Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of Doli Incapax

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Abstract

Despite existing since ancient times the presumption of *doli incapax* — that is, the presumption that children lack the moral and intellectual development to have the capacity to be guilty of crime — appears to be a relatively nebulous concept. Criticisms that the presumption is both over- and under-protective of children reveal diverse views and uncertainty about exactly how the presumption (and its legislative equivalents) does, and should, operate. This article takes the occasion of the recent High Court of Australia case of *RP v The Queen* (2016) 259 CLR 641 as a prompt to address this lack of clarity. It comprehensively reviews current case law to critically evaluate the sort of factors that have been used to establish that a child is sufficiently developed to be found criminally responsible.

I Introduction

The principle that children who commit wrongs should generally not be treated in the same way as adults has existed at common law in some form since ancient times. According, for example, to the Laws of King Aethelstan (925–35) a child under 12 years of age was not to be punished under certain conditions, such as that they stole under a certain amount, or did not attempt to flee.[1] Over time, presumably around the time Roman Law began to influence common law in the 12th and 13th centuries, this protection developed at common law into a presumption that children lack sufficient capacity to be guilty of a crime. This presumption broke down into an absolute presumption of criminal incapacity for children under seven years (often referred to as the minimum age of criminal responsibility) and a rebuttable presumption of criminal incapacity (*doli incapax*) for children from the age of seven until the age of 14. Once fixed the minimum age of criminal responsibility did not change until the mid- to late-20th century when it was raised to the age of 10 in England and Wales and throughout all Australian criminal jurisdictions.[2] In contrast,

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1 'Laws of King Aethelstan (Council of Greatanlea)' reproduced in Wiley B Sanders (ed), *Juvenile Offenders for a Thousand Years: Selected Readings from Anglo-Saxon Times to 1900* (University of North Carolina Press, 1970) 3. For further discussion of the history of criminal responsibility of children, see A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53(3) *Law Quarterly Review* 364; Thomas Crofts, *The Criminal Responsibility of Children and Young Persons* (Ashgate, 2002) 5–35.

2 See Thomas Crofts, 'The Common Law Influence over the Age of Criminal Responsibility — Australia' (2016) 67(3) *Northern Ireland Legal Quarterly* 283.

the upper age level and rebuttable presumption of *doli incapax* have remained stable throughout Australia, applying now to children aged from the age of 10 until their 14th birthday. Following much criticism, particularly in the wake of the Bulger case,[3] this rebuttable form of the presumption was abolished in England in 1998.[4]

Given its long existence, it is perhaps not surprising that the presumption of *doli incapax* has, every so often, encountered a degree of criticism.[5] Particularly over the last two decades there have been expressions of somewhat contradictory concerns in Australia that the rebuttable presumption of *doli incapax* is both over-protective of children, by preventing them from being prosecuted, and under-protective by being too easily rebutted.[6] Views have also been expressed that the presumption is in need of abolition, reformulation or reversal.[7] While noting some of these criticisms, but not addressing them in any detail, the High Court of Australia confirmed the value of the presumption in its 2016 decision of *RP v The Queen*.[8] The plurality judgment stated, in a measured and supportive tone: 'In the case of an accused who is a child … it is not self-evident that the policy of the law is outmoded in requiring that the prosecution prove the child understood the moral wrongness of the conduct.'[9]

This article does not revisit criticisms of the presumption or extensively evaluate the purpose of the presumption. It is sufficient to note that the presumption of *doli incapax* is one of the key gateways to young people entering the criminal justice system.[10] It is based on the fundamental premise of criminal law that unless a person has the capacity to freely choose to do something they understand to be wrong they should not be liable to conviction and punishment in criminal

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3 See, eg, Michael Freeman, 'The James Bulger Tragedy: Childish Innocence and the Construction of Guilt' in Anne McGillivray (ed), *Governing Childhood* (Dartmouth, 1997) 115. See also *R v Secretary of State for the Home Department; Ex parte Venables and Thompson* [1998] AC 407.

4 *Crime and Disorder Act 1998* (UK) s 34. For recent discussion see Kate Fitz-Gibbon, 'Protections for Children Before the Law: An Empirical Analysis of the Age of Criminal Responsibility, the Abolition of *Doli Incapax* and the Merits of a Developmental Immaturity Defence in England and Wales' (2016) 16(4) *Criminology & Criminal Justice* 391.

5 For instance, as early as 1883, Sir James Fitzjames Stephen criticised that '[l]ike most other presumptions of law, this rule is practically inoperative, or at all events operates seldom and capriciously': Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 2, 98.

6 See, eg, Australian Law Reform Commission and Human Rights and Equal Opportunities Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [18.19].

7 For recent criticism see, eg, *GW v The Queen* (2015) 20 DCLR (NSW) 236, 244–5 [41]–[46] (Lerve DCJ). For further discussion see Crofts, above n 2.

8 (2016) 259 CLR 641. See also below n 10 regarding Recommendation 27.1 of the Royal Commission into the Protection and Detention of Children in the Northern Territory.

9 Ibid 650 [10] (Kiefel, Bell, Keane and Gordon JJ).

10 Recently the Royal Commission into the Protection and Detention of Children in the Northern Territory ('NT') recommended that the minimum age level of criminal responsibility be raised to 12 on the basis that this would reduce the number of children brought before the courts and it would better reflect current understanding of brain development: NT, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B, 420 (Recommendation 27.1). The Commission also recommended retention of the rebuttable presumption of *doli incapax* for those aged 12–14: vol 2B, 417–18.

proceedings.[11] It is normal that children lack this ability,[12] but gradually develop it as they grow up. For this reason the law prevents prosecution of young children (under 10 years), but allows prosecution of older children where there is proof that they are developed enough to understand the wrongfulness of their behaviour.

In *RP v The Queen*, the High Court faced the question of whether sufficient proof had been brought to rebut the presumption of *doli incapax* in a case involving a boy aged 11 and a half accused of committing sexual offences against his younger brother.[13] In finding that there had not been sufficient proof, the Court made some important observations about the operation of the presumption which will be discussed alongside other relevant case law throughout this article. This article will reveal that the divergent views on the presumption of *doli incapax* do not necessarily represent deep differences in opinion about the value of the presumption. Instead, they are largely a product of the lack of clarity and coherency, despite the presumption's longevity, over how the presumption should operate and what evidence should be sufficient to rebut it. Elucidating what the presumption requires and clarifying how it can be rebutted will help contextualise criticisms of the presumption. Furthermore, this will show that if appropriate attention is given to the function of the presumption and evidence necessary to rebut it, then it provides an appropriate mechanism for determining whether a child should be held criminally responsible.

II What Needs to be Proved?

The rebuttable presumption of *doli incapax* for children aged 10 but not yet 14 remains a common law presumption in New South Wales ('NSW'), South Australia and Victoria despite a 1997 recommendation that the presumption should be retained and placed on a statutory footing in all Australian jurisdictions.[14] In all other jurisdictions, the presumption has been placed on a statutory footing.[15] Ancient laws, as already noted, generally provided an exemption from punishment for children, dependent on the circumstances of the act and the child's behaviour, but they did not pronounce any broad test for when a child should not be punished. According to Sir Matthew Hale it was around the time of King Edward III (1327–77)

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11 See Sir Matthew Hale, *The History of the Pleas of the Crown* (London, 1736) vol 1, 14–15. For more contemporary views, see H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968) 218; Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64(3) *Modern Law Review* 350, 353.

12 Herein lies the difference to the defence of insanity where mental impairment is not something that every person experiences. As such it is an exception explaining why there is a presumption of sanity and why the burden is on the accused to establish that he or she lacks the capacity to understand the nature of the act and its wrongfulness.

13 The appeal concerned two counts of sexual intercourse with an under 10-year-old.

14 Australian Law Reform Commission and Human Rights and Equal Opportunities Commission, above n 6, [18.20].

15 The presumption is legislatively embedded in all the 'code' criminal jurisdictions of Australia: *Criminal Code 2002* (ACT) s 26; *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code* (Cth)') s 7.2; *Criminal Code Act 1983* (NT) sch 1 ('*Criminal Code* (NT)') s 38(2); *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 29(2); *Criminal Code Act 1924* (Tas) sch 1 ('*Criminal Code* (Tas)') s 18(2); *Criminal Code Act Compilation Act 1913* (WA) sch ('*Criminal Code* (WA)') s 29 para 2.

that 'the Common law received a greater perfection, not by the change of the Common law, as some have thought …; but men grew to greater learning, judgment and experience'.[16] Legal writers, such as Lambard (1581), Dalton (1619) and Hale (1736), referred to cases from that early period which articulated the presumption that children under 14 years could not be guilty of crime.[17] These cases also expressed the basis upon which the presumption could be rebutted. Rebuttal required proof that the child could discern between, or had knowledge of, good and evil.[18] This was not a requirement of some abstract ability to discern good from evil, rather, it was linked to the ability to understand the wrongfulness of the *actual* offence committed. For instance, Dalton spoke of the child having 'knowledge of good and evill, and of the perill and danger of that offence'.[19] Similarly, Hale detailed cases that stated that the presumption of *doli incapax* could be rebutted by proof that the child 'could discern between good and evil at the time of the offence committed'.[20] He also noted that to convict a child there must be evidence 'to make it appear he understood what he did'.[21]

The requirement that there be proof of 'malicious intent' or 'malice' can also be found in some cases in the 19th century.[22] However, this did not require proof that the child had acted maliciously. Rather, the concern was whether the child knew that what he or she was doing was wrong. This was revealed by the case of *R v Smith*, in which 'malicious intent' was described as 'a guilty knowledge that he was doing wrong'.[23] Around the early 20th century there was further explanation of what sort of understanding was required to rebut the presumption. In 1919, it was said in *R v Gorrie* that there must be proof that the child had 'mischievous discretion',[24] an expression that a commentator at the time found to be 'certainly uncommon and one not often met with in ordinary parlance. But like many old English legal phrases it is wonderfully graphic and concise'.[25] This necessitated 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'.[26]

In *R v M*, the question of the nature and degree of knowledge of wrongfulness that needed to be proved to rebut the presumption was addressed by the Supreme Court of South Australia.[27] Chief Justice Bray explored whether this meant contrary to law or something else. His Honour noted that the term 'knowledge of wrong' was

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16 Hale, above n 11, 24–5.

17 Although there was some doubt for a period about whether the presumption of *doli incapax* applied from seven years to the age of 12 or to the age of 14: see Kean, above n 1, 368; Crofts, above n 1, 9. Some early authors also divided this age into seven to under 12, and 12 to under 14: see, eg, Hale, above n 11, 26–8. A similar approach can be found in Roman Law (distinguishing *infantes*, *impuberes infantiae proximi* and *impuberes pubertati proximi*): see Crofts, above n 1, 94.

18 William Lambarde, *Eirenarcha: or, of the Office of the Justices of Peace* (London, 1581) 218; Michael Dalton, *The Countrey Justice* (London, 1618) 223–4; Hale, above n 11, 24–8.

19 Dalton, above n 18, 223–4.

20 Hale, above n 11, 26.

21 Ibid 27.

22 See, eg, *R v Vamlew* (1862) 176 ER 234; *R v Smith* (1845) 1 Cox CC 260; *R v Owen* (1830) 172 ER 685.

23 (1845) 1 Cox CC 260 (Erle J). See also *R v Owen* (1830) 172 ER 685.

24 *R v Gorrie* (1919) 83 JP 136, 136 (Salter J).

25 Commentary, '*R v Gorrie*' (1919) 83 *Justice of the Peace Journal* 307.

26 *R v Gorrie* (1919) 83 JP 136 (Salter J).

27 (1977) 16 SASR 589.

familiar from the '*M'Naghten* Rules' in relation to insanity.[28] Chief Justice Bray found that while in England the term had been interpreted as knowledge that the act was against the law,[29] the High Court of Australia had interpreted the test as knowledge that the act was wrong according to the ordinary standards of reasonable men.[30] His Honour found no reason not to interpret this phrase in the same way in relation to children.[31] In explaining this further, Bray CJ deprecated the use of the term 'understanding that it was something that adults would disapprove of' because '[a]dults frequently disapprove of breaches of decorum and good manners on the part of children and of their lack of diligence or tidiness without regarding the acts or omissions in question as wrong in the relevant sense.'[32] More recently, the Supreme Court of the ACT confirmed this view, stating in *R v JA* that it is: 'not sufficient that the child knows that there would be "disapproval" of the act by a parent or even police'.[33]

A question that also arose in *R v M* was whether the trial judge's direction to the jury 'lacked sufficient intensity' because it referred only to proof that the child had knowledge of right and wrong, not knowledge that the act was 'gravely wrong, seriously wrong' as in *Gorrie*.[34] It was held that there was no authority to the effect that not using the adverbs 'gravely or seriously' would amount to a misdirection.[35] Nonetheless, understanding that the behaviour was 'seriously wrong' has become the standard formulation of what the prosecution must establish to rebut the presumption in Australia (and in England and Wales before it was abolished).

There was some criticism in the English case *C (A Minor) v Director of Public Prosecutions* ('*C v DPP*') that the term 'seriously wrong' is conceptually obscure.[36] On appeal to the House of Lords, Lord Lowry concluded, however, that its meaning is relatively clear when contrasted with mere naughtiness or mischievousness.[37] This distinction was also adopted in a number of Australian decisions that required proof that the child 'knew it was seriously wrong, as distinct from an act of mere naughtiness or mischief'.[38] The High Court in *RP v The Queen* confirmed the approach, noting that aside from establishing that the child knew that the offence was seriously wrong in a moral sense, there was 'the further dimension of proof of knowledge of serious wrongness as distinct from mere naughtiness'.[39]

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28 *R v McNaghten* (1843) 8 ER 718. This case established that the defence of insanity applies when a person, at the time of the act, 'was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong': at 722.

29 *R v Windle* [1952] 2 QB 826.

30 *Stapleton v The Queen* (1952) 86 CLR 358.

31 *R v M* (1977) 16 SASR 589, 591. See also *R (A Child) v Whitty* (1993) 66 A Crim R 462; *R v JA* (2007) 161 ACTR 1.

32 *R v M* (1977) 16 SASR 589, 591.

33 (2007) 161 ACTR 1, 11 [69].

34 (1977) 16 SASR 589, 593.

35 Ibid.

36 [1995] 1 Cr App R 118. This was one of the reasons Laws J found that the presumption of *doli incapax* was a disservice to the law of England: at 125–6.

37 *C (A Minor) v DPP* [1996] AC 1, 22.

38 *BP v The Queen* [2006] NSWCCA 172 (1 June 2006) [27]. See also *RP v The Queen* (2016) 259 CLR 641; *R v JA* (2007) 161 ACTR 1; *R v ALH* (2003) 6 VR 276; *R v M* (1977) 16 SASR 589.

39 (2016) 259 CLR 641, 650 [11].

There has been some criticism of making the contrast between understanding that the behaviour was seriously wrong as opposed to merely naughty. In the NSW Court of Criminal Appeal decision in *RP v The Queen*, Hamill J found this contrast to be

> unhelpful and, in jury directions, could give rise to an erroneous process of reasoning whereby a finding that the act was more than naughty or mischievous may lead to a finding that the child knew that what they did was seriously or gravely wrong without proper attention being paid to that question. There is a vast chasm between something that is 'naughty' or 'mischievous' and something that is gravely or seriously wrong. The trouble with introducing the comparison is that it is easy to fall into the trap of thinking that if something is more than naughty, it must therefore satisfy the test. It does not.[40]

There is some weight in this criticism, however, the formulation is useful. In making the contrast, the courts are aiming to explain, in clear terms, what sort of understanding the child must have in order to rebut the presumption. The term 'seriously' wrong does not mean that the offence itself must be one of a serious nature.[41] Rather, the term serious relates to the nature and degree of the child's understanding. What the court is looking for is that the child knows that what they have done is not just something naughty that will be dealt with in the home or at school, but rather something that is so wrong, hence use of the term seriously wrong, that it will be dealt with outside the home. When explaining the concept of seriously wrong Lord Goodhart spoke about the child understanding the criminality of the act.[42] His Lordship pointed out that a child may develop from very early on a concept of right and wrong, in the sense that the child learns that it is wrong to throw porridge on the floor if he or she does not want to eat it, or that it is wrong to grab a sibling's favourite toy and make them cry. However, this understanding of wrongfulness is more of an appreciation of the naughtiness of the behaviour and is not sufficient to make the child criminally responsible. The child must have an understanding of the criminality of the act, in the sense that he or she knows 'the difference between doing things which are naughty and for which you will be punished (it is to be hoped) by a parent, and doing things which are seriously wrong and liable to punishment by a court'.[43]

The statutory equivalents to the common law presumption of *doli incapax* vary from each other and the common law. The Criminal Codes of the Australian Capital Territory and the Commonwealth are worded in a similar way to the common law, both providing that a child aged 10 but not yet 14 'can only be criminally responsible for an offence if the child knows that his or her conduct is wrong'.[44] In contrast, the Criminal Codes of the Northern Territory ('NT'), Queensland,

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40 *RP v the Queen* (2015) 90 NSWLR 234, 256 [129].

41 As such the criticism in Glanville Williams, 'The Criminal Responsibility of Children' [1954] *Criminal Law Review* 493, 496, that '[i]t seems absurd to say that a child who indulges in a series of annoying peccadilloes can set the magistrates at defiance, for the reason that none of his acts is gravely wrong', is misplaced.

42 United Kingdom, *Parliamentary Debates*, House of Lords, 19 March 1998, vol 587, col 830 (Lord Goodhart).

43 Ibid. For a discussion of similar issues in relation to the competency of a child to testify, see *R v GW* (2016) 258 CLR 108.

44 *Criminal Code 2002* (ACT) s 26(1); *Criminal Code* (Cth) s 7.2(1).

Tasmania and Western Australia, refer to a child under the age of 14 not being criminally responsible 'unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission'.[45] It does not, however, appear that Sir Samuel Griffith when drafting the Criminal Code of Queensland, on which the Criminal Codes of Western Australia, Tasmania and, to a lesser extent, the NT are all based, thought he was doing anything other than codifying the common law in relation to infancy. In his Draft Code, which details the source of his draft provisions, Griffith noted that the basis of s 31 (which then became s 29) is the common law.[46] There is no suggestion from other sources cited that Griffith intended to deviate from the common law position.

Different views have, however, been expressed in the courts of these jurisdictions about whether these provisions merely represent a codified form of the common law presumption and are thus to be interpreted in the same way, or whether something different is required. In *R v B*, Pincus JA took the view that the Queensland provision required something different from the common law presumption.[47] His Honour noted that:

> We were referred to authorities which would if applied, attribute to the subsection which I have quoted a rather different meaning from that which its language appears to convey. For example, reference was made to *B v R* (1958) 44 Cr App R, an English case, in which speaking of an accused between the ages of 8 and 14 it was said that in order to rebut the presumption in favour of such a child 'guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt'. It is plain that this is not the law of Queensland. What the Code requires could hardly be more clearly stated: it must be proved that at the relevant time 'the person had capacity' (I emphasise capacity) 'to know that the person ought not to do the act'. This is, of course, different from proving actual knowledge.[48]

This approach could mean that it is easier to establish criminal responsibility in the traditional Code states, because there need only be proof that the child had the capacity to know that what he or she was doing was wrong at the time of the offence, regardless of whether he or she actually knew this.

In contrast, a number of other cases take the view that the Code provisions are restatements of the common law and thus, despite different wording, require the same proof. In the earlier Queensland case *R v B*, DM Campbell J noted that at common law there is a rebuttable presumption of *doli incapax* and that this presumption is expressed in s 29 of the *Criminal Code* (Qld).[49] Likewise, WB Campbell J cited common law sources as authorities on what must be established to

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45 *Criminal Code* (Qld) s 29(2). See also *Criminal Code* (NT) s 38(2); *Criminal Code* (WA) s 29 para 2. The *Criminal Code* (Tas) s 18(2) refers to sufficient capacity to know.

46 Sir Samuel Walker Griffith, *Draft of a Code of Criminal Law* (29 October 1897) <http://ozcase.library.qut.edu.au/qhlc/documents/GRIFFCC_Draft_1897.pdf>.

47 [1997] QCA 486 (6 November 1997). See also *R v F, ex parte A-G (Qld)* (1999) 2 Qd R 157, where it was found that the trial judge had applied an erroneous test by requiring evidence that the child understood what he did rather than had the capacity to know.

48 *R v B* [1997] QCA 486 (6 November 1997).

49 [1979] Qd R 417, 421.

rebut the presumption.[50] The same approach can be found in Tasmania, where Neasey J stated in *M v J* that: 'The subsection [s 18(2)] re-enacts the common law requirement usually stated in terms of presumptions concerning children under the age of 14 years.'[51] His Honour went on to cite common law references and while noting that s 18(2) makes some changes to the common law rule in referring to the child having 'sufficient capacity' rather than knowledge, he continued: 'I think the subsection was intended to reproduce the common law rule which equates capacity to know with actually knowing.'[52] Justice Neasey also commented that the similar provision in Queensland has also been interpreted in line with the common law. Similarly, in the decision of the Queensland Court of Appeal, *R v T*, Fitzgerald P noted that the issue under s 29 of the Code was whether the appellant had the capacity to know that he ought not to 'flick' his lighted cigarette onto the paper under the counter.[53] However, his Honour's conclusion on the matter referred to knowledge rather than capacity: 'It is difficult to comprehend any basis for a submission that the appellant might not have known that it was wrong to "flick" a lighted cigarette onto paper in a shop … and he would certainly have known that it was wrong to set fire to the shop.'[54] Because of the tendency to treat the common law and Code requirements as indistinct, the following discussion will proceed on the basis of the need for proof of actual knowledge. Having clarified the law relating to the presumption, the following Part will evaluate the types of evidence that have been used to rebut the presumption of *doli incapax*.

III Evidence Rebutting the Presumption

It is important to note that the presumption of *doli incapax* (and its statutory equivalents) is not a defence in the sense that it must neither be raised nor proven by the accused. Since early times, it has been established that the burden of rebutting the presumption is on the prosecution.[55] Accordingly, the prosecution must bring evidence to rebut the presumption alongside proof of all elements of the offence. It must do so with 'very strong and pregnant evidence';[56] that is, to the criminal standard of beyond reasonable doubt.[57] In *R v ALH*, Cummins AJA took the view that the prosecution should prove that a child understood that the act was seriously wrong as part of the mental element of the offence.[58] There is a danger that such a formulation can lead to confusion and the idea that establishing any required mens

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50 Butterworths, *Halsbury's Laws of England*, vol 10 (3rd ed) Criminal Law and Procedure, '1 Principles of Criminal Liability' [528], cited in *R v B* [1979] Qd R 417, 425; *B v The Queen* [1958] 44 Cr App R 1, 3, quoted in *R v B* [1979] Qd R 417, 425.

51 [1989] Tas R 212, 221.

52 Ibid 222.

53 [1997] 1 Qd R 623, 626.

54 Ibid.

55 See, eg, Hale, above n 11, 27. See also *Criminal Code 2002* (ACT) s 26(3); *Criminal Code* (Cth) s 7.2(2), which specify that the burden of proving that the child knows that the conduct was wrong is on the prosecution.

56 Hale, above n 11, 27.

57 *AL v The Queen* [2017] NSWCCA 34 (22 March 2017) [120]; *RP v The Queen* (2015) 90 NSWLR 234, 238 [19]; *R v JA* (2007) 161 ACTR 1, 6 [32], 12 [82]; *C (A Minor) v DPP* [1996] AC 1, 29; *B v The Queen* [1958] 44 Cr App R 1, 3–4.

58 (2003) 6 VR 276, 295 [75].

rea or mental element is the same thing as establishing that a child understood the behaviour to be seriously wrong. In reality, these are distinct concepts: being able to understand that an act is seriously wrong is different from forming a mental element in relation to the act. As correctly stated by Higgins CJ in *R v JA*, the decision by Cummins AJA 'should not, however, be taken to establish that proof of the voluntary and intentional commission of the acts charged will constitute prima facie evidence of doli capax'.[59]

A *Age*

It has been said, in many cases, that the closer the child is to 14 years — the age at which all children are assumed to have the capacity to be criminally responsible — the easier it will be to rebut the presumption.[60] This approach may, at first glance, appear to make sense. However, it has correctly been criticised by the High Court in *RP v The Queen* because it is 'apt to suggest that children mature at a uniform rate'.[61] The whole reason for a rebuttable presumption, rather than a blanket assumption of incapacity, is because it is well-established in research that children in this age period develop at different and inconsistent rates.[62] This was acknowledged by Blackstone in 1769, when he commented that: 'the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment'.[63] Provided that these concerns are kept in mind and the age of the child is not approached rigidly, it is appropriate to treat it as a starting point, indicating how much further evidence may be needed. While being close to 14 years old might suggest that little evidence would be needed to confirm that the child had the requisite understanding, other factors (such as the type of offence, evidence of a low IQ, and so on) may indicate that it is not correct to make this assumption.

B *Offence Committed*

Similarly, in many cases it has been stated that the more obviously wrong the act, the easier it is to rebut the presumption.[64] Clearly, some acts are more obviously wrong than others and so the offence committed may be indicative of how much further evidence is needed. Children gradually develop an understanding of the wrongfulness of acts, depending on the age at which, and how, the child comes into contact with the norm forbidding the behaviour. They are more likely to understand the seriousness of offences that reflect values of which they have direct personal

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59 (2007) 161 ACTR 1, 12 [81].

60 *RP v The Queen* (2015) 90 NSWLR 234; *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013); *R v McCormick* [2002] QDC 343 (19 December 2002) [10]; *R (A Child) v Whitty* (1993) 66 A Crim R 462; *B v The Queen* [1958] 44 Cr App R 1, 3.

61 (2016) 259 CLR 641, 651 [12] (Kiefel, Bell, Keane and Gordon JJ).

62 See, eg, Elizabeth Cauffman and Laurence Steinberg, '(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults' (2000) 18(6) *Behavioral Sciences & the Law* 741; Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm under the Doctrine of *Doli Incapax*: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 793.

63 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 4th ed, 1770) vol 4, 23.

64 *C (A Minor) v DPP* [1996] AC 1, 39; *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013) [12].

experience, or which are commonly discussed or modelled in the home or at school.[65] Some acts may also be more easily aligned with naughtiness, such as throwing stones and causing damage, or mischief that has turned to vandalism.[66] In contrast, acts of dishonesty, such as stealing, may be more likely to be understood to be seriously wrong.[67] But it is also not that simple, because a child may less easily understand the wrongfulness of acts of dishonesty that are based on complex social relations, such as forgery or fraud. As pointed out by Donaldson LJ in the case of *JBH (A Minor) v O'Connell*: 'if, for example, children between the ages of 10 and 14 were charged with forgery, it might require a considerable body of evidence before magistrates were satisfied that they knew that what they were doing was wrong'.[68] It is clear, then, that the starting point is the type of offence committed and the type of interest that it protects, rather than whether the offence itself is serious or not. The statement by Lord Lowry in *C (A Minor) v Director of Public Prosecutions* that the 'more obviously heinous'[69] the offence, the easier it will be to rebut the presumption, is therefore problematic. A child's understanding of wrongfulness is not inexorably related to the seriousness or heinousness of the offence.[70]

An important point to remember here is that it has long been held that the child's knowledge 'must be proved by the evidence, and cannot be presumed from the mere commission of the act'.[71] Not allowing proof of the acts that comprise the offence alone to rebut the presumption is designed to stop the prosecution and the court from simply inferring that the child understood the wrongfulness of the act as an adult would have done in the circumstances.[72] The correctness of this approach was questioned in *R v ALH*, where Callaway JA commented that authorities suggesting that the acts constituting the offence cannot alone be drawn on to prove understanding 'are wrong in principle and should not be followed'.[73] Similarly, Cummins AJA felt that some acts are so 'serious, harmful or wrong' that they establish the required understanding, while others are less obvious and so may be equivocal or insufficient to establish the understanding.[74] His Honour therefore took the view that, provided adult judgments are not attributed to children, 'there is no reason in logic or experience why the proof of the act charged is not capable of proving requisite knowledge'.[75] The danger with this approach, as with age (discussed above in Part IIIA), is that it becomes objective or nomothetic, with the

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65 See, eg, *R v McCormick* [2002] QDC 343 (19 December 2002); *C v DPP* [1995] 1 Cr App R 118, 121.

66 *R v McCormick* [2002] QDC 343 (19 December 2002) [10].

67 This contrast was made in the Divisional Court decision in *C v DPP* [1995] 1 Cr App R 118, 121 to distinguish the case of *A v DPP* [1992] Crim LR 34.

68 [1981] Crim LR 632, quoted in *C (A Minor) v DPP* [1996] AC 1, 30.

69 [1996] AC 1, 33.

70 Fortin expressed particular concern at the preparedness of courts to accept that children are normally developed and thus criminally responsible when charged with a serious offence: Jane Fortin, *Children's Rights and the Developing Law* (Butterworths, 1998) 444. In exactly these cases, Fortin argues, there is a high likelihood that psychologically the child is not normally developed.

71 *R v Smith* (1845) 1 Cox CC 260 (Erle J), quoted in *C (A Minor) v DPP* [1996] AC 1, 38 (Lord Lowry).

72 Glanville Williams, *Criminal Law: The General Part* (Stevens, 2nd ed, 1961) 815.

73 (2003) 6 VR 276, 281 [20]. This criticism and the fact that it was at odds with the earlier law was noted in *BP v The Queen* [2006] NSWCCA 172 (1 June 2006). However, the Court did not feel it necessary to resolve the conflicting views of whether the acts constituting the offence could alone establish sufficient understanding.

74 *R v ALH* (2003) 6 VR 276, 298 [86].

75 Ibid.

focus on generalised assumptions about what children should understand (often based on common sense claims, often from an adult perspective), rather than paying attention to the understanding of the actual child in question and what factors may affect that child's ability in the concrete circumstances of the crime.

There are several cases where the prosecution had not gathered any or much evidence that went beyond that which established the commission of the offence itself.[76] This approach appears to have been a particular problem in the case of *RP v The Queen* where the majority of the High Court noted that aside from inferences drawn from the circumstances of the offence, the only evidence adduced was a Job Capacity Assessment Report and a clinical psychologist's report (issued when RP was 17 and 18 respectively and neither in relation to these charges).[77] Both reports showed that RP was in the borderline range of intellectual functioning, yet despite this, the prosecution brought no further evidence. Perhaps one of the most significant aspects of *RP v The Queen* is therefore the subtle, yet pointed, comment that the prosecution's submissions were 'apt to overlook' the fact that the starting point is the presumption that children lack sufficient intellectual and moral development to be found *doli capax*.[78] This is a reminder that the onus is placed squarely on the prosecution to bring evidence to rebut that presumption to the criminal standard and that it would subvert the presumption if the prosecution did not bring adequate evidence.

This bar on allowing the presumption to be rebutted by inferences only from evidence establishing the offence seems to be largely responsible for the diametrically opposed criticisms of the presumption of *doli incapax*. According to van Krieken, those cases that apply the presumption strictly and require evidence beyond that proving commission of the wrongful acts ('high hurdle' cases) are the ones where courts have been most critical of the presumption of *doli incapax*.[79] This is particularly so where courts feel that the act was so evidently wrong that every child should know this and therefore that there should be no, or little, need for extra evidence to establish understanding. Such criticisms align with the view that the presumption is over-protective, by standing in the way of prosecuting children. In contrast, van Krieken argues that in those cases where the rule is approached less strictly ('low hurdle' cases), there is less criticism of the operation of the presumption by the courts.[80] However, cases where the presumption has been rebutted based on generalisations and inferences from the evidence establishing the offence have also led to arguments that the presumption provides little or inconsistent protection for children. To some extent, the decision in *RP v The Queen* should bring some clarity here by confirming the correctness of the former approach: 'No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or

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76 See, eg, *R v LAH* [2016] QCA 82 (5 April 2016).

77 (2016) 259 CLR 641, 652 [16], 657 [32].

78 Ibid 657 [32] (Kiefel, Bell, Keane and Gordon JJ).

79 Robert van Krieken, 'Frech oder schuldig. Wie das Recht über die Strafmündigkeit der Kinder denkt in England, Deutschland und Australien' in Doris Bühler-Niederberger (ed), *Die Macht der Unschuld: das Kind als Chiffre* (Leske & Budrich, 2004) 185 [trans at: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319773>].

80 Ibid 16.

those acts.'[81] Settling on this approach could leave open criticisms about the difficulty of rebutting the presumption. The remainder of Part III therefore aims to allay such criticism by bringing greater clarity to the types of evidence that are appropriate to rebut the presumption.

C *Circumstances Surrounding the Act*

While the evidence establishing the offence itself cannot alone be used to rebut the presumption it is widely accepted that evidence of the circumstances surrounding the offence can be called on.[82] The sort of evidence of surrounding circumstances which has been used to support a finding that the child understood that what he or she had done was seriously wrong includes: evidence of careful planning of the crime, particularly sophisticated or devious methods of carrying out the act; assertion of a false alibi; making efforts to conceal the act or divert blame;, and running away from police.[83] In *R v Sheldon*, an almost 14-year-old boy told his 10-year-old cousin that he knew a place where people were making a sundial in order to lure her to a secluded place.[84] Once there, he attacked her, made her unconscious by squeezing her neck and then sexually assaulted her. Following the attack, he returned to his friends looking distressed and telling them he had found a body, which he then showed them before calling emergency services. When later accused of committing these acts, he denied them, maintaining that he found his cousin laying there by chance, and also gave a description of someone he claimed to have seen running away from the scene. The conduct of the boy leading up to the act, 'the relatively sophisticated subterfuge practised by the appellant to lure [his cousin] Joanne to the scene',[85] and his behaviour after the act were thought to clearly indicate that he understood that his act was seriously wrong.

Running away from the police has also been accepted in several cases as proof of an appreciation that the act was seriously wrong.[86] As noted by Lord Lowry in *C (A Minor) v Director of Public Prosecutions*, there may be 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.'[87] However, it has also been noted that children may well run away just because they think they have done something naughty or, indeed, simply because they are afraid of the police.[88] The context of running away is therefore important.[89]

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81 (2016) 259 CLR 641, 649 [9] (Kiefel, Bell, Keane and Gordon JJ), 659 [38] (Gageler J).

82 *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013) [30]; *BP v The Queen* [2006] NSWCCA 172 (1 June 2006) [29]–[30]; *R v F, ex parte A-G (Qld)* (1999) 2 Qd R 157; *C (A Minor) v DPP* [1996] AC 1, 39.

83 *R v F, ex parte A-G (Qld)* (1999) 2 Qd R 157; *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013) [28].

84 [1996] 2 Cr App R 50.

85 Ibid 53 (Simon Brown LJ).

86 See, eg, *A v DPP* [1992] Crim LR 34; *JM v Runeckles* (1984) 79 Cr App R 255, 258.

87 [1996] AC 1, 39, quoted in *L v DPP* [1996] 2 Cr App R 501, 504.

88 See *R v JA* (2007) 161 ACTR 1, 11 [76], quoting *C (A Minor) v DPP* [1996] AC 1, 39; *A v DPP* [1992] Crim LR 34, 35.

89 See, eg, *L v DPP*, which involved a bullying incident leading to assault occasioning actual bodily harm and false imprisonment: [1996] 2 Cr App R 501, 513. Factors found to suggest that the act of running away was unlikely to be considered equivocal were that: the incident took place at a time

The type of place where an offence was committed and the manner in which it was committed may also indicate understanding of wrongfulness. In *RH v Director of Public Prosecutions (NSW),*[90] a 12-year-old child forcibly broke into a fire station with the use of a jemmy, 'ransacked' it, and stole some items. It was argued by the defence that because these matters merely proved the acts that constituted the offence, they could not be taken into account, as established in *C v DPP*.[91] Hoeben CJ at CL disagreed and stated:

> The importance of the object of the break-in being a fire station was that it would have been appreciated by the plaintiff that the fire station existed for a specific purpose and that he was not meant to be there. That he was aware of this fact, emerges from statements which he made to CK [his cousin]. Of more significance is the use of a jemmy to break open the padlock. … This was an obviously wrongful act which required some planning, ie, having a jemmy available.[92]

In reaching this conclusion Hoeben CJ at CL noted that there had been conflicting views in earlier cases about whether evidence establishing the offence itself could be sufficient to rebut the presumption. His Honour took the view that according to *C v DPP*, such evidence could be used as long as it was not the only evidence used.[93] His Honour went further and suggested, in agreement with Hodgson JA in *BP v The Queen*, that the Court should not take a narrow view of the sort of circumstances that could be taken into account.[94] In *BP v The Queen*, evidence that the victim was crying, screaming, and struggling while BP digitally penetrated her and the fact that he asked SW, who was also present, to stop the victim crying (which he did by placing his hand over her mouth) were held to be circumstances surrounding the offence that could be taken into account to establish both boys understood that what they were doing was seriously wrong.[95] Similarly, in *A v Director of Public Prosecutions*,[96] a 12-year-old boy and another child took a girl to the chute room in a block of flats and forced her to commit sexual acts under threats of violence. Upon hearing adults outside on the landing, the boys fled. The Court found that the threats, the obviousness of the victim's distress, taking the girl to a place where detection was unlikely, and running away on the appearance of adults were all factors which, although closely associated with the act, could be used to indicate an understanding of the seriousness of the act.[97]

In *RP v The Queen*, the NSW Court of Criminal Appeal also took the view that factors, similar to those in *BP v The Queen* and *A v DPP* such as placing a hand over the mouth of the victim, and the victim crying and being in evident distress, did establish that he understood that he was doing something seriously wrong.[98]

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and place where there would be no help for the victim; the appellants admitted they were aware of the victim's evident distress; the appellants tried to dissociate themselves from the attack; and each appellant blatantly tried to blame the others.

90 [2013] NSWSC 520 (10 May 2013).

91 Ibid [26].

92 Ibid [28].

93 Ibid [27].

94 Ibid; *BP v The Queen* [2006] NSWCCA 172 (1 June 2006) [30].

95 [2006] NSWCCA 172 (1 June 2006) [30].

96 [1997] Crim LR 125.

97 Ibid 126.

98 *RP v The Queen* (2015) 90 NSWLR 234, 249 [78], 258 [140].

However, the High Court disagreed and held that, in the face of the available evidence about the boy's mental development, the circumstances of the offence did not show that he understood the moral wrongfulness of his actions.[99] The Court noted that it is common for children to engage in sexual play and want to keep this secret because they think it is naughty. Even though in this case RP's behaviour went far beyond ordinary experimentation, the Court opined that this, on its own, did not lead to 'a conclusion that he understood his conduct was seriously wrong in a moral sense, as distinct from it being rude or naughty'.[100] The Court took the view that it could not be assumed that a child aged 11 and a half years 'understands that the infliction of hurt and distress on a younger sibling involves serious wrongdoing'.[101] Similarly, RP placing his hand over the mouth of his brother to silence him and thus avoid detection was found to be 'equally consistent with naughtiness or wrong behaviour short of being seriously or gravely wrong'.[102]

More recently, in *AL v The Queen*, a boy aged between 12 and 13 sexually assaulted on several occasions a boy aged between 4 and 5 years old.[103] The offences, which involved the victim being forced to fellate AL, took place while the victim was visiting the house of AL. Factors introduced to indicate that AL understood that his acts were seriously wrong were that AL took steps to avoid detection similar to those discussed in the above cases, such as: making threats to ensure silence; taking the victim to the bathroom and locking the door; and ensuring the victim was composed before he could return to his siblings.[104] The NSW Court of Criminal Appeal rejected the defence's argument that the jury should have been warned of the 'significant shortcomings' in drawing conclusions from the circumstances surrounding the act,[105] as was found to be the case in *RP v The Queen*. The Court noted that *RP v The Queen* turned on its facts, and a significant factor in that case was that the inferences made from the evidence of circumstances surrounding the act needed to be weighed against evidence showing that RP was in the borderline range of intellectual disability, which was not the case in AL.[106]

The use of the condom by RP when he penetrated his brother was also found by the plurality of the High Court to be a significant factor indicating a lack of understanding. The trial judge and Court of Criminal Appeal had erred in disregarding this evidence.[107] The plurality held that

> [t]he fact that a child of 11 years and six months knew about anal intercourse, and to use a condom when engaging in it, was strongly suggestive of his exposure to inappropriate sexually explicit material or of having been himself the subject of sexual interference ...[108]

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99 *RP v The Queen* (2016) 259 CLR 641, 658 [35]–[36] (Kiefel, Bell, Keane and Gordon JJ), 660 [42]–[43] (Gageler J).

100 Ibid 657 [33].

101 Ibid 658 [35].

102 *RP v The Queen* (2015) 90 NSWLR 234, 246 [60].

103 [2017] NSWCCA 34 (22 March 2017).

104 Ibid [132].

105 Ibid [135].

106 Ibid [135]–[139]. In fact, in *AL* the Court found that there was evidence that AL was a diligent, well-mannered and educated student. The relevance of evidence from school is discussed further below.

107 *RP v The Queen* (2016) 259 CLR 641, 657 [34].

108 Ibid.

Such experiences could significantly affect the ability of the boy to understand the moral wrongfulness of the act. While not necessarily disagreeing with this premise, Gageler J found that it was right to set the evidence aside because: 'Without greater context, I do not think that use of a condom alone suggests that RP had been exposed to influences that impeded the development of his capacity to tell right from wrong.'[109]

The mode of committing the offence and level of involvement in the commission of the offence can also be indicative of whether a child understood its wrongfulness. For instance, it may be easier to understand the wrongfulness of an offence committed by positive action, rather than by omission. Similarly, a child participant in the offence of another may be less aware of the wrongfulness than a child who acts alone or who initiates the offence. Bandalli highlights this point using the case of *C (A Minor) v DPP*:[110]

> Holding handlebars [of a motorbike] whilst watching someone else cause damage [by forcing the motorbike lock using a crowbar] could well be regarded as just naughty or even as non-involvement by anyone, especially a child, unacquainted with the principles of secondary participation.[111]

In sum, it should be remembered that generalisations only serve as a starting point and that the inquiry is whether the actual child understood the wrongfulness of the particular act at the time and in the circumstances in which it was committed. Whether a child had the required understanding is dependent on many varied factors, including developmental factors.[112] As Gageler J pointed out in *RP v The Queen*, inferences drawn from the circumstances surrounding the act alone need to be placed in the context of other evidence about the child's mental capacity.[113] Given the difficulty in separating evidence that establishes the commission of the offence from evidence of circumstances surrounding the offence, and the importance of context, the best approach is to adduce further forms of evidence which can confirm any conclusions drawn from such evidence.

D *Evidence of Normality*

As already noted, some offences may be regarded as so obviously wrong that every child is taken to understand their wrongfulness. However, it is quite clear that this does not mean that the prosecution can disregard the presumption and not lead any evidence. In *R v LAH*, the prosecution relied on the argument that '[i]t was inevitable … that the jury would have concluded that, in 1999, the 13 year old appellant who appeared of normal intelligence and attended school, would have the capacity to know he should not behave in this way'.[114] While the Queensland Court of Criminal

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109 Ibid 659 [39].

110 [1996] AC 1.

111 Sue Bandalli, 'Abolition of the Presumption of *Doli Incapax* and the Criminalisation of Children' (1998) 37(2) *Howard Journal of Criminal Justice* 114, 116.

112 Michael E Lam and Megan P Y Sim, 'Developmental Factors Affecting Children in Legal Contexts' (2013) 13(2) *Youth Justice* 131.

113 (2016) 259 CLR 641, 660 [42]. See also *AL v The Queen* [2017] NSWCCA 34 (22 March 2017).

114 [2016] QCA 82 (5 April 2016) [50]. This again was a case where no evidence of the child's understanding was led other than the evidence establishing commission of the offence.

Appeal found some appeal in this approach, it concluded that this is not in line with the clear wording of s 29(2) of the *Criminal Code* of Queensland.[115] As stated in *R v B*:

> One would expect a child as old as 12 to have the capacity to know that threatening a teacher with a knife is wrong, but this expectation does not affect the existence of the presumption; it only affects the strength of the evidence likely to be necessary to rebut it.[116]

Thus, the comment by Cummins AJA in *R v ALH* that some acts are so obviously wrong that a child *will* understand their wrongfulness at an early age,[117] is problematic. While it may be thought that the offence is so obviously wrong that all children should understand this from an early age there may be factors — such as the child's mental capacity, background or the context in which the act is committed — that may mean that this particular child did not understand the wrongfulness at the time of acting. Lennings and Lennings criticise a nomothetic approach rather than a personal approach to assessing the child's understanding and highlight the difference between decision-making in 'cold' and 'hot' conditions. They comment that

> [i]n hot conditions, where there is high emotional stimulation, adolescent immaturity becomes more pronounced. In hot conditions, the impact of developmental delays and vulnerabilities are stark and exert a significant impact on the maturity of decision-making. Tests of whether an action is seriously wrong must therefore require an understanding of the context in which the action took place (in the case of criminal offending, a hot condition mostly) as opposed to some nomothetic understanding of what is possible for young people to decide.[118]

To avoid the preclusion on using proof of the acts constituting the offence, some decisions have adopted the presumption of normality. Although this terminology stems from English cases and is not used in Australian cases, the logic underlying the presumption of normality has been applied in Australia. It functions in this way: the act is assumed to be so obviously seriously wrong that any normal child between the age of 10 and 14 would have known this; so, if there is proof that the child is normal, the child is presumed to have the requisite knowledge. *JBH (A Minor) v O'Connell* confirmed the operation of the presumption of normality provided that there was evidence that the 'children were ordinary children with ordinary mental aptitudes', as opposed to a mere assumption that the children were normal.[119] Similarly, in *RH v Director of Public Prosecutions (NSW)* Hoeben CJ at CL held that the trial judge should not have assumed that the child was a normal 12-year-old without any evidence confirming this. However, his Honour then continued by saying that there was no need for a lot of evidence for the Court to be able to draw such an inference. His Honour noted that: 'Evidence from the plaintiff's mother concerning his performance at school or his behaviour generally, would have

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115 Ibid [51].
116 [1997] QCA 486 (6 November 1997) (Pincus JA).
117 (2003) 6 VR 276, 298.
118 Lennings and Lennings, above n 62, 795.
119 [1981] Crim LR 632 (Donaldson LJ), quoted in *C v DPP* [1996] AC 1, 31; See also *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013) [21].

been sufficient.'[120] Evidence establishing that a child is 'normally' developed will often come from statements by teachers and school reports,[121] but may also include things such as an analysis of the child's handwriting.[122] In contrast, a simple assumption that the child was normally developed on the basis of the child's physical appearance is not sufficient.[123]

It is understandable that the prosecution may consider the need to bring evidence of understanding to be inconvenient where the offence appears to be obviously seriously wrong. Nonetheless, an approach that assumes the child's normality is problematic. The most obvious objection is that there is no examination of the child's actual state of mind in relation to the specific act committed. Rather, there is reliance on assumptions about what children might generally understand, backed up by evidence of the child's normal development. It is vital to remember that the test is 'a subjective one and concerned the state of mind of the particular minor. It could not be applied on the basis of what a normal child of 12 would have known or thought.'[124] An even more fundamental objection to this approach is that using such evidence is incompatible with the presumption. It is illogical to allow evidence of normality to rebut a presumption that is based on the premise that children aged between 10 and 14 generally *do not* understand the wrongfulness of their actions. Proof of normality should actually confirm a lack of understanding, rather than be taken to prove the opposite.

E *Expert Evidence*

It is possible, but not necessary, to call an expert witness to give evidence on the child's developmental state. This may take the form of a report by a psychologist or psychiatrist. Two factors that must be kept in mind when relying on reports are: what was the report produced for and when was it produced? Unless specifically prepared for the court, such evidence may only indicate a general level of understanding or typical behaviour and not whether the child actually understood that what he or she was doing was wrong at the time and in the circumstances of the offence. In *RP v The Queen*, for example, a Job Capacity Assessment and clinical psychologist's report were relied on by the prosecution, even though neither were prepared for the proceedings.[125]

Even where the report is specifically prepared for the court, a significant delay can severely compromise its accuracy and usefulness. In *R v LMW*, the psychiatrist's report was rejected because it was based on an interview with LMW that took place 19 months after the incident.[126] The Court commented that

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120 *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013) [24].

121 See, eg, *AL v The Queen* [2017] NSWCCA 34 (22 March 2017) [139]–[141], [150]. For further discussion, see below Part IIIF.

122 See *JM v Runeckles* (1984) 79 Cr App R 255.

123 *A v DPP* [1992] Crim LR 34, 34–5.

124 *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013) [22] (Hoeben CJ), quoted in *RH v DPP (NSW)* (2014) 244 A Crim R 221, 228 [30].

125 (2016) 259 CLR 641, 652–3 [16]–[19]. The NSW Court of Criminal Appeal noted difficulties in relying on the report of a psychologist completed six years after the events complained of: *RP v The Queen* (2015) 90 NSWLR 234, 248 [67].

126 [1999] NSWSC 1342 (25 November 1999).

> [i]n 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.[127]

An important question is whether expert testimony about the capacity of the child should be allowed or even required in every case. The United Nations Committee on the Rights of the Child has expressed concern about youth justice systems that require a positive finding that the child was criminally responsible, yet do not demand evidence from an expert, such as a psychologist.[128] The potential benefit of such evidence in some cases must, however, be weighed against the negative impact of routinely requiring expert testimony. There are practical considerations of the cost, availability, and expertise of the expert witness. The preparation of a report has the potential to prolong proceedings,[129] which can impact negatively on the child,[130] or, as noted in *R v LMW*, be of limited utility because a child's understanding may change after the event.[131]

Expert testimony is called on the basis that this can provide specialist knowledge that the magistrate, judge or jury does not possess.[132] If there is a view that such evidence is routinely needed because the court does not have the requisite skills, there is the danger that the judge, magistrate, or jury 'will abdicate their duty to ascertain and weigh the facts and simply accept the experts' own opinion evidence'.[133] Such a view was expressed in *L (A Minor) v Director of Public Prosecutions*, where it was felt that requiring a psychiatric report could 'introduce an undesirable and unnecessary element into the prosecution process' by shifting the court's powers to others.[134] As Otton LJ noted: 'It is for the court to decide as a fact whether what the suspect did or said before or after the incident indicates his state of mind at the time of the offence and his appreciation of the seriousness of what he has done.'[135] As such, expert opinion is just one piece of evidence to be assessed by the fact finder in the context of all other evidence that might be available. This is highlighted by *R v EI*.[136] A psychiatrist had interviewed the boy and found that he could not understand the wrongfulness of what he had done. The trial judge weighed the psychiatrist's evidence against other factors (such as evidence from lay

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127 Ibid [11]. See also *RP v The Queen* (2015) 90 NSWLR 234, 248 [67].

128 Committee on the Rights of the Child, *General Comment No 10 (2007): Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 30.

129 Delays may also be caused if there are not enough specialists in the field available to provide a report: see Ann Skelton, 'Proposals for the Review of the Minimum Age of Criminal Responsibility' (2013) 26(3) *South African Journal of Criminal Justice* 257.

130 For instance, the child may need some form of therapeutic help and a lengthening of proceedings means a lengthening of the time before the child gets the help he or she needs if it can only be given at the end of proceedings: see Freeman, above n 3, 119.

131 [1999] NSWSC 1342 (25 November 1999) [12].

132 Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales*, Report No 325 (2011) [1.14].

133 Ibid [1.9].

134 [1996] 2 Cr App R 501, 505 (Otton LJ).

135 Ibid.

136 [2009] QCA 177 (19 June 2009).

witnesses, the content of the police interview, and the circumstances surrounding the act) to conclude that the boy did have the requisite capacity.[137]

When the court is weighing expert evidence it is important to be cognisant of the limitations of any such report. Some experts in the field acknowledge that psychometric measuring instruments are still inadequately developed to allow health professionals to complete their reports with clarity and precision.[138] Unless this is made clear to the court, there is a danger that the court may overestimate the capacity of experts to determine a child's understanding.

A final point is that requiring expert evidence carries the danger of medicalising and pathologising the issue of criminal responsibility and making it appear that the fact finder is generally not in a position to assess the available evidence and lacks relevant experience. Thus, rather than routinely require expert testimony, the aim should be for the prosecution to gather as much evidence as is available from varied sources, in order to gain as full a picture as possible of the child's capacities in relation to the conduct at issue, and for the court to ensure it balances any such reports against other available evidence.[139]

F *Home Background and School Life*

Home and school background profoundly affect a child's ability to understand the wrongfulness of behaviour. In these environments, the child first learns the difference between acceptable and unacceptable behaviour. If there are failings, particularly in the home, 'what is more likely than that a child is brought up without knowledge of right and wrong?'[140] Equally, evidence that a child is from a 'good home' and is well-educated can indicate that it is likely that he or she does have understanding of the wrongfulness of the act.[141]

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[137] Ibid [18].

[138] Anthony L Pillay, 'Criminal Capacity in Children Accused of Murder: Challenges in the Forensic Mental Health Assessment' (2006) 18(1) *Journal of Child and Adolescent Mental Health* 17; Anthony L Pillay and Clive Willows, 'Assessing the Criminal Capacity of Children: A Challenge to the Capacity of Mental Health Professionals' (2015) 27(2) *Journal of Child and Adolescent Mental Health* 91; Skelton, above n 129.

[139] *R v EI* is an example of a case where the expert evidence that a child did not understand the wrongfulness of the act was rejected by the Court after balancing this evidence against the other available evidence: [2009] QCA 177 (19 June 2009).

[140] *F v Padwick* [1959] Crim LR 439 (Parker CJ), quoted in *R v B* (1979) 69 Cr App R 362, 365. Research clearly shows that there is a strong link between abuse, neglect and neurodevelopmental immaturity. See also Youth Justice Working Group, 'Rules of Engagement: Changing the Heart of Youth Justice' (Policy Report, The Centre for Social Justice, January 2012) 202 <http://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2016/08/CSJ_Youth_Justice_Full_Report.pdf>; Elly Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6(2) *Journal of Children's Services* 86, 88–9.

[141] See, eg, *AL v The Queen* [2017] NSWCCA 34 (22 March 2017) [150]. This led to the criticism in *C (A Minor) v DPP* [1996] AC 1, 11 (Laws J) that the presumption is divisive and perverse:

> divisive, because it tends to attach criminal consequences to the acts of children coming from what used to be called good homes more readily than to the acts of others; perverse, because it tends to absolve from criminal responsibility the very children most likely to commit criminal acts.

In *C (A Minor) v DPP* Lowry J suggested that '[o]ne answer to this observation (not entirely satisfying, I agree) is that the presumption contemplated the conviction and punishment of children who, possibly by virtue of their superior upbringing, bore moral responsibility for their actions and

In *M v J*, a boy of 13 was charged with firearm offences for firing an air rifle.[142] In that case, it was noted that 'presumably the applicant knew that his father fired the air-rifle from time to time, assumed that it was not wrong for his father to do so, and probably assumed that it was not wrong for him to do so either'.[143] In *RP v The Queen*, it was argued that an upbringing where there was exposure to violence could mean that the child did not think that the force he or she used was significant.[144] This is in line with social learning theory, which explains 'that maltreated children learn through modelling and reinforcement that aggressive behaviour is linked to more attention and status'.[145] As noted already, the fact that RP knew about anal sex and used a condom were thought by the plurality of the High Court to suggest exposure to indecent material or abuse.[146] This concern was reinforced by a psychiatrist's report related to later offending that also raised the possibility that RP had been the victim of molestation and had been exposed to family violence and family disputes.[147] The High Court noted that despite concerns being raised about the possibility of abuse, the prosecution did not call on the father or anyone else to give evidence about the environment in which RP was raised.[148]

In contrast, in *AL v The Queen* evidence that the child had a good home life, lived with both parents and siblings in an affluent environment and had a good school record were regarded as sufficient, along with other evidence, to allow a jury to be satisfied beyond reasonable doubt that the child understood the wrongfulness of his behaviour.[149] The NSW Court of Criminal Appeal found weight in the fact that the jury had evidence of the home background including 'photographs of the applicant and his home from 2004' from which it noted that: 'Nothing in those images bespeaks disadvantage or deprivation; quite to the contrary.'[150] Such evidence of the home background, while useful, must be balanced against other available evidence given that the inquiry is about whether the child understood the behaviour to be seriously wrong at the time and in the circumstances in which the offence was committed.

Aside from expert evidence from psychologists and psychiatrists, several cases have accepted that evidence of a child's understanding may come from someone who knows the child well, such as a schoolteacher, social worker or even a family member.[151] In *R v JA*, a teacher gave evidence that concern had been expressed about the 11-year-old boy's 'problem behaviours', especially 'rough play'.[152] This was taken to indicate that the boy did not understand that such

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the exoneration of those who did not.': [1996] AC 1, 35–6. See also Williams, *Criminal Law*, above n 72, 819.

142 [1989] Tas R 212.

143 Ibid 223.

144 (2016) 259 CLR 641, 652–3 [18]–[19]; *R v B* (1979) 69 Cr App R 362.

145 Farmer, above n 140, 89, citing Albert Bandura, *Aggression: A Social Learning Analysis* (Prentice-Hall, 1973).

146 *RP v The Queen* (2016) 259 CLR 641, 657–8 [34].

147 Ibid 653 [19], 657–8 [34].

148 Ibid 657–8 [34].

149 [2017] NSWCCA 34 (22 March 2017) [150].

150 Ibid [142].

151 *R v JA* (2007) 161 ACTR 1; *L v DPP* [1996] 2 Cr App R 501.

152 (2007) 161 ACTR 1, 13 [85].

behaviour was wrong in the relevant sense.[153] School reports also revealed that he was not 'able to assess and apply adult standards'.[154] In *BP v The Queen*, a teacher gave evidence that it was almost a daily occurrence that she would need to speak to the boy about his behaviour and explain to him that what he was doing was wrong or unacceptable. She noted that when being counselled about his behaviour he appeared to accept what he was told and appeared remorseful.[155] By contrast, in *AL v The Queen* evidence from school reports that AL was well-mannered, cooperative and appeared to be a good student who complied with school rules was used to support the finding that AL did understand the wrongfulness of his behaviour.[156] In drawing inferences from such reports and statements from teachers, as with reports of psychiatrists of psychologists, it must be remembered that unless specifically prepared about the offence committed, they will usually only indicate an opinion about the child's general level of understanding or typical behaviours. As such, they may be of limited use in determining whether the child actually understood at the time and in the circumstances of the offence that his or her actions were wrong. Care must therefore be taken to ensure that this evidence is balanced with any other forms of evidence that may be more directly related to the commission of the offence.

Some cases have questioned whether inferences could be drawn from the behaviour of the child and/or family in court. In *Ex parte N*, the appeals committee of Middlesex Sessions felt its conclusion that the boy had understood the wrongfulness of his act was 'reinforced by the appearance and demeanour of the father and son in court: the boy appeared to be alert, to have good manners and to have a warm relationship with his father'.[157] On appeal, the Divisional Court held that it was dangerous to deduce anything from this.[158] Similarly, in the case of *CC v Director of Public Prosecutions* the fact that the boy's mother was present in court supporting him was thought to be of little probative value.[159] Clearly such factors say very little about whether the child understood the wrongfulness of the act at the time of committing it, because they mainly indicate how the parent values the court appearance.[160] Where the trial takes place some time after the alleged offence, it is even more inappropriate to use the appearance and demeanour of the accused as indicative of their ability to understand the wrongfulness at the time they committed the offence. Therefore, the comment in *R v JJ; Ex parte Attorney-General (Qld)* that 'the jury were in a position to form their own impressions from having seen him giving evidence in the witness box even if many years after the event'[161] is highly problematic.

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153 Ibid 13 [86].
154 Ibid 14 [94].
155 *BP v The Queen* [2006] NSWCCA 172 (1 June 2006) [18].
156 [2017] NSWCCA 34 (22 March 2017) [139]–[141], [150].
157 *Ex parte N* [1959] Crim LR 523, 523.
158 Ibid.
159 [1996] 1 Cr App R 375, 377–8.
160 While not useful alone, this factor may add weight to any conclusions drawn about how the child has been brought up.
161 [2005] QCA 153 (13 May 2005) [9].

G *Previous Record*

There are strict rules in relation to the admission of records of past criminal convictions in trials involving adults. This makes the use of the past criminal record of the child controversial, because it can place a child in a worse position than an adult.[162] While British courts struggled with establishing when it was appropriate to accept such evidence, Australian courts have tended to be more open to the reception of such evidence. It has been held that it is admissible to establish capacity, even though it would not be allowed under the similar fact rule and so would not be admitted in the case of an adult.[163] This is thought acceptable because evidence of a previous finding of guilt is admitted only for the purpose of establishing whether the child knew the act was wrong, and not to establish commission of the crime.[164] In *GW v The Queen*, it was noted that where there is a danger that the prosecution is seeking to lead evidence of a prior record or finding of guilt, the court can use s 136 of the *Evidence Act 1995* (NSW) to avoid such prejudice and limit the evidence only to the issue of *doli incapax*.[165]

It is evident that if the child has been found guilty of another similar offence, then he or she may well have come to understand that the behaviour was seriously wrong. This is also likely to be so where the child has been dealt with by the police, even if not found guilty. The usefulness of the record or finding of guilt is, however, dependant on whether the past criminal act was similar to the act under consideration. Evidence of a previous conviction says little if it is for a different type of offence. For instance, a conviction for assault does not mean that the child will understand the wrongfulness of an act of forgery. Furthermore, it is important to remember that there must be proof that the child understood the wrongfulness of the specific act committed at the time of committing it. While a previous finding of guilt may be highly suggestive of understanding, there may be evidence of other contextual factors which detract from this inference.

H *Statements by the Child to the Police*

Evidence of statements made by the child are particularly probative — in contrast to evidence inferred from factors such as the type of offence committed, the circumstances surrounding the offence, and the child's upbringing. This type of evidence is preferable to inferential evidence because it comes directly from the child and refers directly to the child's appreciation of the act. It is not drawn from a

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[162] In *C (A Minor) v DPP*, the House of Lords held that previous convictions were not to be admitted 'unless they can be admitted under a generally applicable principle, for example, if he has put his character in issue or attacked the character of prosecution witnesses or if the earlier convictions come within the "similar facts" rule': [1996] AC 1, 34.

[163] *R v M* (1977) 16 SASR 589, 594–5; *R v F; Ex parte A-G (Qld)* [1998] QCA 97 (19 May 1998); *GW v The Queen* (2015) 20 DCLR (NSW) 236, 240–1 [17]–[22]. See, eg, *Evidence Act 1995* (NSW) ss 97–8, 101.

[164] *GW v The Queen* (2015) 20 DCLR (NSW) 236, 240–1 [17]–[22]. Indeed, Lerve DCJ went further and recommended that there be a legislative change to establish that if a young person has previously been found guilty of an offence then the formal criminal history should in itself be admissible as evidence to rebut the presumption: 245 [46].

[165] Ibid 241 [21]–[22].

general analysis of the behaviour and personality of the child, nor is it drawn indirectly from the act or generalised expectations about the understanding of children in general.

There have been several cases where an admission by the child to the police that he or she knew that the act was wrong has been used to rebut the presumption. In *JM (A Minor) v Runeckles*,[166] a 13-year-old girl attacked another girl and stabbed her with a broken milk bottle. Evidence of her understanding was taken from the fact that she clearly and coherently described what had happened when she gave a statement under caution to the police shortly after her arrest. However, the use of statements made by a child must be approached with caution. In *IPH v Chief Constable of South Wales*, a boy accused of criminal damage admitted that he foresaw that pushing a van against a post would result in damage.[167] Lord Justice Woolf regarded this statement as showing that the boy knew the consequences of his act but not that he knew that his act was seriously wrong.[168]

The methods used by police in conducting interviews with children have been the subject of discussion by academics and by the courts.[169] In *IPH v Chief Constable of South Wales*, Woolf LJ suggested, that in order to gather evidence about a child's understanding, the police should include some specifically formulated questions. His Lordship proposed direct questions, such as '[d]id you appreciate that what you were doing was seriously wrong?'[170] However, it is preferable to avoid such 'yes/no' questions because a 'yes' or 'no' does not explain how the child regarded the act or show whether the child knew that the act was seriously wrong, as opposed to naughty or mischievous.[171] *R v EI* provides an example of more useful interview questions.[172] Here the police officer put a number of hypothetical questions to the boy, asking whether what had occurred in each scenario presented was the right or wrong thing to do and why this was so.[173] A psychiatrist who had interviewed the boy gave evidence that he thought the boy was giving answers that he thought the police were

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166 (1984) 79 Cr App R 255.

167 [1987] Crim LR 42.

168 Ibid 43.

169 Research has found that even where police officers have training in child development they do not apply that knowledge when questioning children and treat them the same as adults: Jessica R Meyer and N Dickon Reppucci, 'Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility' (2007) 25(6) *Behavioral Sciences & the Law* 757. It should, however, be noted that this research was undertaken in the United States, so the findings are not inexorably transferrable to Australia.

170 *IPH v Chief Constable of South Wales* [1987] Crim LR 42, 43.

171 See Birch, who in general agrees with direct questioning but feels that 'yes/no' questions should be avoided: Diane Birch, 'Commentary on *IPH v Chief Constable of South Wales*' [1987] Crim LR 42, 43. See also Lennings and Lennings, who note the advantages of using an interview protocol, such as that developed by Apler, which avoids leading questions and yes/no answers, and encourages the child to provide reasons for their answers and explores the dimension of moral reasoning: above n 62, 793, citing Alex Apler, 'Naughty or Bad? The Role of Expert Evidence in Rebuttal of the *doli incapax* Presumption' (2000) 7(2) *Psychiatry, Psychology and Law* 206.

172 [2009] QCA 177 (19 June 2009).

173 For instance, he was presented with a scenario where a boy went into a shop, took a (chocolate) Mars Bar and walked out. He was then asked if he could 'pick out what he's done wrong?' and why it was wrong. Other scenarios he was asked about included picking up lost property, taking drugs, damaging property and touching people without permission: *R v EI* [2009] QCA 177 (19 June 2009) [12].

expecting.[174] Nonetheless, it was found that the boy's answers contained some explanations indicating that he had an understanding of right and wrong and had the capacity at the time of the offence to know that he ought not to do acts of the kind involved in the offences.[175]

Leading questions, such as 'so you knew stealing it was wrong?', can suggest the answer that the person questioning wishes to hear.[176] Research shows that young people are more suggestible and compliant than adults, and more likely to make false confessions.[177] There is, thus, the danger that a child may agree with a question and '[i]n this set of circumstances suspects may appear to admit to the offence without accepting that they have done anything wrong'.[178] This was an issue in *R v McCormick*,[179] where a boy had been inside an aviary and, amongst other things, left a door open leading to some birds escaping and dying. The officer began the questioning by asking: 'Did you know that it's — it was seriously wrong to go into those aviaries?'[180] District Court Judge Wilson felt that the child's answers could not assist in determining whether he had the requisite capacity at the time of the offence because the proposition that his behaviour was wrong had already been put to him. Therefore, Wilson DCJ did not feel 'confident that the child, having been alerted to what the policeman considers to be wrong, did not merely provide the answer that he believed would appease the officer'.[181]

In contrast to those cases where the admission of an offence has been used to rebut the presumption are those cases where the requisite understanding was drawn from the fact that the child falsely denied committing the offence.[182] In *T v Director of Public Prosecutions*,[183] a child was questioned by the police about stealing a first aid kit from an ambulance. The fact that the child said 'it ain't nothing to do with me, I didn't steal it' was regarded as revealing that the child had a good level of understanding.[184] Similarly, the child trying to disassociate himself or herself from the act and blame others may indicate that he or she appreciated the wrongfulness of the act and this was exactly why he or she tried to blame others.[185] In the case of *L v Director of Public Prosecutions*,[186] a child, upon being apprehended, denied having possession of a CS gas canister that he had been seen to throw down. It was held that the fact that 'when confronted at the scene he told a deliberate and blatant lie' could have been taken into account to establish the child's understanding.[187] However, whether the denial can be taken to suggest that a child understood the wrongfulness

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174 Ibid [15].
175 Ibid [20].
176 Lord Justice Otton warned against asking such leading questions: *L v DPP* [1996] 2 Cr App R 501, 505.
177 Farmer, above n 140, 88.
178 Roger Evans, 'The Conduct of Police Interviews with Juveniles' (Research Study No 8, Great Britain, The Royal Commission on Criminal Justice, 1993) 48.
179 [2002] QDC 343 (19 December 2002).
180 Ibid [20].
181 Ibid [21].
182 See, eg, *R v F; Ex parte A-G (Qld)* [1998] QCA 97 (19 May 1998).
183 [1989] Crim LR 498.
184 Ibid 498.
185 See, eg, *L v DPP* [1996] 2 Cr App R 501, 513; *R v Sheldon* [1996] 2 Cr App R 50.
186 [1996] 2 Cr App R 501.
187 Ibid 507.

of the act depends on the circumstances and the accusation that is being denied. In *R v McCormick*, the prosecution sought to rebut the presumption on the basis of a false denial when the boy answered 'no' to the question of '[d]o you realise you killed a lot of small birds?'[188] District Court Judge Wilson rejected that this denial established sufficient understanding because the question related to whether the young person realised the existence of the state of things. There was evidence that he had been at the aviary with other boys, but there was no evidence that he had actually killed the birds. Furthermore, the fact that the boy made no reply to a similar question and looked shocked was taken by Wilson DCJ as signalling nothing more than that the boy was visibly affected by the realisation that his actions could have led to the death of the birds.[189]

It is therefore vital that care is taken in how young people are questioned. It should also be remembered that the child must have known that the act was wrong at the time of committing it. For instance, in *R v EI* the psychiatrist found that the boy may have believed the behaviour to be wrong because the police officer told him or implied it was so.[190] However, the psychiatrist found that the boy did not have any inner sense of why the behaviours were right or wrong and did not understand the implications of his behaviour for the victims.[191] Thus, the possibility must be considered that the child did not appreciate the wrongfulness of the act at that time, but came to realise that it was seriously wrong as a direct result of being questioned by the police or other adults.[192] On this point the usefulness of statements made at a much later date is doubtful. In *AL v The Queen*, the NSW Court of Criminal Appeal accepted that a recollection by AL of his level of understanding at the age of 12, made during cross-examination between 11 and 13 years after the offence, was relevant and admissible to ascertaining whether he had understood the wrongfulness of his behaviour.[193] This is troubling because it seems that this is not drawing on a memory about what he understood when he was 12 years old, but rather it is an expression of an opinion (which is generally not admissible) about what he might have understood back then.[194] As the defence argued, AL was asked as a grown man to give an answer looking back to the relevant period, which does not provide evidence of his actual understanding at that time.[195]

I *Statements Made by the Child during or after the Offence*

Statements made during the commission of the crime can be indicative of the child's understanding. In *R v JA*, an 11-year-old boy was charged with threatening actual bodily harm with the intent to engage in sexual intercourse and committing an act of

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188 [2002] QDC 343 (19 December 2002) [15]. This question was posed when the boy was found on the property by Mr Brown (not a police officer).

189 Ibid [18].

190 [2009] QCA 177 (19 June 2009) [14]–[15].

191 Ibid.

192 *BP v The Queen* [2006] NSWCCA 172 (1 June 2006) [38].

193 [2017] NSWCCA 34 (22 March 2017) [147]. He was asked in cross examination: 'I suppose … you would have known back then when you were 12 or 13 that it would have been seriously wrong to put your penis into a young boy's mouth, wouldn't you?' To which he replied: 'I suppose': at [132].

194 *Evidence Act 1995* (NSW) s 76.

195 *AL v The Queen* [2017] NSWCCA 34 (22 March 2017) [133].

indecency on a 12-year-old girl.[196] It was found that the language used to induce the girl to comply with his demands ('talking about gangs, gang rules and killing his family') revealed that he was acting out a fantasy, rather than appreciating that he was engaging in criminal activity.[197] In contrast, in *R v JJ; Ex parte Attorney-General (Qld)*,[198] a case involving a brother raping his sister, McPherson JA found that there was sufficient evidence of JJ's understanding from the things he said to his victim. When his sister told him she was too young and that because he was her brother 'you don't do that to me', he replied: 'he could do this' and told her not to 'tell Mum or Dad, or I'll hurt you'.[199] This uncontradicted evidence was taken to have been sufficient to satisfy a jury that the boy had the capacity to know he ought not to rape his sister.[200]

Utterances made to others not in the context of questioning, but following the offence, may also be a useful source of evidence. In *RH v Director of Public Prosecutions (NSW)*,[201] after breaking into a fire station and stealing property, RH went to his cousin's house at night to tell him what he had done. He told his cousin, 'I got drinks and that here, I got them from the fire station, I broke in there, … I was searching looking for money. I found drinks and balloons and rulers. Me and S got "em".'[202] Chief Judge Hoeben found that these words had the character of boasting about what RH had done and that the actual words used, particularly in relation to breaking in and searching for money, made it clear that RH knew that what he was doing was seriously wrong and not acts of mischief.[203] Such statements may be more reliable because they are not made in response to direct questioning by a person in a position of authority and, thus, the child is less likely to be led to give a certain answer. There is, however, the danger that such statements may amount to showing off to peers or others and not truly reflect an understanding of the wrongfulness of the act.

IV Conclusion

Despite its longevity, the presumption of *doli incapax* remains a relatively nebulous concept with a lack of clarity over how it is rebutted. Criticisms of the presumption have tended to stem from perceptions of how easy or difficult it is to rebut it. Some find that the presumption is too easily rebutted with little evidence and, as such, it provides little protection. Others consider that the rules around evidence are too rigid and make the presumption too protective of children. Much confusion and frustration seems to stem particularly from those cases where it is thought that the act was so obviously wrong that every normal child would understand this. From this follows the argument that it is absurd to require proof of understanding beyond making inferences from the evidence establishing commission of the offence. The High

196 (2007) 161 ACTR 1.
197 Ibid 13 [83].
198 [2005] QCA 153 (13 May 2005).
199 Ibid [9].
200 Ibid.
201 [2013] NSWSC 520 (10 May 2013).
202 Ibid [32].
203 Ibid [31]–[34]; *RH v DPP (NSW)* (2014) 244 A Crim R 221, 223–4 [10]–[11].

Court in *RP v The Queen* has now brought some clarity about rebuttal of the presumption. It has confirmed the traditional position that evidence of the acts constituting the offence cannot alone be used to rebut the presumption. This is appropriate to ensure that adult judgements are not attributed to the child. It has also made clear that the prosecution has the onus of rebutting the presumption and must, therefore, gather sufficient evidence to support rebuttal, rather than merely relying on inferences and generalisations. This has the potential to increase criticism that the presumption is absurd in presuming children do not understand the wrongfulness of acts which are evidently wrong.

This article should go some way to stemming such concerns by assessing the sort of evidence that is appropriate to rebut the presumption. As stated in *AL v The Queen*: 'There is no prescribed formula for evidence sufficient to rebut the presumption; that will depend upon the circumstances in individual cases.'[204] However, this does not mean that there cannot be clarification of what forms of evidence should be relied on by the prosecution and how these different forms of evidence might interact with one another. It has been shown that the best approach is to collect as much evidence as possible, starting with the age of the child and the type of act committed. If the child is close to 14 years old and the act is obviously wrong, then it may take little further evidence to satisfy a court that the child understood the act to be seriously wrong. But where such inferences are drawn from the age and type of offence committed, other evidence should be called upon to confirm or reject the inferences. Information about the child's mental and moral development may, for example, suggest that general assumptions should not be made. This was the case in *RP v The Queen*, where it was found that RP was in the borderline category of intellectual disability.[205] Evidence of the child's level of understanding generally (for example, from the home, school and social background) may also reveal whether the child was so developed that they should have been able to understand the wrongfulness of the act. Such evidence ought then to be assessed in the context of the concrete act (for example, what the child said and how they behaved before, during and after the act) to reveal whether, in the actual situation, the child understood that what they had done was seriously wrong. The more indicators that are assessed, the clearer the picture will be of a child's understanding. When approached in this way, the presumption of *doli incapax* provides appropriate protection for children. It allows a child to be prosecuted when the prosecution can bring evidence that they understood the act to be seriously wrong as opposed to naughty or mischievous. Where such evidence is not forthcoming, the child should not be prosecuted.

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[204] [2017] NSWCCA 34 (22 March 2017) [149].
[205] (2016) 259 CLR 641, 658 [35]–[36].