸²⁶ Ashworth (2010) p. 41.

⁸²⁷ See, generally, sections 5.3.

“abnormality of mind.”⁸²⁸ The Law Commission believed that the introduction of a defence “not criminally responsible by reason of developmental immaturity” merited separate consideration because of their earlier recommendation for Section 2 as amended was rejected by the Government, which was explored in sections 5.2-5.3. For De Than and Elvin, “this was a revision and rebranding of their earlier and unenacted recommendation of the addition of a ‘developmental immaturity’ limb to the diminished responsibility defence, but with a stricter approach since the lack of capability must be total.”⁸²⁹ As discussed in section 2.10, the Law Commission justified the requirement of a complete lack of capacity for those who suffer developmental immaturity because “... a person may lack capacity in this sense is that he or she has not developed the relevant capacities of understanding and self-control” due to suffering developmental immaturity.⁸³⁰ Even though they acknowledged that the cognitive scientific evidence supports developmental immaturity as individualistic and “... not uniform across all children and young people.”⁸³¹ The Law Commission proposed:

In light of this, it is arguable that a person should not bear criminal responsibility for what would otherwise be an offence when he or she *wholly* lacked the relevant capacities by virtue of developmental immaturity. The relevant capacities could be those which apply in our proposed defence of “not criminally responsible by reason of recognised medical condition”, namely,

- (1) rationally to form a judgment in relation to what he or she is charged with having done;
- (2) to appreciate the wrongfulness of what he or she is charged with having done; or
- (3) to control his or her physical acts in relation to what he or she is charged with having done.⁸³²

The idea that developmental immaturity should form an exculpatory defence and provide persons who suffer from it with a complete general defence has received some support from legal academics. Yet, it has been subjected to significant criticism due to its narrow scope.⁸³³ For instance, McDiarmid argued, “a defence would make it easier to ensure that, where it is relevant, evidence supporting a claim of lack of capacity, arising as a result of developmental immaturity, is available to the court.”⁸³⁴ She further observed that “unlike a MACR, a defence is not a blanket exemption from criminal liability. No child defendant would have to plead it and, indeed, making the plea is no guarantee of success, which depends on the evidence.”⁸³⁵ For McDiarmid, in principle, the idea of a developmental immaturity defence is appealing because it would allow those suffering from it to be exempted from criminal responsibility. However, she argued that such a defence must be “... cast in appropriate terms” to have the most impact on developmental children/young people who commit crime as a reform like increasing the MACR, which it does not appear to as it is narrow in scope.⁸³⁶

⁸²⁸ Law Com (2013) para. 9.5.

⁸²⁹ De Than. C, Elvin. J, “How Should the Criminal Law Deal with People who have ‘Partial Capacity?’ in Livings et al., (2015) p. 311.

⁸³⁰ Law Com (2013) paras. 9.1 and 9.3.

⁸³¹ Law Com (2013) para 9.13.

⁸³² Ibid. at 9.4.

⁸³³ Ashworth (2010) 41; McDiarmid (2016) 329; Child and Duff (2021) 171.

⁸³⁴ McDiarmid (2016) at 329.

⁸³⁵ Ibid. at 338.

⁸³⁶ Ibid.

The cognitive science research and leading theories of legal doctrine explored also indicate that a developmental immaturity defence would be suitable because developmental delays are best understood as brain and cognitive underdevelopment that affect a child/young person's level of maturity. In some individuals, their degree of developmental maturity is higher than the norm for a person of the same age, and their level of immaturity results in a complete lack of capacity.⁸³⁷ This defence could be an essential tool for those who suffer from it and lack total capacity to either form a rational judgment, understand the wrongfulness or exercise self-control over their actions. A developmentally immature child/young person and adult who kills and suffers a total lack of a legally relevant capacity could avoid a murder conviction and the mandatory life sentence if successfully pleaded.

However, the Law Commission framed the defence in such a way that it would require a person to suffer a total lack of legally relevant capacities due to developmental immaturity; the very nature of their degree of capacity will determine whether such a person would be afforded a successful plea, which is problematic. As De Than and Elvin argued, "... a requirement of total lack of capability in relation to cognition or control has a serious risk of rendering a defence largely meaningless and of mimicking the current law's lack of regard for medical reality." According to the thesis, if English law enacts this proposed defence, it will prevent individuals who possess a degree of immaturity higher than the norm for a person of the same age and do not have a level of immaturity that results in a complete lack of legal capacities from successfully pleading the defence. In this case, developmentally immature individuals like *Abbott* and *Edwards* who suffered substantial impairments rather than a complete loss of legally relevant capacities due to developmental delays.⁸³⁸ They would be excluded from successfully pleading the defence simply because their degree of immaturity did not cause them to suffer a total lack of mental capacity, despite being recognised as developmentally immature.

Regarding the case of *L* and the Sentencing Council's rationale for considering the importance of developmental immaturity as a mitigating factor in assessing their culpability during sentencing in section 4.8.⁸³⁹ It was suggested that developmental immaturity should also be relevant in assessing criminal liability precisely because it significantly impairs a child/young person's decision-making and self-control to varying degrees of capacity. Hence, Keating commented that such a legal understanding of their degree of immaturity and capacity is required to ensure that a developmental immaturity defence has the greatest impact on the population.⁸⁴⁰ A narrow defence that only excuses those who suffer developmental immaturity resulting in a total lack of legally relevant capacities would not achieve this aim.

The thesis proposes that two defences should be introduced into English law to exculpate developmentally immature persons who commit crimes based on the Law Commission's above recommendation. The first is the Law Commission's "not criminally responsible by reason of developmental immaturity" defence because it would completely excuse those who suffer developmental delays and a total lack of mental capacity. The general defence would work as the Law Commission envisioned and require proof of total incapacity. A person who commits an offence and suffers a lack of total capacity to exercise self-control, from a rational judgment or

⁸³⁷ See, generally chapter 3 and Law Com (2013) para 9.10.

⁸³⁸ See, generally, chapter 4.

⁸³⁹ Refer back to sections 4.7.3 and 4.8; Sentencing Council (2017) at para. 1.7

⁸⁴⁰ Child and Duff (2021) p. 178.

understand the wrongfulness of their actions could receive complete exculpation from criminal responsibility due to developmental immaturity.

The second is a partial and specific defence to murder that encompasses all these legally relevant capacities (as outlined by the Law Commission), not limited to complete mental impairment. The thesis suggests a partial defence along the following lines:

A person who suffers from developmental immaturity and satisfies the *mens rea* and *actus reus* for murder should receive a reduced conviction of voluntary manslaughter, if they can show that their conduct was explained by developmental immaturity.

He/she must suffer from developmental immaturity.

He/she is substantially impaired in the ability to perform one or more of the following legally relevant capacities:

- (1) form a judgment in relation to what he or she is charged with having done;
- (2) to appreciate the wrongfulness of what he or she is charged with having done; or
- (3) to control his or her physical acts in relation to what he or she is charged with having done

If both defences were enacted, this could allow a person who is developmentally immature to be excused either completely or partially, depending on the degree of their (in)capacity. The partial defence would be more restrictive so that only people who kill suffering developmental immaturity resulting in substantial impairment of one or more of the identified capacities will receive a voluntary manslaughter conviction.⁸⁴¹

Regarding impact, formulating both proposed defences in this way would offer developmentally immature adults and children/young people who kill the chance to plead one of two defences. By distinguishing the defences based on the degree of immaturity and capacity, each would reflect current scientific understandings about developmental immaturity not being “... uniform across all children and young people,”⁸⁴² but as individuals who “... develop at different speeds ...”⁸⁴³ The types of conditions (e.g., frontal lobe damage) that might support these proposed defences need to be explored further in future research because there are several ways in which developmental immaturity arises, as defined by the APA in section 1.1 and the Law Commission in section 5.2. It is vital to establish which conditions that result in developmental immaturity should fall within the scope of these defences. It is important that no age limit is adopted if a general and partial defence of developmental immaturity are proposed in the future limiting them to domestic legislation and the UNCRC’s definitions of the child/young person being someone below 18 years of age.⁸⁴⁴ This makes the thesis’s two defences different from other proposed versions of the developmental immaturity defence, such as McDiarmid’s which is age-specific to children and young people.⁸⁴⁵

Yaffe opposes the idea of a general developmental immaturity defence in England and Wales.

⁸⁴¹ A similar version of the defence was proposed by McDiarmid (2016) at 340.

⁸⁴² Law Commission (2013) at para. 9.13.

⁸⁴³ Moreno, M, Trainor, M, “Adolescence Extended: Implications of New Brain Research on Medicine and Policy” (2013) 102 *Acta Paediatrica* at 228.

⁸⁴⁴ McDiarmid (2016) at 340.

⁸⁴⁵ Ibid. McDiarmid proposed a defence of developmental immaturity, which was mirrored after the Scottish defence of mental disorder.

In a commentary on Keating's book chapter "How Should the Criminal Law Respond to the 'Special Status' of Children?"⁸⁴⁶ He argued that:

*Anyone, of any age, can be developmentally immature. To be developmentally immature is for one's behaviour or psychology to be like that typical of those younger than oneself and in ways that tend to change over the course of the life-cycle. A 40-year-old who spends his free time playing video games is, by some measures, developmentally immature. A person in his 70s who can solve cognitive puzzles at break-neck speeds is, also, developmentally immature; people in their 70s tend to lose that ability just through normal ageing. Developmental immaturity, is not, in itself, in any way excusing or mitigating.*⁸⁴⁷

According to Yaffe, possessing developmental immaturity should not ground the basis of exculpation from criminal responsibility because "*anyone, of any age, can be developmentally immature.*"⁸⁴⁸ By comparing a developmentally immature 12-year-old to 40 and 70-year-olds who also suffer from it in the general population, he postulated that not everyone who suffers from developmental immaturity commits an offence. Thus, it is faulty thinking to assume that a person is owed an exculpatory break because they suffer developmental delays.

To justify his argument further, Yaffe stated that developmental immaturity is no different to a discovery of "... a very reliable genetic marker for schizophrenia ..." because "... it's not that everyone with gene X has schizophrenia, but many do, many more than in the general population. Nor is it the case that everyone with schizophrenia has gene X; there are other ways to contract the illness."⁸⁴⁹ From his perspective, a defence for X-gene "... expresses the faulty and problematic idea that people are owed a break thanks to their genes when, rather, they are owed a break when their problematic behaviour is a symptom of a mental illness (perhaps because of their genes)."⁸⁵⁰ Such a view involves a lack of appreciation of contemporary doctrinal law, as observed in Chapter two, of the idea that it is unfair to hold an individual criminally responsible for wrongful conduct if they lack legally relevant capacities at the time of committing an offence.⁸⁵¹ He claimed that "... agents are culpable for wrongful acts. An act is wrongful just in case it is in violation of a norm; it is criminal if the norm it violates has been given legal force ..." ⁸⁵² Thus, Yaffe takes issue with the causes that might reduce or completely impair a person's mental competence when committing an offence. Altogether, developmental immaturity (and genetic mental conditions) has no bearing on the wrongdoing that ensues if a person with developmental delays commits a prohibited act because:

At best, developmental immaturity, in children, is a proxy for the presence of some other factor thought to be excusing, such as the tendency to be easily influenced by peers, or a tendency to overlook the long-term, or even medium-term, consequences of one's actions, or a tendency to have a skewed perception of the risks of harm to others. These factors might not be excusing at all: that's worth discussing.⁸⁵³

⁸⁴⁶ Yaffe, G, "The Child's 'Special Status' and Disenfranchisement" in Childs and Duff (2021) pp.184-192.

⁸⁴⁷ Ibid. at p. 186.

⁸⁴⁸ Ibid at p.186.

⁸⁴⁹ Ibid.

⁸⁵⁰ Ibid.

⁸⁵¹ Duff (1993) 374; Hart (2008) 152; Lacey and Pickard (2013) 17; Coppola (2020) 18.

⁸⁵² Childs and Duff (2021) p.186.

⁸⁵³ Ibid.

He believed there should be no defence of developmental immaturity because children/young people are not special because they might suffer developmental delays. What makes them special is the fact that they hold a lesser political position than older young people and adults; thus, he claimed that the MACR should not be below the age at which a person lacks voting protections, which will be discussed in greater detail below.⁸⁵⁴

This thinking about the defence does not align with the explored neuroscientific evidence and case law in the thesis, which suggests that developmental immaturity is relevant to responsibility assessments and can be normal or abnormal. As observed, a child/young person's brain development is intertwined with their competency, developmental delays, life experiences and behaviour. Developmental immaturity impacts practical rationality in everyday contexts (not just for the *mens rea* of murder) because it can provide a child/young person with a degree of incapacity to understand the nature of their conduct, exercise self-control and form a rational judgment. Thus, developmental immaturity and rational capacities are relevant to a person's ability to engage in criminal conduct and answer "... the normative demands of the criminal law..."⁸⁵⁵ As Coppola argued, because "... the ability to act for normative reasons, or to be normatively rational, does not simply require knowledge or understanding of the moral appropriateness of one's behaviour against the normative standards of right and wrong."⁸⁵⁶

Criminal responsibility requires that a rational person not only knows/understands the reasons for violating the criminal law's moral restraints but also chooses to break the law and have control over their actions.⁸⁵⁷ If two defences of developmental immaturity (a complete general defence and a partial specific defence to murder) were to be proposed in the future, then such defences would be available to an adult whose degree of developmental immaturity was comparable to a child/young person below 18. For instance, as De Than and Elvin wrote, an adult whose developmental immaturity is difficult to diagnose or identify because of "... continuing immaturity or to a reduction in cognition and/or control after a brain injury, or the onset of a complex condition."⁸⁵⁸ On this basis, Yaffe's view should be rejected in favour of the thesis's proposed defences.

Concerning an increase in the MACR, Yaffe argued that children/young people do not share the same status as adult citizens because "adults in a democracy have a say over the law in two significant ways: First, they have the vote. Secondly, they enjoy free speech protections. He further argued that "... children below the voting age lack one of these entitlements, while some of them possess the other, albeit with limits."⁸⁵⁹ Increasing the MACR is a good idea because it would provide immunity to children/young people who commit offences older than ten without the right to vote.

The problem with this reform is that Parliament have already considered several of Lord Dholakia's Criminal Responsibility Bill[s] in recent years, none of which have been introduced into law.⁸⁶⁰ The latest Criminal Responsibility Bill 2019-2021 has been tabled. If Parliament honestly thought that increasing the MACR is in the best interests of young people/children because they do not have the same status as adult citizens, then they would have enacted one of Lord Dholakia's

⁸⁵⁴ Ibid. at pp.187 and 190.

⁸⁵⁵ Lacey (2007) 36.

⁸⁵⁶ Coppola (2020) p. 136.

⁸⁵⁷ See, generally, section 2.3.

⁸⁵⁸ De Than and Elvin (2015) p. 312.

⁸⁵⁹ Yaffe (2021) p. 189.

⁸⁶⁰ Refer back to section 1.1.

Bills or a similar Bill with the same recommendation.⁸⁶¹ As Keating observed, “the current problem of fixing an appropriate age for the imposition of liability is that the issue is not purely one of determining the point at which, in developmental terms, a child can be said to be responsible for their actions – the issue is also one of policy and is shaped in part, at least, by political considerations.”⁸⁶² This is evidenced in Lord Faulks statement during the House of Lord’s debate on Lord Dholakia’s Bill in 2016, where he stated that “... children of ten and above are, for the most part, able to differentiate between bad behaviour and serious wrongdoing” and the current MACR “... allows flexibility to dealt with young offenders.”⁸⁶³ Similarly, Baroness Charlotte Vere of Norbiton argued that “the age of criminal responsibility is appropriate and accurately reflects what is required of our justice system.”⁸⁶⁴

Based on these statements, there is no reason that political considerations would not play a role in shaping future reform policy, perhaps rejecting a future Bill to increase the MACR above ten years of age. Crofts, however, remains optimistic that legal practitioners and academics will continue to make future calls to increase the MACR in England and Wales, supported by robust neuroscientific evidence on adolescent development. Croft believes that there is “... an emotional response and a scientific, research-based call for change” that might act as a catalyst to increase the MACR.⁸⁶⁵ As highlighted in section 1.1, the Government has not communicated any plans to the public to increase the MACR beyond ten years of age in the immediate future.

Even if the Government were willing to increase the MACR, it would raise the question of which new age would be appropriate to treat children/young people as criminally responsible for committing offences. Numerous proposed threshold ages for the MACR exist in the legal literature, from Lord Dholakia’s increase to 12 years of age⁸⁶⁶ to Keating’s suggestion of an incremental change to the MACR, first to 13 years, then 14 years.⁸⁶⁷ The thesis’s exploration of adolescent brain development and developmental immaturity reveals that children/young people develop at their own speed and at different rates. Most individuals lack varying capabilities based on factors such as sex, age, epigenetics and individual development. Thus, finding a suitable age would be difficult because there is no magic age at which most children/young people reach a reasonable degree of maturity and competence.

Suppose the Government decided that 14 was an appropriate new threshold age for the MACR in England and Wales. In theory, any child who commits an offence below 14 would be exempted from criminal responsibility; however, it also means that any young person aged 14 and above who commits a crime is to be held criminally responsible. For instance, Edwards and L were aged 15 years when they killed, and there was evidence proving they were developmentally immature at the time of the killings. If enacted, they would be convicted of the relevant offences. In contrast, a 13-yearold developmentally immature child with a mental impairment who commits a similar crime would be exempted from criminal responsibility. Other than an age difference of 24 months, nothing separates Markham and L from the 13-year-old child; there is, therefore, no appropriate age to treat children/young people as criminally responsible for committing offences. Some subgroups will

⁸⁶¹ Brown and Charles (2019) 3; Crofts and Wake (2021) 347.

⁸⁶² Elliott (2007) at 191.

⁸⁶³ Hansard HL Debate vol 768, cols 1573, 1577, 1575 (29th of January 2016).

⁸⁶⁴ Hansard HL Debate vol 783, col 2211 (8th of September 2017).

⁸⁶⁵ Crofts (2019) at 39.

⁸⁶⁶ Age of Criminal Responsibility Bill (2019-2021).

⁸⁶⁷ Child and Duff (2021) p. 178.

always be exempted, and others will be held criminally liable regardless of their developmental immaturity using a MACR.

Arguably, the most beneficial reform for developmentally immature children/young people is the introduction of two developmental immaturity defences. Based on the neuroscientific evidence explored, most children/young people who commit offences would not need to plead a defence because they do not suffer developmental delays. However, there is a need for both defences as developmentally immature people suffer varying degrees of capacity/immaturity of legally relevant capacities, as evidenced in the thesis. Currently, developmentally immature children/young people are convicted of offences because English law only recognises it as a mitigation factor affecting their culpability to reduce their sentence.

5.6 Conclusion

The Government rightly rejected the Law Commission's proposed defence of diminished responsibility for the reasons outlined. The Law Commission recommended a "not criminally responsible by reason of developmental immature" defence, which would be a complete and general defence to those suffering from it. It would be broader in legal practice than the Law Commission's earlier recommendation for the defence of diminished responsibility (inclusive of a developmental immaturity limb) as it would be available to all those who suffer from and commit a crime. However, it would have limited scope because successfully pleading the defence would depend on the developmentally immature person lacking *complete* legally relevant capacities when committing an offence. This is a concern because not all developmentally immature people suffer from a total loss of incapacity due to their developmental delays. As the Law Commission observed, "some individuals will have a level of developmental maturity that is much lower than the norm for a person of their age, albeit that their level of immaturity is not so extreme as to constitute a recognised medical condition."⁸⁶⁸

Thus, section 5.5 proposed two defences of developmental immaturity address the 'expert' problem for those who suffer developmental delays and commit offences. A general and complete defence from criminal responsibility for those with developmental delays who commit a crime and suffer from a total loss of legally relevant capacities. In addition, a partial defence to murder for those who kill and suffer a substantial impairment of the same legally relevant capacities would receive a partial excuse from criminal responsibility and a reduction in conviction from murder to voluntary manslaughter. If developmentally immature people who kill could successfully plead one of these two defences, they might avoid a murder conviction and mandatory life sentence.⁸⁶⁹

⁸⁶⁸ Law Com (2013) at 9.10.

⁸⁶⁹ Dated June 2022.

Chapter Six

Conclusion

This thesis has revealed that developmental immaturity is a factor deserving of exculpation from criminal responsibility for those who suffer from it and have a complete lack of capacity or a substantially impaired capacity. The explored cognitive scientific research reveals that developmental delays can profoundly alter the brain's structure and function that support a child/young person's mental competence and behaviour. Developmental immaturity has been found to negatively affect their capacities to resist peer influences, foresee risks, think about the long-term consequences of their actions, control their emotions and regulate their impulsive actions. Yet, developmental immaturity is not uniformly represented in English law; weight is attached to its impact on the child/young person's culpability in mitigation for sentencing rather than excuse and criminal responsibility.⁸⁷⁰

Under Section 2 of the Homicide Act (1957), the defence of diminished responsibility supported developmental immaturity as the basis of a partial excuse for individuals who suffered from it and killed. However, under Section 52 of the Coroners and Justice Act (2009), those with developmental immaturity are excluded from successfully pleading the defence because it falls outside the scope of "a recognised medical condition." The empirical case study and examination of the "expert" problem in the thesis revealed that this narrow framing of Section 2 as amended detrimentally impacts developmentally immature children/young people who kill (aged 10 to 17 years of age).⁸⁷¹ They are convicted of murder and sentenced to a mandatory life sentence because Section 2 as amended is not available to them. In the long term, those⁸⁷² who suffer developmental immaturity and kill without "a recognised medical condition" will be convicted of murder unless the thesis's proposed defences are introduced into English law, offering individuals with developmental delays and cognitive impairment an excuse from criminal responsibility.

Chapter two defended the argument in modern capacity responsibility that developmental immaturity is a factor deserving of excuse in the paradigm of the responsible person because it can affect a person's choice to act, practical rationality and fair opportunity to avoid wrongdoing. The widely accepted idea is that it is unfair to blame and punish a person lacking these legally relevant capacities for their actions in committing a crime.⁸⁷³ Developmentally immature persons have developmental delays resulting in cognitive impairment, meaning they suffer a higher degree of immaturity than the norm for a person of the same age and lack complete capacity or substantial impairment of legally relevant capacities.⁸⁷⁴ While they may have the capacity to satisfy the *mens rea* for murder (intend to kill or cause really serious harm), as the Law Commission remarked, this does not necessarily mean that they can understand their actions in the killing and appreciate the

⁸⁷⁰ See sections 2.11, 4.7.3, 4.8 and 5.5.

⁸⁷¹ Refer back to footnotes 5-6 for age-bracket definitions of children and young people.

⁸⁷² Children, young people and adults.

⁸⁷³ Refer back to sections 2.2-2.3.

⁸⁷⁴ See section 2.4.

significance of killing another person.⁸⁷⁵ This is a problem because there is no specific defence for developmentally immature children/young people who form the intention to kill or cause serious harm but lack the understanding/appreciation of the importance of killing another person.⁸⁷⁶

Before 1998, the defence of *doli incapax* operated in English law and gave generally immature and developmentally immature children charged with a crime a general exculpatory defence from criminal responsibility. The defence presumed that a child lacked the ability to understand the serious nature of their wrongdoing due to their young age and immaturity to take criminal responsibility for their wrongdoing. If the prosecution proved that the child could understand the seriousness of their wrongdoing, the presumption was rebutted, and they were then convicted of a crime (if they satisfied the *mens rea* and *actus reus* of the crime). However, the defence was abolished for reasons discussed in section 2.6. The current Government has made it clear that generally immature and developmentally immature children/young people should take accountability for their wrongdoing, and the defence of *doli incapax* should not be re-introduced into English law. Despite several proposals for policy change and reform, such as the Age of Criminal Responsibility Bill 2019-2021 and the new gradient age-based starting points for the minimum term in detention that children/young people convicted of murder will serve under Section 127 of the PCSC Act.⁸⁷⁷

Drawing on the latest scientific research on adolescent brain development, Chapter three revealed that developmentally immature children/young persons are vulnerable to cognitive impairment due to how their brains mature and change throughout adolescence. They are also more likely to suffer developmental delays, cognitive impairment and patterned behaviours (e.g., antisocial behaviour) associated with mental conditions if they experience a traumatic event or are genetically predisposed to suffer a mental illness, disorder or condition.⁸⁷⁸ Such adverse environments can be a powerful trigger for the child/young person (with and without a genetic prediction for a mental condition) to suffer developmental delays and cognitive impairment.⁸⁷⁹

While psychiatrists and neuroscientists know that some children/young people can reverse developmental delays and cognitive impairment over time because the adolescent brain is malleable. They can restructure their brains and reverse abnormal changes caused by past traumatic experiences and negative behaviours. However, the explored studies revealed that other individuals suffer from developmental delays and cognitive impairment over a more extended period and are more likely to receive a formal diagnosis of a medical condition when they are older than the former group.⁸⁸⁰

In summary, the scientific literature reveals that it is possible for children/young people who suffer developmental immaturity to have a higher degree of developmental immaturity than the norm for individuals of their age, and as a result suffer delays. Some individuals suffer significant cognitive impairments and a total lack of capacity; others lack substantial cognitive impairments, and several persons may have developmental delays with no cognitive impairment.⁸⁸¹ Thus, there

⁸⁷⁵ Law Com No.304 at para. 6.80.

⁸⁷⁶ Refer back to section 2.8.

⁸⁷⁷ See sections 2.6, 2.10 and 2.11.

⁸⁷⁸ Refer back to sections 3.6 to 3.7.

⁸⁷⁹ See sections 3.5, 3.6 and 3.7.

⁸⁸⁰ Sections 3.6 and 3.7.

⁸⁸¹ Section 4.7.3.

must be an acknowledgement that the degree of developmental immaturity and cognitive impairment[s] an individual suffers varies considerably between persons.

Insights into how medical experts formally diagnose children/young people with medical conditions using current methods and tools (e.g., neuroimaging, interviewing and manuals) revealed the effect developmental immaturity has on the accuracy and precision of diagnosis. The problem is that some have a higher degree of developmental immaturity than the norm for individuals of their age, and others exhibit a similar degree of cognitive impairment to children/young persons who develop abnormally with diagnoses of medical conditions. As discussed in isolation, neuroimaging devices (e.g., fMRI), the DSM and observations are not precise diagnostic tools in medical practice to identify developmentally immature children/young persons from those with medical conditions.

Neuroimaging devices, though popular, produce findings that are limited to pinpointing individuals' underlying abnormal functional and structural processes, which do not necessarily indicate that they have a mental condition, for the reasons discussed.⁸⁸² In diagnostic manuals such as the DSM-5, there is much clinical overlap between mental conditions, with many sharing the same cognitive and behavioural characteristics and, ultimately, diagnostic errors. From Frith and Frith's perspective, diagnostic manuals are not helpful to clinicians because they are descriptive guides and cannot fully factor in the impact of developmental immaturity and identify developmental-related causes of medical conditions.⁸⁸³ This is consistent with Morton's view that "... classifying a child as 'perfectly normal,' or as showing only temporary problems that he or she 'will grow out' of it 'are just as serious'" as misdiagnosing those with the incorrect medical condition.⁸⁸⁴ This affirms the need for change and forward-looking ideas to create more accurate and precise diagnostic methods to address the explored issues with current tools and devices.

Section 3.9 explored potential devices and methods that some claim will be essential to diagnosing medical conditions in the future. One key method uses markers such as genetic screening and neuroimaging to bio-predict individuals at risk of developing future mental conditions. It would entail molecular testing to isolate specific genomes associated with certain medical conditions and brain scans to identify abnormal structural changes. According to Singh and Rose, bio-prediction promises to identify those at risk of developing mental conditions who might benefit from early and specialised treatments before symptoms manifest and prevent severe behavioural issues.⁸⁸⁵ They further cautiously remarked that "biomarkers promise to be the most powerful psychiatric tool since the discovery of antipsychotic drugs – a biological means of predicting not only the development of a disorder but also its course and outcome."⁸⁸⁶

Another similar method is behavioural genetics, with molecular testing to identify genomes in individuals with specific behavioural traits of certain medical conditions. This method has already shown encouraging results in isolating the MAOA gene in those who suffer from conduct disorder and adults with antisocial behaviour traits.⁸⁸⁷ While Glannon acknowledged that these methods could detect early on persons who will become involved in serious criminality (e.g., murder), and

⁸⁸² Sections 3.7 to 3.8.

⁸⁸³ Frith and Frith (2009) at p.138.

⁸⁸⁴ Morton (2004) pp.134-135.

⁸⁸⁵ Singh and Rose (2009) at 202.

⁸⁸⁶ Ibid.

⁸⁸⁷ Hare (2006) pp. 39-79; Walsh (2010) p. 48.

Walsh admitted that “... identifying (and intervening with) those who will persist with serious criminality can be seen as the Holy Grail of youth justice policy.”⁸⁸⁸ One of the criticisms of these methods concerns the mislabelling of some children/young people and the effect that label might have on their mental state and development. Suppose a child/young person is identified via a positive brain scan or genetic test as at risk of developing antisocial behaviour. They could become violent and exhibit a lack of guilt because they believe that they will go on to behave this way and thus exhibit psychopathic tendencies, as the label is “self-reinforcing.” For some, this method will mean that they undertake actions of a self-fulfilling prophecy to satisfy a label that deems him/her at risk of developing a specific medical condition later in life.⁸⁸⁹

Chapter 4 revealed that developmentally immature children/young people who kill are excluded from successfully pleading Section 2 as amended with a case study and exploration of the “expert” problem. The case analysis of Abbott, Edwards, and L established that developmentally immature children/young people who kill and lack legally relevant capacities stood a better chance of successfully pleading Section 2 than Section 2 as amended.⁸⁹⁰ Under Section 2, the parenthesis was defined vaguely to include an “abnormality of mind” that arose “... from a condition of *arrested or retarded development of mind* or any inherent cause or induced by disease or injury).”⁸⁹¹ Though this ambiguity was criticised by legal academics because it provided a narrow list of conditions that were accepted under the defence.⁸⁹² In fact, the phrasing of the parenthesis benefited developmentally immature children/young people because an “abnormality of mind” was interpreted broadly to include developmental immaturity as it was recognised as an “arrested or retarded development of mind.”⁸⁹³

Under Section 2 as amended, the defence has been reformed; there is no parenthesis and additional phrases were added to modernise, albeit narrowly, the remit of its definitional requirements. “Abnormality of mind” and the parenthesis were replaced with an “abnormality of mental functioning” arising from “a recognised medical condition.” “Substantial impairment of his responsibility” was substituted for “substantially impaired D’s ability to do one or more things.” Specifically, exercise self-control, form a rational judgment and understand the nature of D’s conduct. Additionally, all of the above must explain the defendant’s acts or omissions of the killing to plead the defence successfully.

While some Parliamentary officials and legal commentators supported the changes made under Section 2 as amended due to modernising the defence and improving its definitional clarity,⁸⁹⁴ the empirical case study reveals that the defence has narrowed considerably to such an extent that those who suffer developmental immaturity are excluded from pleading it successfully. The only way such a person can plead the defence successfully is with expert evidence that they suffer an “abnormality of mental functioning” arising from “a recognised medical condition” at the time of the killing. Developmental immaturity is not accepted as a medical condition, even though those with it suffer from cognitive impairment resulting in a total lack of capacity or substantial impairment of those abilities outlined in Section 52(1A). Without reform, children/young persons

⁸⁸⁸ Walsh (2013) p. 43.

⁸⁸⁹ Singh and Rose (2009) at 204.

⁸⁹⁰ Refer to sections 4.7-4.8.

⁸⁹¹ See section 4.2.

⁸⁹² Dell (1984) 39; Griew (1988) 81; Vizzard in Law Com (2004) para. 5.102.

⁸⁹³ [1964] 1 Q.B 489. See sections 4.3 and 4.7.1

⁸⁹⁴ See sections 2.9, 2.10, 4.5, 4.6 and 4.8.

who kill and suffer developmental immaturity will be convicted of murder and sentenced to a mandatory life sentence.⁸⁹⁵

Chapter 5 explored several key proposals for reform that recognise the relevancy of developmental immaturity as a factor that affects a person's ability to satisfy capacities for criminal responsibility. Specifically, the chapter examined the Law Commission's original recommendation for the current defence of diminished responsibility which included developmental immaturity as a limb, and the Government's justification for rejecting it under Section 2 as amended. It was argued that the Government had reason to reject developmental immaturity within Section 2 as amended for the reasons discussed in section 5.3.

The chapter also considered the Law Commission's 2013 paper proposing the need for a "not criminally responsible by reason of developmental immature" defence, which would excuse from responsibility those who suffer from it with a complete and general defence.⁸⁹⁶ It is worth reemphasising that this recommendation is not a fully worked out Law Commission proposal but is part of a discussion paper on automatism and insanity. As such it reveals the possibility of such a defence and the need for separate consideration in a full paper.

The thesis and several legal commentators criticised the defence because only developmentally immature people who lack complete capacity could successfully plead it. Not all persons who suffer developmental delays result in cognitive impairments and a complete lack of legally relevant capacities. Some individuals (children, young people and adults) have developmental delays that cause substantial cognitive impairment. Others with developmental immaturity do not suffer cognitive impairments at all but are affected by developmental delays. Developmental immaturity is not a time-limited condition that only affects children and young people below a certain age.⁸⁹⁷ Yet such persons would be excluded from pleading the defence successfully because they do not suffer a complete lack of legally relevant capacities.⁸⁹⁸

Another proposed reform considered was increasing the MACR above 10 years of age and the chapter revisited Lord Dholakia's Age of Criminal Responsibility Bill 2019-2021 to raise the MACR to 12 years. Numerous versions of this Bill have been introduced into Parliament and the current Bill has been tabled. Furthermore, some House of Lords members maintain that the current MACR is appropriately set because "... children of ten and above are, for the most part, able to differentiate between bad behaviour and serious wrongdoing."⁸⁹⁹ From this perspective, it is clear that Parliament has no intention of increasing the MACR because if they did, then they would have enacted one of Lord Dholakia's Bills or a similar Bill with the same recommendation. Accordingly, the thesis rejected this proposed reform and recommended a need for two separate defences of developmental immaturity to exculpate developmentally immature persons who commit crimes based on the Law Commission's 2013 proposed "not criminally responsible by reason of developmental immaturity" defence.

At first glance, these two specific developmental immaturity defences might seem excessive to some legal commentators as future reforms such as Catley. He proposed introducing two lack of capacity defences arising from a recognised medical condition; the Law Commission's 2013

⁸⁹⁵ Refer back to sections 4.7 to 4.8.

⁸⁹⁶ See section 5.5.

⁸⁹⁷ De Than and Elvin (2015) 311.

⁸⁹⁸ See sections 5.4 and 5.5.

⁸⁹⁹ Hansard HL Debate vol 768, cols 1573, 1577, 1575 (29th of January 2016).

defence and a partial general defence of diminished capacity for those who substantially lacked capacity:

The party seeking to raise the new partial defence must adduce expert evidence that at the time of the alleged offence the defendant substantially lacked capacity:

- (i) rationally to form a judgment about the relevant conduct or circumstances;
- (ii) to understand the wrongfulness of what he or she is charged with having done; or
- (iii) to control his or her physical acts in relation to the relevant conduct or circumstances as a result of a qualifying recognized medical condition.⁹⁰⁰

If both Catley's proposals were introduced into English law, he argued that "... it would be open for example for a jury who were not satisfied that a defendant wholly lacked capacity to return a guilty, but substantially lacked capacity verdict."⁹⁰¹ He further remarked that both defences would recognise defendants who committed a crime when their capacity was impaired with a partial excuse from criminal responsibility. Also, those who completely lacked the identified legally relevant capacities when they committed a crime with a complete excuse from responsibility.

Catley is correct; two defences are required to recognise that those who suffer developmental immaturity may have impaired capacity or a complete lack of mental capacity. This should be reflected in their level of criminal responsibility with exculpatory defences. Several legal academics have advanced the central argument that developmental immaturity does not just affect children and young people. As discussed previously, the law needs to cater for defendants who suffer from developmental immaturity resulting in diminished or a total lack of capacities aged 10 and above. Catley and the thesis's proposed defences for possible future reform (what a reform might look like) would ensure that all developmentally immature individuals facing a conviction are granted the same opportunity for exculpation from criminal responsibility.

If a person successfully pleads Catley's defence for suffering diminished capacities and satisfies the *mens rea* and *actus reus* of murder, they will receive a voluntary manslaughter conviction (or any offence depending on the offence committed). A voluntary manslaughter conviction by reason of developmental immaturity (as proposed by the thesis) also acknowledges the seriousness of the defendant's actions in the killing and their intention to kill or cause really serious harm, just like Section 2 as amended.⁹⁰² This suggests that more work needs to be done to understand the future implications of such a defence and possible alternatives for reform like a partial and specific defence to murder to fully appreciate the gravity for those who commit serious crimes (e.g., murder, rape and attempted murder) with diminished capacity.

As discussed in section 3.2, the cognitive sciences might aid future work in criminal law in supporting proposals for reform. As McDiarmid remarked, the *Roper* case provides English legal academics and policymakers with a good example of international policy reform supported by neuroscience for young people convicted of murder.⁹⁰³ Although the Age of Criminal Responsibility Bill 2019-21 has been tabled, Parliament has revealed an interest in scientific

⁹⁰⁰ Catley, P, "The Need for a Partial Defence of Diminished Capacity and the Potential Role of the Cognitive Sciences in Helping Frame That Defence" in Lighthart and van Toor. et al., (2021) pp. 66-67.

⁹⁰¹ Ibid. pp. 67-68.

⁹⁰² Refer back to section 2.9.

⁹⁰³ Walsh (2011) 21-22; McDiarmid (2013) 146.

research to understand brain and behavioural development in children/young people. Parliament stated that “advances in our understanding of the neurobiological processes underpinning adolescent behaviour have raised questions regarding the extent to which children should be held culpable for their actions.”⁹⁰⁴ It is therefore possible that legal academics and the Law Commission will delve deeper into how a specific defence of developmental immaturity will operate and what it will look like.

Another area that the cognitive sciences can support is an exploration of the effective participation of developmentally immature children/young people at trial, which I am interested in pursuing. As discussed in sections 2.6 and 3.7, the current test for unfitness to plead is meant to accurately identify vulnerable defendants who lack sufficient capabilities to effectively engage in a fair trial. However, this test fails to properly identify developmentally immature children/young people with significant functional incapacities because it consists mainly of cognitive criteria. As a result, the developmentally immature child/young person is typically deemed fit to plead, irrespective of whether they can cognise (e.g., instruct their legal team). This is a significant problem for such persons because they might make imperfect/flawed decisions at various points in the trial. Although the Law Commission's proposed reform of the current test goes some way to address this issue by assessing the defendant's decision-making, i.e., functional ability alongside many other factors, it has not been introduced into law.⁹⁰⁵ The cognitive sciences might be able to help better identify developmentally immature children/young people who suffer functional incapacities charged with a crime.

The diagnostic tools of the future, which find support in the scientific evidence explored in the thesis, lie in identifying mental conditions using bio-prediction and behavioural genetics tests. As discussed, bio-prediction promises the early detection of medical conditions, specialised treatments and crime prevention. Singh and Sinnott-Armstrong hoped that advancements in “... scientific understanding of biomarkers will eventually have significant consequences for efforts to predict bad behavior.”⁹⁰⁶ For instance, persons “... whose current behavior and/or cognitive profile indicates a higher level of risk of future antisocial or criminal behavior” and “... persons who are evaluated for a psychiatric diagnosis.”⁹⁰⁷ However, as discussed, each is not without its ethical issues; they can potentially harm children/young people by identifying and labelling them as future criminals based on the isolation of specific genomes.

The problem is that risk profiling approaches have already been adopted in the English youth justice system (by the Youth Justice Board (YJB)), excluding bio-prediction, and have been criticised on numerous grounds as ethically questionable. For instance, Haines and Case et al, observed that “offending behaviour may not be caused by a particular set of prior factors or characteristics, nor is it simply the result of unconstrained deliberate acts in pursuit of selfinterest.”⁹⁰⁸ Nonetheless, risk factors such as poor parental supervision and low school attendance are used to identify children/young people at risk of offending for intervention by the

⁹⁰⁴ Parliamentary Office of Science and Technology, Age of Criminal Responsibility POSTNOTE Number 577 p.2
<https://researchbriefings.files.parliament.uk/documents/POST-PN-0577/POST-PN-0577.pdf>

⁹⁰⁵ Law Commission, Draft Legislation No 364 (2016); Law Commission, Report No 364 (2016).

⁹⁰⁶ Singh and Sinnott-Armstrong (2014) p. 4.

⁹⁰⁷ Ibid. pp.4-5.

⁹⁰⁸ Haines. K, Case. S, et al., (2021) at 278.

YJB.⁹⁰⁹ Tellingly, Walker and Thompson's et al, evaluation of the YJB pilot panels, Youth Inclusion and Support Panels across 13 locations in 2003 revealed that the method of "simply adding up risk factors is not likely to help in enabling us to predict which children might get into trouble."⁹¹⁰ They concluded that scoring risks differed substantially between regions, with some scoring individuals very high and others lower-than-average at risk of offending in part due to scepticism over the usefulness of scoring and confusion over how to employ the scoring system.⁹¹¹

Consequently, the question arises whether bio-prediction should be employed to identify children/young people at risk of criminality and developing specific medical conditions, particularly if current risk profiling measures are criticised and caution has been given to biomarkers. Insights have revealed that those who employ such diagnostic tools in the future must think carefully about how these tests may impact individual children/young people and how to approach them. They need to be adequately supported and their individual needs addressed (mental, physical and social) by fostering social inclusion and positive action. These methods, if developed, must accompany steps towards protecting and supporting children/young people so that they do not experience negative feelings such as shame associated with labels like psychopathy to prevent self-fulfilling prophecies and criminality. What those steps could be and the type of support required need to be further researched.

Concerning the defence of diminished responsibility, these future diagnostic tools will not assist those who kill and plead the defence beyond identifying young children at risk of possibly developing a medical condition and committing criminality. As discussed, a successful plea under Section 2 as amended requires expert evidence that proves a defendant suffers an "abnormality of mental functioning" arising from "a recognised medical condition," not a risk profile that a young child is destined to kill with an accepted medical condition. Therefore, these future diagnostic tools as framed must not be viewed as a way for persons to plead Section 2 as amended successfully.

An area of law highlighted in the thesis that requires further research is the sentencing reforms for children/young people convicted of murder under Section 127 of the Police, Crime, Sentencing and Courts Act (2022), which has not yet come into force.⁹¹² As briefly discussed, Section 127 of this Act has removed the 12-year starting point in detention and replaced it with three separate starting points for the minimum term based on age brackets.⁹¹³ The Government articulated that these new starting points will make it fairer for children and young people, as those "... closer to the age of 18, will have higher starting points, while younger children will have lower starting points to reflect their reduced maturity and development."⁹¹⁴ However, without an empirical case study, it is unclear whether Section 127 will be fairer than the minimum starting point 12-year term when enforced.

The thesis's final consideration is that the defence of diminished responsibility under Section 2 as amended is not available to those who suffer from developmental immaturity and kill. Developmentally immature persons suffer developmental delays resulting (in most cases) in

⁹⁰⁹ Haines. K, Case. S, "The Rhetoric and Reality of the 'Risk Factor Prevention Paradigm' Approach to Preventing and Reducing Youth Offending" (2008) 8(1) *Youth Justice* 7.

⁹¹⁰ Walker. J, Thompson et al., *Youth Inclusion and Support Panels:*

Preventing Crime and Antisocial Behaviour? Executive Summary DCSF-RW018 (Newcastle Centre for Family Studies, 2007) p.17

⁹¹¹ Ibid.

⁹¹² As of June 2022.

⁹¹³ Refer back to section 2.11.

⁹¹⁴ MoJ (2020) p. 92.

cognitive impairment and total incapacity or substantial impairment of legally relevant capacities. However, their degree of immaturity and (in)capacity is not significant enough to warrant a formal diagnosis of “a recognised medical condition,” which is a definitional requirement of Section 2 as amended. As a result, they are convicted of murder and sentenced to a mandatory life sentence unless they can plead an alternative defence. This necessitates the introduction of two developmental immaturity defences in English law to address the “expert” problem explored in the thesis. (1) a general and complete defence and (2) a partial and specific defence to murder.

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Appendix A

Methodology

Search Terms

To find reported appeal cases, I started with the search terms:

‘MURDER’, ‘MANSLAUGHTER’, ‘DIMINISHED RESPONSIBILITY’, ‘SECTION 2’, ‘SECTION 52’. ‘YOUNG PERSON’, ‘CHILD’, ‘CHILDREN’, ‘FRESH EVIDENCE’, ‘ISSUE NOT RAISED AT TRIAL’, ‘CRIMINAL LAW’, ‘APPEAL’, ‘EVIDENCE AND PROCEDURE’, ‘DEFENDANT SEEKING TO PUT FORWARD DEFENCE OF DIMINISHED RESPONSIBILITY.’

These terms are common in case law involving appeal cases. For example, the term ‘murder’ produced 1303 results in the LexisNexis database. The terms ‘murder’ and ‘diminished responsibility’ produced 112 results. These search terms generated a very high number of results. The challenge was to exclude irrelevant cases so that the sample size only included appeal cases of children convicted of murder and/or convicted of manslaughter by reason of the defence of diminished responsibility from 1957 to 2019. After multiple practice runs, I settled on the following terms to best identify possible relevant cases:

‘YOUNG OFFENDER’, ‘CHILD’, ‘CHILDREN’, ‘MURDER’ ‘IMMATUREITY’, ‘DEVELOPMENT’, ‘DIMINISHED RESPONSIBILITY’, ‘AGE’, ‘YOUNG AGE’, ‘SECTION 2’, ‘SECTION 52’, ‘FRESH EVIDENCE’, ‘EVIDENCE AND PROCEDURE’, ‘DEFENDANT SEEKING TO PUT FORWARD DEFENCE OF DIMINISHED RESPONSIBILITY’, ‘MEDICAL EXPERT’, ‘SYMPTOMS OF’, ‘MENTAL DISORDER’, ‘MENTAL ILLNESS’, ‘A RECOGNISED MEDICAL CONDITION.’

Again, these search terms produced a significant number of reported appeal cases in the period specified in section 1.6. For example, ‘diminished responsibility’ and ‘immaturity’ produced 16 results; ‘diminished responsibility’ and ‘young offender’ produced 160 results; ‘diminished

responsibility’ and ‘young age’ produced 84 results. I decided to redefine the above search terms to find specific fresh evidence appeal cases that reveal the possibility that the child might have put forward the defence of diminished responsibility based on the evidence of mental disorder and immaturity. I devised the following search terms:

YEAR

- 1957-2019

TYPE OF CASE

- Appeal against murder conviction
- Appeal against sentence of murder
- Appeal against conviction and sentence of manslaughter by reason of the defence of diminished responsibility defence

TYPE OF OFFENCE

- Murder
- Manslaughter by reason of the defence of diminished responsibility defence

AGE OF APPELLANT AT TIME OF OFFENCE

- 10 years
- 11 years
- 12 years
- 13 years
- 14 years
- 15 years
- 16 years
- 17 years

EVIDENCE ON APPEAL

- Fresh evidence of mental disorder
- Fresh evidence of symptoms of mental disorder
- Evidence of immaturity
- Evidence of a history of mental disorder and/or presentation of symptoms
- Unrecognised and/or undiagnosed mental disorder at time of pre-trial medical assessment.
- Evidence of unfitness to plead at trial
- Evidence of no mental disorder at trial

RESULTS 25 cases

- Substituted verdict of manslaughter by reason of the defence of diminished responsibility
- Dismissal of appeal
- Acquittal on the basis of unfitness to plead.
- Amended sentence

As discussed in section 1.6, 25 reported cases were considered for inclusion using the revised criteria. I made a final decision on each case based on whether the case met the final criteria for inclusion provided in section 1.6. I concluded that 5 cases meet the final criteria for inclusion.

Appendix B



Unit
Data Access & Compliance
Ministry of Justice
102 Petty France
London
SW1H 9AJ

Hannah Wishart
hannah.wishart@manchester.ac.uk

data.access@justice.gsi.gov.uk

25 May 2017

Dear Ms Wishart

Freedom of Information Act (FOIA) Request – 111773

Thank you for your request dated 1 May 2017 in which you asked for the following information from the Ministry of Justice (MoJ):

Could I refine my question to the following: Would it possible to receive statistical data on the number of children charged and convicted of murder and manslaughter in England and Wales from 2010 to 2015 and 2003 to 2009. It is important that I get statistical data on the 5year periods before and after the enactment of section 52 of the Coroners and Justice Act 2009.

Your request has been handled under the FOIA.

I can confirm that the MoJ holds some of the information that you have requested and I have provided some of it in the attached table, which details the number of juvenile offenders found guilty at all courts of murder and manslaughter, in England and Wales, from 2003 to 2005.

The number of such offenders from 2006 to 2015 (and also 2016, for reference) is in the most recent annual publication, linked below. Select the Criminal Justice statistics data tool, from where you will need to select juveniles (we are operating on the understanding you class 'children' as those under 18) from the age drop down box, and murder and manslaughter from the offence drop down box. As a result, please note that this information is exempt from disclosure under section 21 of the FOIA, because it is reasonably accessible to you.

<https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december2016>

The Ministry of Justice is not the appropriate authority to contact with regard to charging data, which is held by the Crown Prosecution service (CPS). The CPS can be contacted via the below link:-

<http://www.cps.gov.uk/foi/>

Appeal Rights

If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.

data.access@justice.gsi.gov.uk

Data Access and Compliance Unit, Ministry of Justice, 10.38, 102 Petty France, London, SW1H 9AJ

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

Yours sincerely

David Carmichael
Justice Statistics Analytical Services

Appendix C

Hannah Wishart
hannah.wishart@postgrad.manchester.ac.uk

04 November 2019

Ref: 8771

Dear Hannah Wishart,

Freedom of Information Act 2000 Request

Thank you for your Freedom of Information (FOI) request which we received on 23 October 2019.

The FOI Act gives you the right to know whether we hold the information you want and to have it communicated to you, subject to any exemptions which may apply. It is a public disclosure regime, not a private regime. This means that any information disclosed under the FOI Act by definition becomes available to the wider public.

Request

Would it be possible to get data on the number of children charged with murder and manslaughter via the diminished responsibility defence that pleaded unfit to plead (both successfully and unsuccessfully) in England and Wales during 1957 to 2019?

Response

The Crown Prosecution Service (CPS) was formed in 1986. Prior to this, prosecutions were conducted by the Office of the Director of Public Prosecutions. Any records pertaining to the time 1957 – 1986 are in The National Archives and the CPS has no direct access to them. The links below provide further information which may assist you.

<https://discovery.nationalarchives.gov.uk/details/r/C6232>

<https://discovery.nationalarchives.gov.uk/details/r/C87>

From 1986 – 2004/2005 case outcome data collated by the CPS was in an aggregate form, i.e. other than by looking at case records no detail about the offence, defendant or outcome could be obtained.

From 2004/2005 the CPS began to use the Case Management System and began more detailed data collection, including the volumes of offences in which a prosecution commenced. Offences data is very limited: it does not centrally disaggregate by defendant (whether child/adult), the outcome, the type of plea (such as unfitness to plead) or the defence used.

Offences of murder and manslaughter are prosecuted by way of Common Law. As a guide, during the period 1 January 2004 to 30 June 2019 a total of 13,316 murder/manslaughter offences commenced prosecution which equates to 8,647 cases. In order to answer your request a manual review of those case files would be needed.

Section 12(1) of the FOI Act means public authorities are not obliged to comply with a request for information if it estimates the cost of complying would exceed the appropriate limit. [The appropriate limit for central government it is set at £600.](#) This represents the estimated cost of one person spending 3.5 working days determining whether the department holds the information, and locating, retrieving and extracting the information.

We believe that the cost of reviewing 8,647 cases would exceed the appropriate limit. Consequently, we are not obliged to comply with your request.

Under section 16 of the FOI Act we have an obligation to advise what, if any, information may assist you with your request. The Ministry of Justice (MoJ) holds records and has published data relating to the scope of your request. Their records can be broken down by age, type of defendant, gender, outcome and sentence. In addition, they have records which are available further back in time from 2008. You may wish to submit a Freedom of Information request to them via the email address below;

data.access@justice.gov.uk

Finally, murder/manslaughter prosecution cases tend to be the subject of Long Term Interest and, as such, finalised case records are sent to the Public Records Office/The National Archives. It is therefore possible they may hold data within the scope of your request. Further information can be found via the following link;

<https://www.nationalarchives.gov.uk/about/freedom-of-information/making-a-freedom-of-information-request/>

If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this

response. The internal review will be handled by a member of CPS staff who has not been involved with your original request.

FOI@cps.gov.uk

Information Management Unit
Floor 8
102 Petty France
London
SW1H 9AJ

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

Yours sincerely

Ms L. Mossop
Information Management Unit
020 3357 0788
IMU@cps.gov.uk

Appendix D



Disclosure Team Ministry of Justice
102 Petty France London
SW1H 9AJ

data.access@justice.gov.uk 10 December

Hannah Wishart 2018 hannah.wishart@manchester.ac.uk

Dear Ms Wishart

Freedom of Information Act (FOIA) Request - 181122011

Thank you for your request dated 22 November 2018 in which you asked for the following information from the Ministry of Justice (MoJ):

Would it be possible to get data on the number of children unfit to plead for charges of murder between 2006 and 2016 in England and Wales? I know that 444 children were not proceeded against at that time for murder, I need to know how many of those 444 were unfit to plead.

Your request has been handled under the FOIA.

Your request for information on children 'not proceeded against' has been interpreted as meaning children who were not prosecuted or proceeded against at court. The MoJ does not hold any information in the scope of your request. This is because we are not the appropriate authority to contact on this subject. The MoJ only holds information on those proceeded against, found guilty and sentenced at court in England and Wales. Decisions to prosecute or proceed against an individual are taken by the Crown Prosecution Service. If you wish to make a request of them, their contact details are below:-

Email address:-

IMU@cps.gov.uk Postal

address:

Information Management Unit Rose
Court
2 Southwark Street
London SE1 2HS

The FOIA does not oblige a public authority to create information to answer a request if the requested information is not held. The duty is to only provide the recorded information held.

If by children 'not proceeded against' you meant something different from the above interpretation then you may wish to make a new request, outlining exactly which data held by MoJ you require.

Appeal Rights

If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.

data.access@justice.gov.uk

Disclosure Team, Ministry of Justice, 10.38, 102 Petty France, London, SW1H 9AJ

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

Yours sincerely

David Carmichael
Justice Statistics Analytical Services

If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.

data.access@justice.gov.uk

Disclosure Team, Ministry of Justice, 10.38, 102 Petty France, London, SW1H 9AJ

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

Yours sincerely

David Carmichael
Justice Statistics Analytical Services