



A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)

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Abstract

The rebuttable presumption of *doli incapax* is available in all Australian states and territories and provides that, where a child is unable to comprehend the distinction between actions that are 'seriously wrong' and those that are 'naughty or mischievous', they cannot be held criminally responsible for their actions. Despite the key role that *doli incapax* should play in diverting the youngest offenders away from the criminal justice system, its operation to date has been largely unexamined. This article seeks to directly address this gap. Drawing on the experiences of those involved in all aspects of the youth justice system, this article examines the need for, and the effectiveness of, the presumption of *doli incapax* in Victoria, Australia. Revealing inconsistencies in the use of the presumption, the article also examines the need for future reform of this area of law.

Keywords

Child offenders; *doli incapax*; youth justice system; law reform.

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Introduction

In recent years, Australian criminal justice responses to children in conflict with the law have been the subject of unprecedented scrutiny. From the establishment of a Royal Commission (2017) in response to harrowing images of children in restraints in a Northern Territory youth detention centre, to multiple Victorian Supreme Court rulings against the imprisonment of children in adult prison facilities,¹ an increasing awareness of the dangers of children's interaction with the criminal justice system has highlighted the importance of legal safeguards for those in conflict with the law. National attention to the treatment of children in detention has contributed to mounting recognition that correctional facilities are poorly suited for children, and that children should be diverted from the criminal justice system at the earliest possible stage.

One key way that diversion of very young children can be achieved in Australian law is through the operation of the presumption of *doli incapax*. *Doli incapax*, which translates from Latin into 'incapable of committing an evil act' (Arthur 2010: 43), operates as a rebuttable presumption by which children between the ages of 10 and 13 are presumed to be incapable of understanding the difference between naughty behaviour and criminal acts that are 'seriously wrong'. The presumption is available in all Australian states and territories and provides that, where a child is unable to comprehend this distinction, they should not be held criminally responsible for their actions. Despite the key role that *doli incapax* should play in diverting the youngest offenders away from the criminal justice system, its operation to date has been largely unexamined.

This article seeks to directly address this gap in current understandings in five parts. First, it sets out the legal justification and test for the presumption of *doli incapax* in Australia, and next provides an overview of the qualitative study that informs the analysis in this article. Third, it critically examines the process of determining *doli incapax* from the perspective of those involved in the Victorian youth justice system, with attention to the reversal of the onus of proof, the realities of legal practice in regional areas, as well as the effect of the length of time that it takes to determine if a child is *doli incapax*. Building on this analysis, this article next examines the value of individualised assessments and the need for a holistic service response; finally, it explores practitioners' views on future needs for reform. The article concludes by calling for enhanced legal protections for very young children in conflict with the law in Victoria.

The presumption of *doli incapax* in Australia

The rebuttable presumption of *doli incapax* applies to all children aged 10 to 13 years at the time an alleged offence is committed. Derived from the longstanding principle of English common law, the presumption was designed to provide a legal safeguard to protect children from 'suffering the full extent of the law' (Arthur 2010: 45). Its operation is well captured in the following English case law:

At common law a child under 14 years is presumed not to have reached the age of discretion and to be *doli incapax*; but this presumption may be rebutted ... Between 10 and 14 years a child is presumed not to know the difference between right and wrong and therefore to be incapable of committing a crime because of lack of *mens rea*. (*C v DPP* [1995] 2 All ER 43, per Lowry L at 48)

An important feature of *doli incapax* is the 'rebuttable presumption', which places the onus of proof with the prosecution. The test for rebutting *doli incapax* is established in Australian case law:

1. that the prosecution must rebut the presumption as an element of their case
2. that the prosecution must demonstrate that the child knew 'the act was seriously wrong as opposed to naughty'

3. that the evidence relied upon by the prosecution 'must be strong and clear beyond all doubt or contradiction'
4. that 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. that the 'older the child is the easier it will be for the prosecution to prove guilt or knowledge'. (*R v CRH* unreported NSWSCA 1996, per Hidden and Newman JJ)

Where the prosecution seeks to rebut the presumption, evidence produced may include a psychological assessment of the child; a police interview transcript or recording; the child's prior criminal history; evidence given by parents, teachers, psychologists or psychiatrists; as well as evidence of the child's behaviour before and after the alleged criminal act (Johnson and Chambers 2006; see also *RP v The Queen* [2016] at 9).

The threshold for determining 'seriously wrong' is well established in English and Australian case law, whereby the courts have stated:

it is not enough that the child realised that what he or she was doing was naughty or mischievous. It must go beyond childish things of that kind ... It would not be right for a child under that age to be convicted of a crime, even if they had committed the relevant *actus reus* and had the relevant *mens rea* specified in the statute, unless they appreciated that what they were doing was seriously wrong. (*R v Gorrie* [1919] 83 JP 136, per Goff LJ at 260)

The presumption is designed to recognise the differences in maturity between adult and child offenders, and the fact that very young children lack the capacity to understand the implications of their actions.

Doli incapax is available in every Australian state and territory. In Tasmania, Western Australia, Queensland, the Australian Capital Territory and the Northern Territory it has been enacted in legislation, while in New South Wales, South Australia and Victoria it is based on common law (Australian Law Reform Commission [ALRC] 1997). While the presumption animated a degree of debate in England and Wales prior to its abolition in 1998 (Home Office 1997), in Australia *doli incapax* has been the subject of very limited scholarly analysis and political debate. As a result, little is known about its operation and the extent to which it effectively delivers upon its aim of protecting very young children from criminal liability. This lack of empirical research on the topic is further hampered given neither the Children's Court nor any independent monitoring body produces annual statistics on the number of cases in Victoria in which a child is found to be *doli incapax*. There are also no publicly available records on the number of cases in which the presumption is raised but rebutted successfully by the prosecution.

Research design

This article draws on the findings of a wider qualitative research project examining legal responses to children in conflict with the law in Victoria. In 2016, 48 semi-structured interviews were conducted to gain insight into the views and experiences of those involved in the operation of the Victorian youth justice system.² Participants included persons with experience working to support children in conflict with the law, those practicing in the specialist Children's Court division and legal practitioners with experience in cases where the presumption of *doli incapax* was considered. Participants were asked about their views on the operation of *doli incapax*, their experience in cases in which the presumption was raised, the strengths and limitations of its operation, and areas in need of reform.

Participants for the 48 interviews comprised various professional roles including:

1. judicial officers (with experience in the Children's Court)
2. legal counsel (with defence and prosecutorial experience, including members of the Victorian Bar, Office of Public Prosecutions and Victoria Legal Aid)
3. support service personnel (including Victorian Department of Health and Human Services staff)
4. youth conferencing practitioners
5. children's advocates.

Recognising that there may be differences in professional views across geographical areas, interviews were conducted in metropolitan Melbourne (n = 26), Ballarat (n = 10), Shepparton (n = 6), Geelong (n = 2) and other regional areas, including Gippsland and Warrnambool (n = 4). Some participants had specific expertise working with diverse youth communities, including young people with a disability and Indigenous youth. While this study does include the views of those working with Indigenous children—and our findings highlight several deficiencies in criminal law responses to Indigenous children—given the significant over-representation of Indigenous young persons at all stages of the justice system, there is a need for further research that engages specifically with issues unique to this context.

With the exception of one interview,³ all interviews were audiotaped and transcribed verbatim, with the transcripts uploaded into NVivo software for thematic analysis. All participants were assigned a pseudonym to ensure their anonymity, which were allocated according to the locality and professional role of the participant followed by a randomly assigned letter of the alphabet to allow for differentiation between participants (e.g., MetroAdvocateA, RegSupportB, RegCounselC, MetroJudicialA).

The value of using interviews with legal practitioners to gain an in-depth understanding of the operation of the criminal justice system is well recognised (see, inter alia, Fleming 2011; McBarnet 2009). As described by McBarnet (2009: 152), interviewing also allows one to discover worlds that may forever be closed to direct observation, permitting one to hear people, report their perspectives and describe their behaviours.

McBarnet's recognition of the value of using interviews to gain insights into 'hidden' justice processes is particularly relevant here given that, in Victoria specifically and Australia more broadly, there is a dearth of empirical research on the presumption of *doli incapax*. In light of the critical role that this presumption *should* play in diverting young offenders away from the criminal justice system, there is a need to better understand the effectiveness of processes used to determine whether a child is *doli incapax*.

The process of determining *doli incapax*

The interviews revealed general support for the availability of the presumption, with participants describing *doli incapax* as 'incredibly valuable' (RegCounselF), 'really useful' (RegCounselD), 'imperative to have' (RegConferencingB), 'an invaluable mechanism' (RegCounselA) and 'a really important area' of law (MetroCounselE). However, despite its recognised benefits, there was a general view among those interviewed that the presumption has been falling into disuse in Victoria in recent years and that, where used, it is done so in an ad hoc and procedurally questionable way.

Several participants attributed inconsistencies in practice to the complexities present in the process of rebutting the presumption or proving that a child is *doli incapax*. Participants described it as 'very confusing' (MetroDefenceA), 'a bit convoluted' (MetroCounselF),

'impractical' (MetroCounselC) and as a 'very challenging and complex area ... [that] we still don't always get it right' (MetroCounselE). Building on this view, one legal counsel noted, 'I think sometimes *doli incapax* makes it a bit complicated, because even the language and trying to explain that to a young person can be quite confusing' (MetroDefenceA).

Reflecting this complexity, many participants discussed the ad hoc implementation and operation of *doli incapax* in practice. These views are examined in more detail in the following sections, with particular focus on the practical operation of the burden of proof, the realities of rural and regional practice, and the lack of built-in service responses.

The reverse onus

One of the key features of the presumption of *doli incapax* is that it locates the onus of proof with the prosecution, as recently affirmed by the High Court of Australia:

The appellant is presumed in law to be incapable of bearing criminal responsibility for his acts. The onus was upon the prosecution to adduce evidence to rebut that presumption to the criminal standard. (*RP v The Queen* at 32)

Despite this, interviews revealed a common view that, in Victorian practice, the onus is more commonly located with the defence, who bear the unofficial burden of providing a report (at their cost) to prove that the defendant is *doli incapax*. As one participant explained:

you may as well not call it a presumption frankly because the way it works in the Children's Court here is that you have to raise it, as in the defence has to raise it, the defence has to commission or produce a report confirming it, and then the defence has to argue that it applies sometimes right through to contests. So you can't just say the presumption applies ... You have to do all the groundwork of getting that defence up and going. It may as well be a defence, not a presumption ... because that's how it operates in practice. (MetroCounselF)

Demonstrating that this viewpoint is neither unique to one participant's experience nor to metropolitan practice, a regional participant described an identical trend:

In practice it seems to be defence getting reports and trying to make the argument that—so it's sort of like we're proving that they don't understand that something was seriously wrong as opposed to police proving that they did ... I just don't think it's what the system envisaged when the legislation was written. (RegCounselG)

Other participants similarly commented that in practice the onus being placed on the prosecution 'doesn't happen' (MetroCounselE), 'is never happening in practice' (MetroDefenceA) and that 'it becomes sort of a reverse onus' (MetroCounselG). This unofficial reversal of the onus means that the burden of costs for forensic assessments falls to the defence or the Children's Court Clinic (located in metropolitan Melbourne). One participant described this as placing 'significant pressure on the defence' (RegCounselA), while another recognised the resource pressures facing the Children's Court Clinic. Some participants indicated that without such resources access to and the quality of such assessments could be jeopardised:

It's quite hard to get good reports. Partly that may be because Legal Aid only pays a certain rate and most of the kids' court cases for this age group are legally aided. So there have been criticisms, and I would see that myself, in the quality of some of the reports, the amount of work that is done beforehand, but that may be reflected in the fee structure ... Some of them [reports] are a little bit more

superficial and they just do an assessment of the child and it's like, yeah, they're doli or they're not doli, or whatever. So it's not good. (MetroCounselF)

This unofficial reversal of the onus also places increased (albeit unintended) significance on the child's instructions to counsel. Interviews with legal counsel indicated that children can refuse a doli assessment (which, of course, they should be at liberty to do). Participants reported that children refuse assessments without full comprehension of the consequences of their decision, or because they know that an assessment will delay proceedings that they would like to resolve quickly. However, it cannot be overlooked that, in such instances, the child forgoes a presumption that may be in their best interests. A child of an age legally presumed to lack the capacity to understand serious wrongdoing should, by extension of that presumption, not be burdened with the obligation to make a decision that could strip them of a legal safeguard to which they are entitled by virtue of their chronological age.

While participants identified challenges with the fact that the defence bear the onus in practical terms, it is worth noting that participants did not advocate that the onus revert to that prescribed by common law. Indeed, some participants identified risks with the prosecution holding the onus:

You wouldn't necessarily want the prosecution to have control of that assessment process because you'd have to be very careful about who they were getting an assessment from and all of that. So I'm not saying it's fixable. (MetroCounselF)

The legal burden very clearly states it's the prosecution's presumption, but I've never encountered and nor do I think there has been any matters that I'm aware of where prosecutors have actively arranged to have an assessment done or tried to rebut that in practice. It's always defence practitioners who raise it and then pay and conduct the report ... By no means in practice has that presumption been followed ... I think it's good in theory that it's their [the prosecution's] burden but it would sit uncomfortably with me if ultimately they were the ones that facilitated all these types of assessments. (MetroDefenceA)

These views reveal an interesting nuance, which suggests that while the status quo is problematic in that it contradicts the process required in accordance with the common law, the answer does not necessarily lie in better processes to ensure that the prosecution carry out their burden. The possibility of shifting the onus of proof has been previously explored in Australian jurisdictions. For example, in 1999 a bill introduced in Queensland Parliament proposed to reform the law such that the onus would be reversed and doli incapax would operate as a defence rather than a presumption (see *Criminal Code Amendment Bill*, Queensland Parliament Hansard 1999: 3178–3179). While that bill was defeated and in the nearly 20 years since there has been no reform of the presumption in any Australian jurisdiction, participants' views illustrate the need to reconsider whether the presumption is operating as intended or reform is required to ensure doli incapax operates effectively.

The realities of regional practice

The interviews revealed a dominant view that regional areas sorely lacked the specialist youth justice training and expertise evident in the practice of the Melbourne Children's Court. In areas where expertise of this kind is limited, participants identified inconsistencies in the application of doli incapax. As described by one metropolitan advocate:

if you're in the Children's Court in Melbourne, for example, I think the magistrates are well trained in the needs of children. They'll immediately turn their mind to that issue of doli incapax, and so there is some degree of safeguard there. But there's so many places where it's just the ordinary court lists, adults and children

... The training and the mentality and the dynamics kind of start from an assumption of this person is an offender, or is before the court for a reason and is fully aware of what they're doing and in full command of their faculties and their sense of responsibility, even if they're 10 years old. I feel like a lot of magistrates I've tried to tease out those issues with have not really even engaged with the question. (MetroAdvocateD)

Other participants commented that there are 'inconsistent practices across the state' (MetroDefenceA), 'I'm not sure always how well they [magistrates] understand' (RegSupportJ) and that 'a young person, depending on where they appear, will get a different approach ... especially the further out you go in country Victoria' (MetroCounselE). Not only is such inconsistency in practice concerning from a procedural justice perspective, but it also belies the disadvantages faced by young people in rural and regional areas who are likely to have access to fewer support services. One participant referred to this as 'postcode justice', stating:

it's all good and well for Melbourne practitioners to have specialised children's crime lawyers who that's all they do. But the reality in the country is my practice involved adult crime, children's crime, child protection, a little bit of family law and a whole range of civil stuff ... Doli [incapax] was very rarely raised in regional practice ... You know kids in the country areas are not getting the same criminal law treatment and opportunities as kids in the city. (RegCounselE)

Participants also identified a lack of expertise to undertake a doli incapax assessment in regional areas. This means that, even in cases where the court recognises the need for a child to be assessed, there are difficulties in bringing that to fruition. As one participant described:

I think the regional [and] rural areas really suffer—and it's a funding issue ... It's just a really difficult thing to get funding to do proper assessments ... I've seen the quality of some of those reports and assessments and they are appalling. (MetroSupportF)

In practice, RegCounselF described that this can mean that young persons may have to be transported to metropolitan Melbourne for their assessment, which can result in time spent away from school. Likewise, it can place additional strains on a young person's family who may be responsible for ensuring that children are taken to and from the city.

For some participants this lack of specialisation and resources is exacerbated by the number of cases coming before regional courts for which a doli incapax assessment could be undertaken. Between 2012–2013 and 2013–2014, the number of children and young persons appearing before regional courts—such as Bairnsdale, Swan Hill, Colac and Wodonga—increased by between nine and 64 per cent (Jesuit Social Services 2015). Here, the decline in the use of doli incapax is perceived to be a consequence of increased pressures on the court, as one participant described:

We hear lots of cases—for example, a 10-year-old being dragged before the court for sneaking into a film and charges going ahead as a matter of course rather than there being any real consideration of doli incapax. Too often with those under-resourced lawyers, particularly in circuit courts where there's huge lists and have magistrates visiting for a day or something, I don't think it's adequately even considered. I don't think it necessarily even crosses the minds of some of the lawyers who are completely swamped to raise it. So I think it's one of those issues that compounds disadvantage. (MetroAdvocateD)

Acknowledgement of the compounding disadvantage experienced by youths in rural and regional areas underscores the need for better resourcing of services and development of expertise in the circuit courts. The effective operation of safeguards such as the presumption of *doli incapax* is particularly important in such areas, in that research has found that diversion strategies are less utilised and, consequently, that young people are at risk of 'repeated and extensive' contact with the youth justice system (Overall 2016). An effective application of the presumption in these areas would provide an important mechanism for diverting children away from the justice system prior to conviction or sanction.

While the lack of specialisation in youth justice matters was largely identified as a regional issue, there was a small number of participants who discussed the lack of expertise as a whole-of-systems problem. As one metropolitan practitioner explained:

what we're finding on the ground is because there isn't a specialist children's prosecution division of Victoria Police that the interpretation and understanding of *doli incapax* is actually quite limited ... More often than not every time we are presenting a *doli incapax* report and saying the charges should be withdrawn because they don't have the capacity, many [police] prosecutors either are confronted with it, not sure what to do with it, never heard of it or just say, okay, well, we need to adjourn the case so I can talk to my sergeant; it's all too hard. So I think that that is one of the main barriers ... The prosecutors probably need to be specialised and also extensively trained in what it actually is. (MetroDefenceA)

Other participants described the practice of *doli incapax* as 'varied, really', with one stating that 'there's too much inconsistency' (MetroCounselD). This was also noted in relation to police understandings of *doli incapax*, with legal counsel commenting that, in their experience, *doli incapax* is not 'properly understood by police' (RegCounselF). A lack of understanding of the presumption of *doli incapax* at the police level is problematic given the key 'gatekeeping' role that police officers have in their interactions with young people. Arguably, were police better trained in identifying at the pre-charge stage whether a child is *doli incapax*, children would be less likely to be unduly remanded and criminalised. While a detailed examination of the role and responsibilities of police in youth justice is beyond the scope of this article, participants' reflections highlight the importance of specialisation in youth justice practices for all persons within the justice system, including police, legal practitioners and judicial officers across metropolitan, rural and regional areas.

Prolonging involvement with the criminal justice system

One of the other central concerns raised by practitioners pertained to the means by which *doli incapax* prolongs a child's involvement with the criminal justice system. This critique is captured in the following interview excerpt:

While on paper it looks like there's some level of safeguard there, there's a whole lot of kids that are being held on remand before those questions have even been answered. So that's the other really big issue. You can be charged as a 10 year old and may not ultimately be found guilty ... So in those circumstances it doesn't even necessarily matter whether *doli incapax* applies because they might not have really got to those questions before someone's being held in remand, possibly, or being held in police watch houses, having been charged. So the damage has already been done. (MetroAdvocateD)

Reflecting on the same prolonged processes, another participant commented that 'it becomes a very long, drawn-out process. So I wonder if there's better ways to get around it' (RegCounselA).

There are several problems identified here that bring into question the efficacy of the presumption. Particularly problematic is the practice of holding children on remand prior to doli incapax assessments being conducted (as identified above by MetroAdvocated). This is concerning in light of the body of Australian research that documents the adverse effects experienced by children on remand, including separation from family and community, disruption to education, the negative effects of associations with sentenced young offenders and lack of access to therapeutic programs (Richards and Renshaw 2013). These recognised effects are heightened in the current climate, in which several recent incidents in Victoria (as well as in other states and territories) have revealed the dangers that children face in such environments (e.g., Edwards 2016). Indeed, in 2015 in response to the growing number of children on remand in Victoria, the then Commissioner for Children and Young People, Bernie Geary (cited in Miletic 2015), described custodial remand for children as 'the beginning of the end'. For a safeguard like doli incapax to be truly effective, it must ensure that children who are 'doli' are identified and assessed *prior* to being put on remand to prevent the disadvantage associated with this point of contact with the justice system. To undertake a determination of doli incapax following remand largely defeats the purposes for which the safeguard is intended.

This is not to suggest that delays in the assessment process are only problematic for children in the pre-trial stage. Equally, participants identified that when an assessment is contested the prolonged nature of the subsequent court processes are contrary to the aims of the safeguard. As one participant described:

when you go down the path of getting doli incapax assessments and things like that, the difficulty is, arguably, we're dragging kids to court and through assessment practices, and they just don't quite understand what the court's about. (RegCounselG)

By prolonging a child's involvement with the criminal justice system the operation of the presumption of doli incapax can be psychologically and criminogenically stigmatising, in turn. While the presumption 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 criminogenic justice system institutions.

Interestingly, one participant described how prolonged court processes can affect the outcome of the doli incapax assessment itself:

There are times when a young child comes into the criminal justice [system] and they become educated whilst they're being charged and, unfortunately, sometimes by the time that the assessment is done, if the case goes on for a long time and comes backwards and forwards to court, I feel that by the time the assessment occurs they're educated in a way that possibly isn't a fair assessment because they understand more having been in the court system and having been bounced around, having had conversations with police and other people, their lawyers ... So if the case takes a while to come to court and goes through several stages and adjournments, possibly the doli incapax doesn't protect them in the same way. (RegSupportN)

This reflection highlights how prolonged processes can influence the integrity of the assessment and the extent to which doli incapax will effectively identify and remove young children who lacked capacity at the time of their offending from the justice process. This reanimates concerns raised in a 1999 New South Wales case in which a judge rejected an assessment on the basis that it had been conducted 19 months after an alleged incident. Recognising that time undermined the

assessment's validity, and that court processes imposed adverse effects on young children, the judge ruled:

in that period not only had the accused grown older but much more importantly he had undergone very unhappy experiences resulting from the death of the deceased. He had experienced threats from those who obviously believed he was responsible for what had occurred, he had undergone the ordeal of proceedings in the Children's Court and he had been subject to much attention by the media. (*R v LMW* [1999] NSWSC 1342, para 11, cited in Crofts 2016)

Several participants identified that prolonged processes associated with the presumption highlight an inherent tension between a child defendant's instructions and their own view, as legal counsel, that an assessment of *doli incapax* is in a child's best interests. Practitioners explained that, in some cases, young clients seek the fastest outcome, regardless of whether that results in a conviction or sanction. As one participant explained:

what does tend to happen in practice is that we will get an expert report, which talks about capacity ... then there's also the fact that, more often than not, that still doesn't satisfy [the] prosecution and the matter might need to go to contest ... But the other issue is that you need to take a young person with you and you're acting on instructions. These are young, vulnerable clients, particularly young in the case of *doli incapax*; they might not be interested in going to contest: they want their matters dealt with. So we've got all of these different challenges that we need to try and navigate. (MetroCounselE)

This reflection highlights important issues surrounding the protection of children before the law, including the difficulty of ensuring the best interests of a child, and the (often) competing need to ensure that child can exercise their agency. It is important to recognise that children ultimately found to be '*doli*' cannot be expected to fully understand and meaningfully engage with court processes. While it may be argued that this is exactly why the presumption removes such children from the justice process, this is not an adequate solution given the findings of this research, which reveal that children are first brought within the bounds of the court system (in some cases for prolonged periods of time) prior to the outcome of a *doli incapax* assessment.

Recognising the value of individualised assessments and the need for a holistic service response

Participants were asked to reflect on the need for, and value of, individualised assessments in determining a child's capacity. For many participants, the answer to this question lay in the need to ensure a process that adequately recognises the multiple layers of disadvantage often experienced by children in conflict with the law. As described by one participant:

the amount of children I've had who have come from extremely impoverished ... backgrounds—many of them raised in state care, who end up being charged with criminal offences that have occurred in state care—and they won't understand that they're not allowed to punch a hole in their wall, and that they get charged with criminal damage, yet another kid who lives with their parents is made to plaster it up. I think that there are different approaches to different situations, and I don't think that it's appropriate when you might get one psychologist who says, 'well, no, they understand that it's wrong to break a wall, therefore, they can be charged', and the reality is that, well, why should they be, for starters? What good does it serve society to criminalise them? And second, there is a difference between understanding something might be naughty or wrong and having a serious criminal element and understanding [of] what criminality is. (MetroCounselC)

This excerpt highlights the importance of an individualised 'doli' assessment to ensure that a child's actions are contextualised and understood within the broader environment in which they live. For many participants, the need for an individualised assessment to determine capacity is reinforced by the disadvantage and childhood trauma often experienced by children who come before the law. This is particularly important in Australia, where research has revealed the high number of children who are in state care when they come into conflict with the law (Australian Institute of Health and Welfare 2016), and where research attests to histories of abuse, childhood trauma and disadvantage in children charged with a criminal offence (Fitz-Gibbon 2016; Richards 2011). The effect that disadvantage and trauma has on a child's cognitive development and moral capacities cannot be uniformly assumed and requires a process by which an individualised response can be achieved. As explained by two participants:

it's a grey area because you can have a 13 year old that's extraordinarily articulate. ... However, to take that as the norm—and we understand that young people who are involved in the criminal justice system at 14 and below, and the backgrounds that you can assume that they've come from—that level of articulation in the main doesn't exist. So we have to potentially deal with those young people differently. (MetroConferencingB)

we represent some of the most vulnerable kids; they're really damaged, and we need to think very carefully about a child, for example, who's in residential care or the child protection system. Why are they there? What that means in terms of their understanding, especially the younger you go down that age curve, if you like. (MetroCounselD)

Participants' recognition of the value of an individualised assessment process lends support to the conclusion of the ALRC (1997: chap. 18) that, while the presumption 'can be problematic for a number of reasons', it is 'a practical way of acknowledging young people's developing capacities. It allows for a gradual transition to full criminal responsibility'.

However, while participants were supportive of the individualised assessment process through which doli incapax is determined, there was an almost unanimous view that there is a lack of built-in service referrals for a child that is determined to be doli incapax. As one judge explained:

where you have a young person, particularly a very young person between the ages of 10 and, say, 13 who are engaging in behaviours that would be classified as criminal, wherever you sit in terms of at what point in that age trajectory responsibility should rest for them to be brought before a court, what seems critically important to me is that, even at a young age, those children are receiving assistance with their behaviours. Because I have experienced cases, and one recent matter comes to mind, where a young person was charged, over the age of 10, obviously, with serious offending involving sexualised behaviours. And not once but twice that young person was found doli incapax and that ended the matter, but no additional supports were put in place to address the behaviours that have brought that young person to court ... It seemed somewhat inevitable, really, when they ultimately came back before the court then as a 15, 16 year old with similar offending of a similar nature, and particularly serious. Nothing had been put in place. (MetroJudicialB)

This participant offered that, while it is not being utilised as such in current practice, the process of establishing doli incapax 'does provide an opportunity for some structured interventions to be put in place' (MetroJudicialB). Other participants similarly acknowledged the missed opportunities to provide a holistic response:

There's always that concern with some people that if a kid is found to be *doli incapax* there's no sort of follow-up. There might be ongoing issues in that child's life, which means in another few months or another year they'll probably be back before the courts. So treating it as, I guess, undesirable behaviour that needs to be modified through support and help might be a more effective way. (RegCounselE)

It [*doli incapax*] didn't lead anywhere apart from no criminal justice response ... I'm really opposed to just saying, 'well, no criminal justice response until 14, but let's not worry about anything else'. (MetroSupportI)

These views reveal a pressing need to ensure that, during the period in which a child awaits assessment, supports are put in place to understand and address the reasons why a child came before the law in the first place. As described by one participant, this ensures that children do not 'slip through' the cracks of the system (RegConferencingB). These views support research by Weatherburn, McGrath and Bartels (2012: 806), who found that 'failure to intervene early [with rehabilitation programs for young offenders] is likely to make intervention more difficult and less likely to be successful' at a later stage. This is particularly important given the level of disadvantage often experienced by children who come before the law. In such instances, not only does the criminal justice process itself potentially exacerbate that disadvantage, but also the failure to address known disadvantage and to identify the causes of antisocial behaviour may increase the likelihood that a child will reappear before the court in coming years. Any *doli incapax* assessment should trigger a thorough, ecologically informed assessment of the needs of a child and their family, with non-stigmatising welfare supports provided in instances where these will bolster one's wellbeing, a child's family and their immediate community.

Reflections on the need for reform

Several practitioners sought that the prescribed age range be supplanted by the application of *doli incapax* to all children charged with a criminal offence. The potential of such reform is captured in one participant's comments:

In theory it makes a lot of sense to make it variable depending on the capacity because I think there is no birthdate that applies across all children at which they become mature enough to understand the impact of their actions and the context and the environment in which they are acting ... My worry about that in practice is I think there would be so much assessment involved I'd worry that there would be a default to the minimum again ... We'd need to make sure that really well-qualified people were involved in doing the assessments so that it wasn't left—with all respect to my legal colleagues—that it wasn't left to the lawyers and judicial officers to make those assessments. (MetroAdvocateB)

Participants also acknowledged the fluidity of a child's maturity, arguing that to set a determinative range fails to acknowledge the developmental differences that influence a child's capacity to understand the distinction between right and wrong. Two regional support workers noted that removing the set age range would be particularly beneficial in responding to cases involving a child with an intellectual or cognitive disability:

If you're talking about issues relating to disability or cognitive capacity it varies so much for young people, depending on experience and circumstances, and I think that a set age can be an issue as well. I think there's certainly room for individualised assessments around that. (RegSupportL)

I've worked with some 18 year olds who present as 12 or 13 and would not have the capacity to know the consequences of their actions, just because they're

intellectually impaired and they're really vulnerable to being led by their peers ...
[If the age were to be raised] I think it would definitely need to be assessed case by case. (RegSupportD)

The merit of extending the protection to *all* children in conflict with the law was recognised by the English Law Commission (2005), which found that there is a need for children, of all ages, to be better catered for under the criminal law. This same argument can be applied in Australia, where the applicability of the presumption leaves children aged between 14 and 18 vulnerable to the full force of the criminal law. The strict upper age limit for *doli incapax* belies the common disjuncture between a child's chronological age and their developmental maturity. In instances in which children have endured childhood trauma or for children with a neuro-disability, for example, chronological maturity does not necessarily guarantee a child's capacity to understand the difference between wrong and seriously wrong.

Participants were also asked for their views on the abolition of the presumption of *doli incapax* in England and Wales in 1998, a reform that formalised the age of 10 as the minimum age of criminal responsibility (*Crime and Disorder Act 1998* (UK) s. 34). The English reforms were implemented following the Home Office (1997: para. 4.4; see also Bandalli 1998) consultation paper, which described the presumption as 'contrary to common sense' and noted that its operation was 'not in the interests of justice, or victims or of the young people themselves'. These reforms stand England and Wales apart from other common law jurisdictions that have increased the minimum age of criminal responsibility (MACR) at the time of abolishing the presumption of *doli incapax* (e.g., Canada) (Crofts 2016).

Given participants' recognition of the limitations of the presumption as it is currently operationalised, this research sought to determine whether Victorian youth justice practitioners believed the presumption had outlived its purpose. The answer was a resounding no. Participants described any prospect of the abolition of *doli incapax* as 'really problematic' (MetroAdvocateD) and 'less than ideal' (MetroSupportC). Other participants commented that they 'don't want to go down the path of England' (MetroCounselE), that they 'would be very concerned' (MetroDefenceA) if similar reforms were introduced, that they 'would not want to see it go ... definitely not, definitely not' (MetroSupportF) and that they were 'very concerned, alarmed' by the English approach (RegCounselA). Explaining these responses, one legal counsel reflected, 'if children aren't protected against the unlimited power of the state, what hope have they got?' (RegCounselA); another observed that 'it's definitely important to have that safeguard ... it's better to have it than not' (MetroSupportC).

Several participants recognised that while the presumption is problematic in practice, abolition of this safeguard would leave children more vulnerable to convictions, incarceration and prolonged criminalisation. As one participant explained:

I don't think I'd be in favour of [it] being abolished without broad reform ... it's one piece of an imperfect system. If we were going to abolish it, we would have to be moving towards a broad-based treatment system that was legislated with a number of legislative protections ... [We have] such a young age for criminal responsibility that I'm not open to just abolishing willy-nilly. (MetroSupportI)

These views largely mirror those expressed in the wake of the abolition of *doli incapax* in England and Wales, where legal scholars and stakeholders heavily criticised the government's reforms (Arthur 2010; Goldson 2013).

Conclusion

I think it's like a lot of legal principles or arguments that in theory work to the favour of people; it relies too much on the system working well and everyone involved being adequately represented and having equal resources. (MetroAdvocateD)

As captured by MetroAdvocateD, the presumption of *doli incapax* is, in theory, a meritorious legal safeguard that seeks to provide an individualised protection that allows for differences in the cognitive development and maturity of children who come into conflict with the law. This study reveals that, in practice, the presumption falls far short of achieving this laudable aim. An insight into the daily operation of *doli incapax* provided by practitioners involved in all aspects of the Victorian youth justice system reveals shared concerns about the *process* by which the presumption is rebutted, including an informal reversing of the onus in practice, the inconsistency of its application, and a concern that the process itself is prolonged and unduly criminogenic.

This research also documents views on the needs for reform, including the dangers of abolition, the merits of expanding the age range for which *doli incapax* applies, alongside the importance of specialised training for criminal justice professionals (particularly in regional areas) to ensure full understanding of the importance of the presumption as a legal safeguard. The interviews emphasise the importance of a holistic approach to reforming *doli incapax*, in concert with calls for wider reform to both the child protection and youth justice systems in Victoria, including a review of the MACR (see further O'Brien and Fitz-Gibbon 2017), and increased welfare supports for vulnerable children and their families. To this end, this article urges caution in the face of an increasingly punitive youth justice system in Victoria. While *doli incapax* has recognised limitations, it offers the strengths associated with individualised justice and has great potential as a mechanism through which the disadvantage and trauma often experienced by children in conflict with the law can be meaningfully considered. Interviews with Victorian legal stakeholders show that abolition of this safeguard would find no support among those working daily with children in conflict with the law. As Bandalli (1998: 114) argued nearly two decades ago in England and Wales, the presumption 'should be retained and taken seriously as recognition of the protection which the law should be affording to children'.

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1 See also *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children & Ors* [2016] VSC 796; *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 241.

2 Ethics approval was granted from Deakin University, Monash University and the Victorian Department of Health and Human Services.

3 One participant did not consent to being audiotaped. The interviewer took notes throughout, which were included in the thematic data analysis phase.

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