

Position Statement on *Doli Incapax* in NSW

What is *doli incapax*?

Doli incapax is a legal principle that has always been a part of the law in NSW. It recognises that children are at a stage of development that makes them unlikely to be capable of forming criminal intent and are more vulnerable than adults.

Doli incapax exists because of the undisputed harms that children suffer when they are forced into contact with the court process, youth prisons and criminal punishment. The evidence shows that:

- the earlier in life that a person experiences contact with the criminal legal system, the more likely it is that they will have future contact with the system as an adult;¹
- people who have experienced incarceration in childhood are also more likely to be re-incarcerated within the following 10 years;² and
- the majority of children in the youth justice system present with disability and complex needs, and these vulnerabilities might be exacerbated by spending time in custody. This is particularly the case for Aboriginal and/or Torres Strait Islander children, who continue to be grossly over-represented in the youth justice system.³

Doli incapax ensures that children under 14 are only found guilty at court if the prosecution can prove the child actually knew that what they did was seriously wrong.

Doli incapax is only considered at a late stage in the court process, after a child under 14 has been charged by police and taken to court – usually many weeks or months after the charge.

Doli incapax does not prevent police from stopping, searching, arresting, charging, detaining, bail-refusing and using force against a child. It does not prevent children as young as 10 from being imprisoned on remand or subject to bail conditions for months while their charges go through court.

The ALS position on *doli incapax*

Most children aged 10–13 who are charged with criminal offences are, in fact, *doli incapax* – they have not yet reached a stage of neurodevelopment, nor developed the social, emotional and intellectual maturity necessary to form criminal intent and to be liable for criminal responsibility.

This is especially the case because the majority of criminalised children have a disability, complex trauma, or both. They have unmet and complex needs which criminal courts cannot address.

For centuries, through the principle of *doli incapax*, the law has recognised that children are more vulnerable to the harms of criminalisation and imprisonment than adults.

¹ BOCSAR, 'The Transition from Juvenile to Adult Criminal Careers' (Contemporary Issues in Crime and Justice No 86, 2005) cited in Australian Law Reform Commission, [Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples](#) (2017).

² Jason Payne and Don Weatherburn, 'Juvenile Reoffending: A Ten-Year Retrospective Cohort Analysis' (2015) 50(4) *The Australian Journal of Social Issues* 349.

³ Australian Institute of Criminology, [Youth justice in Australia: Themes from recent inquiries](#) (Trends & Issues in Criminal Justice No 605, October 2020).

Impacts of criminalising children

There is no evidence that prosecuting children prevents or reduces crime, but there is overwhelming local and international evidence that contact with police, courts and youth prisons compounds harm for children and communities and increases crime. Contact with police, courts and youth prisons is criminogenic: it increases the likelihood of future offending and contact with the criminal process.⁴ A so-called solution which makes the problem worse is no solution at all.

Aboriginal children are disproportionately arrested, charged and imprisoned in NSW. On any given day, 60% of children in NSW youth prisons are Aboriginal. Changing the law to make sure more children are found guilty and criminally punished at court would be contrary to the commitments made by the NSW Government under the [National Agreement on Closing the Gap](#) to reduce the overrepresentation of Aboriginal children in the criminal legal system.

Criminalising more children is also poor economic policy – it costs \$3,320 per day to imprison a single child in Australia.⁵ Even NSW Treasury has recommended investment in alternatives to the criminal legal system in the [2023-24 Indigenous Expenditure Report](#).

What the NSW Government should do

Instead of seeking to increase the number of children aged 10–13 found guilty at court, the NSW Government should urgently raise the age of legal responsibility to 14 years without exception.

Until that occurs, *doli incapax* should not be abolished, weakened in any way, or changed so that the principle is more difficult for children aged 10–13 to rely upon.

In technical terms, this means that:

- *doli incapax* must remain an element of any offence charged against a child aged 10–13 years;
- the burden of proof must remain on the prosecution to rebut the presumption beyond reasonable doubt; and
- if the test for *doli incapax* is to be legislated, the legislation should go no further than confirming the law stated by the High Court of Australia in *RP*. This includes preserving the requirement for the prosecution to prove that the child had actual knowledge that the alleged conduct was seriously morally wrong – not merely the capacity to know.

Section 11 of the *Youth Justice Act 2024* (Vic) is an example from another jurisdiction that reflects the common law position and provides guidance to courts and parties to court proceedings:

11 Presumption that child 12 or 13 years of age cannot commit an offence

(1) It is presumed that a child who is 12 or 13 years of age cannot commit an offence.

(2) The presumption in subsection (1) is rebutted only if the prosecution proves beyond reasonable doubt that the child knew at the time of the alleged commission of the offence that the child's conduct was seriously wrong.

(3) Whether a child knew that their conduct was seriously wrong—

⁴ See, eg, Australian Institute of Health and Welfare, [Young people returning to sentenced youth justice supervision 2021–22](#) (Report, 2023): two-thirds of children sentenced to community-based supervision and 85% of children sentenced to imprisonment are sentenced for further offences within 12 months.

⁵ Productivity Commission, [Report on Government Services 2025 – 17 Youth justice services](#) (Report, 2025).

- (a) is a question of fact; and
- (b) cannot be inferred merely from the fact that the child engaged in the conduct which constituted the offence; and
- (c) refers to the child's knowledge that it was seriously wrong in a moral sense to engage in the conduct that constitutes the physical element or elements of the offence.

(4) To avoid doubt—

- (a) any presumption arising by or under the common law in relation to the criminal responsibility of a child continues to apply; and
- (b) in the event of inconsistency between this section and a presumption referred to in paragraph (a), this section prevails to the extent of the inconsistency.

Reducing or removing access to *doli incapax* would increase delay in the Children's Court of NSW because more matters would have to be scheduled for a full hearing. Most of these children would still be found not guilty after hearing. Greater delays will increase costs to taxpayers and keep children in prison or on punitive bail conditions for longer, increasing their likelihood of future contact with the criminal courts as adolescents and adults.

Instead, legislation should be introduced to require consideration of *doli incapax* at more and earlier stages of the criminal process – including by police, at the time of their first contact with a child, before police make a decision to charge, and by prosecutors within 21 days of any charge being laid.

Strengthening diversionary options

Doli incapax is not a barrier to police- or court-initiated diversion. The NSW Government should strengthen the *Young Offenders Act 1997* and *Mental Health and Cognitive Impairment Forensic Provisions Act 2023* to make these diversionary options more accessible to criminalised children – not weaken *doli incapax* to coerce more young children to plead guilty and be criminally punished.

Recommended changes to the *Young Offenders Act 1997* (NSW)

Diverting more children away from court using warnings, cautions and conferences under the *Young Offenders Act (YOA)* would lead to fewer children ending up in the court process and needing to rely on *doli incapax* in the first place.

The NSW Government should strengthen the YOA to increase use of diversion, including by:

- removing the limit on cautions;
- making diversion available for all offences which can be dealt with to finality in the Children's Court, with no exceptions; and
- strengthening admissibility protections for warnings and cautions so that they can't be used against children in court. This will mean more children are able to access diversion without prejudicing their legal interests.

NSW Police should also incentivise its officers to divert more children under the YOA, especially Aboriginal and Torres Strait Islander children, through ongoing training, performance requirements for officers and local area commands, and internal policies reinforcing this expectation.

If a more intensive therapeutic response is required for the very small number of currently criminalised children aged 10–13 with needs that cannot currently be appropriately addressed by YOA diversion, the ALS has proposed a new diversionary option in its submission to the NSW Government's [Review of](#)

[the Operation of Doli Incapax in NSW for Children under 14](#) that would exist outside of the criminal court process, does not require charging a child, and could be introduced as a new Part in the YOA.

Prioritise prevention and early intervention by investing in NSW communities

The NSW Government should urgently implement the recommendations and advice of dozens of previous inquiries about improving community safety and the criminal legal system.⁶ Collectively, these inquiries have made hundreds of recommendations, none of which involve weakening *doli incapax* or increasing the criminalisation of children aged 10–13.

The NSW Government should implement the co-designed options and models in the *Therapeutic Pathways for Children* project delivered in partnership with the ALS for the [2022-24 Closing the Gap Implementation Plan](#). This means investing in therapeutic pathways which ensure access to, support and care for all children in NSW to enable them to thrive – like prevention programs, community-based pathways and alternative responder models, especially those delivered by Aboriginal community-controlled organisations – not measures which make it easier to prosecute them.

The NSW Government should listen to the voices and experiences of systems-impacted Aboriginal young people themselves when making decisions about policies that impact them.⁷ This would give effect to commitments the NSW Government has made by signing the National Agreement on Closing the Gap and the NSW Closing the Gap Partnership Agreement that Aboriginal and Torres Strait Islander people should be involved, through shared decision-making, in the design, implementation, monitoring and evaluation of programs and policies that impact them.

⁶ See, eg, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991); 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); Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (December 2017); NSW Legislative Council Portfolio Committee No. 2 – Health and Community Services, *Provision of Drug Rehabilitation Services in Regional, Rural and Remote New South Wales* (August 2018); NSW Legislative Assembly Committee on Law and Safety, *The Adequacy of Youth Diversionary Programs in New South Wales* (September 2018); *Family Is Culture: Independent review of Aboriginal children and young people in out-of-home care* (October 2019), in full but especially ch 15 ('Care criminalisation'); *Special Commission of Inquiry into the Drug 'Ice'* (January 2020); Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report – Volume 8, Criminal Justice and People with Disability* (September 2023); NSW Legislative Council Portfolio Committee No. 2 – Health, Equity, accessibility and appropriate delivery of outpatient and community mental health care in New South Wales (June 2024).

⁷ See, eg, [JustReinvest NSW Moree Youth Forum Report](#) (2022); [Mounty Yarns: Lived Experiences of Aboriginal Young People in Mount Druitt](#) (2023).