THE CRIMINAL CAPACITY OF CHILDREN

“ ‘No civilised society’, says Professor Colin Howard in his book entitled Criminal Law, 4th ed. (1982), p343, ‘regards children as accountable for their actions to the same extent as adults’... The wisdom of protecting young children against the full rigour of the law is beyond argument. The difficulty lies in determining when and under what circumstances should it be removed.”

The Age of Criminal Responsibility
In New South Wales section 5 of the Children (Criminal Proceedings) Act 1987 provides that a child under the age of ten years cannot commit an offence. This statutory presumption is irrebuttable.

The common law presumes that a child between the ages of 10 and 14 does not possess the necessary knowledge to have a criminal intention. This common law presumption of doli incapax, is a rebuttable presumption that can be rebutted by the prosecution calling evidence. This means that the prosecution, in addition to proving the elements of the offence, must also prove that the child knew that what he or she did was seriously wrong in the criminal sense.

The existence of the presumption in the common law of New South Wales has been recently affirmed in Treffiletti & Ors v Robinson & Anor (unreported, Woodward J, Supreme Court of New South Wales, 9/2/81), DK v Maurice Rooney, (unreported, McInerney J, Supreme Court of New South Wales, 3/7/96), R v CRH (unreported, Court of Criminal Appeal, 18/12/96) and R v LMW (unreported, Supreme Court of New South Wales, Studdert J, 30/11/99). The defence and prosecution should consider doli incapax in all cases involving children under the age of 14.

The test for rebutting doli incapax
The leading case in New South Wales on doli incapax is the decision of R v CRH (Unreported, NSW Court of Criminal Appeal, Smart, Hidden and Newman JJ,18 December 1996). Newman J sets out the test for rebutting doli incapax and relies strongly on the House of Lords decision in C v DPP (1996) 1 AC 1 at 38:

The test can be summarized as follows:
1. The prosecution must rebut the presumption of doli incapax as an element of the prosecution case.
2. The child knew the act was seriously wrong as opposed to naughty.
3. The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction.
4. The evidence to prove the accused’s guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however, horrifying or obviously wrong the act may be.
5. The older the child is the easier it will be for the prosecution to prove guilty knowledge.

1 This paper is a revised version of the paper prepared by Matthew Johnston, Barrister from Forbes Chambers. It was a paper developed from a joint paper presented with Julie Morgan Legal Aid Commission in May 1999
2 Harper J; R (A Child) v Whitty (1993) A Crim R 462, Supreme Court of Victoria
1. The prosecution must rebut the presumption of doli incapax as an element of the prosecution case.

The presumption of doli incapax is not a defence; it is an element of the prosecution case. If the prosecution fails to call evidence to rebut the presumption there is no case to answer.

Lord Lowry - C v DPP at
‘If the presumption is allowed to stand and the prosecution did not call evidence to rebut it, then at the close of the prosecution case, there would be a ruling that there was no case to answer.’

Again at
“… it is quite clear as the law that, as the law stands, the Crown must, as part of the Crown’s case, (his emphasis) show that a child defendant is doli capax before the child can have a case to meet.”

Lord Lowry at 33;
“Very little evidence is needed but it must be adduced as part of the prosecution’s case, or else there will be no case to answer.”

Newman J, in R v CRH, approved of Lord Lowry’s comments adding at 11:
“In short, it is my view that such Australian authority as exists is consistent with the law as expressed by Lord Lowry.”

In R v CRH the Court of Criminal Appeal held that the charge should have been taken from the jury, by the trial judge, once there was a finding that there was no conclusive evidence to rebut doli incapax.

In R v LMW (unreported, Studdert J, Supreme Court of NSW, 30 November 1999) the defence made an application at the close of the prosecution case that the Crown had not rebutted the common law presumption of doli incapax. The application was rejected with the judge finding that ‘there is evidence upon which the jury properly instructed could (his emphasis) conclude that the presumption has been rebutted.’ The issue of doli incapax doli incapax was left to the jury. The defence case commenced and evidence supporting the child was called on the issue of doli incapax. A copy of the decision is annexed to this paper.

2. The child knew the act was seriously wrong as opposed to a naughty.

In order to rebut the presumption of doli incapax the prosecution must prove that the child defendant did the act charged and that in doing that act he knew that it was a wrong act as distinct from naughty.

“A long uncontradicted line of authority makes two propositions clear. The first is that the prosecution must prove that the child defendant did the act charged and that in doing that act he knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief.”
Lord Lowry, *C v DPP* at 3 and approved by the CCA in *R v CRH*.

However, there is often difficulty in determining whether the correct test is naughty, wrong or seriously wrong. Lord Lowry in *C v DPP* at 38:

> “I agree that the phrase ‘seriously wrong’ is conceptually obscure, and that view is confirmed by the rather loose treatment accorded to the *doli incapax* doctrine by the text books, but, when the phrase is contrasted with ‘merely naughty or mischievous’, I think its meaning is reasonably clear.”

*R v Runeckles* ((1984) The Times, 5 May 21) states that the prosecution must show that the act was ‘seriously wrong’ and not just something that would invite parental disapproval.

In *R v Gorrie* (1918) 83 JP 136, Salter J directed the jury that the prosecution

> “… must satisfy the jury that when the boy did this he knew that he was doing what was wrong – not merely what was wrong but what was gravely wrong, seriously wrong.”

3. The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction.

The evidence the prosecution relies upon must be clear evidence that the defendant knew that his or her actions were wrong and not just naughty. If the evidence is ambiguous then it is not sufficient to rebut the presumption.

Lord Lowry in *C v DPP* at 38:

> “A long uncontradicted line of authority makes two propositions clear. The first is that the prosecution must prove that the child defendant did the act charged and that in doing that act he knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief. The criminal standard of proof applies. What is required has variously been expressed, as in Blackstone, ‘strong and clear beyond all doubt or contradiction’, or in *Rex v Gorrie* (1919) 83 JP 136, ‘very clear and complete evidence’ or in *B v R* (1958) 44 Cr App R1 at 3 per Lord Parker CJ, ‘It has often been put this way, that ... “guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt”’. (emphasis added)

Again, the CCA in *R v CRH* cites this entire passage with approval.

It is very important to read the entire passage of *C v DPP* in order to understand the test. Another paragraph in Lord Lowry’s decision is often, in the opinion of this writer, incorrectly cited as an alternative test. The paragraph of *C v DPP* in question is at 33:

> “The presumption itself is not, and never has been, completely logical; it provides a benevolent safeguard which evidence can remove. Very little evidence is needed but it must be adduced as part of the prosecution’s case, or else there will be no case to answer.”
It has been suggested that this paragraph, particularly when read in isolation, is authority for ‘very little evidence’ being needed to rebut the presumption. However, it is submitted that this is incorrect. The test must be read in its entirety:

The test in summary reads, very little evidence (is needed to rebut the presumption) that is; **clear beyond all doubt or contradiction, very clear and complete evidence**, and ‘guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt’.

This argument is supported by the words of Lord Lowry at 38, (see below) which confirm the Court’s desire to rely on the ‘emphatic tone’ of the directions in order to protect children.

“No doubt the emphatic tone of some of the directions was due to the court’s anxiety to prevent merely naughty children from being convicted of crimes and in a sterner age protect them from the draconian consequences of conviction.”

**C v DPP** and **R v CRH** are cases which turn on the requirement to call clear and cogent evidence. They also appear to suggest that if the evidence put forward to rebut **doli incapax** is equivocal or ambiguous then there is no evidence to rebut the presumption.

In **C v DPP** the question posed is whether evidence of flight was suggestive of a guilty mind.

**Facts of C v DPP:**
The appellant was aged 12 and was seen by police officers using a crowbar to tamper with a motor cycle in a private driveway. Appellant ran away but was caught and arrested. Initially convicted. The Magistrate inferred from the fact that he ran away that he knew what he had done was wrong. The House of Lords held that flight from scene can as easily follow a naughty action as a wicked one. In such circumstances the House of Lords were left with no option other than to find that the presumption had not been rebutted by the prosecution evidence. (at 39)

“... Running away is usually equivocal ... because flight from a scene can as easily follow a naughty action as a wicked one.”

However, the House of Lords did go on to say (at 39) that there may be a few cases where running away would indicate guilty knowledge, where an act is either wrong or innocent and there is no room for mere naughtiness.

“An example might be selling drugs at a street corner and fleeing at the sight of a policeman.”

**R v CRH** provides an example of the strength of evidence required and the requirement the evidence be unambiguous.

**Facts in R v CRH:**
The defendant in that matter was 13 at the time of the alleged offence. The defendant is alleged to have woken the victim during the night in a room she was sharing with her sister. She felt a felt a tap on her shoulder and heard the appellant calling her name... somehow she ended up in the living room... the defendant is alleged to have forced her to suck his penis ... the victim said she then heard a noise and the appellant pulled a
blanket over her head. Soon after the victim said she heard her elder sister’s voice and heard the appellant tell her sister that she, the complainant, was hiding from her.

The Crown (at the bottom of page 5) relied on the ‘furtive’ nature of the accused’s conduct; waking the complainant in the early hours of the morning, the carrying or encouraging the complainant to come with him into the lounge room, hiding the complainant’s head under the blanket and misleading the complainant’s sister when she was looking for her.

However, Newman J (at 9) was NOT satisfied that the actions of the appellant after the alleged commission of the sexual assault in question would be sufficient to satisfy the test stated by Lord Lowry.

“I say this because the actions allegedly taken by the appellant are as consistent with naughty behaviour as wrong behaviour. On the criminal standard my view is that no prima facie case was made out.”

The conviction was quashed and the verdict of acquittal entered.

4. The evidence to prove the accused’s guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however, horrifying or obviously wrong the act may be.

The act itself cannot be used as evidence to rebut doli. The surrounding circumstances to the act can be used to rebut doli.

Lord Lowry at 38:

“The second clearly established proposition is that the evidence to prove the defendant’s guilty knowledge, as defined above, must not be the mere proof of the doing of the act charged, however, horrifying or obviously wrong that act may be. As Erle J said in Reg v Smith (Sydney) (1845) 1 Cox CC 260

‘a guilty knowledge that he was doing wrong , must be proved by the evidence, and cannot be presumed from the mere commission of the act. you are to determine from a review of the evidence whether it satisfactorily proved that at the time he fired the rick (if you should be of the opinion he did fire it) he had a guilty knowledge that he was committing a crime.’"

And also McInerney J in DK v Rooney & Anor (unreported, Supreme Court of NSW, 3/7/96):

“On consideration of the authorities it is quite clear that in order to rebut the presumption of doli incapax it must be established by the prosecution beyond reasonable doubt not only that the child did the act in the circumstances which would involve adult criminal liability, but also that what he was doing was wrong. The knowledge is not to be presumed from the mere fact of the commission of the act, but it must be proved aliunde and may be proved inter alia by the circumstances attending the act, the manner in which it was done and the evidence as to the nature and disposition of the child concerned. The burden of proving that the child’s knowledge is wrong is on the
prosecution, so at the conclusion of the evidence the prosecution must fail if the court is not satisfied beyond reasonable doubt of the child’s guilt.”

And in Queensland in *The Queen v Jay Michael Folling* (Supreme Court of Queensland – Court of Appeal, 26/3/98) at 6:

“I would therefore express my opinion that 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 … Such conduct may include asserting a false alibi, rendering a victim incapable of identifying the accused or preventing a victim from summoning assistance during the commission of an offence. Although evidence of the accused’s age alone cannot rebut the presumption made by s29(2) of the Code, inferences capable of rebutting the presumption can be drawn from the accused’s age when considered together with evidence of the accused’s education or of the surrounding circumstances of the offence, or with observations of the accused’s speech and demeanour.”

*DK v Maurice Rooney* is a useful case to understand this principle. The defendant was 12 years old in juvenile detention at Reiby. He was charged under s66C of the Crimes Act. (Sexual intercourse of a child between the ages of 10 and 16). The Magistrate was held to be wrong at law when he suggested that the act of sexual intercourse, without consent, was so ‘irretrievably wrong’ and so ‘intrinsically bad’ that the court could presume that the child should have known ... ‘that what he was doing was wrong.’

McInerney J held that the child’s acts constituting the elements of the offence are not evidence of knowledge that the act was wrong. The act itself cannot be relied upon to rebut *doli incapax*, however, evidence may be adduced by the prosecution regarding the surrounding circumstances attending the act, the manner in which it was done, and evidence as to the nature and disposition of the child.

5. The older the child the easier it will be for the prosecution to prove guilty knowledge.

The age of the child is very relevant in the prosecution’s attempts to rebut *doli incapax*. Section 5 provides an irrebuttable presumption up to 10. From 10 to 14 the common law presumption is rebuttable. The closer the child is to 10 the more difficult it is for the prosecution to rebut the presumption. The closer the child is to fourteen the easier it will be to rebut the presumption.

The full Divisional Court in *B v R* (1960) 44 Cr App R 1 held at 3

“There is no doubt in the case of a child between the age of eight and fourteen that there is a presumption that the child is not in possession of that knowledge of which mens rea is an essential ingredient, and it is to be observed that, the lower the child is in the scale between eight and fourteen, the stronger the evidence necessary to rebut the presumption, because in the case of an eight year old it is conclusively presumed he is incapable of committing a crime.”

Harper J in *R (a Child) v Whitty* was of the view that the closer the child is to the age of 14, the less strong the evidence needed to rebut the presumption.
Also *DK v Rooney* (unreported 3/7/96, McInerney J) at 8

“... to do so it (the prosecution) must make it appear to the tribunal that the child knew at the relevant time that what he or she was doing was more than merely naughty or mischievous. The standard of proof is the criminal standard. … it is also clear that the closer the child comes to that age (i.e. ten) the stronger must be the evidence to rebut the presumption. *Stapleton v The Queen* (1952) 86 CLR 358.”

**The erroneous presumption of normality**

In attempting to rebut the presumption of *doli incapax* it is often argued that a ‘normal’ child of ‘that’ age must have known that what it was doing was seriously wrong. Thomas Crofts in his article *Rebutting the Presumption of Doli incapax* 62 Journal of Criminal Law 185 at 188, refers to this as the ‘so-called presumption of normality’. Croft’s argues that this so-called ‘presumption of normality’ is erroneous.

Firstly, the argument ignores the requirement that the prosecution is required to bring positive proof that the child in question has the requisite knowledge. It is not sufficient to simply argue that other children of this age would have known it was seriously wrong. The prosecution must prove beyond a reasonable doubt that ‘this’ child knew that ‘this’ offence was seriously wrong and not just naughty.

Secondly, the presumption of normality mis-states the law. The presumption of *doli incapax* presumes that a child between 10 and 14 does not have the capacity to differentiate between right and wrong. The presumption creates the requirement that the prosecution proves that a particular child has the capacity. To allow the prosecution to rebut the presumption without any positive proof would lead to a reversal of the burden of proof. If accepted, it would then fall upon the defence to prove that the child was below normal development.

**Rebutting the presumption of Doli incapax**

The onus of rebutting *doli incapax* falls upon the prosecution. Evidence that can be used to rebut the presumption includes:

1. Statements/admissions made by the child
2. Behaviour of the child before and after the act
3. Prior criminal history
4. Evidence of parents/ home background
5. Evidence of teachers
6. Evidence of psychologists/ psychiatrists

1. **Statements/admissions made by the child**

An admission made by a child will often be sufficient to rebut *doli incapax*. Thomas Crofts (at 187) argues:
“It has been established that an important source of information for assessing a child’s appreciation of the seriousness of the act is what the child says when interviewed by the police. This type of evidence is preferable in as far as it refers directly to a child’s appreciation of the act itself and is not drawn from a general analysis of the behaviour and personality of the child.”

The classic Australian case on point is the Victorian case of *R (a child) v Whitty* (1993) 66 A Crim R 462. In Whitty’s case a child was arrested for shoplifting and when interviewed by police regarding the offence used the words, ‘I stole’ (the goods). It was held that the use of these words was evidence of mischievous discretion. The child’s language was interpreted to indicate knowledge that the act of stealing was wrong, perhaps in contrast to the words ‘I took’.

However, the use of alleged admission as conclusive evidence to rebut the presumption of *doli incapax*. The usual questions relating to any alleged admission must be asked but also, if the alleged admission was made, is it indicative of the child’s understanding at the time of the offence.

(i) Is a child required to make admissions?

Despite the additional obligations placed on the prosecution in order to rebut *doli incapax* a child is still entitled to rely on his or her right to silence.

A child under fourteen should be advised of the additional dangers of making a record of interview. If a child elects to make a record of interview the investigating police are likely to ask questions with the specific intention of rebutting *doli incapax*.

The NSW Police Service ‘Code of Practice’ at page 33 reminds officers:

“Remember, when interviewing children between 10 and 14 you need to obtain evidence they knew what they were doing was wrong (as opposed to mischievous or naughty).”

(ii) Can otherwise inadmissible admissions be used to rebut *doli incapax*?

A child should not be put into any worse position than an adult offender and is entitled to attempt to exclude otherwise inadmissible admissions. A quick checklist includes:

(a) Are the admissions caught by s.13 of the *Children (Criminal Proceedings) Act* (1987)?
(b) Did the child receive legal advice? See *R v ME*, *R v LT* and *R v CE* (Unreported, Supreme Court Common Law Division, 3 October 2002)
(c) Are the admissions admissible under Part 3.4 of the *Evidence Act*?
(d) Should the admission be excluded under s.90, s.135, s.137 or s.138?
(e) Is the admission caught by s.424A *Crimes Act*?

(iii) Are the words attributed to the child ‘clear beyond all doubt or contradiction’?

The alleged admissions must show that the child understood that his actions were seriously wrong and not just naughty. If the admissions are equivocal, or ambiguous,
then it can be argued that the prosecution has not successfully rebutted the presumption.

It has been suggested in *IPH v. Chief Constable of South Wales* it was suggested that the most appropriate way to determine the *doli incapax* issue is for investigating police to ask the child ‘did you appreciate that what you did was seriously wrong?’ In the absence of such a direct question, the evidence will require the Court to interpret what was the understanding of the child.

**IPH v. Chief Constable of South Wales** [1987] Crim LR 42.

An 11-year-old boy was convicted of criminal damage to a van. The van’s windows were smashed, the paintwork was scratched and the van was pushed into a pole. The child was interviewed by police. During the interview the child said, “Yeah, I knew I would damage the truck by pushing it into the pole”. On appeal the Divisional Court said that the admission proved that the child knew that damage would result from the action. The admission did not prove knowledge that the action was seriously wrong as opposed to mischievous or naughty.

(iv) Do the admissions indicate the child’s understanding at the time of the alleged offence?

The child’s intention must be assessed at the time of committing the offence. Any statements given by a child after the offence may have been tainted or affected by the process. It is arguable that since being arrested, taken to a police station and placed in a dock the child has come to an appreciation that he or she has done something wrong. This understanding may not have been consistent with the child’s state of mind at the time of the alleged offence.

2 Behaviour of the child before and after the act

While evidence of the act itself, no matter how horrifying, cannot be relied upon, evidence of the child’s behaviour before, after and going to the surrounding circumstances of the offence may be admissible.

In **The Queen v. Folling** (QLD CCA, Unreported, 19 May 1998)

A 14 year old boy who during a home invasion blindfolds the victim and warns the victim not to move for five minutes after he leaves and later gives the police a false alibi Folling who was, 14 years 9 months⁵, entered the victim’s house with another young person while the victim was asleep. Folling woke the victim, assaulted him, demanded drugs from him, bound and blindfolded him and warned him not to move for five minutes after he left. One of the offenders cut the telephone cord.

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⁵ The Queensland Criminal Code provides under s.29 (2) that “a person under the age of 15 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 the capacity to know that the person ought not to do the act or make the omission.”
The Queensland CCA held that conduct, including conduct closely associated with the act, could be considered on the issue of *doli incapax*. Such conduct may include giving a false alibi, rendering a victim incapable of identifying the accused or preventing the victim from summoning assistance during the commission of an offence.\(^4\)

For the Crown to rely on behaviour the Crown must be able to show that the actions of the child effectively amount to an admission that the child knew that the act was seriously wrong.

In *LMS* (1996) 2 Cr App R 50 at 54, the child’s mischievous discretion was seen in the fact that he persistently lied, pretended to find the body of his cousin (of whom he was accused of attempted murder) called the police and pretended that he saw the assailants run away. The attempts to conceal his actions were held to show that he knew that he had done something seriously wrong.

However behaviour, such as running away, in combination with an admission may well be sufficient to rebut the presumption:

**T v. DPP** [1997] Crim LR 127: T, an 11-year-old boy, stole sandwiches from a store. When T realised he had been spotted by a security guard he threw the sandwiches down and ran away. When interviewed in the presence of his mother T admitted that he had no money and knew the sandwiches were stolen as he walked out of the shop. On appeal the court said running away in combination with the admission was sufficient to rebut the presumption.

**JM (a minor) v. Runeckles** (1984) 79 Cr App R 255: JM, a 13 year old girl stabbed another girl with a broken milk bottle. JM went to the victim’s home, knocked on the door and threatened to break in. When the victim opened the door JM stabbed her and ran away. Following the incident JM was seen by police who pursued her. She ran away from them but was caught. JM told police that she thought they were looking for her. The evidence of flight, together with her statement to the police was enough to rebut the presumption.

Flight is a good example of behaviour that can be equivocal – children run away because they think they are going to get into trouble – even when they are not sure what they are getting in trouble for. (**C v DPP** – discussed earlier)

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\(^4\) See also *H and Others v DPP* [1997] Crim LR 127 May 2, 1996, Queen’s Bench Divisional Court.
The latest case on this point is *R v ALH [2003] VSCA 129 (4 September 2003)*. This case dealt with whether acts constituting the offences and applicant's age may be sufficient on their own to discharge onus. It was held that acts surrounding the offence could be used. In this case, the child offender and victim were siblings. The child offender was charged with two counts of indecent assault and two counts of sexual assault/rape occurring on four different dates. The age range was from 13 and 8 months to 12 days before his fourteenth birthday. All four incidents occurred whilst the child offender and his sister were home alone. Their mother and mother's partner were at alcoholics anonymous. The victim was 12 years old at the time, described isolated and vulnerable and cried throughout the incidents. The child offender had no prior record. The court held that at 74:

“Acts may be so serious, harmful or wrong as properly to establish requisite knowledge in the child; others may be less obviously serious, harmful or wrong, or may be equivocal, or may be insufficient. I consider that the correct position is that proof of the acts themselves may prove requisite knowledge if those acts establish beyond reasonable doubt that the child knew that the act or acts themselves were seriously wrong.”

The earlier case of *Queen v M (1977) 16 SASR 589* also came to a similar conclusion as *ALH*. The case of *C v. Director of Public Prosecutions [1996] A.C. 1* was not followed. However this is a Victorian case. *CRH* remains good law New South Wales which states that *C v DPP* should be followed (surrounding acts were not used to rebut *doli*).

### 3 Prior Criminal History

In some circumstances the prior criminal history will be admissible to rebut *doli incapax*. The prosecution will argue that the record is evidence that the child has been in contact with the criminal justice system and has been told by the police or courts that those types of actions are wrong. Evidence of prior cautions or youth justice conferences may also be admissible.

However, the mere presence of a criminal history is not conclusive evidence. A child who has a criminal history is not precluded from raising *doli incapax* as an issue at a hearing for a later offence. A prior charge of assault does not necessarily mean that a child will have an understanding of the offence of Goods in Custody.

The elements of the offence and the complexity of the charge should also be carefully considered. In circumstances where the prosecution relies on complicity, common purpose, or omissions, there may be scope to argue the child was not aware that he or she was committing an offence.

The question should also be raised as to whether it is appropriate for a child to have his or her criminal history raised in court. Such a step would be considered highly prejudicial to an adult defendant. Why should a child be afforded less protection than an adult should?

In *C v. DPP at 34*, Lord Lowry said that the governing principle on the admissibility of prior convictions is that a child offender should not be in any worse position than an adult offender should.
Newman J in *Ivers v Griffiths* (NSW Supreme Court, 22 May 19998) adopted Lord Lowry’s view in *C v. DPP* and said that 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.

While the NSW CCA said in *R v. CRH* that *C v. DPP* represents the common law in Australia, however there is authority to suggest that 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.

The Full Court of the Supreme Court of South Australia held in *The Queen v. M* (1977) 16 SASR 589 that evidence of past convictions were admissible. M, who was 12, murdered a younger boy by hitting him on the head with a brick. M then concealed the body and misled searchers who were looking for the boy. M was questioned by police about this matter and other matters including assaults on other children, stealing, arson and breaking and entering. M told police that he knew that in committing those prior offences he was doing seriously wrong acts.

Dr Bray CJ said at 594:

“The rule excluding evidence of past misbehaviour yields when that evidence is relevant to prove one or more of the elements of the crime in issue, and I think this was so relevant, or rather, I think that evidence of his admissions during the course of his interrogations about his past crimes was so relevant, and that evidence could not be given without disclosing the commission of other crimes. Nor do I think that her Honour was bound to exclude the evidence in the exercise of her discretion. It was, I think, highly probative that the appellant was *doli capax*, even if it was also highly prejudicial.”

The Queensland CCA took a similar approach in *R v. Folling*. In *Folling* the Crown sought to adduce evidence of prior interviews with police in relation to charges of housebreaking, trespassing on school grounds, wilful damage and obstructing police. In the interviews Folling had admitted that he was aware that his actions were wrong. The evidence did not amount to similar fact evidence. The evidence was excluded at trial and the Crown appealed.

The Queensland CCA held that even where the evidence is prejudicial where it is highly probative of the defendant’s state of knowledge it is admissible to rebut the presumption.

See also *G v. DPP* (Unreported, Queen’s Bench Division, 14 October 1997) where evidence of a prior allegation of indecent assault, for which the child was punished, was admitted against a 12 year old charged with indecent assault to rebut the presumption.

The key consideration on this question 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 that he or she knew the act to be wrong then 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.
4 Evidence of parents/home background

A common method of rebutting the presumption is for the prosecution to call evidence from parents, guardians or family friends that can attest to the fact that the child knew that committing the alleged act was seriously wrong as opposed to naughty.

A common prosecution tactic is to call the parents of the child who had come to court in support of the child. The parents are likely to confirm, 'that they have brought the child up well', ‘taught the child the difference between right and wrong’, and ‘made sure the child is aware of the law’. The ‘ambush’ element of this tactic has now been avoided in Children’s Courts with the introduction of section 66 of the Justices Act. If a statement has not been served fourteen days before the hearing objection can be made to the parents being called to give evidence.

Additionally, section 18 of the Evidence Act provides that a “parent” may object to giving evidence against the child as a witness for the prosecution. The witness must take the objection and the Court must satisfy itself that the person is aware of their right to object to giving evidence. If the parent objects they must not be required to give evidence if the Court finds that:

S.18(5)(a) There is a likelihood that harm would or might be caused (whether directly or indirectly) to the person and the defendant, if the person gives evidence; and

(b) The nature and extent of that harm outweighs the desirability of having the evidence given.

Parent and child are widely defined in the Evidence Act and include adoptive parents, ex-nuptial parents and a person with whom the child is living as if the child were a member of the family.

Other family members, or family friends may be called. Section 18 does not extend to such situations. In cases such as CRH, where the accused and the victim were cousins, the Crown perhaps could have called the accused’s aunt or uncle on the issue.

General evidence of the child’s home background can be used to rebut the presumption.

In B v. R [1958] 44 Cr App R 1: a 9-year-old boy was convicted of BES. The only evidence with respect to doli incapax was that the boy came from a respectable family and was properly brought up. The Court held that the evidence of his upbringing was sufficient evidence to rebut the presumption.

A child who comes from a very poor background with limited opportunity for education, both social and formal, and with poor parental examples is in a better position to argue that he or she is not aware of the rules of society.

Equally, a child who has a learning difficulty may be able to argue that his or her development is not equal to that of a normal child.

Cultural considerations may also be important on this point. For example, a child who comes from a community where there is less emphasis placed on ownership of objects, may be able to argue that taking a bike from another child is not seriously wrong.
5 Evidence of teachers

In C v. DPP Lord Lowry suggests another way to rebut doli incapax is for the prosecution to obtain evidence from a teacher who knows the child well. It is argued that teachers will have been in close contact with the child and may be in a position to provide information that assists in understanding the child’s mental and moral development.

It is important to look closely at any statements from teachers. There is a world of difference between school rules and criminal liability. While a child may have an understanding of school rules is the Court entitled to make the assumption on that basis that the child understands that it is seriously wrong to sexually assault another child?

In Graham v DPP [1997] EWHC Admin 869 (1997), the court also held that a teacher’s statement relating to past disciplinary action could be admitted. It is a case where the appellant and victim were 12 years old and attended the same high school. The appellant had sexually abused the victim after an argument. The Crown sought to tender a statement from a Mr Hiscock, a head teacher. Mr Hiscock gave evidence that the appellant had been lectured and suspended from school for a similar matter where he pulled a girl’s underwear off in a classroom. The question in the appeal was whether the teacher’s statement was admissible. The appellant denied the earlier incident and his counsel argued that the statement would have the effect of allowing a prior conviction be used to prove a new offence. The respondent argued that the statement was relevant to the issue of doli and that it would have been made clear to the child on this occasion serious nature of his conduct.

Issues to canvass when looking at teacher’s statement and reports

1. Look at whether the evidence goes to the specific nature of the charge?
2. What is the relationship between the teacher/Principal and the child?
3. Is this a matter that has been discussed in class at any time?
4. What was the nature of that discussion?
5. Was the child present for that discussion?
6. Does the disciplinary action relate to a similar offence?
7. What was the nature of the disciplinary action?

There is also an issue as to the potential damage to relationship between child and teacher if a teacher is compelled to give evidence against a child however, the provisions of section 18 of the Evidence Act do not extend to protecting this relationship.

6 Evidence of psychologists and psychiatrists

Evidence from psychologists and psychiatrists may assist the court on the issue of doli incapax. In R v LMW both prosecution and defence called evidence.

There is case law from the United Kingdom that suggests that evidence from psychologists would not be accepted.

“It is for the court to decide as a fact whether what the defendant did or said before or after the incident indicated his state of mind at the time of the offence
and his appreciation of the seriousness of what he did. That essential function must not be usurped by or delegated to psychiatrists or others: *T v. DPP, L v. DPP, H v. DPP* [1997] Crim LR 127."

However, that position is disputed by Crofts in his article “Rebutting *Doli incapax*”;

The suggestion that obtaining evidence from these sources would undermine the power of the court, is to say the least tenuous. People giving such evidence would not prejudge the issue, because in all cases where expert witnesses are called, their function is merely to give advice and information and assist the courts in its direction. As such it is for the court to ensure that it decides independently on the basis of the evidence laid before it.”

The defendant obviously has the right to silence and cannot be forced to see a psychologist or psychiatrist. However, if the child had a pre-existing relationship with a psychologist or psychiatrist, or the defence chooses to obtain an assessment, it is conceivable the prosecution may attempt to obtain access to such information. Issues of confidential relationship privilege (s126A *Evidence Act*) and legal privilege may arise. It is important that what is assessed is the child’s knowledge at the time of the act not at the time of the hearing. Objective testing by psychologists may give a strong indication of the child’s mental abilities at the time of testing and by extrapolation of the likely understanding at the time of the alleged offence.

However, subjective interpretation of even standard tests may lead to inconclusive, irrelevant and potentially prejudicial material being presented. The decision of Studdert J, *R v LMW* (unreported, Supreme Court of NSW, 25 November 1999) gives an interesting insight to the need to balance the probative value of the reports with any prejudicial material.

**Practical Tips on Running a Doli Matter**

1. Have the prosecution proved the following five elements
   - The prosecution must rebut the presumption of *doli incapax* as an element of the prosecution case.
   - The child knew the act was seriously wrong as opposed to naughty.
   - The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction.
   - The evidence to prove the accused’s guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however, horrifying or obviously wrong the act may be.
   - The older the child is the easier it will be for the prosecution to prove guilty knowledge.
2. Check the child’s record and see whether a similar offence
3. Ask the child whether there are any reports from teacher/principals or any education on this topic
4. If there are admissions, can these be excluded?
5. Has the child seen a psychiatrist or psychologist?
6. Consider whether representations should be written (a copy is attached)
8 June 2004

Attention: Con Smith

Officer In Command
Bloom Police Station
Flower Street
Rose NSW 1111

Also to
SenSgt Prosecutor at Bidura By Fax: 9552 8055
Prosecutors at Cobham By Fax: 9623 7718

WITHOUT PREJUDICE SAVE AS TO COSTS

Dear Con Smith

RE: JAMES BROWN
FOR MENTION 12 JULY 2004
H 1111111

We act for the above child. We would appreciate your considering withdrawing the charges of assault X 2 and enter inclosed land.

Law

The child has been charged with the following:

7
8 61 Common assault prosecuted by indictment

Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.

9
10 4 Unlawful entry on inclosed lands

(1) Any person who, without lawful excuse (proof of which lies on the person), enters into inclosed lands without the consent of the owner, occupier or person apparently in charge of those lands, or who remains on those lands after being requested by the owner, occupier or person apparently in charge of those lands to leave those lands, is liable to a penalty not exceeding:

(a) 10 penalty units in the case of prescribed premises, or
(b) 5 penalty units in any other case.

11 Objective Facts
The child was charged on 13 April 2004 for an incident that occurred on 22 March 2004 at Rose High School. The child is not a student at this school.

The child made a record of interview. The child makes admissions that he was involved in the incident.

At the time of the incident, the child was 11 years old. The child had no prior criminal or alternative record.

Submission
There are two issues that arise in this case creating difficulties for the prosecution to prove the above charges beyond reasonable doubt.

a) no legal advice
Firstly the child was given an opportunity to speak to a solicitor. The child refused to speak to the on call solicitor.

As you are aware, the custody manager has a positive obligation to assist a vulnerable person, or child, to exercise their rights [Regulation 20]. It has been held that this obligation includes the obligation to make known to the child the services offered by the Legal Aid Youth Hotline:

“The whole intention of the hotline is that young people would know that it is free, that it is available, and would be able to obtain advice there and then. Failure to make it available is a clear breach of the Act and regulations but, more importantly, in clear breach of the requirement of fairness to the child” (Dowd J, R v ME, R v LT and R v CE (Unreported, Supreme Court Common Law Division, 3 October 2002).

Secondly, The practical effect of this judgment is that any ERISP that is now made by a child without having legal advice is inadmissible as evidence against the child. In this case, the child’s ERISP on 13 February 2003 would be inadmissible. This means that any admissions would be inadmissible.

We believe that the above principles could be extended in the case of this 11 year old child. All children are defined as vulnerable in the Crimes Act. The child would have been more so. The child was at the time, a tender 11 years of age. The police had clear obligation to protect his interests. The police officers had the discretion to wait to interview the child at a later stage or even to issue the child with a field CAN. Clearly this ERISP was obtained at too high a cost and would be excluded under s 138 Evidence Act (1995) NSW.
Even if the ERISP were allowed into evidence, the child has a clear doli incapax defence.

b) doli incapax defence

According to common law, there is a rebuttable presumption of “doli incapax” for all children between the ages of 10 and 14. This law states that a child between the ages of 10 and 14 as:

“an infant shall be prima facie adjudged to be doli incapax, yet if it appears to the court and jury, that he was doli capax, and could discern between good and evil, he may be convicted and suffer death.”

The presumption of Doli incapax has been applied in many recent cases such as DK v Rooney, Treffiletto and Ors v Robinson & Anor and R v CRH.

The application of the presumption obligates the defence and prosecution to consider doli incapax in all cases where the child is under the age of fourteen as being an element of mens rea. It must be proven beyond reasonable doubt by the prosecution. If the prosecution calls no evidence, the accused has no case to answer as reflected in the English case of C v DPP as per Lord Lowry:

“if the presumption is allowed to stand and the prosecution did not call evidence to rebut it, then at the close of the prosecution case, there would be a ruling that there was no case to answer.”

The Australian courts have adopted the approach of C v DPP in the leading case of R v CRH.

To rebut the presumption of doli incapax, evidence must be adduced to prove the defendant’s guilty knowledge. The test to be used as established in R v M is whether the accused knew that what he was doing was wrong according to the ordinary principles of reasonable people. It has been said that the crown must show that the defendant knew what they were doing was “seriously wrong”. Such evidence must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act appears.

There is insufficient evidence in the brief to indicate that the child knew what he was doing was seriously wrong.

If the prosecution were successful in tendering the ERISP, a number of issues would arise. It is well accepted that an admission in an ERISP does not necessarily rebut the presumption as upheld in R v Whitty.

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6 DK v Rooney (unreported, Supreme Court of New South Wales, 3/7/96)
7 Treffiletto and Ors v Robinson & Anor (unreported, Supreme Court of New South Wales, 9/2/81)
8 R v CRH (unreported, Court of Criminal Appeal, 18/12/96)
9 (1995) 2 All ER 43 at 59
10 R v CRH (unreported, Court of Criminal Appeal, 18/12/96) Smart, Hidden, Newman JJ. In this case CRH was charged with a number of offences of sexual assaults upon a young girl which were allegedly committed when the child was 12 or 13.
11 R v M (1977) 16 SASR 589
These admissions are honest and frank. They only take the crown case further with respect to the ‘act’ being done and not the *mens rea* aspect.

A few questions are put to the child to gauge whether he had the mental aptitude to understand the seriousness of the offence.

At question 21, the interview indicates

<table>
<thead>
<tr>
<th>Police</th>
<th>Ok, If I was to walk up to punch my partner in the face that would be right or wrong?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child</td>
<td>Wrong</td>
</tr>
<tr>
<td>Police</td>
<td>Why?</td>
</tr>
<tr>
<td>Child</td>
<td>Because you punched her for no reason</td>
</tr>
</tbody>
</table>

These questions are insufficient to prove that at the time of the offence, the child knew what he was doing seriously wrong. Clearly the child would have some understanding that there is something wrong at the time of the recording of the ERISP. During the ERISP, he is now under arrest. He is at a police station. He has been spoken to by the school principal. He has probably been lectured by his support person.

Moreover a punch in the face is clearly different to throwing sticks without causing injury or giving someone a wedgey.

Clearly at the making of the ERISP, the child has some understanding that he is in trouble. Questions are put to the child that his behaviour is wrong. A lie is wrong. Disobeying parents is wrong. For criminal offences for children between 10 and 14, the test is seriously wrong.

No “general” questions are put to the child about being on inclosed lands being seriously wrong. No “general” questions are put to the child about assaulting someone being seriously wrong. There is insufficient evidence to show that the child knew what they were doing was seriously wrong on 22 March 2004.

From Constable Smith’s statement as the attending officer, there is no evidence to show that the child knew what he was doing was seriously wrong.

From Constable Matthews statement, there is no evidence to show that the child knew what he was doing was seriously wrong.

From the Victim’s statement, there is again no evidence that the child knew what he was doing was seriously wrong. At is highest, the teachers evidence shows that an act occurred. It does not touch upon the elements of *mens rea* or *doli incapax*.

From the Victim’s statement, there is again no evidence that the child knew what he was doing was seriously wrong. At is highest, the students evidence shows that an act occurred. It does not touch upon the elements of *mens rea* or *doli incapax*.

There is evidence to show that an assault and trespass occurred. The act on its own cannot be used to rebut *doli incapax*, however the surrounding circumstance may be
used instead.\textsuperscript{13} It is alleged that the surrounding circumstances are that the child and a friend approached Rose High School and made remarks towards a teacher. The children throw sticks at the teacher with nil effect/injury. The child also places his hands on his private parts. The child then walks up to a student and gives her a wedgey. There is no evidence to show that the children hid from anyone. These actions are clearly reflect an immaturity, a childish naughtiness and could not be considered seriously wrong.

The prosecution have insufficient evidence to call to show that the child knew what he was doing was seriously wrong. If no evidence is called to show that the child had the requisite \textit{mens rea}, the defence has no case to answer.

We would submit that based on the prosecution’s inability to rebut the presumption of \textit{doli incapax} that it would not be appropriate to proceed with the above charges. On the basis of these submissions, we would ask that the matter be withdrawn.

If you could please advise us as to your decision with respect to the above representations within 10 days, that would be much appreciated. If you have any questions regarding the matter, please do not hesitate in contacting me on 9891 1600. Thank you for your help in this matter.

Yours faithfully,

SOLICITOR

\footnotesize\textsuperscript{13} DK v Rooney (unreported Supreme Court of NSW, 31/7/96)