

The Presumption of Doli Incapax:
What it means for a child to know
their actions are seriously morally
wrong.

Presented by:

Sharon Lacy SC & Hetty de Crespigny

Foley's List

selacy@vicbar.com.au

hetty.decrespigny@vicbar.com.au

Authorities

R v PM [2023] VSC 560

RP v The Queen [2016] HCA 53

EL v R [2021] NSWDC 585

BDO v The Queen [2023] HCA 16

The Law

The prosecution must prove, beyond reasonable doubt, that the child knew his acts were seriously wrong or gravely wrong in a moral sense.

- As the plurality said in *RP v The Queen* [2016] HCA 53 at [4], the ‘*common law presumes that a child under 14 years lacks the capacity to be criminally responsible for his or her acts*’. Further at [8], the ‘*rationale for the presumption of doli incapax is the view 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.*’

Justice Gageler said in the same case at [38]:

Doli incapax – incapacity for crime – is a common law presumption in the same way as innocence is a common law presumption. To establish that a child under the age of 14 years has committed an offence in a jurisdiction in which the common law presumption continues to apply, the prosecution must prove more than the elements of the offence. The prosecution must prove beyond reasonable doubt that the child understood that the child's conduct which constituted the offence was seriously wrong by normal adult standards.

Per Incerti J in *R v PM* at [67]

The onus is on the prosecution to rebut the presumption of doli incapax. It is not a defence in the sense that it must neither be raised nor proven by an accused. Accordingly, the prosecution must bring evidence to rebut the presumption to the criminal standard of beyond reasonable doubt, alongside proof of all the elements of the offence.”

... at [80]

"Considering RP and the High Court's further clarification in BDO, I accept that this Court must take care not to pose a question as a simple choice of characterisation, being whether the child knew their actions were seriously morally wrong or whether they thought them to be merely naughty or mischievous. I consider that to pose the question as a simple dichotomy would be an oversimplification of the test as set out in RP and confirmed in BDO. The test always maintains the burden on the prosecution to prove beyond reasonable doubt that the child—in this case PM—knew his actions were seriously wrong in a moral sense, not merely that he knew that his actions were more than 'naughty' or 'mischievous'."

NJ Lennings & CJ Lennings:

‘The concept of knowing something is “seriously wrong” involves more than a childlike knowledge of right and wrong, or a simple contradiction. It involves more complex definitions of moral thought involving the capacity to understand an event, the ability to judge whether their actions were right or wrong (moral sophistication), and an ability to act on that moral knowledge. Moral reasoning involves the interpretation individuals make of information for evaluating rightness or wrongness. Such interpretative systems are influenced by social factors (e.g. modelling), manipulation of the perceived effect of the action (such as whether the action causes slight or severe harm) and information processing biases.’

**The importance of
medical science on
brain development**

“Examining the science behind such contemplation, it is apparent that the current minimum age of criminal responsibility is unscientific. As detailed below, the science proves unequivocally that adolescents aged below 14 have under-developed brains (Blakemore & Robbins, 2012).”

- Yolisha Singh 2023

Yolisha Singh (2023) *Old enough to offend but not to buy a hamster: the argument for raising the minimum age of criminal responsibility*, *Psychiatry, Psychology and Law*, 30:1, 51-67

**Philosophical
underpinnings of
criminal
responsibility &
how it applies to
*doli incapax***

*“Man is born free; and everywhere he
is in chains.”*



Jean-Jacques Rousseau – François
Guérin (c.1760) Public domain

Image credit: the
Conversation

FOLEY'S | LIST

The Functions of Criminal Law

the *punitive view*: to deliver justified punishment – punishment focused

- Moore, M. S., 1997, *Placing Blame: A Theory of Criminal Law*, Oxford: Oxford University Press

the *curial view*: calling suspected offenders to account – trial focused

- Gardner 2007, 80; Duff 2010c

the *communitarian view*: responding to wrongs on behalf of all of us - public censure

- Duff 2011, 140

the *imperfectionist view*: enables duties of general interest to be discharged less imperfectly than they otherwise would be if the criminal law took no interest – public order

James Edwards, 2018, *Theories of Criminal Law*, online, Stanford Encyclopedia of Philosophy, Department of Philosophy, Stanford University

<https://plato.stanford.edu/ENTRIES/criminal-law/#:~:text=Call%20this%20the%20imperfectionist%20view,distinctiveness%20in%20a%20different%20place.>

Limits of criminal responsibility

- Criminalised acts
- *mens rea* element of most offences
- presumption of innocence
- criminal defences
- Executive & Prosecutorial discretion
- Evidence law
- Burden and standard of proof
- Fitness to be tried
- minimum age of criminal responsibility

**United Nations Standard Minimum Rules for the Administration of Juvenile Justice AKA
“*The Beijing Rules*”:** Rule 4.1

In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

*Commentary: “The minimum age of criminal responsibility differs widely owing to history and culture. **The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility**; that is, whether a child, by virtue of her or his **individual discernment and understanding**, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no age limit at all, the notion of responsibility would become meaningless.*

Doli Incapax: a middle ground?

**Human rights
implications of *doli
incapax***

UN Convention on the Rights of the Child (CROC)

Article 40(30)(a)

- Requires States Parties to establish a minimum age of criminal responsibility but does not specify any particular age

Article 40(30)(b)

- requires State Parties to promote the establishment of measures for dealing with children without resorting to judicial proceedings, whenever appropriate

The “Beijing Rules” – guiding principles

UN Committee General Comments

UN Committee Concluding Observations on Australia

UN General Comments on the minimum age of criminal responsibility

*A minimum age of criminal responsibility below the age of 12 years is considered by the Committee **not to be internationally acceptable**. States parties are encouraged to increase their lower MACR [minimum age of criminal responsibility] **to the age of 12 years as the absolute minimum age** and to continue to increase it to a higher age level.*

– General Comment No 10 (2007)

Strongly recommends that States Parties “*abolish the use of a lower minimum age of criminal responsibility for serious crimes and instead sets ‘one standardized age... without exception’ ...*”

“*Maturity and the capacity for abstract reasoning is **still evolving** in children aged 12 to 13 years due to the fact that **their frontal cortex is still developing**. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings.*”

“*States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age.*”

– General Comment No 24 (2019)

Victorian Government Commitment

- “staged increase”
- Raising the age of criminal responsibility for all crimes to 12yo by 2024
- Raising the age of criminal responsibility to 14 by 2027 **with exceptions for “certain serious crimes”**
- ***Future of doli incapax... ?***

**General Comment No.
24 (2019)**

“The Committee is concerned about practices that permit exceptions to the use of a lower minimum age of criminal responsibility in cases where, for example, the child is accused of committing a serious offence. Such practices are usually created to respond to public pressure and are not based on a rational understanding of children’s development. The Committee strongly recommends that States parties abolish such approaches and set one standardized age below which children cannot be held responsible in criminal law, without exception.”

Criticisms of *doli incapax* & age of criminal responsibility

- Process of rebutting the presumption is inherently criminogenic and slow
- Negative impacts of exposure to the youth justice system outweigh the possible 'deterrent' effects it may have
- The process by which the presumption is rebutted is flawed resulting in an informal reversing of the onus (onto defence)
- For children over 14 they are attributed with an adult's level of criminal responsibility

Raise the age campaign



<https://raisetheage.org.au>

a national campaign to push every single state, territory and federal government to change the laws so that children under 14 cannot be sent to prison.

- Over 100 partner organisations
- Developed by NATSILS, Change the Record, HRLC, AMA, Amnesty International, Law Council of Australia, Public Health Association, RACP

Alternative reform proposals

- Raising age of criminal responsibility to 14 with no exceptions
- Extending *doli incapax* to older children
- Removing criminal responsibility altogether and managing children's problematic behaviour outside the criminal justice system
- 'justice reinvestment approach' – providing cognitive behavioural therapy or multi-systemic therapy and case management
- Defence of 'developmental immaturity'

**Preparation and
forensic decision
making in *doli
incapax* cases**

- Record of interview
 - Pressures
 - Advice pre-interview
- Prosecution expert
 - ‘adherence to alternate moral code’
- Defence expert – risks involved
- Time pressures
- Negotiation
- Other materials you have

Bibliography

- Dominique Moritz, Children's Developmental (Im)maturity: *Aligning Conflicting Decisional Capacity Assessment Approaches in Australia*, 12 LAWS 1 (2023).
- Yolisha Singh (2023) Old enough to offend but not to buy a hamster: the argument for raising the minimum age of criminal responsibility, *Psychiatry, Psychology and Law*, 30:1, 51-67
- Fitz-Gibbon K and O'Brien W (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. DOI: 10.5204/ijcjsd.v8i1.1047.
- Standing Council of Attorneys-General '*Age of Criminal Responsibility Working Group Report*' – September 2023
- Council of Attorneys-General '*Age of Criminal Responsibility Working Group Final Draft Report*' – 2020
- "Proving the Criminal Responsibility of Children: *RP v The Queen*" authored by Mr H Dhanji SC (as his Honour then was), Ms J Roy and Ms S McLaughlin.

FOLEY'S | LIST

205 William Street
Melbourne VIC 3000

T (03) 9225 7777

F (03) 9225 8480

foleys@foleys.com.au

www.foleys.com.au