

Youth Law Australia

Submission regarding

DOLI INCAPAX AND RAISING THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

for the

Australian Council of Attorneys-General

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Contents

About Youth Law Australia (YLA)	3
Problems with the practical application of doli incapax	3
1. Lack of uniformity is leading to unfair and unjust outcomes for children	3
2. The evidentiary issues of doli incapax leading to discrimination on the basis of age	4
3. An unofficial reverse burden of proof.....	5
4. Inconsistent application	5
5. Prolonged involvement with the criminal justice system.....	6
YLA's recommendations.....	8
Conclusion	8
Endorsements	8

About Youth Law Australia (YLA)

The National Children's and Youth Law Centre t/a Youth Law Australia (YLA) is Australia's national Community Legal Centre for young people. YLA can be contacted by young people 24/7 and aims to respond to any Australian young person, anywhere, with any legal problem. YLA also monitors and advocates for the rights and best interests of young people in Australia and is accredited to the UN Economic and Social Council as a children's rights specialist NGO.

Problems with the practical application of *doli incapax*

Doli incapax is an entrenched legal principle in the Australian criminal justice system. Despite this, evidence reveals at least five practical problems with the current application of *doli incapax* in Australia including:

- a lack of uniformity across jurisdictions;
- evidentiary issues leading to the admission of commonly inadmissible evidence;
- an unofficial reverse onus of proof;
- inconsistent application within jurisdictions; and
- a lack of coherency of the *doli incapax* principle leading to the prolonged involvement of children in the criminal justice system.

The impact of such intractable practice issues in applying *doli incapax* is that the principle has become an inadequate justification for refusing to increase the minimum age of criminal responsibility in Australia.

This submission will summarise the practical concerns relating to *doli incapax* before recommending that governments increase the minimum age of criminal responsibility to at least 14 years of age and repeal *doli incapax*.

1. Lack of uniformity is leading to unfair and unjust outcomes for children

The application of *doli incapax* is not uniform across Australian states and territories which is leading to unjust and unfair outcomes for children. All Australian jurisdictions provide for the rebuttable presumption of *doli incapax* for children from 10 years to under 14 years, although not in a uniform manner.

New South Wales (NSW), South Australia (SA) and Victoria (VIC) rely on the common law presumption of *doli incapax*.¹ Importantly, this is contingent upon a child having **actual knowledge** that the child's conduct is wrong.

Conversely, the Commonwealth, Australian Capital Territory (ACT), Queensland (QLD), Tasmania (TAS), Western Australia (WA) and Northern Territory (NT) have expressly legislated

¹ See for example *RP v The Queen* (2016) 259 CLR 641, [4].

the doli incapax presumption.² However, even within these jurisdictions, there are differences in the formulation of the legislative provision that provides for the presumption.

The Commonwealth and ACT jurisdictions provide that a child aged 10 but not yet 14 can only be criminally responsible if the child has actual knowledge that the child's conduct is wrong.³ This is similar to the common law doctrine.

In contrast to this, the NT, QLD, TAS and WA jurisdictions provide that a child aged 10 but not yet 14 only requires **the capacity to know** that an action is wrong in order to be criminally responsible (each a 'Capacity Focused Jurisdiction').⁴ Proof of a capacity to know is a lower bar than proof of actual knowledge of wrongfulness of the particular conduct in question. The test in the Capacity Focused Jurisdictions is arguably easier to satisfy and less rigorous than the common law test or the statutory test operating in other jurisdictions.⁵

As a result of this, there are evidentiary differences depending on how doli incapax is formulated. Evidence that a child knows that his or her conduct is wrong requires evidence that points to the fact that the child had subjective knowledge that the specific act, omission or event was wrong. Evidence of capacity to know particular conduct is wrong is geared towards showing that the child had the general capacity to know the act, event or omission was wrong, suggesting constructive knowledge of wrongfulness is sufficient.⁶

There is, therefore, a real risk that children will not be treated in a fair and consistent way across jurisdictions. There is no reasoned justification for having a test in some Australian jurisdictions which is easier to satisfy than that used in the others, and there should be national consistency on how the criminal responsibility of a child is determined in every jurisdiction.⁷

2. The evidentiary issues of doli incapax leading to discrimination on the basis of age

There are practical difficulties in proving whether a child knew that a certain act was "wrong" under doli incapax. It has been observed that, in attempting to rebut the presumption of doli incapax, "the prosecution is allowed considerable evidentiary concessions whereby normally inadmissible, highly prejudicial material is deemed admissible".⁸ Evidence which is generally used includes:

² *Crimes Act 1914* (Cth) s 4N, *Criminal Code Act 1995* (Cth) s 7.2, *Criminal Code 2002* (ACT) s 26, *Criminal Code Act 1983* (NT) s 38(2), *Criminal Code Act 1899* (Qld) Sch 1 s 29(2), *Criminal Code Act 1924* (Tas) s 18(2), *Criminal Code Act Compilation Act 1913* (WA) Appendix B s 29

³ *Criminal Code Act 1995* (Cth) s 7.2(1), *Criminal Code 2002* (ACT) s 26(1), *Crimes Act 1914* s 4N(1)

⁴ *Criminal Code Act 1983* (NT) s 38(2), *Criminal Code Act 1899* (Qld) Sch 1 s 29(2), *Criminal Code Act 1924* (Tas) s 18(2), *Criminal Code Act Compilation Act 1913* (WA) Appendix B s 29.

⁵ Ben Mathews, Children's Criminal Responsibility in Australia: Some Legal, Psychological and Human Rights Issues, *Australian & New Zealand Journal of Law & Education*, 1327-7634 Vol 5, No 2, 2000, p 28

⁶ Ailsa McKeon, "Doli Incapax - an assessment of the current state of the law in Queensland", <https://www.yac.net.au/wp-content/uploads/2019/01/YAC-submission-re-YJ-Strategy-Att-A_doli-incapax.pdf>.

⁷ Ben Mathews, Children's Criminal Responsibility in Australia: Some Legal, Psychological and Human Rights Issues, *Australian & New Zealand Journal of Law & Education*, 1327-7634 Vol 5, No 2, 2000, p 29

⁸ Patricia Blazey-Ayoub, 'Doli incapax' (1996) *Criminal Law Journal*, 20(1), 34-40 in Gregor Urbas, 'The Age of Criminal Responsibility' (2000) *Trends & issues in crime and criminal justice no. 181* Canberra: Australian Institute of Criminology <<https://aic.gov.au/publications/tandi/tandi181>>.

- statements and admissions made by the child;
- prior criminal history;
- evidence of parents/ home;
- evidence of teachers; and
- evidence of psychologists or psychiatrists.⁹

YLA agrees with the UN Committee who observed that the presumption of *doli incapax* can lead to children being treated differently based on the evidence led to rebut the presumption, which might not necessarily require evidence from an expert (e.g. a psychologist).¹⁰ Not only does the presumption allow the prosecution to lead highly prejudicial material, the evidence that is commonly used fails to take into account the interaction between a child's developmental maturity and the conditions in which an offence occurred. The impact of this is that children against whom such evidence is presented are essentially being discriminated against within the criminal justice system on the basis of age.

3. An unofficial reverse burden of proof

A key element of the presumption of *doli incapax* is that the onus of proof sits with the prosecution. In practice, however, as the principle is not consistently applied by the prosecution or the judiciary, this can lead to an unofficial reversal of the onus of proof, meaning that the presumption effectively operates as a defence.

According to recent research with legal stakeholders in Victoria, the onus commonly fell on the defence to provide a report (at the defence's cost) to establish that the child is *doli incapax*.¹¹ This results in the burden of costs for forensic assessments sitting with the defence.¹² It also places increased importance on the instructions that the child gives to its counsel. In this regard, research participants highlighted that children may refuse a *doli incapax* assessment (perhaps because they know that the assessment would delay proceedings) without full comprehension of the consequences of that decision.¹³ This has the effect of undermining the legal safeguard that the presumption of *doli incapax* is intended to provide to children by virtue of their chronological age. The impact of this is that it can lead to the wrongful conviction of children.

4. Inconsistent application

Evidence suggests that *doli incapax* is also being applied inconsistently *within* jurisdictions which can result in the presumption being used in "an ad hoc and procedurally questionable

⁹ Matthew Johnston, 'Doli Incapax – The Criminal Responsibility of Children' (Paper presented at Children's Magistrates Conference, Sydney, 1 February 2006) 7.

¹⁰ United Nations Committee on the Rights of the Child, 'General Comment No 10 (2007): Children's Rights in Juvenile Justice', 44th sess (UN Doc CRC/C/GC/10) (General Comment No 10) [30] in Thomas Crofts 'Will Australia Raise the Minimum Age of Criminal Responsibility?' (2019) 43 *Criminal Law Journal* 26, 36.

¹¹ Wendy O'Brien and Kate Fitz-Gibbon (2019) 'A child's capacity to commit crime: Examining the operation of *doli incapax* in Victoria (Australia)' *International Journal for Crime, Justice and Social Democracy* 8(1): 18-33 <<https://www.crimejusticejournal.com/article/view/1047>>.

¹² *Ibid.*

¹³ *Ibid.*

way”.¹⁴ Responses to research undertaken in Victoria indicate that the presumption is applied inconsistently in that state.¹⁵ For example, research participants suggested that the presumption was less commonly applied in rural and regional areas of Victoria, and that practitioners in those areas tended to be less familiar with the principle of *doli incapax*.

The research also noted that there was a lack of expertise to undertake *doli incapax* assessments in rural and regional areas, which in turn creates practical barriers even in cases where a court recognises the need for a child to be assessed.¹⁶ For example, children may have to travel for their assessment, which may result in an absence from school and place additional strain on the child’s family if they are responsible for taking the child to their assessment.¹⁷

As *doli incapax* is regarded as an element of any offence committed by a child aged 10 – 13 years inclusive, its non-application in any matter leading to a conviction would be probative in and of itself of a wrongful conviction.

5. Prolonged involvement with the criminal justice system

The presumption of *doli incapax* has been criticised on the basis that it prolongs a child’s involvement with the criminal justice system. Although the presumption is intended to function as a legal safeguard, it has been noted that the lack of coherency over how the presumption should operate leads to “errors and results in children held in custody for lengthy periods of time before the presumption is led or tested in court, and the child acquitted.”¹⁸

This is troubling given that there is substantial research demonstrating the negative effects experienced by children in custody. These include, for example, separation from family and community, disruption to education, the negative effects of associations with sentenced child offenders and lack of access to therapeutic programs.¹⁹

Commentators note that “while the presumption [of *doli incapax*] is in itself designed to remove children who lack the necessary capacity from the justice system, for this to be an effective safeguard such a response must occur at the earliest point and without requiring the child to spend prolonged periods of time within the bounds of the criminogenic justice system institutions.”²⁰ The effect experienced by children on remand ultimately defeats the

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Australian Law Council, n1.

¹⁹ Kelly Richards and Lauren Renshaw, ‘Bail and remand for young people in Australia: A national research project’, *Research and public policy series no. 125*. Canberra: Australian Institute of Criminology <<https://aic.gov.au/publications/rpp/rpp125?>>>.

²⁰ Wendy O’Brien and Kate Fitz-Gibbon (2019) ‘A child’s capacity to commit crime: Examining the operation of *doli incapax* in Victoria (Australia)’ *International Journal for Crime, Justice and Social Democracy* 8(1): 18-33 <<https://www.crimejusticejournal.com/article/view/1047>>.

purpose for which the *doli incapax* principle is intended,²¹ and exacerbates the psychological issues which often contribute to the offending behaviour.

Further inconsistencies and concerns

Due to time constraints, YLA was unable to explore the further inconsistencies which are often evident in the application of *doli incapax*, including the lack of understanding of *doli incapax* by police.²²

In particular, YLA would have appreciated more time to explore the inconsistencies that exist in the application of *doli incapax* to Indigenous children.

Research has suggested that a substantial proportion of young people in custody under the age of 14 suffer from mental health disorders and cognitive impairments.²³ Of these young people, the rate of cognitive disability is much higher for Indigenous children than it is for non-Indigenous children.²⁴ Given that Indigenous children comprise a majority of those under the age of 14 who appear before youth courts in Australia,²⁵ it may be suggested that Indigenous children with mental health and cognitive disabilities are grossly overrepresented within the youth justice system.

This is a strong indication that courts are failing to take into consideration these mental health and cognitive disabilities when applying *doli incapax*. Alternatively, it may be presumed that many courts are not applying the presumption at all.

Mental health and cognitive deficits have a significant impact on the ability to engage with the justice system.²⁶ Hearing and language impairments, which are often undiagnosed in Indigenous children, impact the potential for behaviour to be misinterpreted as rudeness or non-compliance.²⁷ Importantly, these deficits would arguably impede an ability to distinguish between conduct that is seriously and morally wrong as opposed to merely naughty or mischievous.²⁸

Other concerns regarding 10 – 13 year olds in the criminal justice system were not able to be explored at all given the timing of the call for submissions. YLA, however, asks that it be noted that we have concerns regarding the inadequacy of the following apparent safeguards to adequately protect the rights of this cohort:

- support persons during police interviews (with the notable exception of Victoria);
- criminal defence advice and representation services;

²¹ Kelly Richards and Lauren Renshaw, 'Bail and remand for young people in Australia: A national research project' (2013) 125 AIC Reports: Research and public policy series.

²² *Ibid.*

²³ Chris Cunneen, 'Arguments for raising the minimum age of criminal responsibility', *Comparative Youth Penalty Project Research Report* (2020) Jumbanna Institute for Indigenous Education and Research, University of Technology Sydney, 16.

²⁴ *Ibid.*, 15.

²⁵ *Ibid.*, 4.

²⁶ *Ibid.*, 16.

²⁷ *Ibid.*, 15.

²⁸ *Ibid.*, 10.

- interpreters at police interviews; and
- police conduct rules relating to the policing of children in this cohort.

YLA's recommendations

YLA submits that it is unsafe to retain the principle of *doli incapax* whilst maintaining a minimum age of criminal responsibility at 10 years old. Jurisdictions should repeal the principle of *doli incapax* and raise the minimum age of criminal responsibility to at least 14 years old.

In this regard, YLA notes that its recommendation accords with that of the UN Committee on the Rights of Child (2019) to Australia “to raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which *doli incapax* applies”²⁹.

Conclusion

Despite the entrenched principle of *doli incapax*, the Australian criminal justice system has failed to ensure that *doli incapax* operates as a legal safeguard for children who do not know that their conduct is wrong. Not only is the principle being inconsistently applied across different Australian jurisdictions, leading to unfair and unjust outcomes for children, the principle potentially discriminates against children on the basis of age and can lead to tortious and compensable harms, including wrongful convictions and imprisonment being inflicted on children.

Doli incapax is not a justifiable reason for the minimum age of criminal responsibility to remain at 10 years of age. The preferable position is to repeal the principle of *doli incapax* and raise the minimum age of criminal responsibility to at least 14 years old.

Endorsements

The following organisations have endorsed this submission:

- CLCs Australia
- Northern Community Legal Centre
- Youth Justice Network

YLA also notes and endorses the submission of the Youth Advocacy Centre Inc.

²⁹ United Nations Committee on the Rights of the Child, “Concluding Observations on the UN Committee on the Rights of the Child (2019)” (UN doc CRC/C/AUS/CO/5-6 (48(a)))