

# CHILDREN IN THE CRIMINAL JUSTICE SYSTEM: THE HIGH COURT CASES OF *GW* AND *RP*

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*In two decisions handed down in 2016, the High Court of Australia considered legal measures designed to deal with children in the criminal justice system in an age-appropriate manner. The first case, *The Queen v GW*, was a prosecution appeal involving the unsworn evidence of a child witness. In this decision, the High Court reviewed the common law and statutory background to unsworn evidence, and gave important guidance on the proper approach to dealing with such evidence in proceedings. The second case was *RP v The Queen*, which involved the criminal responsibility of a child defendant, and in particular the application of the *doli incapax* presumption. In this decision, the High Court reviewed the common law background to *doli incapax*, and gave guidance on its application in criminal proceedings. This commentary discusses both cases and the principles underlying the High Court's reasoning.*

## I INTRODUCTION

The treatment of children within the criminal justice system is a perennial challenge for legal professionals as well as policy-makers. The law has largely departed from a traditional distrust of children as witnesses susceptible to manipulation and prone to fabrication, so that their appearance in court or via videolink or pre-recording to give evidence is nowadays mostly routine and is regulated by special rules designed to facilitate their participation. Protective rules also exist for child defendants, shielding them to varying degrees from the full harshness of the criminal law and its punishments, as reflected in modern juvenile justice systems based on welfare principles.<sup>1</sup>

In two recent decisions, the High Court of Australia considered legal measures designed to deal with children in the criminal justice system in an age-appropriate manner reflecting their level of maturity. It is generally accepted by Australian courts that children's capacities to understand situations and to make rational decisions are different from those of adults and that rates of development vary between individual children. However, a lack of full maturity should not preclude their participation in criminal justice processes.<sup>2</sup> As a result, the justice system seeks to take a nuanced approach, where individual maturity can be taken into account in dealing with children appropriately.

The first case, *R v GW*<sup>3</sup> ('*GW*'), was a prosecution appeal in the Australian Capital Territory ('ACT') involving the unsworn evidence of a child witness. This mechanism allows certain witnesses, notably young children and persons with mental impairment, to give evidence in legal proceedings without the formal requirements and consequences of doing so under oath. It is designed to afford a more conducive environment for the taking of evidence from vulnerable witnesses, without diminishing the value of their testimony overall. This can be in addition to, as occurred in this case, the child giving her evidence through a pre-recorded statement or by videolink.<sup>4</sup> In this decision, the High Court reviewed the common law and statutory background to unsworn evidence, and gave important guidance on the proper approach to dealing with such evidence in proceedings.

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<sup>1</sup> See, eg, John Seymour, *Dealing with Young Offenders* (Lawbook, 1988); Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 2011).

<sup>2</sup> Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997).

<sup>3</sup> [2016] HCA 6 (2 March 2016), on appeal from *GW v The Queen* [2015] ACTCA 15 (24 April 2015).

<sup>4</sup> The use of videolink and pre-recording are not dealt with further in this paper, but see, eg, Helen L Westcott, Graham M Davies and Ray Bull (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Wiley & Sons, 2002).

The second case was *RP v The Queen*<sup>5</sup> ('RP'). This involved the criminal responsibility of a child defendant, and in particular the application of the *doli incapax* presumption. This mechanism operates to protect children within a specified age range from the attribution and consequences of criminal responsibility, though it may be rebutted by the prosecution with sufficient evidence. In this decision, the High Court reviewed the common law background to *doli incapax*, and gave guidance on its application in criminal proceedings.

It is interesting to consider these cases together, in order to discern whether there is an underlying philosophy discernible in the High Court's approach to the treatment of children in the different roles of witness and defendant, given that in both cases, special rules designed to protect vulnerable members of society operate alongside the general rules of the criminal justice system. In particular, do the two cases endorse a more flexible approach to the special rules regarding children in the criminal justice system? If so, does this indicate a High Court trend towards a more protective approach?

## II PART 1: UNSWORN EVIDENCE AND THE GW CASE

Witnesses in legal proceedings are usually required to give sworn evidence, which emphasises both their obligation to give truthful evidence and exposes them to legal consequences if they knowingly or recklessly give false evidence.<sup>6</sup> In Australia, witnesses are allowed to choose between taking an oath or making an affirmation.<sup>7</sup> In either case, the witness swears or promises to 'tell the truth, the whole truth and nothing but the truth'.<sup>8</sup> The dispensation afforded to witnesses of reduced capacity, but who are still able to give meaningful evidence, is that they may do so without being sworn.<sup>9</sup> Reduced capacity may be related to mental development, linguistic skills, or the age of a witness. However, as this circumstance is the exception rather than the rule, threshold tests must be satisfied, and this is where trial judges and counsel must pay close attention to the requirements of these tests and their application.<sup>10</sup>

In particular:

- (i) *Uniform Evidence Law* ('UEL') s 13 sub-s (1) provides a threshold test of competence to give evidence about a fact, stated negatively:<sup>11</sup>

<sup>5</sup> [2016] HCA 53 (21 December 2016), on appeal from *RP v The Queen* [2015] NSWCCA 215 (26 August 2015). This was the last criminal appeal decision handed down by the High Court in 2016.

<sup>6</sup> The consequences may be liability for contempt of court, or prosecution for perjury: see, eg, the contentious 'double jeopardy' case of *R v Carroll* [2002] HCA 55 (5 December 2002).

<sup>7</sup> Evidence law in most Australian jurisdictions is governed by the *Uniform Evidence Law* ('UEL'), comprising the *Evidence Act 1995* (Cth), *Evidence Act 2011* (ACT), *Evidence Act 1995* (NSW), *Evidence (National Uniform Legislation) Act 2011* (NT), *Evidence Act 2001* (Tas), and the *Evidence Act 2008* (Vic). The common law or other statutes apply in the remaining jurisdictions. As the *GW* case occurred in the Australian Capital Territory ('ACT'), the UEL provisions applied, in particular under pt 2.1 – Witnesses, s 12 (Competence and compellability), s 13 (Competence: Lack of capacity), s 21 (Sworn evidence to be on oath or affirmation), s 23 (Choice of oath or affirmation) and s 24 (Requirements for oaths).

<sup>8</sup> This wording is found in sch 1 to each of the UEL statutes. The difference in wording between oaths and affirmations is that for the former, the person swears or promises 'by Almighty God (or the person may name a god recognised by his or her religion)' whereas for the latter, the person is required to 'solemnly and sincerely declare and affirm' to give truthful evidence. Both witnesses (s 21) and interpreters (s 22) are allowed to choose between oath and affirmation (s 23) and there is no legal difference as s 21(5) provides that 'an affirmation has the same effect for all purposes as an oath'. Section 24 states that there is no requirement for a religious text to be used in taking an oath, while s24A (in NSW) allows that an oath may be made by a person without religious belief in the existence of a god, and may indeed dispense with reference to a god and instead refer to some other basis for the person's beliefs.

<sup>9</sup> UEL s 13 (Competence: Lack of capacity). This is the only basis on which unsworn evidence may be given, since the traditional right of criminal defendants to give unsworn evidence by way of a 'dock statement' has been abolished in all Australian jurisdictions. Its last known use was in a Norfolk Island murder trial before its abolition: see *McNeill v The Queen* [2008] FCAFC 80 (23 May 2008) [278]; *R v McNeill (Sentence)* [2007] NFSC 8 (25 July 2007) [19]. Section 25 of the *Evidence Act 1995* (Cth), which preserves any State and Territory provisions relating to unsworn statements of criminal defendants, thus has no continuing application.

<sup>10</sup> UEL s 21(1) provides that a 'witness in a proceeding must either take an oath, or make an affirmation, before giving evidence' but sub-s (2) states that this 'does not apply to a person who gives unsworn evidence under section 13'. Thus, as affirmed in *R v GW* [2016] HCA 6 (2 March 2016), the giving of sworn evidence is taken to be the 'default position' subject to the exception in UEL s 13. Convictions in trials in which a child complainant has wrongly been allowed to give unsworn evidence, because procedural requirements have not been properly followed, may be overturned on appeal: *R v Brooks* (1998) 44 NSWLR 121; *R v RAG* [2006] NSWCCA 343 (26 October 2006); *R v Cooper* [2007] ACTSC 74 (10 September 2007); *RJ v The Queen* [2010] NSWCCA 263 (15 November 2010); *MK v The Queen* [2014] NSWCCA 274 (26 November 2014).

<sup>11</sup> By implication, if a person has the capacities described in paras (a) and (b), or the person's incapacities can be overcome, then the person is competent to give evidence about a fact. Note the provisions in s 30 allowing interpreters in cases of linguistic difficulty, and s 31 permitting deaf or mute witnesses to overcome limitations in their abilities 'in an appropriate way'. Section 13(2) qualifies,

A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):

- (a) the person does not have the capacity to understand a question about the fact, or
  - (b) the person does not have the capacity to give an answer that can be understood to a question about the fact,
- and that incapacity cannot be overcome.

- (ii) This *general test* for competence, is supplemented in the case of a witness who is competent, by a more *specific test* in sub-s (3) for sworn evidence:<sup>12</sup>

A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

- (iii) If a witness fails to satisfy the first general test, he or she cannot give evidence; if a witness satisfies *both* tests, he or she will give *sworn* evidence; if a witness satisfies the general test for competence but not the specific test, he or she may give *unsworn* evidence, provided that, as set out in sub-s (5), the court tells the person:

- (a) that it is important to tell the truth, and
- (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and
- (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

Importantly, the structure of s 13 dictates that the tests must be applied in that logical order: first, general competence is established where there is an issue of competence raised, then specific competence is addressed, then (where the witness meets the first but not the second test), the three-element instruction is given.<sup>13</sup>

### A *The Facts in GW*

GW, the father of two girls, R and H, allegedly committed three acts of indecency upon or in the presence of each child. R was five years old and H was three years old. At that time, GW had sole custody of the children due to a domestic incident that resulted in GW obtaining an interim domestic violence order against the children's mother.<sup>14</sup> Police recordings of conversations with each of the girls became the children's evidence in chief.<sup>15</sup> Of the charges, GW was convicted on only one count in relation to R, the jury finding the defendant not guilty on two other counts and being unable to reach a decision on the three remaining counts. That conviction became the subject of the first appeal, a main ground of which was a challenge to R's unsworn evidence.

### B *The GW Trial*

At a pre-trial hearing R had been questioned in order to establish her level of competence. Aged over six years at the time of this proceeding, she was able to respond rationally to questions, satisfying the general

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providing '[a] person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts'.

<sup>12</sup> The term 'sworn evidence' is not defined in the *UEL* Dictionary, but its use in pt 2.1, particularly in s 21 (Sworn evidence to be on oath or affirmation), makes clear that it means evidence given by a witness who has made an oath or affirmation before giving evidence, to 'tell the truth, the whole truth and nothing but the truth'.

<sup>13</sup> *UEL* s 13 was amended by the *Evidence Amendment Act 2007* (NSW) and *Evidence Amendment Act 2008* (Cth) following recommendations by the Australian Law Reform Commission in *Uniform Evidence Law*, Report No 102 (2005), so that there is no longer a requirement for the instruction to be acknowledged by the witness.

<sup>14</sup> These facts are drawn from *GW v The Queen* [2015] ACTCA 15 (24 April 2015) [1], [17] (Murrell CJ, Refshauge and Ross JJ). Details of the alleged conduct resulting in the six charges are found at [19]–[34].

<sup>15</sup> This is allowed under the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ch 2 – Evidence of children.

test for competence.<sup>16</sup> This prompted the judge, Burns J, to observe that she ‘understands the difference between the truth and what is not the truth, and says that she understands that she has an obligation to tell the truth today’; however, His Honour continued that ‘because of the difficulty in truly gauging the level of her understanding and her age, I am not satisfied that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence’.<sup>17</sup> This meant that, although generally competent to be able to give evidence, R did not have an understanding of the legal and moral ‘obligation to tell the truth’ and so R was allowed to give unsworn evidence. Defence counsel was asked but did not wish to be heard on the matter.<sup>18</sup> Subsequently, at another pre-trial hearing before the ACT Chief Justice, the parties agreed to be bound by the pre-trial rulings including as to R’s evidence. The defence later unsuccessfully sought to argue that it was not bound by those rulings.<sup>19</sup>

### C The GW Appeal

On appeal to the ACT Court of Appeal, the appellant argued unsuccessfully that there was unreasonableness and inconsistency in his conviction on one count of indecency while the jury had returned verdicts of not guilty or been unable to decide on other counts. However, in relation to R’s unsworn evidence and the judge’s reasons for allowing it, the appeal judges accepted the appellant’s contention that s 13(3) had been wrongly applied.<sup>20</sup>

[I]t was essential to address the correct question under s 13(3): Whether R lacked the ‘capacity to understand’ that, in giving evidence, she was ‘under an obligation to give truthful evidence’. His Honour addressed a question that differed from the correct question in a subtle but important way. His Honour found ‘difficulty in truly gauging the level of [R’s] understanding ... [at six years of age]’. Consequently, his Honour was ‘*not satisfied* that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence’ (emphasis added). This reversed the test in s 13(3). His Honour treated unsworn evidence as the ‘default’ position, but he should have treated sworn evidence as the ‘default’ position. Perhaps his Honour intended to give primacy to sworn evidence, but that is not apparent from his reasons.

The Court of Appeal also accepted the appellant’s argument that the jury was not properly directed as to the fact that unsworn evidence was being given by a key prosecution witness.<sup>21</sup>

R was the key witness in the prosecution case. The most fundamental and most difficult task that the jury had to undertake was to assess the reliability of her evidence. With a view to bolstering the reliability of evidence given in courts, the Evidence Act gives primacy to sworn evidence and makes it clear that unsworn evidence is acceptable only from a witness who is not competent to give sworn evidence. In those circumstances, it was important for the jury to understand the difference between sworn and unsworn evidence and take that difference into account when assessing the reliability of R’s evidence. The jury should have been directed accordingly.

The trial verdict of guilty on one count of indecency was set aside and a retrial was ordered.<sup>22</sup> The prosecution appealed to the High Court against this decision and order.

<sup>16</sup> UEL s 13(1) sets out the general test for competence of a witness.

<sup>17</sup> *GW v The Queen* [2005] ACTCA 15 (24 April 2015) [70], UEL s 13(3) sets out the more specific test for sworn evidence. His Honour continued ‘[s]o I propose to proceed under subsection (5) of section 13. Do you want to be heard in relation to that, Mr Gill [defence counsel]?’ [70].

<sup>18</sup> *R v GJ [No 1]* [2014] ACTSC 108 (26 March 2014) [3]-[4] (referring to the pre-trial hearing which is unreported). The reporting of this proceeding as ‘GJ’ rather than ‘GW’ is unexplained. *R v GJ [No 2]* [2014] ACTSC 113 (31 March 2014) concerned cross-examination of the mother as to a Family Court report; while *R v GJ [No 3]* [2014] ACTSC 193 (14 July 2014) is the sentencing decision, at which a two year sentence was imposed, to be served by three months of periodic detention and suspended for the remainder subject to a good behaviour undertaking ([31]).

<sup>19</sup> R’s evidence was presented to the trial jury in the form of a recording of the questioning of R as an unsworn witness by Burns J: *R v GJ [No 1]* [2014] ACTSC 108 (26 March 2014) [5]-[7], [8]-[13], [44] (Penfold J).

<sup>20</sup> *GW v The Queen* [2015] ACTCA 15 (24 April 2015) [80].

<sup>21</sup> *Ibid* [103].

<sup>22</sup> *Ibid* [131].

## D *The High Court's Decision in GW*

The prosecution's appeal to the High Court was successful. First, the unanimous judgment dealt with the adequacy of the judge's application of the test for competency to give evidence:<sup>23</sup>

It was necessary for Burns J to be affirmatively satisfied that R did not have the requisite capacity before instructing her pursuant to s 13(5) and admitting her evidence unsworn. At the end of the examination of R, Burns J expressed his provisional conclusion, subject to any submission by defence counsel in terms that he was not satisfied that R had the requisite capacity. In the absence of controversy over the indication of the intention to proceed under s 13(5), Burns J was not required to, and did not, give further reasons for the determination. Whether it is correct to conclude that Burns J was not satisfied that R lacked the requisite capacity, and that his Honour treated the reception of R's unsworn evidence as the 'default' position under the *Evidence Act*, does not turn on analysis of his remarks alone. It requires consideration of the whole of the circumstances.

On consideration of those circumstances, including the fact that neither party in the trial phase had ever suggested that R was in fact competent to give sworn evidence, the High Court concluded that there had been no error in the way the judge had applied the law:<sup>24</sup>

His Honour's conclusion was not based solely on the 'difficulty in truly gauging the level of [R's] understanding'. It took into account that R was a six-year-old child. In the circumstances, the failure to express the conclusion in the terms of the statute did not support a finding that Burns J was not satisfied on the balance of probabilities that R lacked the requisite capacity.

The second issue on appeal was the adequacy of trial directions given to the jury regarding the unsworn evidence of R. On this point, counsel for the defendant had sought a jury direction along the lines that as the evidence was unsworn, this could affect its reliability. The trial judge declined to give such a direction and the High Court agreed with that approach, explicitly rejecting the suggestion that the unsworn evidence of a child is inherently less reliable than sworn evidence.<sup>25</sup> The jury, the High Court observed, could be trusted to understand the situation concerning R:<sup>26</sup>

At the respondent's trial, the jury observed witnesses giving evidence on oath or affirmation as the case may be and may be taken to have heard those witnesses undertake to tell the truth, the whole truth and nothing but the truth. By contrast, the jury did not see R take an oath or make an affirmation before giving her evidence. It strains credulity to suggest that in order to avoid the risk of a miscarriage of justice it was necessary to instruct the jury that R's evidence had been received without the solemnity of an oath or affirmation or the possibility of sanction should it be intentionally false. It might be thought unlikely that it would occur to jurors to think a six-year-old child was at risk of prosecution for perjury regardless of whether the child's evidence was taken on oath or otherwise.

As the prosecution's appeal was successful, the High Court set aside the orders of the Court of Appeal and remitted the matter to that court for consequential orders with respect to sentence, as the execution of sentence had been stayed pending the resolution of appeals.<sup>27</sup>

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<sup>23</sup> *R v GW* [2016] HCA 6 (2 March 2016) [28] (French CJ, Bell, Gageler, Keane and Nettle JJ).

<sup>24</sup> *Ibid* [31]. Note that although *UEL* s 13(8) allows courts to satisfy themselves as they see fit regarding questions of competence, including through the opinion evidence of experts with specialised knowledge of child development (see also *UEL* ss 79(2) and 108C), no expert opinion evidence was involved in this proceeding.

<sup>25</sup> *Ibid* [32]-[57]. A significant consideration in this regard was that *UEL* s 165 (Unreliable evidence), which is in pt 4.5 – Warnings and information, does not include children's evidence or unsworn evidence as examples of 'evidence of a kind that may be unreliable'; and in the 2008 amendments (which are reflected in the ACT's *Evidence Act*) was supplemented by s 165A (Warnings in relation to children's evidence) specifically prohibiting a judge from warning a jury that children as a class are unreliable witnesses.

<sup>26</sup> *Ibid* [51]. The High Court here is obliquely referring to the fact that a six-year-old cannot be prosecuted for perjury as the minimum age of criminal responsibility in Australia is ten: see Gregor Urbas, 'The Age of Criminal Responsibility; [2000] (81) *Trends and Issues in Crime and Criminal Justice* 1; and remarks by Higgins CJ in *R v Cooper* [2007] ACTSC 74 (10 September 2007).

<sup>27</sup> *R v GW* [2016] HCA 6 (2 March 2016) [58]. With the conviction reinstated, the Court of Appeal then re-sentenced the offender to two years wholly suspended, with community service rather than periodic detention (abolished in the ACT with effect from 2 March 2016): *GW v The Queen* [2016] ACTCA 9 (29 March 2016).

### III PART 2: *DOLI INCAPAX* AND THE *RP* CASE

The criminal responsibility of children presents acute challenges for courts, especially so in cases where both the alleged offender and the victim are in their early years. In such cases, regard must be had to the simultaneous demands of protection within the criminal justice system of the alleged wrongdoer against overly harsh treatment and protection of the alleged victim and society from criminal conduct through the imposition of criminal punishment on the offender. For centuries, there has been recognition that it is wrong in principle and futile in practice to criminally punish those who, by reason of mental incapacity or immaturity, cannot understand the wrongness of their actions. In the case of insanity or other mental impairment, defences have been developed that remove criminal liability either completely or partially. For children, presumptions operate to preclude criminal responsibility either conclusively or rebuttably, depending on the age of the child. Above the minimum age of criminal responsibility, a rebuttable presumption against attributing responsibility applies, known in common law as *doli incapax*.<sup>28</sup> The presumption is rebutted if the prosecution proves beyond reasonable doubt that the child knew at the time of his actions that they were ‘seriously wrong’, and not just mischievous.<sup>29</sup> In its last criminal appeal decision handed down in 2016, the High Court considered the application of *doli incapax* in a child sexual assault case in New South Wales (‘NSW’).<sup>30</sup>

#### A *The Facts in RP*

RP was charged with two counts of aggravated indecent assault (counts one and four) and two counts of sexual intercourse with a child under ten years (counts two and three). By agreement between the parties, his trial took place before a judge alone, and RP was acquitted on count one but convicted on the remaining counts. At the time of the alleged offences, RP was 11 years and six months (counts two and three) and 12 years and three months (count four). The complainant was his younger brother, aged around four years less than RP.<sup>31</sup>

#### B *The RP Trial*

The trial was based entirely on documentary evidence rather than on witness testimony, and included a recorded police interview with the complainant when he was aged around 15 years. The facts of the alleged offences were not in dispute. Rather, the sole issue at trial was *doli incapax*. The judge accepted, in relation to count two, that the prosecution had shown beyond reasonable doubt that RP knew that his conduct was seriously wrong and therefore the presumption against criminal capacity was rebutted. Evidence contributing to this conclusion, despite the fact that RP had been assessed in two reports<sup>32</sup> at ages 17 and 18 as having a low level of intelligence, included ‘the use of force; the placement of the hand over the complainant’s mouth; the complainant’s evident distress; the breaking off of the act of intercourse when an adult returned to the home; and the instruction to the complainant to say “nothing”’. The use of a condom, however, was disregarded as equivocal as to capacity to understand the wrongness of the sexual conduct engaged in by

<sup>28</sup> The minimum age of criminal responsibility is 10 years in all Australian jurisdictions. A child under 10 years is conclusively presumed to lack the capacity to form criminal intent, or *mens rea*. A rebuttable presumption against criminal responsibility for children above 10 but not yet 14 applies under either common law *doli incapax* or statute to the same effect. Above the age of 14 years, accused persons are presumed to have criminal capacity, though more welfare-oriented juvenile justice processes and sentencing options generally apply to those who have not yet reached adulthood: see Urbas, above n 26.

<sup>29</sup> *C (A Minor) v Director of Public Prosecutions* [1995] UKHL 15 (17 March 1995), cited in *RP v The Queen* [2015] NSWCCA 215 (26 August 2015) [36] (Johnson J); and *RP v The Queen* [2016] HCA 53 (21 December 2016) [9]-[10] (Kiefel, Bell, Keane and Gordon JJ).

<sup>30</sup> In NSW, the common law governs *doli incapax*, while the *Children (Criminal Proceedings) Act 1987* (NSW) provides in s 5 (Age of criminal responsibility) that ‘[i]t shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence’.

<sup>31</sup> These facts are drawn from *RP v The Queen* [2016] HCA 53 (21 December 2016) [1]-[2] (Kiefel, Bell, Keane and Gordon JJ) and *RP v The Queen* [2015] NSWCCA 215 (26 August 2015) [22]-[23] (Davies J).

<sup>32</sup> The first report was an employment capacity assessment, while the second was prepared by a clinical psychologist, and included the results of an IQ test ‘at the top of the borderline disabled range, placing him in the eighth percentile in terms of functioning’ ([17]).

RP.<sup>33</sup> Because criminal capacity had been established in relation to count two, the trial judge considered and the defence counsel conceded that the same conclusion would hold for counts three and four.<sup>34</sup> *Doli incapax* was thus held to be rebutted.

### C The RP Appeal

The Court of Appeal judges all took the view that though the defendant's criminal capacity in relation to one count had a bearing on his capacity in relation to the others, there was not an automatic connection. Thus, each count had to be considered against the evidence. Two of the judges agreed that, in all the circumstances, the facts convincingly demonstrated that RP must have known that what he was doing was seriously wrong in relation to the conduct involved in both counts two and three.<sup>35</sup> The third judge found that there was reasonable doubt about ground three.<sup>36</sup> However, all three agreed that the conviction on count four had to be overturned.<sup>37</sup> Thus, at the time of the High Court appeal, RP was convicted on only two counts.

### D The High Court's Decision in RP

The High Court upheld the defendant's appeal against conviction on counts two and three. The majority judgment reviewed the law on *doli incapax*, noting that it has 'served to ameliorate the harshness of the criminal law'<sup>38</sup> and observed that the presumption has some fluidity in that 'the closer the child defendant is to the age of 10 the stronger must be the evidence to rebut the presumption ... [c]onversely, the nearer the child is to the age of 14, the less strong need the evidence be to rebut the presumption'. However, children develop at different rates and thus in rebutting the presumption, attention must be directed 'to the intellectual and moral development of the particular child'.<sup>39</sup>

Taking into account all of the evidence available, including the two reports on RP which led the trial judge to conclude that he was of 'low intelligence', the majority turned to whether the *doli incapax* presumption had been rebutted by the prosecution:<sup>40</sup>

In relation to the offences charged in counts two and three, there was no evidence about the environment in which the appellant had been raised or from which any conclusion could be drawn as to his moral development. The circumstance that at the age of 11 years and six months he was left at home alone in charge of his younger siblings does not so much speak to his asserted maturity as to the inadequacy of the arrangements for the care of the children, including the appellant. No evidence of the appellant's performance at school as an 11-year-old was adduced. In the absence of evidence on these subjects, it was not open to conclude that the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood that his conduct, charged in counts two and three, in engaging in sexual intercourse with his younger brother was seriously wrong in a moral sense.

The convictions on counts two and three were ordered to be quashed with verdicts of acquittal entered.<sup>41</sup> Thus, at the end of these appeals, RP stood acquitted on all of the four counts.

## IV PART 3: DISCUSSION

The criminal justice system has developed a number of legal measures designed to accommodate the different levels of maturity in children. For witnesses, one such mechanism is the giving of unsworn evidence where a child has general capacity to understand questions and give rational replies, but lacks the specific capacity to understand the legal obligation to tell the truth. For child defendants, the mechanism of the *doli incapax*

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<sup>33</sup> *RP v The Queen* [2016] HCA 53 (21 December 2016) [20]-[21] (Kiefel, Bell, Keane and Gordon JJ).

<sup>34</sup> *Ibid* [4] (Kiefel, Bell, Keane and Gordon JJ).

<sup>35</sup> *RP v The Queen* [2015] NSWCCA 215 (26 August 2015) [1]-[9] (Johnson J), [73]-[78] (Davies J).

<sup>36</sup> *Ibid* [162]-[164] (Hamill J).

<sup>37</sup> *Ibid* [1] (Johnson J), [79]-[80] (Davies J), [182] (Hamill J).

<sup>38</sup> *RP v The Queen* [2016] HCA 53 (21 December 2016) [10] (Kiefel, Bell, Keane and Gordon JJ).

<sup>39</sup> *Ibid* [12] (Kiefel, Bell, Keane and Gordon JJ), notes omitted.

<sup>40</sup> *Ibid* [36] (Kiefel, Bell, Keane and Gordon JJ).

<sup>41</sup> *Ibid* [37] (Kiefel, Bell, Keane and Gordon JJ), [43] with the remaining judge (Gageler J) agreeing in a separate judgment.

presumption shields those too immature to appreciate the serious wrongness of their acts from criminal responsibility. Both measures have a long history, but often prove difficult for courts to apply correctly in particular cases.

In the *GW* appeal, the High Court affirmed that the trial judge must assess the capacities of the child witness before allowing him or her to give unsworn evidence, but that rigid adherence to a particular form of words is not necessary in reaching the required conclusion, nor is there a requirement based on potential unreliability of evidence for a jury warning to be given. Rather, a measure of flexibility and common sense should be afforded to judges and juries, the main focus being on the particular child's capacity to participate effectively in legal proceedings.

In the *RP* appeal, a similar focus on the particular child's capacity was also encouraged, in this case the question being whether the evidence sufficiently rebutted the *doli incapax* presumption to allow criminal responsibility to be attributed to the defendant. Both appeals invite attention to the purpose to be served by these legal measures, with the High Court being willing to review the evidence, or its absence, in considerable detail. Of course, this does not mean that the appeal judges were usurping the role of trial judges and counsel, but rather that the correctness of the procedures adopted in each case had to be assessed in the individual circumstances involved, with particular regard to the level of maturity and understanding of the child.

In conclusion, the High Court did not in either of the two cases discussed, *GW* and *RP*, alter our understanding of the mechanics or underlying purpose of the protective mechanisms under consideration. However, the approach taken by the High Court in both cases does reinforce that these protective aims can only be properly achieved through careful yet flexible application of the legal tests applicable in light of the particular individual's circumstances. Understanding children's capacities is a complex task that certainly continues to challenge the criminal justice system. However, the High Court reminds us that rigid application of the special rules designed primarily to protect the vulnerability of a child is not the correct method to deal with that complexity. Indeed, doing so may undermine the underlying purpose of these special rules in the first place.