APPLYING THE DOLI INCAPAX PRINCIPLE IN THE NORTHERN TERRITORY: THE IMPLICATIONS AND THE WAY FORWARD

I INTRODUCTION

It is fair to say that one of the central objectives of criminal justice is to determine criminal responsibility. The same can be said about juvenile justice. The difference, however, is the need in the fair administration of juvenile justice to restrict the scope of criminal responsibility to only children who are capable of appreciating the moral wrongfulness of their conduct. The principle of doli incapax was developed to achieve this particular purpose and this rebuttable presumption continues to exist in the common law tradition and statutes today.

Despite the principle of doli incapax being arguably the most important and specific common law doctrine in juvenile justice, it was not explored in any great detail in any of the four volumes of the final report of the Royal Commission into the Protection and Detention of Children in the Northern Territory.[1] None of the 227 recommendations of the Royal Commission refers to the principle of doli incapax, nor the need to reform the doctrine in any way. Nevertheless, when one examines the ways that the presumption of doli incapax applies to very young defendants in practice, serious doubts about the effectiveness of this common law doctrine are raised. This is especially the case in the Northern Territory where children are reported to enter the criminal justice system at a much younger age and where many indigenous children are known to be developmentally vulnerable due to various difficulties associated with their background and upbringing.

Following a brief introduction to the background of the principle of doli incapax and its application in Australia and the Northern Territory, this paper will illustrate the particular challenges in applying the principle in the Northern Territory, using relevant statistics from the Royal Commission and the example of bail. In conclusion, this paper will also seek to propose two different approaches that practitioners and courts can adopt in response to these challenges.

II THE DOLI INCAPAX PRINCIPLE

A *History and Justification*

For many years, the principle of doli incapax has maintained its critical importance in the Australian juvenile justice system.[2] It is because all civilised societies consider young people as less blameworthy than adults and should protect them 'against the full rigour of the law'.[3] In fact, specific rules were established as early as before the time of Edward I which applied to children under the age of 14.[4] Over the years, these rules were developed and adopted to formulate the common law principle of doli incapax. Essentially, the common law creates a rebuttable presumption that children between the age of 10 and 14 are incapable of committing any offence unless there are strong and cogent evidence to prove that they

[1] Commonwealth and Northern Territory, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017). Herein after, referred to as 'Royal Commission'.

[2] Australian Institute of Criminology, *The Age of Criminal Responsibility,* Trends & Issues No 181 (2000), 2

[3] Colin Howard, *Criminal Law* (Law Book Co. Ltd, 4th ed, 1982) 343.

[4] John Gillen, 'The Age of Criminal Responsibility: "The Frontier between Care and Justice"' (2006) 12(2) *Child Care in Practice* 129, 130.

understand what they did was seriously wrong.[5] This presumption is consistent with the core criminal law principle that an accused should only be penalised if he or she has the freedom to engage in conduct which he or she understands to be wrong.[6] On a theoretical level, this principle seeks to provide a threshold that restricts the imposition of criminal sanctions in accordance with community expectations, which is not dissimilar to other established legal principles in criminal law.

The principle of doli incapax did not survive until today without challenge. It was criticised in the courts in England as unreal and producing inconsistent results in the 1990s, leading to the abolition of the doctrine through the passage of the *Crime and Disorder Act 1998* in the British Parliament.[7] However, the principle has been confirmed as part of the common law in Australia and it would be regarded as 'a retrograde action' if the principle was abolished because it 'is consonant with humane and fair treatment of children' and 'part of a civilized society'.[8] More recently, the status of the principle of doli incapax has been reaffirmed by the High Court 'as a common presumption in the same way as innocence is a common law presumption.'[9]

In the Northern Territory, the principle of doli incapax has been incorporated into our statue book and can be found in the *Criminal Code*.[10] However, there are currently two different tests depending on the nature of offences.[11] The *Criminal Code* separates offences into two different categories. Schedule 1 offences require the prosecution to prove the child to have capacity to know the acts were wrong whereas offences which are not included in Schedule 1 require the prosecution to prove actual knowledge of the child concerned.[12] Regardless of which test applies, both legislative provisions still amount to 'due process safeguard[s]' where police are prevented from simply assuming the child has the requisite capacity or knowledge before prosecuting him or her.[13]

B *Application and Problems*

At the outset, it is imperative to acknowledge that no readily available data or empirical analysis exist to indicate the extent that the principle affects police practices or how often the rebuttable presumption is tested in Northern Territory courts. In practice, some critics claim that enforcement agents, lawyers and courts have often overlooked the principle of doli incapax in day-to-day processes.[14] In

[5] *R v Gorrie* (1918) 83 JP 136; *C v DPP* [1995] 2 WLR 383; *R v CRH* (unreported, New South Wales Court of Criminal Appeal, Newman J, 18 December 1996). The former two English decisions laid down the principle of doli incapax before it was abolished in 1998.

[6] Thomas Crofts, 'Doli Incapax: Why Children Deserve Its Protection?' (2003) 10(3) *Murdoch University Electronic Journal of Law* 1, 8.

[7] *Crime and Disorder Act 1998* (UK) c 37, s34.

[8] *R v ALH* [2003] VSCA 129, 6 VR 276 at [74] per Cummins JA.

[9] *RP v The Queen* (2016) 259 CLR 641 at [38] per Gageler J.

[10] *Criminal Code 1983* (NT) ss38 and 43AQ. Prior to the legislation being enacted, it was confirmed in *O'Toole v Arnold* [1982] 61 FLR 372 that the common law principle still applied in the Northern Territory.

[11] *Police v LH and SB* [2012] NTMC 26 at [4-6].

[12] Ibid at [8].

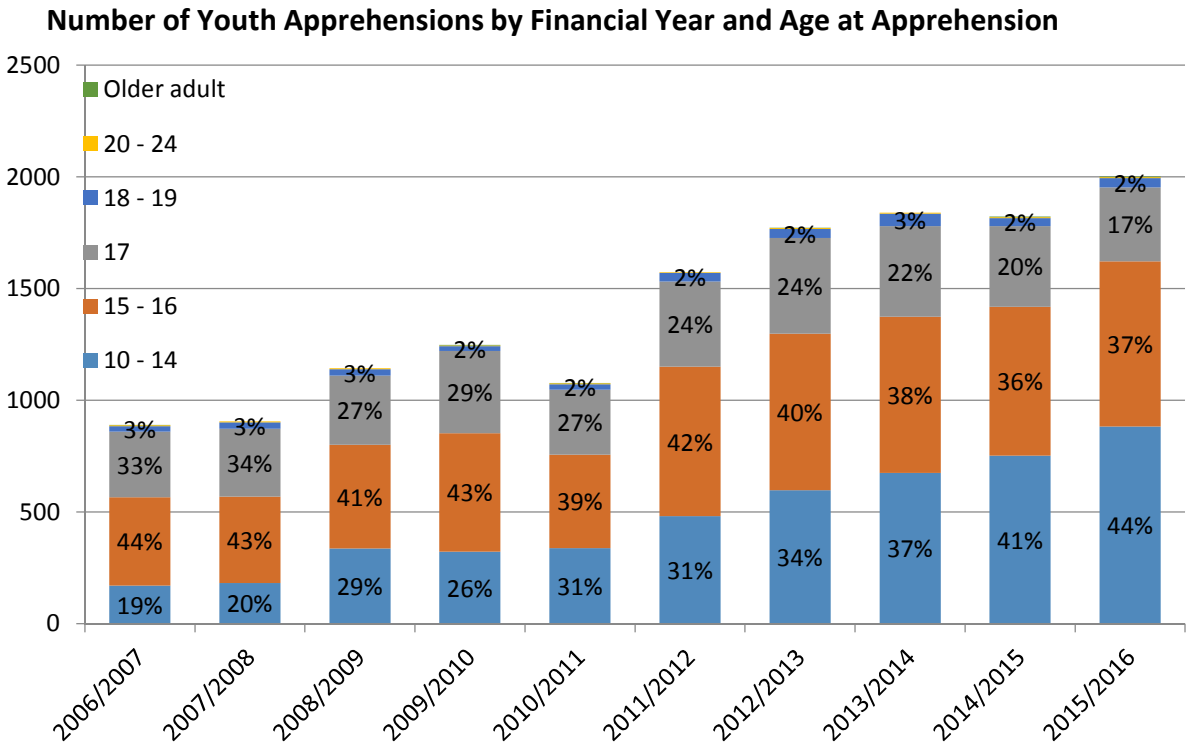
[13] Crofts, above n 6, 8.

[14] Ben Matthews, 'Children's Criminal Responsibility in Australia: Some Legal, Psychological and Human Rights Issues' (2000) 5(2) *Australia and New Zealand Journal of Law & Education* 27, 30.

order to properly assess this claim, it is important to consider some relevant statistics in the NT. For example, evidence before the Royal Commission has demonstrated that there has been a 747% increase of the total number of arrests of children aged between 10-14 since 2006 (table and chart below).[15]

Table 2. Number and percentage of youth arrests by financial year and age at arrest

	Age at apprehension						
	10 - 14	15 - 16	17	18 - 19	20 - 24	Older adult	Grand Total
2006/2007	77	183	146	13	3	1	423
2007/2008	77	183	153	13	2		428
2008/2009	156	211	138	19	5		529
2009/2010	147	265	176	4	1	2	595
2010/2011	149	185	158	15	3	1	511
2011/2012	281	405	239	25	2		952
2012/2013	365	459	276	27	2	1	1130
2013/2014	416	464	278	33	1		1192
2014/2015	509	456	265	26	1	1	1258
2015/2016	652	539	239	22	3	2	1457
Grand Total	2829	3350	2068	197	23	8	8475
% change	747%	195%	64%	69%	0%	100%	244%



(Source: statement of Joe Yick, 14 October 2016, tendered 9 December 2016 before the Royal Commission, p. 8)

Despite Australia's international obligations to use arrest as a last resort,[16] the drastic increase in arrests regarding the cohort of young children between the age of 10 and 14 raises doubts as to how the principle of doli incapax operates as a

[15] Commonwealth and Northern Territory, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) Volume 2B, 225.

[16] *United Nations Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(b).

principal safeguard to prevent very young children from entering into the criminal justice system. Not only has the number of police apprehensions for children aged between 10-14 increased over the last ten years, this cohort of children is also increasingly over-represented in the total youth apprehension population since 2006. It should be borne in mind that frequent police apprehension often mean that these children will be more likely to be subject to the routine police practice of interviewing. Given children are usually much more likely to confess and accept propositions put to them by authority figures, it is arguable that this police practice creates difficulties for child advocates to investigate and raise any issues of incapacity.[17] As a matter of fact, a child's admissions on interview is the most common and preferred evidence adduced at trial to rebut the presumption.[18]

On the other hand, it has also been argued that many judicial officers form the view that the principle of doli incapax has limited application to the modern world because children nowadays receive more advanced education and are exposed to much better information than children in the last two centuries.[19] Yet, there is no evidence to suggest any necessary positive correlation between technological advancement and maturity of children.[20] In fact, some social scientists contend that longer life expectancy and later parenthood have relieved the pressure on children in the modern era to assume responsibilities and mature at an earlier stage.[21] Most importantly, to simply assume a particular child before the court to have the normal mental functioning of an average child of similar age is to offend the very spirit of the doctrine of doli incapax.[22] Quite clearly, the law stipulates proof of the subjective capacity or knowledge of the child concerned.[23] Again, the legal requirement is supported by developmental science research which confirms that age alone cannot be used to reliably determine a child's capacity.[24] The assessment requires specific inquiry into the child's background, education, previous contacts with justice agents and the surrounding circumstances in relation to the wrongful conducts in question.[25] Although it may not be practical to conduct these thorough inquiries on each child in a timely manner, the doctrine at least mandates a more robust scrutiny by the criminal justice system than simply taking the child's capacity for granted. Considering the relevant statistics in the NT so far, it is questionable whether the principle is given due regard in practice.

C *Implications for Vulnerable Children in the Northern Territory*

If the majority of the children under the age of 14 who come through the juvenile justice system are assumed to have the requisite legal capacity, it has the effect of reversing the presumption, potentially rendering the principle futile. In the

[17] Elly Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6(2) *Journal of Children's Services* 86, 88.
[18] Crofts, above n 6, 7.
[19] Australian Institute of Criminology, above n 2, 5.
[20] Crofts, above n 6, 5.
[21] Matthew Johnson, 'Doli Incapax – The Criminal Responsibility of Children' (Paper presented at the Children's Magistrates' Conference, 1 February 2006) 14.
[22] Matthews, above n 14, 29.
[23] Johnson, above n 21, 7.
[24] Matthews, above n 14, 30.
[25] *DK v Rooney & Anor* (unreported, Supreme Court of New South Wales, Mclnerney J, 3 July 1996); *The Queen v Folling* (unreported, Queensland Court of Criminal Appeal, 19 May 1998).

Northern Territory context, this practice is consistent with the significant number of children under the age of 14 who are routinely arrested and brought to courts and are subject to various types of sentence (table below).[26] To a certain extent, this arguably represents the failure of the juvenile justice system to divert very young children through the operation of the principle of doli incapax. In other words, the relatively high number of children under the age of 14 who are dealt with by the court through non-divisionary formal sanctions is arguably an outcome of the limited application of the principle in day-to-day juvenile justice practice in the Northern Territory. There are certainly documented cases in the NT where the presumption has been vigorously tested.[27] However, in light of the significant number of very young children who are subject to formal criminal penalties in the NT, questions ought to be raised as to how regularly the presumption is raised and rebutted successfully by the prosecution. This is particularly so when publicly available data on the utility of the principle are absent. A recent study has demonstrated the ad hoc application of the principle of doli incapax in Victoria.[28]

[26] Statement of Joe Yick, 14 October 2016, Exhibit 045.001, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (2017).

[27] *O'Toole v Arnold* (1982) 61 FLR 372; *Police v LH and SB* [2012] NTMC 026; *KG v Firth* [2019] NTCA 5.

[28] Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of Doli Incapax in Victoria (Australia)' (2019) 8(1) *International Journal of Crime, Justice and Social Democracy* 18, 21.

Table 1c_1: Court Finalisation Occasions For Youth by Outcome and Age Group

	Age at Order	Actual Detention	Home Detention or Youth Alternative Detention	Fully Suspended Detention	Community Work Order	Monetary Penalties	Other Orders	Withdrawn/Acquitted	Total
2006/2007	10 - 14	10	0	4	9	13	8	32	76
	15 - 16	37	1	12	22	57	30	71	230
	17	36	0	13	18	96	14	40	217
	18 - 19	24	0	9	7	37	6	24	107
	20 - 24	1	0	1	2	5	2	4	15
	25 +	0	0	0	0	3	2	6	11
	Total	108	1	39	58	211	62	177	656
2007/2008	10 - 14	6	0	4	8	32	8	21	79
	15 - 16	35	0	14	20	86	45	48	248
	17	36	0	10	11	120	21	25	223
	18 - 19	20	0	4	8	58	11	19	120
	20 - 24	1	0	2	0	5	0	4	12
	25 +	1	0	0	0	2	0	12	15
	Total	99	0	34	47	303	85	129	697
2008/2009	10 - 14	16	0	4	7	44	28	42	141
	15 - 16	39	1	11	17	121	43	51	283
	17	32	0	18	8	131	25	37	251
	18 - 19	25	1	12	5	55	12	28	138
	20 - 24	5	0	1	0	2	1	7	16
	25 +	0	0	0	0	3	0	6	9
	Total	117	2	46	37	356	109	171	838
2009/2010	10 - 14	12	2	4	7	56	30	38	149
	15 - 16	37	1	15	26	127	48	59	313
	17	24	0	10	13	149	25	31	252
	18 - 19	10	0	7	8	55	6	27	113
	20 - 24	3	0	0	1	9	2	4	19
	25 +	1	0	1	0	2	0	2	6
	Total	87	3	37	55	398	111	161	852
2010/2011	10 - 14	24	0	5	6	61	24	40	160
	15 - 16	45	0	6	13	128	43	72	307
	17	38	0	11	17	130	14	47	257
	18 - 19	20	1	4	8	71	15	34	153
	20 - 24	2	0	1	0	6	2	5	16
	25 +	1	0	1	0	3	2	5	12
	Total	130	1	28	44	399	100	203	905
2011/2012	10 - 14	26	1	1	10	61	40	67	206
	15 - 16	48	2	11	15	154	39	67	336
	17	30	0	9	16	124	20	40	239
	18 - 19	20	3	5	11	65	14	31	149
	20 - 24	0	0	0	0	3	3	7	13
	25 +	0	0	0	0	1	1	63	65
	Total	124	6	26	52	408	117	275	1008
2012/2013	10 - 14	34	0	5	21	87	42	67	256
	15 - 16	87	0	17	33	126	54	84	401
	17	48	1	10	18	100	27	46	250
	18 - 19	33	0	9	19	59	15	30	165
	20 - 24	2	0	2	1	4	1	2	12
	25 +	0	0	0	0	0	1	151	152
	Total	204	1	43	92	376	140	380	1236
2013/2014	10 - 14	42	0	4	23	51	35	72	227
	15 - 16	75	0	14	30	101	46	90	356
	17	49	0	16	22	102	27	54	270
	18 - 19	32	0	6	16	54	17	33	158
	20 - 24	3	0	0	1	3	4	4	15
	25 +	0	0	0	0	1	0	2	3
	Total	201	0	40	92	312	129	255	1029
2014/2015	10 - 14	44	0	9	35	62	40	65	255
	15 - 16	79	1	22	44	101	46	90	383
	17	40	0	11	28	77	21	42	219
	18 - 19	38	0	7	21	52	15	39	172
	20 - 24	1	0	1	1	8	1	5	17
	25 +	0	0	0	0	2	1	2	5
	Total	202	1	50	129	302	124	243	1051
2015/2016	10 - 14	79	1	9	19	66	43	115	332
	15 - 16	86	1	17	43	127	55	117	446
	17	53	0	9	22	69	21	40	214
	18 - 19	21	0	6	7	44	13	30	121
	20 - 24	5	0	0	0	9	2	2	18
	25 +	2	0	1	0	1	0	1	5
	Total	246	2	42	91	316	134	305	1136

(Source: statement of Joe Yick, 14 October 2016, tendered 9 December 2016 before the Royal Commission, p. 17)

When the principle of doli incapax is given very limited regard in juvenile justice proceedings, the consequences can be far-reaching if one closely examines the actual circumstances of the children in the NT. According to the Australian Early Development Index in 2012, 59.2% of indigenous children in the Northern Territory were deemed to be developmentally vulnerable in at least one or more than one of the five domains.[29] Despite this, indigenous children continue to be extremely over-

[29] Bruce Wilson, *A Share in the Future: Review of Indigenous Education in the Northern Territory* (2013) 38. < http://www.education.nt.gov.au/__data/assets/pdf_file/0007/37294/A-Share-in-the-Future-The-Review-of-Indigenous-Education-in-the-Northern-Territory.pdf>. The five domains are physical health and wellbeing, social competence, emotional maturity, language and cognitive skills, and Communication skills and general knowledge.

represented in the Northern Territory detention population[30] and they are also seen to be becoming increasingly younger.[31] On its face, the above statistics thus imply that the Northern Territory may be over-criminalizing its young vulnerable indigenous children who should otherwise be protected by the doctrine of doli incapax.

This argument is made even stronger by the fact that half of indigenous children grow up in 'community and family environment[s] which are replete with early childhood adversity' characterised by malnutrition, severe family stress, extreme poverty and misuse of substance and alcohol.[32] Apart from being a core predictor of offending,[33] developmental adversity also explains why indigenous young people are often associated with high rates of cognitive disabilities and pronounced poor mental health.[34] In addition, in a 2005 study, 24% of indigenous children between the ages of 4 and 17 years in Western Australia were found to be suffering from high risk of clinically significant emotional or behavioural difficulties whereas only 15% of children of non-Indigenous background are said to be suffering the same.[35] These background facts can only support an inference that the majority of youths in the NT juvenile justice system are particularly vulnerable and their capacity to justify criminal liability should always be carefully examined. Although there is limited data and research about Aboriginal children with cognitive impairment or mental illness, available statistics certainly demonstrate the 'double disadvantage' experienced by many indigenous young people in terms of their risks for intellectual and psychological disabilities and their contacts with the criminal justice system.[36] For example, 56% of the children with previous experience in detention who were assessed by the Royal Commission were found to have FASD and 31% of the same group of children were assessed to have some form of brain injury.

As far as the ability of these indigenous young people to understand the wrongfulness of their conduct is concerned, the above information certainly raises questions as to how the principle of doli incapax is applied in practice. Again, without any specific data or detailed analysis as to how and how often the principle of doli incapax is tested in Northern Territory courts, these questions will remain unanswered.

---

[30] Northern Territory Government, *Review of the Northern Territory Youth Detention System* (2015) 10. According to the review, Indigenous youths make up for approximately 97% of the detainee population.

[31] Northern Territory Government, *Review of the Northern Territory Youth Justice System* (2011) 116. The review reports that the number of young people under the age of 15 is on the rise with the youngest detainee being only 11 years old.

[32] Jack Mechielsen, Mal Galbraith and Andrew White, 'Reclaiming Indigenous Youths in Australia: Families and Schools Together' (2014) 23(2) *Reclaiming Children and Youth: Journal of Emotional and Behavioral Problems* 35, 39; Wilson, above n 29, 38. It is also reported that Aboriginal children in the Northern Territory are likely to have younger, low income or welfare-dependent parents and residing in overcrowded households.

[33] Farmer, above n 17, 89.

[34] Human Rights and Equal Opportunity Commission, *Indigenous Young People with Cognitive Disabilities and Australian Juvenile Justice System* (2005) 14.

[35] Telethon Institute for Child Health Research, *Western Australian Aboriginal Child Health Survey – The Social and Emotional Wellbeing of Aboriginal Children and Young People* (2005) 25 <http://www.creahw.org.au/media/394807/western_australian_aboriginal_child_health_survey_ch2.pdf>.

[36] Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008) 1, 10.

II AN ILLUSTRATION: BAIL

The tension between the doctrine of doli incapax and juvenile justice system in the NT is most evident when bail is involved. Theoretically, a more vigorous application of the doctrine of doli incapax should see vulnerable children being excluded from the criminal justice process not only because they are unable to appreciate the wrongfulness of their actions, but also because they are unlikely to appreciate the wrongfulness of not engaging with the various processes of the juvenile justice system. Bail, for example, is a crucial criminal justice process and it is generally regarded as the most important pre-trial process for defendants[37] because it serves to strike the necessary balance between the liberty of the accused who is entitled to the presumption of innocence and the public interest in community protection and safety of witnesses.[38]

Understandably, less intrusive and punitive means such as a summons should normally be utilised at first instance to ensure court attendance by young defendants in the youth justice context.[39] However, when bail is considered, authorities are normally required to impose conditions which are 'necessary to minimise risks to the safety or welfare of others, or to the proper administration of justice' and these conditions must be 'reasonably proportionate' to the risks identified.[40] While it is recognised as a core principle that youths are to be dealt with in a manner consistent with their age and maturity, there is no specific legal requirement that courts are to be satisfied with the defendant's ability to understand the agreement before granting bail.[41] In practice, this will effectively mean that the youth will be 'presumed' to understand the ramifications of signing his or her bail undertaking. Even though the legislation specifically confers power on judges to order assessment to investigate the mental condition of any youths before the court,[42] anecdotal evidence suggests that these assessments are unlikely to be ordered prior to a young person being required to sign their bail undertaking. In practice, the onus is regularly placed on defence counsel to raise any issues in relation to the youth's capacity.[43] It is often an absurd reality that children defendants are first put on bail until proceedings are adjourned to a later date when the issue of doli incapax is tested by way of contested hearing. The consequence of this is arguably reflected in the relevant statistics, where children under the age of 14 are over-represented for breach of bail offences between 2011 and 2016 (chart below).

[37] Tracey Booth and Lesley Townsley, 'The Process is the Punishment: The Case of Bail in New South Wales' (2009) 21(1) *Current Issues in Criminal Justice* 41, 42.

[38] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time For Doing: Indigenous Youth in the Criminal Justice System* (2011) 225.

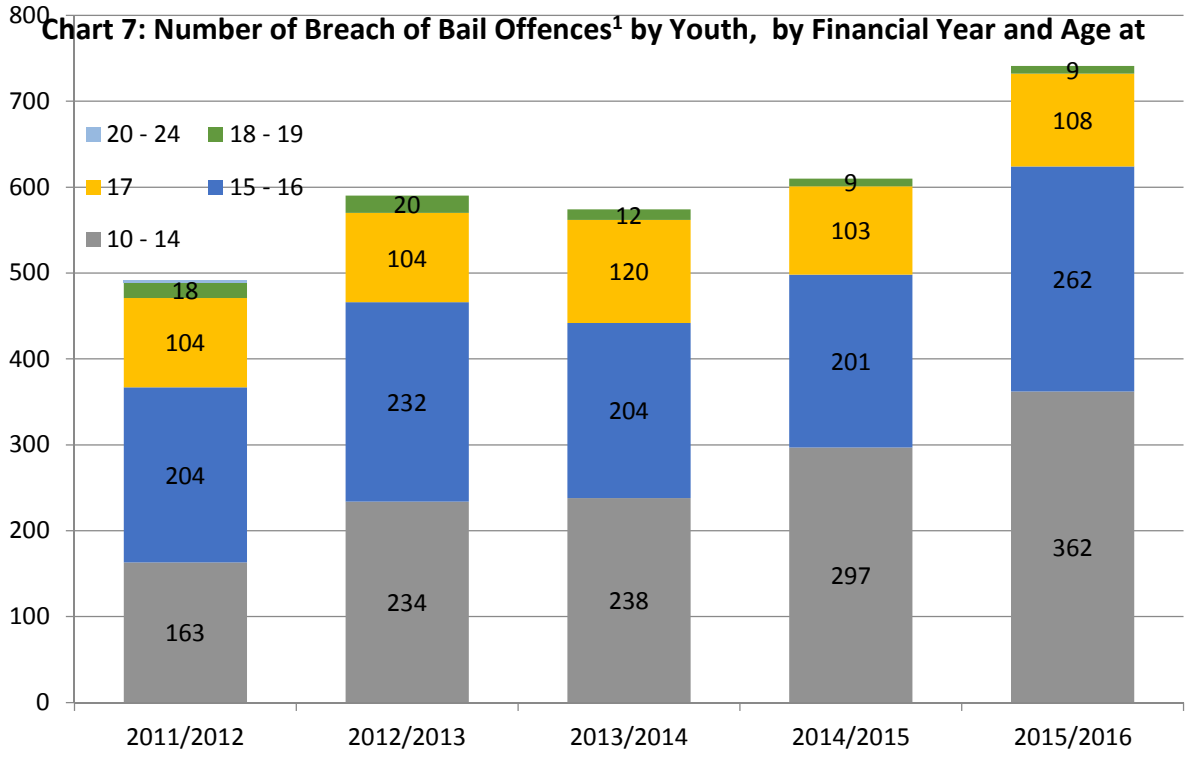
[39] *Youth Justice Act 2005* (NT) s22.

[40] *Bail Act 1982* (NT) s28.

[41] *Youth Justice Act 2005* (NT) s4(d).

[42] Ibid s67.

[43] Fitz-Gibbon and O'Brien, above n 28, 22.



(Source: statement of Joe Yick, 14 October 2016, tendered 9 December 2016 before the Royal Commission, p. 17)

The outcome of an increasing number of young children being charged with breach of bail offences is also obvious in other jurisdictions. In NSW, for instance, the revocation of bail as a result of any contravention of bail conditions has led to a significant increase of youth remand rates.[44] The increased number of breaches of bail among young offenders is also consistent with the highest rate of young people on custodial remand being in the Northern Territory.[45] On an average day in 2017-18, over 80% of young people in custody were unsentenced which was higher than the national average.[46] Yet, normally only 10% of this remand population ends up receiving a custodial sentence.[47] The phenomenon is problematic because it compromises the fundamental objective behind the doctrine of doli incapax and more importantly, the presumption of innocence. The very children who should be protected by the doctrine of doli incapax due to their vulnerabilities are put in custody precisely because they are subject to criminal processes such as bail, despite concerns over their ability to understand the nature and the consequences of not complying with the process itself. It should be noted that custody also has the potential to harm their development and both generate more and intensify aberrant

[44] New South Wales Law Reform Commission, *Bail*, Report No. 133 (2012) 59.

[45] Australian Institute of Criminology, *Bail and Remand for Young People in Australia: A National Research Project*, Research and Public Policy Series No 125 (2013) 15.

[46] Australian Institute of Health and Welfare, *Northern Territory: Youth Justice Supervision in 2013-14* (2015) 4; Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-18* (2019) 16. The Northern Territory has the highest rate of unsentenced youths in the country, being 12 per 10,000.

[47] Mark Evenhuis, 'Set Up to Fail: Aboriginal Youth, Bail and Children's Rights in Central Australia' (Central Australia Aboriginal Legal Aid Service, 2013) 31.

behaviours.[48] More importantly, to punish these children before establishing that they have the relevant capacity to understand the consequences of their actions has the effect of further alienating these young people and engendering an anti-social or anti-authority attitude which hinders successful rehabilitation.[49]

III WAY FORWARD

A *Specialised Training and Professionalism*

So what can we do? By relying on international guidelines,[50] the Royal Commission recognised specialised legal representation as an effective mechanism to guarantee the adequate protection of the interests of children, particularly vulnerable young children, in criminal proceedings.[51] Recommendation 25.31 relevantly provides:

> 'All legal practitioners appearing in a youth court be accredited as specialist youth justice lawyers after training in youth justice to include child and adolescent development, trauma, adolescent mental health, cognitive and communication deficits and Aboriginal cultural competence.'

In response, the Inaugural Children's Court Practitioners Training Conference was held in March 2019 to give effect to implementing this recommendation. At the time of writing, a Youth Proceedings Education Committee, with representatives from various legal service providers in the sector, is in the process of being established to develop and deliver a training program for lawyers in youth justice and care and protection proceedings.[52] If practitioners have access to specialised training to learn more about the implications of a child's vulnerabilities on their capacity, it follows that the court will be offered better assistance from both sides to address the doli incapax issue.

Nevertheless, in my view, we, as lawyers, are bound by our professional obligations, namely the Guidelines of the Director of Public Prosecutions (DPP) and the Rules of Professional Conduct and Practice to diligently ensure the principle of doli incapax is applied. Section 10 entitled 'Young Offenders' of the Guidelines of the DPP specifically refers to the details of the principle of doli incapax in the NT.[53] Guideline 10.4 stipulates that 'generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness

---

[48] Farmer, above n 17, 89; Susan Baidawi, Philip Mendes and Pamela Snow, 'Setting Them Up to Fail' System Responses to Dual Order Child Protection and Youth Justice Clients' (2014) 39(1) *Alternative Law Journal* 31, 33.

[49] Anthony 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 & Adolescent Mental Health* 91, 95.

[50] UN Principles and Guidelines on Access to Legal Aid in Criminal Justice System, June 2013, guideline 11 (58(d)).

[51] Commonwealth and Northern Territory, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) Volume 2B, 312.

[52] Recommendation 25.32 of the Royal Commission refers to the following: 'A youth Proceedings Education Committee be established to develop and deliver a training program for Northern Territory legal practitioners in youth justice and care and protection. Membership to include a representative from the Supreme Court, Youth Justice Court (or equivalent), Territory Families, police, health, NAAJA, NTLAC, CAALAS and an academic expert in the field of youth justice.'

[53] Guidelines of the Director of Public Prosecutions, Northern Territory. <http://www.dpp.nt.gov.au/about-us/Publications/DPP%20Guidelines%20-%20Current%202016.pdf>

of the offence or the circumstances of the young offender concerned dictate otherwise'. In deciding whether to prosecute, the DPP is required to particularly give regard to 10.6(2) 'the age and apparent maturity and mental capacity of the young offender' and 10.6(7) 'whether a prosecution would be likely to be harmful to the young offender', among other youth specific factors.[54] For any decision to prosecute a child between the age of 10 and 14, the DPP is required to make an assessment of any available and admissible evidence which is capable of rebutting the presumption of doli incapax.[55]

Defence lawyers are mandated by Rule 17.1 of the Professional Conduct Rules to 'advance and protect the client's interest to the best of [their] skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person, and always in accordance with the law including these Rules'.[56] This is not to say that a defence lawyer should never concede to the principle being rebutted because any practitioner is still required to 'confine the case to identified issues which are genuinely in dispute'.[57] However, the vulnerable background and circumstances of a child will usually warrant the best efforts from their lawyer to consider the relevance of the presumption as an option to safeguard their rights recognised by law.[58] Similarly, it will be unnecessary and ineffective to require the prosecution to prepare evidence to rebut the presumption for every single charge and for every single child under the age of 14. But prosecutors should be in a position to turn their minds to the question of doli incapax early on, independently evaluate the evidence and make the necessary decisions and relevant disclosure in a timely manner. In turn, the court will be better informed about the specific vulnerabilities of the children who are subject to the presumption and will be better assisted in resolving any issues relevant to capacity without unnecessary delays.

B *Problem-Solving and Rehabilitation-Focused Court Response*

In circumstances where the issue of capacity is a legitimate contentious issue, it is also important that collaborative efforts should be made to address the underlying causes of offending before the matter is formally adjudicated. This can be done by adopting a non-adversarial problem-solving approach.[59] Regardless of whether the presumption of doli incapax is ultimately rebutted, it is still in the best interests of the community and the child concerned that the child be afforded every opportunity to rehabilitate and address the criminogenic risks. Importantly, the successful implementation of a solution-oriented approach will mean that the child in question is not to be regarded as the problem itself, especially not before a formal

[54] Ibid 10.6.
[55] Ibid 2.2(1).
[56] Law Society of the Northern Territory, Rules of Professional Conduct and Practice (2005) <https://lawsocietynt.asn.au/images/stories/Professional_Conduct_and_Practice.pdf>.
[57] Ibid 10A.5(a).
[58] Australasian Juvenile Justice Administrators, Juvenile Justice Standards (2009) <http://www.ayja.org.au/wp-content/uploads/2018/07/AJJA-Standards-2009.pdf>. As far as Territory Families is concerned, the Australasian Juvenile Justice Administrators Juvenile Justice Standards specifically set out that 'juvenile justice services should be delivered to children and young in ways that recognizes vulnerability and recognize developmental levels' which is consistent with what the principle of doli incapax promotes.
[59] Elizabeth Richardson and Bernadette McSherry, 'Diversion Down Under – Programs for Offenders with Mental Illnesses in Australia' (2010) 33 *International Journal of Law and Psychiatry* 249, 256.

finding of guilt is made. Instead, their criminal behaviours are treated as the manifestation of underlying problems and this will involve looking beyond the problematic behaviours and addressing these underlying causes such as emotional, educational and social needs.

The key feature of problem-solving focused juvenile justice administration is collaboration. In practice, this is usually reflected in the courts' preparedness to seek out partnerships and ongoing contributions from other services to address the underlying issues of justice-involved youths through multi-disciplinary collaboration. Often, this involves out-of-session case management conferences and regular progress reviews. When dealing with the complex issues of indigenous young offenders, it may require intensive case management by a team of multidisciplinary professionals to appropriately address their mental health, substance misuse, accommodation needs, cultural and educational barriers.[60] It is also crucial to acknowledge that this cohort of vulnerable very young children usually have multi-system involvement such as health, education, disability, child protection and criminal justice. To adopt a problem-solving approach will ensure the opportunities to collectively intervene to effect meaningful rehabilitation are not lost when the question of doli incapax is yet to be determined.

IV CONCLUSION

By using the doctrine of doli incapax as a framework, this research paper has highlighted the disproportionately negative impact on very young vulnerable children in the NT when this important safeguard is ignored in practice. Unless there is a more robust application of this principle, it is unlikely to provide the fundamental legal protection to this category of young people, including arguably the most vulnerable cohort of Aboriginal children in the country. Until then, the over-criminalisation of young children may continue without the necessary scrutiny and the criminal justice process may be rendered an unjust tool which imposes legal sanctions on the very vulnerable disadvantaged individuals who deserve protection rather than further victimisation by the criminal justice system.

[60] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 38, 119.