Doli Incapax – an assessment of the current state of the law in Queensland

This document has been drafted to assist the Youth Advocacy Centre Inc in current discussions around the age of criminal responsibility. It is not a substitute for legal advice and no responsibility is taken for reliance on the contents.

Since 2011, the concept of *doli incapax* has been considered in a number of judicial decisions. Before reviewing those decisions of substance, however, it is worth considering the legal bases of *doli incapax* in each jurisdiction and the distinctions between each.

Commonwealth	*Criminal Code* 7.1 Children under 10 A child under 10 years old is not criminally responsible for an offence. 7.2 Children over 10 but under 14 (1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong. (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution. *Crimes Act 1914* 4M. Children under 10 A child under 10 years old cannot be liable for an offence against a law of the Commonwealth. 4N. Children over 10 but under 14 (1) A child aged 10 years or more but under 14 years old can only be liable for an offence against a law of the Commonwealth if the child knows that his or her conduct is wrong. (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.
Australian Capital Territory (ACT)	*Criminal Code 2002* 25. Children under 10 A child under 10 years old is not criminally responsible for an offence. 26. Children 10 and over but under 14 (1) A child aged 10 years or older, but under 14 years old, can only be criminally responsible for an offence if the child knows that his or her conduct is wrong. (2) The question whether a child knows that his or her conduct is wrong is a question of fact. (3) The burden of proving that a child knows that his or her conduct is wrong is on the prosecution.
Queensland (QLD)	*Criminal Code* 29. Immature age (1) A person under the age of 10 years is not criminally responsible for any act or omission. (2) A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.

New South Wales (NSW)	*Children (Criminal Proceedings) Act 1987* 5. Age of criminal responsibility It shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence. Common law
Northern Territory (NT)	*Criminal Code* 38. Immature age (1) A person under the age of 10 years is excused from criminal responsibility for an act, omission or event. (2) A person under the age of 14 years is excused from criminal responsibility for an act, omission or event unless it is proved that at the time of doing the act, making the omission or causing the event he had capacity to know that he ought not to do the act, make the omission or cause the event.
South Australia (SA)	*Young Offenders Act 1993* 5—Age of criminal responsibility A person under the age of 10 years cannot commit an offence. Common law
Tasmania	*Criminal Code* 18. Immature age (1) No act or omission done or made by a person under 10 years of age is an offence. (2) No act or omission done or made by a person under 14 years of age is an offence unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make.
Victoria	*Children, Youth and Families Act 2005* 344. Children under 10 years of age It is conclusively presumed that a child under the age of 10 years cannot commit an offence. Common law
Western Australia (WA)	*Criminal Code* 29. Immature age A person under the age of 10 years is not criminally responsible for any act or omission. A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.

As can be seen from the table above, the law of the Commonwealth and the ACT with respect to criminal responsibility of children under 14 is, in substance, identical. The same is true of the law in Qld, WA, NT and Tasmania. Although in Tasmania, reference is made to what constitutes an offence, rather than criminal responsibility, the result is the same. Interestingly, the NT provision is framed as a defence ("a person… is *excused* from criminal responsibility") where in the other jurisdictions a bar to responsibility is established. Leaving aside such distinctions for the present, in these six jurisdictions, the question of criminal responsibility of a child between the ages of 10 and under 15 years is to be determined by a process of statutory interpretation.

Separately, legislation in NSW, SA and Victoria addresses only the absence of criminal responsibility of children under 10 years of age. This is done, however, without abolishing the common law of *doli incapax* and so the common law still operates to determine criminal responsibility in the individual case.

Regardless of the jurisdictional similarities and differences, it remains the case that across Australia, the question of the criminal capacity of children under the age of 14 years has only rarely been given consideration by the courts, certainly at the senior level. Since 2011, all of the cases of note have derived from NSW, meaning that they deal only with the common law as to *doli incapax*, on which light was definitively shed in the recent case of *RP v The Queen* [2016] HCA 53 ('*RP*'). The relevance of this to the jurisdictions which employ statutory definitions of children's criminal responsibility will be examined following the summary of recent cases below.

The case of primary significance is *RP*, an appeal from the NSW Court of Criminal Appeal. That case arose because, at trial, the learned judge accepted a concession made by counsel for the defence regarding the presumption of *doli incapax*. The concession was that, if the presumption were rebutted in relation to one offence that allegedly occurred when the defendant was 11-and-a-half years old, it would follow as a matter of logic that it was rebutted in relation to two further counts, which took place when the defendant was the same age or older. The appellant was acquitted of the first count (aggravated indecent assault) after the trial but convicted of the other three offences. The NSW Court of Criminal Appeal quashed the appellant's conviction on the fourth count (aggravated indecent assault) and entered a verdict of acquittal instead on the ground that his capacity in relation to that count had not been established beyond reasonable doubt. However, the convictions on counts two and three (sexual intercourse with a child under 10 years) remained.

The appeal in the High Court was successfully brought on the ground that the verdicts on counts two and three were unreasonable because the evidence did not establish beyond reasonable doubt that the presumption of *doli incapax* had been rebutted. Kiefel (as she then was), Bell, Keane and Gordon JJ delivered a joint judgment granting the appeal.

The High Court correctly explained that *doli incapax* encapsulates the presumption that *"*a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea" (in contrast with the popular explanation that it means children are "incapable of *evil*"). At common law the presumption was rebuttable from the age of 7 years, however the minimum age has been raised by the various legislatures to 10 years (as shown above). The court identified the modern source of the doctrine as the UK case of *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 ('*C*'), where the test was said to ask whether the child knew her or his conduct to be morally wrong, as distinct from merely naughty or mischievous. This has been expressed elsewhere as knowing that the conduct was "seriously" or "gravely" wrong. The court emphasised "[n]o matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts" and overruled the Victorian Supreme Court in *R v ALH* (2003) 6 VR 276 to the extent that it suggested otherwise. Rather, the High Court expressly stated that

> "[t]he prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised".

The court continued,

> "[w]hat suffices to rebut the presumption… will vary according to the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience…"

As to the form of evidence required, "[a]nswer given in the course of a police interview may serve to prove the child possessed the requisite knowledge. In other cases, evidence of the child's progress at school and of the child's home life will be required". The High Court rejected the suggestion of earlier courts that, the closer the child is to age 10, the stronger the evidence must be to rebut the presumption, and vice versa. Instead, the court emphasised that "[r]ebutting the presumption directs attention to the intellectual and moral development of the particular child".

In the instant case, the High Court remarked that, despite the onus upon it, the prosecution had not adduced any evidence beyond the circumstances of the offending itself to establish that the appellant had the capacity to form criminal intent. Rather, a Job Capacity Assessment Report and a psychologist's report were tendered by the prosecution at the request of the appellant's trial counsel, each of which was undertaken some years

after the offending but nonetheless found the appellant at the age of 17 and 18 years respectively to be on the borderline of intellectual disability. The second report also brought to light family dysfunction and possible suffering of abuse himself. Against that background, it was incumbent upon the prosecution to bring some positive evidence to establish the appellant's capacity. This it failed to do. The court observed that it "cannot… be assumed that a child of 11 years and six months understands that the infliction of hurt and distress on a younger sibling involves serious wrongdoing". As such, the High Court quashed the appellant's remaining convictions and, in their place, entered verdicts of acquittal.

In effect, the High Court affirmed that the test to be applied is subjective, assessing the actual capacity of the particular child before the court. The objective wrongness of impugned conduct will not suffice to rebut the presumption.

RP is important for its emphasis on the need for evidence beyond the mere circumstances of the offence for the presumption to be rebutted. This point had already been made in *C*, in which Berman SC J specifically relied *R v RL (No 1)* [2016] NSWDC 162, a trial judgment dealing with the common law position before the High Court's handing down of *RP*. The learned trial judge rejected the prosecution's approach, by which "the doli incapax issue [was] reduced to a submission that all 12 or 13 year old boys who have attempted to hide their wrongdoing must have known in the early 1960s that it was seriously wrong to incite their brothers to have sex with their sister". Other cases have emphasised the equivocal nature of flight and subterfuge in determining whether a child knew their act to be mere naughtiness or seriously wrong. Again, whatever view might be reached objectively about the accused's conduct, the question ought to have been addressed by reference to what he himself could be taken to have understood at the time. As such, the accused was acquitted on the relevant counts.

Similarly, in the earlier NSW case of *RH v Director of Public Prosecutions (NSW)* [2013] NSWSC 520 ('*RH*'). There again Hoeben CJ referred to *C* as the seminal decision regarding the presumption of *doli incapax*. His Honour noted that that judgment had been the subject of significant criticism by the Victorian Court of Appeal in *R v ALH* [2003] VSCA 129 ('*ALH*'), as mentioned above.

Nonetheless, Hoeben CJ in *RH* observed that *ALH* did not have any bearing on his decision, as he was bound instead by the earlier NSW appellate cases of *R v CRH* NSWCCA, 18 December 1996, unreported, and *BP v The Queen* [2006] NSWCCA 172. Each of those cases had referred to *C* as stating the correct approach and that therefore "mere proof of the doing of the act charged" was not sufficient. In dismissing the appeal, however, Hoeben CJ stated that "[r]ead in context, the observation in *C v DPP* was to the effect that it was not sufficient to rely only upon the matters charged" and that "[i]n any event… I prefer the approach of Hodgson JA [in whose reasons Adams and Johnson JJ concurred] in *BP*… to the effect that 'there should not be a narrow view taken on what are circumstances of the offence that can operate as evidence'". Thus, in both Victoria and NSW, the courts were tugging at the edges of the decision in *C*. *RP* was therefore a timely restatement of the test to be applied at common law and how it was to be met.

A further point of significance arises from the judgment of Lerve DCJ in *R v GW* [2015] NSWDC 52, where an appeal was reluctantly allowed on the basis that the only evidence as to capacity beyond the impugned behaviour had been in an inadmissible form. Despite the Lerve DCJ's exhortations that the presumption should be abolished, it appears from the High Court's stance that *doli incapax* is likely to remain a part of the Australian common law for some time yet.

We therefore return to the question of the common law's relevance to the statutory definitions. There is a potentially salient distinction between the ACT/Commonwealth formulation and that used in Queensland, Tasmania, WA and the NT. The former two jurisdictions state that a child of the relevant age will be criminally responsible "if the child knows that his or her conduct is wrong". This appears to require actual knowledge as to the wrongfulness of the particular conduct in question. In contrast, the latter four jurisdictions refer (*mutatis mutandis*) to the child having "sufficient capacity to know that the act or omission was one which he ought not to do or make". These provisions in terms refer to the general capacity of the child to know that the specific act was wrong, suggesting constructive knowledge of wrongfulness is sufficient. The statement of the High Court in *RP* is consistent with actual knowledge, suggesting closer relation between the ACT/Commonwealth provisions and the common law than in the four Code jurisdictions. This is the same

position taken in Queensland in *R v B* [1997] QCA 486 ('*B* (1997)'), with Pincus JA citing, "if [authority] were needed…[,] the case of *McGrath* (CA No. 252 of 1986, judgment delivered 20 November 1986)".

It should be noted that these two cases involved quite different approaches. The first, *R v B (an infant)* [1979] Qd R 417 ('*B (an infant)*'), dealt with *doli incapax* as a subsidiary issue, the court having already determined to allow the appeal on other grounds. Section 29(2) of the *Criminal Code* was not examined in detail, but it was apparently assumed by acceptance of common law authority that the provision was simply a codification of the common law. It was only when specific consideration was first given to the provision in *B* (1997) that the court observed that Queensland had departed from the common law course. Pincus JA therefore rejected the authority of *B v R* (1958) 44 Cr App R 1 – which had in fact been accepted in *B (an infant)* – because the Queensland *Code* text plainly differed from the common law formulation. This was not a change in direction so much as a correction of the law that had earlier been misstated.

The Queensland Court of Appeal case *R v F; ex parte Attorney-General* [1999] 2 Qd R 157 was an appeal on a point of law, which raised questions as regards the trial judge's conclusions in relation to doli incapax. The questions were concerned in large part with the evidence which was admissible to establish a defendant's capacity, but the first asked whether the trial judge had applied the correct test in stating that the Crown "must call strong and pregnant evidence that the accused understood that what he did was seriously wrong, not merely naughty or mischievous". This, Davies JA observed, was a paraphrase of Lord Parker LCJ in *B v R* (1958) 44 Cr App R 1 – the common law authority accepted in *B (an infant)* but rejected in *B* (1997). Davies JA therefore reiterated that the law of Queensland was not the common law in this regard: proof of actual knowledge of wrongfulness is not required, but rather proof of capacity to know. Moreover, the prosecution need not reach some special standard of proof, but must prove capacity beyond reasonable doubt, as is the standard on any criminal charge. To this extent, Davies JA was simply restating what had already been said by Pincus JA in *B* (1997).

Davies JA quoted from the case of *R v M* (1977) 16 SASR 589, 591 wherein the test was stated as being "that the act was wrong according to the ordinary principles of a reasonable man". However, the context in which this quotation was given by Davies JA is as follows:

> "It is preferable, in my view, if the phrase 'that the person ought not to do the act' needs to be paraphrased, *and I doubt if it does*, to use the phrase 'that the act was wrong according to the ordinary principles of a reasonable man'" (internal citation omitted; emphasis added).

It bears noting that that approach was rejected at common law by the High Court in *RP.* At [11], their Honours observed that Bray CJ in *R v M* (1997) 16 SASR 589 had drawn an analogy with the M'Naghten Rules as to incapacity. The High Court accepted this foundation, but added that "[t]here is… in the case of a child defendant, the further dimension of proof of knowledge of serious wrongness as distinct from mere naughtiness".

On the basis of *F*, this "further dimension" does not form a part of the Queensland criminal law (nor that of the other Code jurisdictions given the same interpretation): Davies JA considered the requirement of an appreciation that the conduct was "seriously wrong" was out of touch with modern criminal law, which had moved on from the point in *C* where the courts were "anx[ious] to prevent merely naughty children from being convicted of crimes… and in a sterner age to protect them from the draconian consequences of conviction".

The above contextualised quote demonstrates that his Honour preferred a simple application of the text of the *Code*, rather than addition of any gloss. Significant weight therefore ought not to be placed on the quotation of *R v M* within the broader context of his Honour's reasoning. This much is reinforced by the fact that, in closing this section of the judgment, Davies JA concluded:

> "… the test stated by her Honour was wrong and … the Crown must prove beyond reasonable doubt that the accused had the capacity to know that he ought not to do the act which he did".

This is no more and no less than what the *Code*'s text requires.

In *R v JJ; ex parte Attorney-General* [2005] QCA 153, among the grounds for the appeal was an argument that it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's capacity. What was in

issue was not so much the meaning of the test but the evidence required to meet it. Naturally, however, the Court of Appeal stated the correct test, both by quoting s. 29(2) and also as follows (at [9]):

> "The question, as Pincus JA observed in *R v B* [1997] QCA 486, at 5-6, and as is evident from s 29(2) itself, is not whether the accused knew he was doing wrong, but whether he had the capacity to know he ought not to do the act in question".

Thus, the Court of Appeal endorsed its earlier view in *B* (1997), creating consistency in approach rather than divergence. Similarly, in *R v EI* [2009] QCA 177 at [16], the Court of Appeal cited *B* (1997) as stating the correct test. Moreover, at [17] the court went on to say that "[i]n his written reasons, the learned trial judge correctly identified the question of whether the prosecution had proved that the appellant had the capacity to know that he ought not to do the acts charged".

Finally, in *R v TT*, the Court of Appeal again quoted s. 29(2) before turning to the specific grounds of appeal. Relevantly, the court then stated (at [19]):

> "The second ground of appeal was that there was insufficient evidence for the learned trial judge to be satisfied beyond reasonable doubt that the appellant knew that the offences with which he was charged were 'seriously wrong'. This ground of appeal is quite misconceived. *What the learned trial judge had to decide was whether he was satisfied beyond reasonable doubt that the appellant had the capacity to know that it was wrong to assault another person*" (emphasis added).

It concluded:

> "It is not difficult to infer as a fact from the circumstances of the case that the appellant had the necessary capacity. It was open to the tribunal of fact to reason that the most basic level of understanding would suffice to enable a child of 12 years to understand that it is wrong to punch a wheelchair-bound person without provocation".

This is not statement of a new test but rather application of the facts of the case to the test as stated. There was evidence at trial that the appellant had "intelligence… consistent with his age and his answers to questions [on interview] indicate a capacity to know right from wrong". Thus, the court did not presume normality, but rather found it proven on the facts – a finding of the trial judge which the Court of Appeal did not disturb. It was open then to the tribunal of fact, in light of its experience with children, to find that the normal capacity of a 12 year old and indeed of this particular child, entailed the ability to know that certain acts ought not to be done. Further, reference to the act in question being wrong (not, it bears noting, 'seriously wrong' or any other graded standard) simply paraphrases the *Code* question of whether the act was something that the appellant ought not to do.

In sum, while there may be infelicities of wording in some judgments, the Queensland Court of Appeal has consistently expressed a test that requires proof of a *general capacity* to understand that the *specific act* charged ought not to have been done (*mutatis mutandis* with respect to omissions). That test is clear from the wording of s. 29(2) and differs from the common law. It does not require proof of any specific degree of wrongfulness. This may be a matter of some concern, permitting a lower bar to be set for children in the Code jurisdictions: all that need be established, it seems, is that they have the capacity to distinguish right from wrong *simpliciter* in order to bear criminal responsibility.

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