

## DOLI CHECKLIST

This checklist is designed as a guide for legal practitioners dealing with criminal matters involving *doli incapax*. It may be useful in advocacy with police prior to charge, in negotiations with prosecutors, or in preparing/running court proceedings.

### **1. Is there evidence to rebut the presumption of *doli incapax*? If there isn't, can evidence be obtained to rebut the presumption?**

#### **Rebutting *doli incapax* – key principles**

- (a) A child under 14 years is presumed in law to be incapable of bearing criminal responsibility for their acts.
- (b) The onus is on the prosecution to adduce evidence to rebut the presumption of *doli incapax* to the criminal standard. This is in addition to the *actus reus* and *mens rea* (if any) elements of the offence(s) charged.<sup>1</sup>
- (c) The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction.<sup>2</sup> It must be adduced as part of the prosecution's case, or else there will be no case to answer.<sup>3</sup>
- (d) The prosecution must prove that the child knew the conduct was morally wrong – i.e. they knew it was 'seriously wrong in a moral sense', as opposed to merely naughty or mischievous.<sup>4</sup> Gageler J in RP refers to the test as 'seriously wrong by normal adult standards'.
- (e) The prosecution must prove the child's knowledge at the time of the alleged offending. The question of what the child knew subsequently – e.g., at the time of investigation, interview, *doli* assessment or court hearing – is not determinative of capacity.
- (f) The nearer a child is to 14 years does not mean the less strong the evidence need be to rebut *doli*. Children do not mature at a uniform rate. Rebutting the presumption directs attention to the intellectual and moral development of the *particular* child.<sup>5</sup>
- (g) The evidence to prove the child's guilty knowledge, must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act may be.<sup>6</sup>
- (h) The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that they knew that it was morally wrong to engage in the conduct. This directs attention to the child's intellectual and moral development, their education, and the environment in which they have been raised.<sup>7</sup>
- (i) What 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 they have direct personal experience (e.g. control of their own possessions and the theft of others' property, as opposed to offences such as damaging public property, fare evading, receiving stolen goods, fraud or forgery).<sup>8</sup>

#### **Types of evidence**

##### **(a) Statements/admissions made by the child**

- Has the child made an admission? If so, is it admissible or objectionable?
  - Is the admission caught by s 13 Children (Criminal Proceedings) Act 1987 (CCPA) (exclusion of admissions where responsible person / adult / lawyer not present)?

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<sup>1</sup> RP v The Queen [2016] HCA 53 (**RP**) [32]. See also *C v DPP* (1996) 1 AC 1 (**C v DPP**) [37E], [38], approved in *R v CRH* (Unreported, NSW Court of Criminal Appeal, Smart, Hidden and Newman JJ, 18 December 1996) (**CRH**); R v LMW (Unreported, Supreme Court of NSW, Studdert J, 30 November 1999) (**LMW**).

<sup>2</sup> *C v DPP*, approved in *CRH*.

<sup>3</sup> *C v DPP*, approved in *CRH*.

<sup>4</sup> *RP* [9], citing *C v DPP* [38]; BP v The Queen [2006] NSWCCA 172 (**BP**) [27]-[28]; *R v Gorrie* (1918) 83 JP 136 (**Gorrie**); Archbold: Criminal Pleading, Evidence & Practice, (1993), vol 1, 52 [1-96]. See also *JM (A Minor) v Runeckles* (1984) 79 Cr App R 255 (**Runeckles**).

<sup>5</sup> *RP* [12].

<sup>6</sup> *RP* [9]. See also *C v DPP* [38].

<sup>7</sup> *RP* [9] and [12].

<sup>8</sup> *RP* [12].

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- Did the child receive legal advice?<sup>9</sup>
  - Is the admission admissible under s 281 [Criminal Procedure Act 1986](#) (CPA) (exclusion of admissions not recorded)?
  - Is the admission admissible under Part 3.4 [Evidence Act 1995](#) (Evidence Act)?
  - Should the admission be excluded under s 90, s 135, s 137 or s 138 [Evidence Act](#)?
  - Is the admission inadmissible under s 67 [Young Offenders Act 1997](#) (YOA) (admission during the giving of a caution or youth justice conference not admissible in subsequent proceedings)?
  - Was the admission made under the YOA Protected Admissions Scheme?
  - Are the words attributed to the child clear beyond all doubt or contradiction?<sup>10</sup>
  - Does the admission indicate the child's understanding at the time of the alleged offence?
- (b) Surrounding circumstances – behaviour of the child before, during and after the act
- Evidence of surrounding circumstances, including conduct closely associated with the act constituting the offence, may be considered for the purpose of proving the relevant capacity in relation to that offence.<sup>11</sup>
  - Surrounding circumstances might include the behaviour of the child before, during and after the act. It might include:
    - noticing the victim's distress but continuing
    - using force
    - conduct to avoid detection: e.g. saying "don't tell anyone"; hiding things; stopping the offence when a parent returns; flight; asserting a false alibi, rendering a victim incapable of identifying the accused or preventing a victim from getting help during the commission of the offence, or
    - observations of the accused's speech and demeanour.
  - However, depending on the circumstances and the child, evidence of these behaviours may be equivocal and/or demonstrate knowledge of mere naughtiness. For example, evidence of flight did not demonstrate consciousness of guilt in *C v DPP*. In *RP*, surrounding circumstances were insufficient to rebut *doli* when the court also took into account the child's intellectual limitations, and concerns about his upbringing.<sup>12</sup> If the evidence is 'consistent with the child thinking that the act is merely naughty it will carry little weight'.<sup>13</sup>
- (c) Prior criminal history
- Check the child's record and see whether there is a similar offence.
  - Regarding admissibility of prior convictions, a child offender should not be in any worse position than an adult offender should.<sup>14</sup>
  - Where the primary facts were not in issue, and the record went only to the *doli incapax* issue, the prior criminal history could be tendered.<sup>15</sup>
  - In some circumstances, evidence of a prior record is so compelling on the issue of *doli incapax* that it is admissible even where the primary facts are in issue.<sup>16</sup>
  - The key consideration is the nature of the earlier convictions – where the prior record shows matters of similar offences and there is evidence of admissions made by the child indicating

<sup>9</sup> See *R v ME*, *R v LT*, and *R v CE* (Unreported, Supreme Court Common Law Division, 3 October 2002).

<sup>10</sup> *C v DPP*, approved in *CRH*.

<sup>11</sup> *RP* [41]. *R v Folling* (Supreme Court of Queensland – Court of Appeal, 26 March 1998) (**Folling**). See also *LMS* (1996) 2 Cr App R 50; *T v DPP* [1997] Crim LR 127; *Runeckles*; *CRH*; and *C v DPP*.

<sup>12</sup> *RP* [31-36]; [41-43].

<sup>13</sup> *BP v Regina*; *SW v Regina* [2006] NSWCCA 172 at [29]. *BC v R* [2019] NSWCCA 111 at [52].

<sup>14</sup> *C v DPP*.

<sup>15</sup> *Ivers v Griffiths* (NSW Supreme Court, 22 May 1998).

<sup>16</sup> *R v CRH*; see also *The Queen v M* (1977) 16 SASR 589; *Folling*; *G v DPP* (Unreported, Queen's Bench Division, 14 October 1997).

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that they knew the act was wrong, the prior record may be admissible. Where the prior matters are of a completely different nature, it would be more difficult to argue that the evidence is so compelling that the prejudicial effect outweighs the probative value.

- A person who acquires information or prepares a record in the exercise of functions under the YOA must not divulge the information to another person except in the exercise of functions under the YOA. Information may be divulged in certain circumstances – e.g. records of cautions and conferences under the YOA may be divulged to an investigation official, specialist youth officer or a court to determine whether to take action under the YOA: s 66 YOA.
- Any statement, confession, admission or information made or given by a child during the giving of a caution or a conference under the YOA is not to be admitted in evidence in any subsequent criminal proceedings: s 67 YOA.
- If a child has been the subject of a warning, caution or conference under the YOA, a question concerning the child's criminal history is taken not to refer to any such warning, caution or conference. But insofar as a caution or conference is concerned, this doesn't apply in relation to proceedings before the Children's Court: see s 68 YOA.
- The fact that a child has been dealt with by warning, caution or youth justice conference under the YOA, or has pleaded guilty to an offence in or been found guilty of an offence by a court, is not to be admitted in evidence in any criminal proceedings subsequently taken against the child in response of any other offence. This doesn't apply to criminal proceedings before the Children's Court but does apply to other courts: s 15 CCPA.
- Re Children's Court interpretation of s 66 YOA re warnings, see [Police v CO](#) [2020] NSWChC 8.
- Re inadmissibility of bail reports; can't hand up court alternatives to satisfy evidentiary requirements of 'conviction', see [R v GW](#) [2015] NSWDC 52.
- Was the child present for previous conviction/sentence, or were they sentenced in their absence? What was the child's understanding of their conduct? If the evidence of their prior record is strong to rebut the presumption of *doli incapax*, consider asking questions of the child, but note ethical considerations.

### (d) Evidence from parents / evidence of home background

- Re parents giving evidence, see Evidence Act s 18 (parent may object to giving evidence in criminal proceedings) and s 65 (exception to hearsay rule in criminal proceedings if maker not available). Also note s 279 Criminal Procedure Act.
- In [RP](#) there was reference made to a "*paradoxical result*" that "*the more warped the child's moral standards, the safer he is from the correctional treatment of the criminal law*". Meaning where a young person growing up in a household where contact with the Police was normalised, this may not equate to an understanding of moral wrongness.
- See [RP](#) [36]; [B v R](#) [1958] 44 Cr App R 1.
- See Evidence Act ss 135 and 137 (exclusion of prejudicial evidence).

### (e) Evidence from schools

- Examples: admissions in school interview, counselling notes from school counsellor, school attendance records, school reports.
- A teacher's statement relating to past disciplinary action could be admitted.<sup>17</sup>
- Re admissibility of interviews by schools, see [P v JC](#) [2018] NSWChC 2 and [R v MG](#) [2016] NSWDC 374.
- Are there any previous or ongoing school disciplinary proceedings where the child was spoken to about relevant matters?
- Issues to consider when reviewing a teacher's statement/report:

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<sup>17</sup> [Graham v DPP](#) [1997] EWHC Admin 869.

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- Does the evidence go to the specific nature of the charge?
- What is the relationship between the teacher/principal and the child?
- Is this a matter that has been discussed in class at any time? What was the nature of that discussion? Was the child present for that discussion? (e.g. Was the sexual education class just about anatomy and not about sexual consent; is there evidence that the child participated and understood the content?)
- Does the disciplinary action relate to a similar offence? What was the nature of the disciplinary action?
- If there have been multiple disciplinary actions for the same behaviour, does this in fact indicate the child continues the behaviour because they do not appreciate its seriousness? See [EL v R](#) [2021] NSWDC 585.

(f) Evidence from out-of-home care workers

- Similar to school questions – and note Evidence Act Pt 3.10 (privileges).

(g) Evidence from psychologists/psychiatrists (if obtained)

- What is assessed is the child's knowledge at the time of the act, not at the time of the hearing.
- Issues of confidential relationship privilege (Evidence Act s 126A) and legal privilege may arise if the prosecution attempts to access information from a child's psychologist/psychiatrist.
- Who provided the report – treating psych, forensic psych or Justice Health?
- What does the report say – does it specifically address *doli incapax* or is it more general? Is it a generic *doli incapax* report that does not concern the specific child but concerns child development generally?
- Subjective interpretation of even standard tests may lead to inconclusive, irrelevant and potentially prejudicial material being presented. *LMW* discusses the need to balance the probative value of the reports with any prejudicial material.

**2. Did the child have any developmental or mental health concerns at the time of the alleged offence?**

- Ask the child whether there are any reports from teachers/principals/school counsellors.
- Has the child seen, or are they seeing, a counsellor, psychiatrist or psychologist? Are there any prior hospital admissions?
- Was there any diagnosis at the time of the alleged offence? How does the child's mental health affect the question of *doli*?
- Consider whether to get a report from the school and/or a psych report.
- Consider whether to get a separate psych report with an opinion about whether the child was *doli incapax*.
- Consider whether the child has previously been dealt with under [Mental Health \(Forensic Provisions\) Act 1990](#) ss 32 or 33, or [Mental Health and Cognitive Impairment Forensic Provisions Act 2020](#) (MHCIFPA) s 18.
- Consider strategically whether to run a case under the MHCIFPA or a *doli incapax* case.

**3. Consider whether defence obtains and adduces any of the above mentioned evidence to show the child is *doli incapax***

- Note onus is on the prosecution to rebut *doli*.
- Defence may be in a better position to access/obtain certain evidence which may support *doli incapax* (e.g. evidence from parents/DCJ of poor upbringing, lack of education, mental health issues).

**4. Consider whether to write representations to police or prosecutors**

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- Consider whether police/prosecutors are able to obtain the evidence needed to rebut *doli incapax*.
- Are there alternatives to criminal processes that can be offered? Examples:
  - A 'warning' pursuant to Part 3 of the *Young Offenders Act 1997* (NSW)
  - A 'caution' pursuant to Part 4 of the *Young Offenders Act 1997* (NSW)
  - AVOs
  - NSW Health [New Street Adolescent Services](#) (for children with harmful sexual behaviours)
  - [PCYC Rise Up Programs](#) – Fit for Life, Fit to Learn, Fit Together, Fit for Change, Fit for Home Fit to Strive
  - [Joint Protocol to reduce the contact of young people in residential care with the criminal justice system](#)
  - [Their Futures Matter](#) – [A Place to Go](#)
  - Youth On Track (note: just been expanded by Youth Justice NSW – see [fact sheets](#)).
  - Youth Action Meetings
  - Legal Aid NSW Community Legal Education programs (e.g. workshops on sexting/sexual consent)
  - DCJ programs for kids in out-of-home care