

LEGAL STUDIES

Doli Incapax Essay

Australia has implemented many pieces of legislation to protect children from the full extent of the law, should they be trialled for a criminal matter but they are also protected through common law. The presumption of doli incapax was implemented in Britain in 1619 and is Latin for “incapable of crime”.

The principle does not mean that children physically cannot commit crimes, but rather that children can't legally be convicted of a crime if they don't understand what they did was wrong. As with any criminal trial, the prosecution has to prove that two things: “actus reus” (guilty act) and “mens rea” (guilty mind). Legally speaking, a child under ten can't have a guilty mind because they don't know what is and isn't wrong, so there is no possible way for a child under ten to be sentenced under any circumstance. In Australia, if the child is over ten, but not yet fourteen, the presumption of doli incapax applies unless the contrary, the “mens rea”, can be proven. For example, in the case of *R v M* (1977) a twelve year old boy was convicted for murdering another child by hitting him several times in the head with a brick. Although the boy was barely out of primary school the prosecution proved that he had made a decision to do something that he knew to be wrong.

For decades there have been arguments worldwide about whether the doctrine should remain part of the law as it is out-dated and no longer effective in today's society. In Australia, crimes by children fourteen and under have risen 27% in just three years and many of them are being allowed to walk free because of the doli incapax presumption. Because of these problems, governments worldwide have been considering changing the doctrine through law reform. Law reform is the process by which a government or government body examines specific laws with intent to alter or modify them, generally in order to create a more efficient legal system or promote justice, equity, fairness or accessibility.

Law reform is also the main way in which statute laws are changed to fit in with changing social values and public morality. The Australian Law Reform commission released a report to promote child rights in the legal process. s18: Children's involvement in the criminal justice processes listed recommendations for age of criminal responsibility, majority and the principle of doli incapax. The commission recognised that the doctrine can be problematic, primarily because highly prejudicial evidence can sometimes be used by the prosecution that would normally be inadmissible. It states that “in these circumstances, the principal may not protect children but be to their disadvantage”. It recommended that all states and territories should have the principle of doli incapax established in legislation, rather than in common law, and that at the least the age limit be changed to apply to children under 14 if it was not already. The Attorney-General's Department also released an extensive document titled Review of Commonwealth Criminal Law. One of its recommendations was that the burden of proof for the principal of doli incapax be changed from the prosecution to the accused. This would mean that rather than the DPP or Police Prosecutor having to prove that a child between 10 and 14 knew the act they were doing was wrong, the child and its lawyer would have that job and if they couldn't prove this then the offender could still be sentenced.

This recommendation would fix many of the problems associated with the doctrine as nearly every child knows right from wrong; the best option would be to have the accused prove that they are an acceptance to the norm. The British Parliament stated that “the notion that the average 10-14 year old doesn't know right from wrong seems contrary to common sense in an age of compulsory education from the age of five, when children seem to develop faster both mentally and physically”. Although, while school educates children in what is acceptable and what isn't, it may fail to do so for those children who don't regularly attend school – the ones most likely to commit a crime. If that is combined with the failure of parents to teach children right from wrong as well as being set poor examples by role models breaking the law, the child would have next to no understanding of what is wrong.

It seems that the best option would be if the Australian Government adopted the commission's recommendation to change the burden of proof to the accused. This would allow for the minority of abused children who haven't had an opportunity to develop an understanding of right and wrong to be excused and given help but also more effectively stop the majority of young offenders who understand what is wrong from re-offending when they become of age and being dealt the full force of the law.