

EVIDENCE AS IT RELATES TO CHILDREN AND YOUNG PEOPLE

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This paper will endeavour to cover some aspects of evidence as it relates to children and young people. I will discuss some sections of the Evidence Act and other legislative provisions and common law doctrines that are specific to, or have particular application to, children and young people.

1. THE COMMON LAW DOCTRINE OF DOLI INCAPAX:

Section 5 Children (Criminal Proceedings) Act provides that no child under the age of 10 years can be guilty of an offence.

The common law doctrine of *doli incapax* provides a rebuttable presumption that from 10 years of age to 13 years of age (inclusive) a child cannot possess the requisite knowledge to form or possess a criminal intent (*mens rea*). The rebuttal of *doli incapax* is in addition to proving the *actus reus* beyond a reasonable doubt.

Following are some important points when considering the question of *doli incapax*:-

- The prosecution must rebut the presumption of *doli incapax* as an element of the prosecution case. If the presumption is not rebutted, the prosecution's case is not made out at the prima facie level.
- The child must know that the act was seriously wrong as opposed to naughty or childish mischief: *R v CRH* (unreported, NSW Court of Criminal Appeal, Smart, Hidden and Newman JJ, 18 December 1996); *C (A Minor) v DPP* [1996] 1 AC 1; *JM v Runeckles* [1984] 79 Crim App R 255.
- Evidence of the prosecution must be strong and clear beyond all doubt and contradiction.
- The act/ offence itself is not sufficient to rebut the presumption however horrifying or obviously wrong the act may be: *R v CRH* (unreported, NSW Court of Criminal Appeal, Smart, Hidden and Newman JJ, 18 December 1996); *DK v Rooney* (Supreme Court of NSW, McInerney J, 3 July 1996).
- The older the child, the easier for the prosecution to prove guilty knowledge.
- An admission in an ERISP does not necessarily rebut the presumption: *R v Whitty* [1993] 66 A Crim R 462; *IPH v Chief Constable of New South Wales* [1987] Crim LR 42.
- Prior criminal history and the court alternatives history may be tendered to rebut the presumption: *Ivers v Griffiths* (NSW Supreme Court, 22 May 1998). However, where prior matters have no bearing on the case, sections 135, 136 and 137 of the *Evidence Act* (NSW) should be used to seek to exclude the record/ history.

- Where the prior matters are of a completely different nature, it is arguable that *doli incapax* has not been rebutted.
- If the prosecution seek to rely upon the delivery of a *Young Offenders Act* caution to rebut *doli incapax*, a transcript of the caution or a statement from the person who delivered the caution should be available.
- If the prosecution seek to call evidence from a parent to rebut the presumption, the court must be satisfied that the parent is aware of their right to object to giving evidence: section 18 *Evidence Act* (NSW).
- The prosecution could obtain evidence from a teacher who knows the child well, and/ or use an internal school disciplinary hearing to rebut the presumption: *Graham v DPP* (Queen's Bench, 10 October 1997); *C (A Minor) v DPP* [1996] 1 AC 1.
- Flight alone does not rebut the presumption: *C (A Minor) v DPP* [1996] 1 AC 1; *A v DPP* [1992] Crim LR 34.
- Flight in combination with an admission may rebut the presumption in certain circumstances: *T v DPP* [1997] Crim LR 127; *JM v Runeckles* [1984] 79 Crim App R 255.
- Surrounding circumstances may be used by the prosecution to rebut the presumption: *The Queen v M* [1977] 16 SASR 589; *The Queen v Folling* (Qld CCA, Unreported, 19 May 1998); *LMS* [1996] 2 Cr App R 50.

Doli incapax was recently considered in a committal context in the matter of *RP v Ellis and Anorm* [2011] NSWCA 442 (19 May 2011). The decision is short (7 pages) and worth the read. Following is a basic summary of the case

RP was 13 years old. He was charged with an offence contrary to section 33 *Crimes Act*, the maximum penalty of which is 25 years and accordingly is a serious children's indictable offence.

At the committal hearing the DPP sought to tender the brief to establish to the requisite standard that the offence was made out.

To establish the offence, the DPP were required to establish the specific elements of the section 33 offence and that RP knew, at the time of doing the act, that the act was wrong as distinct from an act of mere naughtiness or childish mischief.

There was a deficit in the brief as to any evidence to rebut the presumption of *doli incapax*. Despite the deficit the Children's Court at Bidura committed RP on the erroneous understanding that *doli incapax* was an exclusionary objection that was impermissible at committal.

The Supreme Court in RP confirmed that *doli incapax* was an element of the offence that the prosecution must rebut beyond a reasonable doubt (and is not a discretionary exclusion of evidence). The order of the Children's Court (committing the child) was quashed and the matter was remitted to the Children's Court to be dealt with according to law.

The application and significance of this case extends beyond committal proceedings and should be considered in general matters that are being dealt with in the absence of the child. For example, when a matter is listed for hearing and the issue (perhaps amongst others) is *doli incapax* (and there is an absence of evidence to rebut same) submissions can be made that the magistrate when dealing with the matter under section 196 Criminal Procedure Act would not be satisfied that the offence is made out. Similar submissions can be made when a child (under 14 years old) does not appear on the first return date and the Statement of Facts do not address the issue of *doli incapax* in a manner sufficient to rebut same.

2. SECTION 13 CHILDREN (CRIMINAL PROCEEDINGS) ACT:

Section 13 Children (Criminal Proceedings) Act is the specific legislative provision relating to statements made by children to police¹ and states that:

(1) Any statement, confession, admission or information made or given to a member of the police force by a child who is a party to criminal proceedings shall not be admitted in evidence in those proceedings unless:

(a) there was present at the place where, and throughout the period of time during which, it was made or given:

(i) a person responsible for the child,

(ii) an adult (other than a member of the police force) who was present with the consent of the person responsible for the child,

(iii) in the case of a child who is of or above the age of 14 years-an adult (other than a member of the police force) who was present with the consent of the child, or

(iv) an Australian legal practitioner of the child's own choosing, or

(b) the person acting judicially in those proceedings:

(i) is satisfied that there was proper and sufficient reason for the absence of such an adult from the place where, or throughout the period of time during which, the statement, confession, admission or information was made or given, and

(ii) considers that, in the particular circumstances of the case, the statement,

¹ For a brief history of the legislation see John Boersig "The Duty of 'A Responsible Person' Under Section 13 of the *Children (Criminal Proceedings) Act 1987 (NSW)*" (2002) 2(2) *Queensland University of Technology Law Journal* 244.

confession, admission or information should be admitted in evidence in those proceedings.

(2) In this section:

(a) a reference to a person acting judicially includes a reference to a person making a determination as to the admissibility of evidence in committal proceedings, and

(b) a reference to criminal proceedings is a reference to any criminal proceedings in which a person is alleged to have committed an offence while a child or which arise out of any other criminal proceedings in which a person is alleged to have committed an offence while a child, and

(c) a reference to a person responsible for a child does not include a member of the police force (unless he or she has parental responsibility for the child).

(3) Nothing in this section limits or affects the admissibility in evidence in any criminal proceedings against a child of any statement or information that the child is required to make or give by virtue of the provisions of any Act or law.

The purpose of section 13 is to:

- Recognise the child's vulnerability in police custody.
- To protect children from self incrimination.
- To recognize a child's immaturity.

There are a few notable aspects of the section:

- It deals with *all information* given by a child who is a party to criminal proceedings.
- It only relates to information given to a member of the police force.
- Children 14 years and over must consent to the adult who is nominated as the support person.
- There remains a discretion to admit evidence if not obtained in compliance with the section.

The mere presence of a support person is not sufficient. Whilst the earlier cases regarding section 13 focused on the procedural compliance of having an adult present, the more recent authorities have focused on the practical effect of the responsible adult's presence. In R v H (A Child) Hidden J made rulings during the course of a Supreme Court trial about the admissibility of admissions made by a child. Hidden J said:

The primary aim of such a section is to protect children from the disadvantaged position inherent in their age, quite apart from any impropriety on the part of the police. That protective purpose can be met only by an adult who is free, not only to protest against perceived unfairness, but also to advise the child of his or her rights. As the occasion requires, this advice might be a reminder of the right to silence, or an admonition against further participation in the interview in the absence of legal advice. No-one could suggest that a barrister or solicitor, whose presence is envisaged by section 13(1)(a)(iv), could be restrained from tendering advice. Nor should any other adult. Further, within appropriate limits, the adult might assist a timid or inarticulate child to frame his or her answer to the allegation. For example, the child might be reminded of circumstances within the knowledge of both the child and the adult, which bear on the matter.²

This was reinforced in R v Huynh where Hunt CJ at CL said:

The role of the support person is to act as a check upon possible unfair or oppressive behaviour; to assist a child, particularly one who is timid, inarticulate, immature, or inexperienced in matters of law enforcement, who appears to be out of his or her depth, or in need of advice; and also to provide the comfort that accompanies knowledge that there is an independent person present during the interview. That role cannot be satisfactorily fulfilled if the support person is himself or herself immature, inexperienced, unfamiliar with the English language, or otherwise unsuitable for the task expected, that is, to intervene if any situation of apparent unfairness or oppression arises, and to give appropriate advice if it appears the child needs assistance in understanding his or her rights.³

Section 13(1)(b) provides the court with discretion to admit evidence that was obtained in non-compliance of section 13(1)(a) if satisfied that there was proper and sufficient reason for the absence of the adult **and** in the circumstances of the case the statement/ confession/ admission/ information should be admitted. The requirements in section 13(1)(b) are cumulative. There must be some concurrence of the circumstances before the court admits the evidence.

² Id at 486.

³ [2001] NSWSC 115 at paragraph 36.

Importantly, once non-compliance with section 13(1)(a) is established (that is, that there was no adult present), there is no onus on the defence to establish or convince the court as to why the evidence should be excluded. As noted by Finley J in Briar and Jones⁴ there is a requirement that the Crown discharge an onus of satisfying the Court.

3. RECORDING OF CONVICTIONS AND ADMISSIBILITY OF PRIOR OFFENCES:

Section 14(1) Children (Criminal Proceedings) Act states that the court shall not record a conviction for a child who is under the age of 16 and has discretion to refuse to record a conviction for a child above the age of 16 years (provided that the matter is disposed of summarily). A court, other than the Children's Court, can record a conviction for an indictable offence: section 14(2).

In any court other than the Children's Court, the fact that a person has pleaded guilty to an offence, or been found guilty is not to be admitted in any criminal proceedings (including an application for bail) subsequently taken against the person in respect of any other offence if [section 15 Children (Criminal Proceedings) Act]:

- A conviction was not recorded in respect of the first mentioned offence; and
- The person has not, within the period of 2 years prior to the commencement of the proceedings for the other offence, been the subject of any judgment, sentence or order whereby the person has been punished for any other offence.

Evidence that a young person has been dealt with under the *Young Offenders Act 1997* ("YOA") is not to be admitted into evidence (in any criminal proceedings subsequently taken against the person) in any court other than the Children's Court [sections 15(3) Children (Criminal Proceedings) Act and section 67 Young Offenders Act].

4. LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT:

The Law Enforcement (Powers and Responsibilities) Act 2002 ("LEPRA") and Law Enforcement (Powers and Responsibilities) Regulation 2005 ("LEPRR") make specific provisions in respect to children and young persons. Following is a summary of the relevant provisions:

⁴ (8 March 1996, unreported).

- A child is a “vulnerable person”: Reg 23 and 24 LEPRR.
- The custody manager *must* assist (as far as practicable) a child to exercise his her rights, including calling a lawyer or support person: Reg 25 LRPRR.
- A child may have a support person present during any investigative procedure in which the person is to participate: Reg 27 LEPRR.
- A child cannot waive the entitlement to have a support person present: Reg 29 LEPRR.
- The custody manager is to inform the support person that he/ she is not restricted to acting merely as an observer but is to play an active role and may (among other things):
 - assist and support the child;
 - observe whether or not the interview is being conducted properly and fairly;
 - identify communication problems.

The custody manager is to give a copy of a summary of the provisions relating to extension of the maximum investigation period and how same may be extended to the support person: Reg 30 LEPRR.

- If the child is an Aboriginal person or Torres Strait Islander, the police must immediately inform ALS that the child is being detained and the place where the child is being detained: Reg 33 LEPRR.
- The custody manager must take appropriate steps to ensure that the child understands any caution: Reg 34 LRPRR.
- If the child was cautioned in the absence of the support person the custody manager must repeat the caution in the presence of the support person: Reg 34 LEPRR.
- Schedule 2 of the LEPRR provides a “Guideline” for custody managers and contains interesting (and perhaps infrequently complied with) provisions in respect to placement of children in police cells.

The requirement for an informed and appropriate support person to be present should be strictly applied:

the provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequences of any failure to give proper regard to them is to

risk the exclusion of any ERISP, or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law⁵.

Furthermore, the obligations on the custody manager must also be strictly applied. This is particularly so in respect to the obligation to make known to the young person the services offered by the Legal Aid Youth Hotline:

The whole intention of the hotline is that young people would know that it is free, that it is available, and would be able to obtain advice there and then. Failure to make it available is a clear breach of the Act and regulations but, more importantly, in clear breach of the requirement of fairness to the young person⁶.

5. SECTION 18 AND 19 EVIDENCE ACT:

A common children's court hearing will often involve a parent being required to give evidence against their child for damaging their property or assault.

A parent can object to giving evidence under section 18 Evidence Act:

18 Compellability of spouses and others in criminal proceedings generally

(1) This section applies only in a criminal proceeding.

(2) A person who, when required to give evidence, is the spouse, de facto partner, parent or child of a defendant may object to being required:

(a) to give evidence, or

(b) to give evidence of a communication between the person and the defendant, as a witness for the prosecution.

(3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.

(4) If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.

(5) If there is a jury, the court is to hear and determine any objection under this section in the absence of the jury.

(6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:

(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and

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

(7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following:

(a) the nature and gravity of the offence for which the defendant is being prosecuted,

(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it,

⁵ Wood CJ, R v Phung and Huynh (2001) NSWSC 115.

⁶ Dowd J, R v ME, R v LT and R v CE (Unreported, Supreme Court Common Law Division, 3 October 2002).

- (c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor,
- (d) the nature of the relationship between the defendant and the person,
- (e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.
- (8) If an objection under this section has been determined, the prosecutor may not comment on:
 - (a) the objection, or
 - (b) the decision of the court in relation to the objection, or
 - (c) the failure of the person to give evidence.

In domestic violence and other specified matters, the prosecution often argued that a parent does not have the option to object because of the operation of section 19 Evidence Act (and in particular the reference to section 279 Criminal Procedure Act) which states:

19 Compellability of spouses and others in certain criminal proceedings

Section 18 does not apply in proceedings for an offence against or referred to in the following provisions:

section 25 (Child abuse), 26 (Neglect of children), 51 (Endangering children in employment) or 52 (Certain employers of children to be authorised) of the Children (Care and Protection) Act 1987
 section 279 (Compellability of spouses to give evidence in certain proceedings) of the [Criminal Procedure Act 1986](#).

This issue was recently considered in LS v Director of Public Prosecutions (NSW) and Anor [2011] NSWSC 1016 (2 September 2011). LS was 15 years old. He lived with his mother and grandmother. LS kicked a side fence and threw an iron at a wall causing damage. He was charged with damage property. His mother made a statement and was subpoenaed by the police for the summary hearing. The mother objected to giving evidence. The prosecutor argued that section 19 applied to the effect that the objection was not available on the basis that section 279 Criminal Procedure Act applied. Importantly, it was determined (or clarified) that section 279 only applies to compel spouses to give evidence and not parents.

6. S. 281 CRIMINAL PROCEDURE ACT – TAPE RECORDING OF ADMISSIONS BY SUSPECTS:

Section 281 Criminal Procedure Act provides:

281 Admissions by suspects

(1) This section applies to an admission:

- (a) that was made by an [accused person](#) who, at the time when the admission was made, was or could reasonably have been suspected by an [investigating official](#) of having committed an [offence](#), and
- (b) that was made in the course of [official questioning](#), and
- (c) that relates to an [indictable offence](#), other than an [indictable offence](#) that can be dealt with summarily without the consent of the [accused person](#).

(2) Evidence of an admission to which this section applies is not admissible unless:

(a) there is available to the [court](#):

- (i) a [tape recording](#) made by an [investigating official](#) of the interview in the course of which the admission was made, or
- (ii) if the prosecution establishes that there was a [reasonable excuse](#) as to why a [tape recording](#) referred to in subparagraph (i) could not be made, a [tape recording](#) of an interview with the person

who made the admission, being an interview about the making and terms of the admission in the course of which the person states that he or she made an admission in those terms, or

(b) the prosecution establishes that there was a [reasonable excuse](#) as to why a [tape recording](#) referred to in paragraph (a) could not be made.

(3) The hearsay rule and the opinion rule (within the meaning of the [Evidence Act 1995](#)) do not prevent a [tape recording](#) from being admitted and used in proceedings before the [court](#) as mentioned in subsection (2).

(4) In this section:

"investigating official" means:

(a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or

(b) a person appointed by or under an Act (other than a person who is engaged in covert investigations under the orders of a superior) whose [functions](#) include [functions](#) in respect of the prevention or investigation of [offences](#) prescribed by the [regulations](#).

"official questioning" means questioning by an [investigating official](#) in connection with the investigation of the commission or possible commission of an [offence](#).

"reasonable excuse" includes:

(a) a mechanical failure, or

(b) the refusal of a person being questioned to have the questioning electronically recorded, or

(c) the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned.

"tape recording" includes:

(a) audio recording, or

(b) video recording, or

(c) a video recording accompanied by a separately but contemporaneously recorded audio recording.

The issue as to whether this objection was available in the Children's Court for indictable offence being dealt with summarily was recently considered in [CL v Director of Public Prosecutions \(NSW\) \[2011\] NSWSC 943](#). The argument largely focused on section 281(1)(c).

CL was alleged to have broken a window of a shop and stolen scooters and scooter wheels. A police officer interviewed CL at his home in the presence of his aunt. During the interview CL made admissions, which were recorded in a police notebook. The interview was not recorded by tape recording or adoption in ERISP as the tape recorder batteries were said to be flat. CL pleaded not guilty and proceeded to a summary hearing. CL's lawyer objected to the admission and relied on section 281. The magistrate in the Children's Court determined that because of section 31(1) [Children \(Criminal Proceedings\) Act](#) [which states proceedings are to be dealt with summarily except in certain circumstances] section 281 was not an available objection. The Supreme Court in CL determined that section 281 did apply and was a valid objection to admissions made to indictable offences being dealt with summarily.

Given the fairly common police practice of recording admissions in police notebooks rather than on ERISP or tape recorder, this section will provide a useful objection for indictable offences being dealt with summarily.

7. FORENSIC PROCEDURES:

Applications for forensic procedures are common in the Children's Court. They are often used by the police as an evidentiary tool into the investigation of children.

There have been two recent and important decisions in respect to forensic procedures:

R v SA, DD and ES [2011] NSWCCA 60 (28 March 2011)

Prior to this decision it was regularly argued that fingerprints and photographs taken pursuant to section 133 Law (Enforcement Powers and Responsibilities) Act 2002 could not be used for comparison of fingerprints at a crime scene or in photo identification boards in the absence of the Children's Court granting an order for forensic procedure.

In the case of SA (15 yo), DD (14 yo) and ES (15 yo) police took fingerprints and photographs pursuant to section 133. The police did not make any application under the Crimes (Forensic Procedure) Act for an order authorising the taking of fingerprints and photographs. The fingerprints taken were compared to weapons/ exhibits found at the crime scene. The photographs taken were used in identification boards with various witnesses. In the joint trial in the District Court, it was argued that the evidence regarding the fingerprints and photographs should be excluded because an order for a forensic procedure authorising the taking of fingerprints and photographs had not been sought/ granted. The young persons were successful in the District Court in excluding the relevant evidence and the Crown appealed pursuant to section 5F(3A) Criminal Appeal Act. On appeal, the CCA determined that there was no inconsistency between the powers available in the Crimes (Forensic Procedures) Act and the Law (Enforcement Powers and Responsibilities) Act and that:

The power of the police to take fingerprints and photographs of persons in lawful custody to identify the suspect and to provide evidence of the commission of the offence had been in existence since 1951 at the time the CFPA was enacted. The Act clearly indicated in s 112 that this power should continue and there is nothing in the LEPPRA to suggest any change to that policy. Indeed it is clear from that Act the power remains unchanged [para 40].

The appeal court determined that there was no illegality for improper conduct by the police and allowed the Crown appeal and set aside the District Court order that rejected the evidence.

Importantly, section 133 only enables police to taken fingerprints and photographs from persons above the age of 14. An order for a forensic procedure is still required for children under 14 years of age. The objection remains available for child clients under the age of 14.

LK v Commissioner of Police and Anor [2011] NSWSC 458 (20 May 2011)

Prior to this decision Walker v Bugden [2005] NSWSC 898 was regularly used as authority for the blanket proposition that without evidence of a DNA deposit from a crime scene that was suitable for comparison, the test in section 24(3)(b) Crimes (Forensic Procedure) Act⁷ could not be made out as a matter of law.

This issue was considered in LK where Her Honour Fullerton J was not persuaded that Walker v Bugden was authority for the blanket proposition outlined above. Her Honour noted:

- That the court in Walker v Bugden concluded that the absence of a DNA sample was fatal **in that case** because without it there was insufficient factual basis to induce a reasonable

⁷ That there must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the offence.

belief that a comparison DNA could be undertaken that might provide evidence of the kind required.

- Each application must be considered by reference to an assessment of *existing* facts and whether, in the particular case, they are sufficient to induce a reasonable belief in the mind of a Magistrate that the prospective outcome or result of the forensic procedure, if undertaken, might produce evidence of the relevant kind [para 32].
- Photographic or electronic evidence establishing a suspect's presence at the scene of a crime at a relevant time and/ or a suspects physical contact with an item or items in some way involved with the commission of an offence, or perhaps admissions by a suspect to a similar effect, are examples of evidence that may carry sufficient weight on an application for final orders under s24 of the Act despite the fact that crime scene DNA evidence is unavailable [para 32].

Since LK careful consideration needs to be given to whether various facts, as they exists, are sufficient to found a reasonable belief in the mind of the magistrate that the forensic procedure might producing evidence tending to confirm or disprove the suspect committed the offence. Assumptions, theoretical possibilities and speculation are insufficient to ground a reasonable belief.

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