

30 June 2025

[REDACTED]  
[REDACTED]

Dear Reviewers,

**Re: Review of the operation of doli incapax in NSW for children under 14**

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**).

The Aboriginal Legal Service (NSW/ACT) Limited (**ALS**) is a proud Aboriginal Community-Controlled Organisation (**ACCO**), Aboriginal and Torres Strait Islander Legal Service (**ATSILS**) and the primary legal services provider for Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. Our vision is to achieve social justice and equity for Aboriginal and Torres Strait Islander people and communities.

More than 350 ALS staff members based in 21 communities support Aboriginal and Torres Strait Islander people through the provision of high quality and culturally safe legal support, including advice and representation in criminal law, children's care and protection law and family law. We also deliver a variety of wrap-around programs including bail support programs, a family violence prevention legal service, and child and family advocacy and support. We provide a Visiting Legal Service for Aboriginal children in youth detention centres, represent Aboriginal and Torres Strait Islander families in coronial inquests into deaths in custody and police operations, and deliver a variety of civil law services including tenants' advocacy, assistance with fines and fine-related debt, workplace sexual harassment and discrimination and employment law.

The ALS is the Justice Peak on the NSW Coalition of Aboriginal Peak Organisations (**NSW CAPO**) and a key partner in Closing the Gap. As a Peak and proud ACCO, we centre community interests in our advocacy for the transformation of systems which impact the lives of Aboriginal and Torres Strait Islander people.

This submission is informed by the experiences of the clients and communities we walk alongside, and the expertise of our staff providing vital services to children, families and communities across NSW.

Thank you for the opportunity to provide a submission. Please contact [REDACTED] if you would like to discuss this submission further.

Yours faithfully,

[REDACTED]

[REDACTED]

Acting Principal Legal Officer  
**Aboriginal Legal Service (NSW/ACT) Limited**



**Aboriginal  
Legal Service**  
(NSW/ACT) Limited

# **Submission to Review of the Operation of *Doli Incapax* in NSW for Children under 14**

*June 2025*

## About the Aboriginal Legal Service (NSW/ACT)

The Aboriginal Legal Service (NSW/ACT) Limited (**ALS**) is a proud Aboriginal Community-Controlled Organisation (**ACCO**), Aboriginal and Torres Strait Islander Legal Service (**ATSILS**) and the primary legal services provider for Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. Our vision is to achieve social justice and equity for Aboriginal and Torres Strait Islander people and communities.

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## Terms of Reference

The Reviewers are asked to review and report on the operation of, and legislative options for, the common law presumption of *doli incapax* in NSW.

The Review should recommend a framework to enable the enactment of the presumption in NSW legislation and consider matters including, but not limited to:

1. The form that the legislation should take, noting different approaches across Australian jurisdictions.
2. How the presumption is currently operating, including:
  - a. the nature and extent of the evidentiary burden on the prosecution
  - b. the evidence available to the court, including what improvements could be made to improve the available evidence.
3. Any improvements in relation to the process by which the presumption is dealt with in criminal proceedings (e.g. if it should be considered earlier in proceedings or dealt with in a separate hearing).
4. The interaction between *doli incapax*, the *Young Offenders Act 1997*, and the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*.
5. The impact of the operation of the presumption on available responses to address underlying causes of behaviour by children aged under 14, including appropriate options for intervention.
6. Any other matters considered relevant, including those related to community safety and the interests of children.<sup>1</sup>

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<sup>1</sup> <https://dcj.nsw.gov.au/legal-and-justice/laws-and-legislation/review-of-operation-of-doli-incapax-in-nsw-for-children-under-14.html>

## Introduction

The doctrine of *doli incapax* is a centuries-old legal protection for children facing the might and comparatively infinite resources of the state in criminal prosecutions. Since the 17<sup>th</sup> Century, the common law has recognised that children are at a stage of development that makes them far less likely to be capable of forming criminal intent, and far more vulnerable to the harms of criminalisation and imprisonment, than adults. Contemporary scientific evidence now confirms that children under the age of 14 years have not yet developed the social, emotional and intellectual maturity necessary for criminal responsibility.

*Doli incapax* is an essential safeguard in a jurisdiction that has not yet raised the minimum age of criminal responsibility. Our primary position remains that the NSW Government should urgently act to raise the minimum age of criminal responsibility to at least 14 years, without exception.

However, for as long as criminalisation of children under 14 remains possible in NSW, *doli incapax* is a critical safeguard for criminalised children aged 10–13 that should not be weakened in any way.

The vulnerability of children and their limited capacity to meaningfully participate in legal proceedings is recognised by the NSW legislature in numerous contexts, including:

- Section 6(b) of the *Children's (Criminal Proceedings) Act 1987* which provides that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance.
- Section 13 of the *Children's (Criminal Proceedings Act) 1987* which requires that children have a support person present for any statement made by the child to an investigating office to be admissible, with particular protections for children aged under 14.
- Part 2 of Schedule 2 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016* which prohibits a child from being placed in a police cell except in exceptional circumstances.
- The *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023* which requires that children under the age of 16 must have access a witness intermediary when giving evidence in child sexual assault matters due to their vulnerability.
- Section 96(3) of the *Children and Young Persons (Care and Protection) Act 1998* which exempts children from giving evidence in care and protection proceedings in the Children's Court.
- Section 99B of the *Children and Young Persons (Care and Protection) Act 1998* which creates a rebuttable presumption that a child who is less than 12 years of age is not capable of giving proper instructions to his or her legal representative.

These statutory principles and safeguards respond to the evidence about the neurodevelopmental stages of children, and support international human rights norms and protections including:

- The United Nations Convention on the Rights of the Child (**UNCRC**), which confirms that universal economic, social, cultural, civil and political rights apply equally to children and adults, but also includes additional protections for children because of their immaturity and vulnerability;<sup>2</sup> and

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<sup>2</sup> [Convention on the Rights of the Child](#), opened for signature 20 November 1989, UNTS 1577 (entered into force 2 September 1990).

- The Standard Minimum Rules for the Administration of Juvenile Justice (**Beijing Rules**), which provide guidelines for the treatment of children while they are in contact with criminal legal systems. Alongside the provisions of the UNCRC, the Beijing Rules emphasise that a distinct approach is required for accused persons who are children.<sup>3</sup>

We are concerned that the NSW Government has deemed it both necessary and appropriate to conduct a review into the operation of *doli incapax* which is seemingly predicated on a conclusion that it is undesirable that there has been a decline in the number of successful prosecutions of children aged 10-13 since the law was clarified in *RP v The Queen* (2016) 259 CLR 641 (**RP**).<sup>4</sup>

On the contrary: a reduction in the number of findings of criminal liability for children aged 10–13 since *RP* reflects the fact that the doctrine is now being applied consistently, and that the majority of criminalised children in NSW below the age of 14 are in fact *doli incapax*: they have not yet developed the social, emotional and intellectual maturity necessary to form criminal intent and to be liable for criminal responsibility.

The very small number of children below the age of 14 currently coming into contact with police and the criminal courts reflects a failure of public policy that is best dealt with through critical and sustained investment in community-based services, infrastructure and support for prevention, early intervention and diversion from the court process – not through legislative change that fails to address the underlying drivers of contact with police and the courts and, instead, exposes children to trauma and criminogenic influences.

For children aged 10–13, *doli incapax* is available in every Australian jurisdiction. In New South Wales, South Australia and Victoria it is based on the common law, while in the other states and territories it has been enacted in legislation. Legislating to weaken *doli incapax* in any way would cause further harm to criminalised children, increase crime rates because of the known criminogenic effects of early contact with the criminal legal system, lead to significant backlash from NSW communities, and take NSW far out of step with the laws of all other states and territories.

Legislating to weaken *doli incapax* in any way would also take NSW even further out of step than it already is with many international jurisdictions where children under 14 are protected from criminalisation entirely: for example, most European countries set their age of criminal responsibility between 14 and 16 years.<sup>5</sup> The United Nations Committee on the Rights of the Child has criticised Australia's low age of 10 years as the minimum age of criminal responsibility and has encouraged all countries 'to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age'.<sup>6</sup> The Committee has recommended a higher minimum age (such as 15 or 16) due to the fact that 'adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses' and 'developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making'.<sup>7</sup>

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<sup>3</sup> [United Nations Standard Minimum Rules for the Administration of Juvenile Justice \("The Beijing Rules"\)](#), GA Res 40/33, UN Doc A/RES/40/33 (adopted 29 November 1985).

<sup>4</sup> Jonathan Gu, [Did a High Court Decision on Doli Incapax Shift Court Outcomes for 10-13 Year Olds?](#) (Crime and Justice Bulletin 268, May 2025).

<sup>5</sup> The most common minimum age of criminal responsibility around the world is 14. Excluding four countries that do not set a minimum age, the mean is 12.5 and the median is 14: Neal Hazel, [Cross-National Comparison of Youth Justice](#) (Youth Justice Board, 2008) 31.

<sup>6</sup> Committee on the Rights of the Child, [General comment No. 24 \(2019\) on children's rights in the child justice system](#), UN Doc CRC/C/GC/24 (18 September 2019).

<sup>7</sup> *Ibid.*

Law and policy changes directed at increasing successful prosecutions of children aged 10–13 not only disregard the weight of scientific evidence and international norms, but, due to the gross over-representation of Aboriginal children in the criminal legal system, they also directly undermine the commitments made by the NSW Government to reduce the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system under the National Agreement on Closing the Gap and the NSW Closing the Gap Partnership Agreement.<sup>8</sup>

Law and policy changes which increase criminalisation also disregard advice about sound economic policy. NSW Treasury in the *Indigenous Expenditure Report 2023–24* observed that high general expenditure relating to Aboriginal people across all justice areas ‘reflects the over-representation of First Nations people across all stages of the criminal justice system’ and ‘suggests the need for targeted reform to reduce First Nations representation in these systems, including identification of opportunities for diversionary and preventative measures’.<sup>9</sup> Treasury estimates that if ‘the First Nations’ share of spending on justice in NSW matched the First Nations population share’, there would be avoided costs of around \$1.028 billion per year, or a 76.1% reduction in expenses for First Nations justice services. Treasury recommended that ‘opportunities for investment in early intervention and diversion should be considered in light of these long-term potential avoided costs’.

Numerous Royal Commissions, inquiries and other independent and parliamentary processes have considered social and environmental drivers of crime, and current systems and responses.<sup>10</sup> Collectively, these reports make hundreds of recommendations which prioritise a public health approach to key drivers of crime, diversion from criminalisation for young people, reform to child protection systems, investment in social services and essential infrastructure, and investment in Aboriginal community-led responses and services for Aboriginal communities. None have recommended an increased reliance on criminalisation for children aged 10–13, or a weakening of *doli incapax* to increase prospects of conviction for the youngest children who are criminalised.

Our responses to the Issues Paper are set out on the pages that follow. The key positions of the ALS may be summarised as follows:

1. Our primary position remains that the NSW Government should urgently act to raise the minimum age of criminal responsibility to at least 14 years, without exception. However, for as long as criminalisation of children under 14 remains possible in NSW, *doli incapax* is a critical safeguard for criminalised children aged 10–13 that should not be abolished, weakened in any way, or changed to make it more difficult for accused children to rely upon.
2. If the test for *doli incapax* is to be legislated in NSW, legislation must go no further than codifying the requirements set down by the High Court of Australia in *RP* – a judgment which did not change the law but, rather, produced certainty and clarity in the law, and is binding

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<sup>8</sup> The Issues Paper notes that 41% of young people aged under 14 years who were legally proceeded against by police in 2023 were Aboriginal, and that this proportion of Aboriginal young people in the cohort is six times higher than the proportion of Aboriginal young people in the general population.

<sup>9</sup> NSW Treasury, *Indigenous Expenditure Report 2023–24* (June 2024).

<sup>10</sup> 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).

across all Australian jurisdictions. We support a formulation similar to that contained in s 11 of the *Youth Justice Act 2024* (Vic).

3. Legislation should be introduced to mandate consideration of *doli incapax* at earlier stages of the criminal process: by police at the time of a child's first contact with police prior to decision to charge, and by prosecutors within 21 days of any charge being laid.
4. Courts are not an appropriate, safe or effective site of therapeutic intervention for children aged 10–13 with complex unmet needs. Forcing children to remain engaged in the court process so that they may be subjected to court orders and 'supervision' by state agencies is not only counterproductive and ineffective, it is harmful to the child, and antithetical to any meaningful form of community safety reflecting the evidence that criminalising children only serves to increase crime.
5. For as long as Aboriginal children remain grossly overrepresented at all stages of the criminal process, positing criminal courts as an effective, let alone necessary, site of intervention does little more than continue the paternalistic approaches of Australian governments since colonisation. Positing criminal courts as a site of therapeutic intervention exacerbates ongoing paternalism in the practices of NSW state agencies dealing with Aboriginal children and families every day, and compounds intergenerational harm to Aboriginal communities.
6. Weakening or restricting access to *doli incapax* would increase delay in the criminal legal system. Policies directed at increasing the number of findings of guilt for children aged 10–13 will result in a high volume of criminal charges which are currently withdrawn or discontinued proceeding to defended hearing, following which accused children – the majority living with disability and complex trauma – would still be found not guilty. This would exacerbate harm to criminalised children by forcing them to remain engaged in a lengthy court process, many of them facing significant periods of incarceration or conditional liberty, and ultimately increase delay and workload for the Children's Court, as previously avoided defended hearings would need to be allocated time and heard to finality.
7. Diversion of children from criminal prosecution under the *Young Offenders Act 1997* (YOA) is an existing and effective mechanism that is under-utilised, especially in relation to Aboriginal children. Measures should be taken to reverse the decline in the use of youth warnings, cautions and conferences by NSW Police over recent years, to address the disparity in diversion between Aboriginal and non-Aboriginal children, and to reform to the YOA to ensure that children may be provided access to timely and effective support and interventions, without the delay, trauma and wasted expenditure associated with the criminal court process.

We have proposed one option below for an intensive, pre-court diversionary response for children aged 10–13 alleged to have committed serious offences, which could be implemented as a new Part of the YOA.

In addition to our substantive feedback on the subject matter, we note some concerns we hold about the parameters of the Review itself:

- **Scope of consultation** – We welcome the Reviewers' consultation with the ALS and with NSW CAPO, as well as the commitment to consult with other 'Aboriginal-led organisations' in the Terms of Reference, however, we understand that there are stakeholders with relevant expertise have not been invited to participate. We are concerned that the Review may not

receive the benefit of the range of input and stakeholder views required to meaningfully inform decisions about the significant issues under consideration.

- **Public accountability and transparency** – We are concerned that a matter of such wide-reaching public importance is subject to a closed consultation, and that submissions to the Review will not be published. We urge reconsideration of this position.
- **Timeframe for consultation and finalisation of the Review** – We note that the timeframe for completion of the Review and associated consultation is short, with the review having been first announced on 8 May 2025 and consultation concluding in the next two weeks, as far as we understand it. We urge that adequate time be allowed for careful consideration of any proposed changes to a fundamental principle of the common law of NSW which bolsters the lack of positive, statutory rights protection for children in this jurisdiction.

## Characteristics of criminalised children aged 10–13 years

Children aged 10–13 who are criminalised in NSW are often physically and neurodevelopmentally vulnerable, with high rates of disability and pre-existing trauma. In NSW, BOCSAR has found:<sup>11</sup>

- 25% are in out-of-home care;
- 82% have been identified in a child protection report as at “risk of significant harm”;
- 60% have been reported at “risk of significant harm” over 10 times;
- 56% have been recorded by NSW Police as a victim of violence;
- 37% have accessed homelessness services; and
- 40% have a parent who has been in custody.

This accords with findings in other Australian jurisdictions.<sup>12</sup> Data referred to in the final report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability highlighted the disproportionate number of people with cognitive disability who are in custody, particularly Aboriginal children, describing this as a largely hidden national crisis.<sup>13</sup>

In a study of 65% of children in youth prisons in New South Wales (n=295), 45.8% had borderline or lower intellectual functioning.<sup>14</sup> A 2023 study by the NSW Bureau of Crime Statistics and Research (BOCSAR) found that almost a quarter of children who have allegedly offended had a disability, and more than 2 in 5 young people with sentenced custodial episodes were identified as having a disability.<sup>15</sup> Rates of disability were higher among Aboriginal people in contact with the criminal legal system than non-Aboriginal people.<sup>16</sup>

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<sup>11</sup> Bureau of Crime Statistics and Research, [The involvement of young people aged 10 to 13 years in the NSW criminal justice system](#) (Bureau Brief, August 2024).

<sup>12</sup> See, eg, Susan Baidawi et al, [Children aged 10 to 13 in the justice system: Characteristics, alleged offending and legal outcomes](#) (Australian Institute of Criminology, Report, January 2024), which describes the prevalence of “high levels of early adversity and trauma, family difficulties, and child protection involvement among children charged with early offending” in Victoria.

<sup>13</sup> The Royal Commission heard that, as of 2015, almost one in four First Nations children in detention were estimated to have an intellectual disability: Final Report, vol 8.

<sup>14</sup> Leigh Haysom et al, ‘Intellectual disability in young people in custody in New South Wales, Australia - prevalence and markers’ (2014) 58 *Journal of Intellectual Disability Research* 1004. See also Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (Report, 2015).

<sup>15</sup> Clare Ringland, Stewart Boiteux and Suzanne Poynton, [People with disability and offending in NSW: Results from the National Disability Data Asset pilot](#) (Crime and Justice Statistics Bureau Brief No 1674, January 2023).

<sup>16</sup> *Ibid.*

A 2018 study of the Western Australian youth detention population identified a high prevalence of Foetal Alcohol Spectrum Disorder (**FASD**) and severe neurodevelopmental impairment, the majority of which had not been identified prior to the study. These findings highlight the vulnerability of children brought into contact with the legal system and the urgent need for improved diagnosis to identify their strengths and difficulties, and to guide and improve their rehabilitation.<sup>17</sup> Impairment in executive function, memory, language, learning and attention in young people with FASD can result in a range of difficulties including understanding cause and effect, learning from past experiences and decision making.<sup>18</sup> The neuropsychological result can affect all aspects of the legal proceedings, including the child understanding the expectations of them and providing credible evidence in forensic interviews, fitness to plead, capacity to stand trial and the process of sentencing.<sup>19</sup>

As noted in the Issues Paper, Aboriginal children aged 10–13 and children in regional and remote areas aged 10–13 are disproportionately criminalised:<sup>20</sup>

- In 2023, 41% of young people aged under 14 years who were legally proceeded against by police at least once were Aboriginal – a proportion six times higher than the proportion of Aboriginal children in the general population.
- The rate of legal proceedings against young people under 14 years of age was more than three times as high in regional/remote/very remote areas compared with major cities (1171.6 per 100,000 population vs 371.2 per 100,000 population).

However, there are very few children aged 10–13 in NSW who come into contact with the criminal courts every year:<sup>21</sup>

- In 2023, 171 distinct young people under the age of 14 were refused bail by police at least once. The number of children with repeat offences were even fewer.
- Of these children, two were aged 10 years; eight were 11 years; 35 were 12 years; and 126 were 13 years old. 60% of this cohort were Aboriginal (102 Aboriginal young people aged 10 to 13 years).

Contact between children aged 10–13 and the criminal court process generally represents the final failure in a long chain of systems which have failed to meet the needs of those children and their families. Redirecting the costs associated with criminalising this small number of children and with associated ancillary government processes (such as this Review) to meet the needs of their needs and prevent them coming into contact with police in the first place would be an evidence-based and effective policy response to public concern about their behaviours.

## The Impacts of Criminalising Children

Criminalising children increases crime and decreases community safety.

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<sup>17</sup> Bower et al, 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) *BMJ Open*.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid*.

<sup>20</sup> BOC SAR, [The involvement of young people aged 10 to 13 years in the NSW criminal justice system](#) (Bureau Brief, August 2024).

<sup>21</sup> *Ibid*.

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. A NSW longitudinal study which followed the life trajectory of a sample of criminalised children found that 57% of those who appeared before the Children’s Court had at least one appearance in an adult court in the 8 years that followed.<sup>22</sup> People who have experienced incarceration in childhood are also more likely to be re-incarcerated within the following ten years.<sup>23</sup>

A 2020 review by the Australian Institute of Criminology analysed hundreds of recommendations of key reports into Australian youth justice systems over a 5-year period, and summarised some of the key recurring recommendations:<sup>24</sup>

- Young people who enter youth justice systems, especially those who serve some period in detention, frequently present with an array of vulnerabilities and complex needs.
- These vulnerabilities might be exacerbated by spending time in custody, especially in segregation and isolation. This is particularly the case for Aboriginal young people, who continue to be massively over-represented in youth justice systems across Australia.
- Consequently, detention should be a last resort option. To ensure that youth justice detention is used as a last resort, recommendations from reviews included that:
  - the minimum age of criminal responsibility should be raised;
  - diversion should be more frequently used, where appropriate; and
  - alternatives to being remanded in custody should be employed more often.

The incarceration of young people increases their risk of reoffending and future imprisonment. It follows that effective strategies to reduce and prevent crime must promote diversion from contact with police and courts, yet Aboriginal children, especially those in regional, rural and remote areas, are less likely to be diverted from the criminal legal system than young people in metropolitan areas.<sup>25</sup>

## Issues Paper Questions

*How is the presumption of *doli incapax* operating in practice - Do you have any comments in relation to the nature and extent of the evidentiary burden on the prosecution?*

The presumption of *doli incapax* is working as it should in NSW, and the nature and extent of the evidentiary burden on the prosecution is appropriate. The burden should not be shifted or reversed, and the standard of proof prosecutors are required to each should not be lowered.

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<sup>22</sup> 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 People* (2017) <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>

<sup>23</sup> Jason Payne and Don Weatherburn, ‘Juvenile Reoffending: A Ten-Year Retrospective Cohort Analysis’ (2015) 50(4) *The Australian Journal of Social Issues* 349.

<sup>24</sup> Australian Institute of Criminology, *Youth justice in Australia: Themes from recent inquiries* (Trends & Issues in Criminal Justice No 605, October 2020)

<sup>25</sup> See, eg, Legislative Assembly of NSW Law and Safety Committee, NSW Parliament, *Report on the Adequacy of Youth Diversionary Programs in New South Wales* (September 2018), [3.3]; BOCSAR, [NSW Recorded Crime Statistics Quarterly Update June 2024](#).

In NSW, there are two minimum ages of criminal responsibility: the legislated minimum age which is not capable of being rebutted (10 years),<sup>26</sup> and the common law presumption of *doli incapax* for children aged under 14, which may be rebutted by the prosecution. *Doli incapax* is an element of every offence charged against a child under 14 years of age, and the burden to rebut the presumption of *doli incapax* beyond reasonable doubt appropriately rests with the prosecution, as reaffirmed in *RP*.

It would be an abrogation of fundamental protections for an accused person in the criminal law – including the right to silence, the presumption of innocence and the burden on the prosecution to prove all elements of a criminal offence beyond reasonable doubt – to require an accused child to establish that the presumption applies (or otherwise ‘prove’ that they were *doli incapax* – for example, by making *doli incapax* a defence), or to lower the standard of proof that the prosecution must reach to rebut the presumption.

A reduction in the number of successful prosecutions of children aged 10–13 following *RP* reflects an improved understanding and application of the law. BOCSAR recently published a study finding that conviction rates and guilty pleas for 10- to 13-year-olds in NSW decreased significantly following the decision in *RP*. Similar trends have been observed in Victoria and South Australia. This is neither an unexpected nor undesirable outcome. The High Court in *RP* clarified a long-standing legal test that was, in some locations, misunderstood or misapplied, and court outcomes have changed in line with this clarification of the law.

*Doli incapax* recognises the inappropriateness of criminalisation responses for children at an early stage of neurodevelopment, and their inherent vulnerability when they are enmeshed in the criminal process, often involving periods of imprisonment and/or extended periods of conditional liberty.

Assessing whether *doli incapax* is operating effectively requires an analysis of whether it is achieving its aim, not whether it aligns with the misconceptions of powerful stakeholders and media outlets.

The aim of *doli incapax* is to afford the necessary protections to children who are incapable of committing a crime because of their early stage of development. A reduced rate of guilty findings for children aged 10–13 following *RP* indicates that children who were previously being inappropriately found guilty, despite the fact that they did not know that their alleged conduct was seriously wrong, are currently being appropriately protected in line with NSW law.

#### *Prosecutors do adduce evidence to rebut the presumption*

It is true that many charges against children under 14 are withdrawn by police prosecutors with little or no evidence offered to rebut the presumption, however, many ALS clients whose charges are withdrawn or dismissed because the prosecution does not adduce evidence to rebut *doli incapax* would still be acquitted even if the prosecution did adduce evidence. Adducing evidence in these cases would not only still fail to secure a conviction, it would risk undermining protective factors for criminalised children and risk compromising their future engagement with services and supports which reduce risk of repeat contact with the criminal process.

For example, evidence against an accused child is often called from caseworkers, police youth liaison officers, teachers, education support staff, carers, family, health and therapeutic support providers. This has the capacity to damage or end these supportive relationships, and result in an increased risk of future contact with police and courts because of this disengagement.

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<sup>26</sup> *Children (Criminal Proceedings) Act 1987* (NSW) s 5.

Prolonging the court process for children who would otherwise have been presumed to be *doli incapax* will only increase expense and delay for the courts, while compounding trauma for impacted children.

A suggested approach to diverting children from court entirely using the *Young Offenders Act*, thereby avoiding these resource-intensive and often fruitless processes, is discussed below.

#### *The burden to establish or rebut the presumption of doli incapax should not be reversed*

Requiring an accused child to ‘prove’ that the presumption of *doli incapax* applies to them would represent a radical departure from the fundamental tenet of the criminal law that the onus is on the prosecution to prove all elements of its case against an accused beyond reasonable doubt. This is a critical safeguard for accused persons, especially children, facing the might and comparatively infinite resources of the state in criminal prosecutions.

If the burden to establish *doli incapax* were to be reversed, there would be practical barriers to accused children obtaining relevant materials and evidence, such as school records. The need for an accused child to adduce evidence to establish *doli incapax* (even to a lower standard, such as on the balance of probabilities) would result in further delay to the courts and expense because of the increased need for legal arguments regarding subpoenas and access under Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*.

Obtaining evidence by requiring a child accused to submit to examination/cross-examination in court would not be an appropriate alternative, as this would abrogate the accused’s right to silence and risk compounding trauma for an already extremely vulnerable cohort. Requiring children to adduce evidence regarding their level of understanding would also lead to increased delays in the finalisation of court proceedings, with the likely ancillary consequence of increasing time on remand for young children who are bail refused.

The ALS does not receive adequate baseline funding to obtain private consultant assessments and reports for clients in the summary jurisdiction on a regular basis. Children represented by the ALS would be structurally disadvantaged if required to adduce evidence to establish that they are *doli incapax* in court.

#### *How is the presumption of doli incapax operating in practice - Do you have any comments in relation to the evidence available to the court in doli incapax matters, including what improvements could be made to improve the available evidence?*

The primary reason that *doli incapax* matters do not proceed to a guilty finding is because the prosecution declines to adduce any evidence to rebut the presumption. The fact that evidence is not made available reflects the fact that the majority children aged 10–13 are, in fact, *doli incapax* – they are not at a stage of development where they are capable of forming criminal intent. Charges are subsequently either withdrawn or dismissed because an element of the offence has not been proven.

However, despite the general practices of NSW Police prosecutors, the presumption is capable of being rebutted, and evidence to rebut *doli* is capable of being adduced. The ALS represents children, especially in matters where Office of the Director of Prosecutions has carriage of the matter, in which *doli incapax* is successfully rebutted.

### *Use of Young Offenders Act diversions as evidence to rebut doli incapax*

Prosecutors often rely on previous warnings or cautions under the *Young Offenders Act 1997* to seek to rebut *doli incapax*. Please refer to discussion below relating to the use of warnings and cautions under the *Young Offenders Act 1997* by prosecutors to seek to rebut *doli incapax*.

### *Evidence obtained from schools*

The children ALS represents are some of the most systemically and structurally marginalised in NSW. The process of obtaining of evidence from schools often disrupts what are already fragile relationships between marginalised children and the education system. Research from across Australia has found that criminalised children reported being disengaged from school, often from very young ages. The ongoing reliance on evidence from schools compounds this disengagement. When records are produced, they are often of limited utility, given the disengagement of these children who experience high levels of suspension, expulsion and reduced hours under partial attendance plans.<sup>27</sup>

### *Other types of evidence adduced*

The prosecution also commonly relies upon:

- Statements or admissions made by the child (with admissibility often the subject of legal contest, depending on the circumstances in which the admission was made);
- Surrounding circumstances – behaviour of the child before, during and after the act beyond the elements of the offence itself;
- Prior criminal history, including court transcripts; and
- Evidence from parents and carers, including out-of-home-care workers.

We refer the Reviewers to our submission to the NSW Law Enforcement Conduct Commission investigation, Operation Mantus, in which we outline concerns relating to the practices of NSW Police officers in seeking to produce ‘*doli* evidence’ through informal interviews of Aboriginal children that do not comply with statutory safeguards for vulnerable persons.<sup>28</sup>

### *Court-ordered doli incapax assessment reports*

Some jurisdictions, such as Victoria, provide for court-ordered *doli incapax* assessment reports. It is important to note that these reports and a child’s participation are voluntary in Victoria, preserving the accused’s right to silence and right against self-incrimination.

We are not supportive of court-ordered reports as a requirement in *doli incapax* matters due to the risk of further harm to criminalised children through the process of report-writing. Obtaining a report in these circumstances does not have a therapeutic objective and does not reflect trauma-informed practice. If court-ordered reports were to be considered by the NSW Government, it would be essential that they be voluntary, that they be provided to the accused directly, that steps be taken to ensure trauma-informed best practice in the way the assessments are conducted by clinicians, and that robust education be provided to clinicians as to the operation of the doctrine of *doli incapax*

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<sup>27</sup> Australian Human Rights Commission, [Help way earlier! How Australia can transform child justice to improve safety and wellbeing](#) (Report, 2024) 40.

<sup>28</sup> Aboriginal Legal Service (NSW/ACT) Limited, [Systemic Issues Relating to Police Practices of Interviewing Children following Refusal of Interview: Submission to LECC Investigation Operation Mantus](#) (30 March 2023).

(including that the burden rests on the prosecution to rebut the presumption beyond reasonable doubt).

### *Are there potential evidentiary or operational reforms (for example, improved training) that should be considered to improve the evidence available to the court in *doli incapax* matters?*

We recommend that improvements be made to training for police about the operation of *doli incapax*, as well as in relation to admissibility standards – for example, the admissibility of prior criminal history, and the admissibility of expert or opinion evidence.

We also recommend improved and mandatory training for police officers about their obligations to comply with statutory safeguards for children who are subject to police interviews, whether while they are in custody or ‘informal’ interviews in the field, and implementation of all recommendations of the Law Enforcement Conduct Commission investigation, Operation Mantus.<sup>29</sup>

We recommend specific training for judicial officers about the operation of *doli incapax* – magistrates, especially those who are not specialist children’s magistrates, District Court judges and Supreme Court justices, where very serious *doli incapax* matters do proceed, generally without the benefit of specialist children’s practitioners to assist the court.

As discussed above, the ALS opposes the use of court-ordered reports or subjecting an accused child to examination/cross-examination in court.

### *How should the principle of *doli incapax* be legislated in NSW?*

The ALS opposes legislating any changes to the principle of, or ‘test’ for, *doli incapax*. If *doli incapax* is to be codified in legislation, drafting should reflect the common law position as stated in *RP*, without amendment. The common law doctrine of *doli incapax* can be summarised as follows:

- (i) A child under 14 years is presumed at law to be incapable of bearing criminal responsibility for their acts.
- (ii) The onus is on the prosecution to adduce evidence to rebut the presumption of *doli incapax* to the criminal standard (beyond reasonable doubt). This is an element that the prosecution must establish as part of its case, in addition to the actus reus and mens rea (if any) elements of the offence charged: *RP* at [32].
- (iii) The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction. It must be adduced as part of the prosecution’s case, or else there will be no case to answer: *C v DPP* (1996) 1 AC 1, approved in *R v CRH* (Unreported, NSW Court of Criminal Appeal, Smart, Hidden and Newman JJ, 18 December 1996).
- (iv) The prosecution must prove that the child knew the conduct was morally wrong – i.e. they knew it was ‘seriously wrong in a moral sense’, as opposed to merely naughty or mischievous. Gaeger J in *RP* refers to the test as ‘seriously wrong by normal adult standards’: *RP* at [9], citing *C v DPP* at [38]; *BP v The Queen* [2006] NSWCCA 172 (BP) at [27]-[28].

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<sup>29</sup> <https://www.lecc.nsw.gov.au/publications/publications/section-132-report-operation-mantus-december-2023.pdf?expand=actions,breadcrumbs,navigation&expand.navigation.depth=2>

- (v) The prosecution must prove the child’s knowledge at the time of the alleged offending. The question of what the child knew subsequently – e.g., at the time of investigation, interview, doli assessment or court hearing – is not determinative of capacity.
- (vi) The nearer a child is to 14 years does not mean the less strong the evidence need be to rebut doli. Children do not mature at a uniform rate. Rebutting the presumption directs attention to the intellectual and moral development of the particular child: *RP* at [12].
- (vii) The evidence to prove the child’s guilty knowledge must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act may be: *RP* at [9]. See also *C v DPP* at [38].
- (viii) The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child’s development is such that they knew that it was morally wrong to engage in the conduct. This directs attention to the child’s intellectual and moral development, their education, and the environment in which they have been raised: *RP* at [9] and [12].
- (ix) What suffices to rebut the presumption will vary according to the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it concerns values of which they have direct personal experience (e.g. control of their own possessions and the theft of others’ property, as opposed to offences such as damaging public property, fare evading, receiving stolen goods, fraud or forgery): *RP* at [12].

#### *Codification in other Australian jurisdictions*

The Queensland legislation should not be used as a model if the NSW Government decides to legislate *doli incapax*. The test in Queensland refers to the *capacity* of the child to know (rather than *actual knowledge*) that the alleged conduct was seriously wrong. This approach is a significant departure from the common law doctrine of *doli incapax*, and does not reflect an individualised assessment of the level of understanding of the specific child who is appearing before the court.

We draw the Reviewers’ attention to s 11 of the *Youth Justice Act 2024* (Vic), which accurately reflects the common law position and provides guidance to courts and parties:

**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—*

*(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.*

## *Should legislation require consideration of *doli incapax* at early or multiple stages of the criminal justice process?*

We recommend that the NSW Government legislate requirements for *doli incapax* to be taken into consideration by police and prosecutors from a child's first contact with the justice system.

It should be a requirement for police to consider *doli incapax* prior to charging a child, as well as for prosecutors within 21 days following the laying of charges.

### *Police should be required to consider *doli incapax* at earlier stages of the criminal process*

In our experience, NSW police routinely charge children aged 10–13 years without evidence to rebut *doli incapax*, and often do not give consideration to the operation of *doli incapax* until close to or on the date of hearing. For police, the incentives to proceed to charge (e.g. remanding the child or placing them on conditional bail) significantly outweigh the disincentives (e.g. future costs orders in court).

There are frequently significant delays between children being charged with an offence and proper consideration of *doli incapax*. The extent of the delay for consideration and settling of *doli incapax* issues varies across NSW, but is particularly acute in regional areas, where there are long wait times for hearing dates (generally 6-12 months, compared with 2-4 months in metropolitan courts). In the interim, children are either subject to bail conditions (which can be onerous and counter-productive to therapeutic objectives which reduce their likelihood of future offending) or imprisoned on remand.

**Child's testimonial (bail)** – *"I've had a lot of shit bail conditions, like once I had to report to Mount Druitt police but was living in Parramatta and I got fines just going to report. Even this time, that non-association was with a cousin I was living with, where I was bailed to at the time, so I had to be there. I even had one that said I wasn't allowed in Mount Druitt, when I was 11 years old. But everyone I knew lived in Mount Druitt. No one was offering me help to live somewhere else."*

**Child's testimonial (detention)** – *Being locked up, being away from family, having anxiety, and being locked up in small spaces and stuff, it messes with you mentally. Messes with your head, being in environments like that. You overthink stuff. Think of bad stuff.*

The ALS recommends that it be a requirement for police to consider *doli incapax* prior to charging a child, as well as for prosecutors following the laying of charges. We recommend the approach taken in the *Youth Justice Bill 2024* (Vic):

*Clause 13 stipulates that if a proceeding is commenced against a 12- or 13-year-old, the prosecutor (all except the Director of Public Prosecutions) must review the charge to assess if there is enough admissible evidence to prove criminal intent and constitute a 'reasonable prospect' of a conviction. These actions should, 'if practicable', be done within 21 days after a proceeding's commencement. If it appears that evidence is not sufficient, they must consider whether a withdrawal of the charge is necessary. Accordingly, clause 14 stipulates that the prosecution must advise the child or their representation of a review's result.<sup>30</sup>*

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<sup>30</sup> Parliament of Victoria Parliamentary Library & Information Service, [Youth Justice Bill 2024 Bill Brief](#) (8 July 2024).

We also draw the Reviewers' attention to Principle 38 in the Standing Council of Attorneys-General (SCAG) Age of Criminal Responsibility Working Group report:

*Where a child under 14 years is charged with a criminal offence, police and prosecuting bodies should ensure the timely acquisition and disclosure of evidence to rebut the presumption against capacity.<sup>31</sup>*

This position was accompanied by a number of suggestions by SCAG as to how to realise the intent of the Principle, such as:

- establish a requirement for police to particularise, in initial charging documents and allegations of facts, the evidence that will be relied on to rebut a child being *doli incapax*;
- establish a 'consent to charge' requirement that would require the public prosecution agency of a jurisdiction to authorise the laying of a charge against a person who may be *doli incapax*;
- implement a scheme whereby a public prosecutor certifies the laying of charges, or advises on the appropriateness of laying charges, against an accused child, which would include an assessment of the prospect of rebutting that a child may not be *doli incapax*;
- introduce procedural reforms that indicate the points in the criminal proceeding that the court and the parties could/should consider the issue of whether a child is *doli incapax* presumption and whether there is sufficient evidence to rebut that presumption.

In 2023-2024, NSW spent \$223,062,000 on detention-based services.<sup>32</sup> Meaningful and early consideration of *doli incapax* not only benefits children and courts; it also reduces the significant costs associated with detention and criminal procedures to the state. These savings could be more effectively utilised in providing therapeutic interventions for children in the community that prevent crime and promote safety for the community at large, including these children.

*How does the operation of the presumption of doli incapax impact on: (a) criminal justice responses to offending behaviour by children aged 10 to 13, and/or (b) the affected children themselves?*

*Doli incapax* is a vital protection for currently criminalised children aged 10–13 that ensures they are not forced to remain in contact with the criminal court process and subjected to its attendant harms and criminogenic effects for longer than necessary.

Criminalisation responses, especially imprisonment, harm children.<sup>33</sup> The criminal legal system is too slow and inflicts too much harm to be an effective or appropriate point of therapeutic intervention for children. Current expenditure on police, Youth Justice and courts to run prosecutions against children who are *doli incapax* should instead be invested in prevention, early intervention and diversion. This accords with the recommendations of an ever-increasing and widely accepted body of research literature.

Because police are not currently required to point to any available evidence to rebut *doli incapax* before commencing a prosecution against a child under 14 – nor at any point prior to the date of hearing – criminalised young children with complex unmet needs are subjected to protracted contact with the criminal process, including police, courts and Youth Justice, and the associated harm, trauma,

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<sup>31</sup> Standing Council of Attorneys-General, [Age of Criminal Responsibility Working Group Report: September 2023](#) (4 Dec 2023).

<sup>32</sup> Productivity Commission, [Review of Government Services 2025](#) (Web Page, 30 January 2025)/

<sup>33</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, [Final Report](#) (2017).

and damage to the supportive relationships in their lives. Legislating to require police to consider *doli incapax* at time of charge, discussed below, would be one mechanism to cure this.

Numerous studies and testimonies from criminalised young people themselves demonstrate that early criminalisation of children does not reduce offending as the child matures. The underlying causes of contact with the criminal legal system cannot be addressed through a criminal process: addressing the root causes requires investment in communities and community-led solutions. What criminalisation does achieve, however, particularly through repeated interactions with police and attendances at court, is the normalisation of such interactions for the child, especially if these interactions occur from a young age.

As discussed above, our position is that the preferred approach is raising the age of criminal responsibility to 14 years, without exception. This is the only reliable way of ensuring that children who are *doli incapax* are not subjected to the many negative consequences and increase in the risk of future offending that accompany being forced into contact with the criminal legal system.

We note that *doli incapax* poses no barrier to charge by police – it only applies at the time of defended court proceedings, often many weeks or months following charge. The harms that children aged 10–13 charged by police are subjected to include: being arrested, searched and handcuffed; being detained in police vehicles, police cells (including near adults) and youth detention facilities; being subjected to restraints and other uses of force, isolation and solitary confinement; being interviewed; being subjected to onerous bail conditions; and appearing before courts.

The idea that criminalisation and detention of children is an appropriate mechanism through which to provide support and effective therapeutic interventions is not supported by national inquiries.<sup>34</sup>

*Are there any ways to facilitate access by accused children aged 10 to 13 to relevant services or support, without undermining the operation of doli incapax? If so, what changes should be made to enable this?*

Community-led prevention, early intervention and diversion should be prioritised for investment instead of carceral responses like police, courts and youth prisons.

*Community-based prevention and early intervention should be prioritised*

It is increasingly recognised that children who have been exposed to trauma ‘are at greater risk of displaying negative behaviour and that early interventions aimed at reinforcing wellbeing and skill development can be instrumental in bringing about the best crime prevention and community safety outcomes.’<sup>35</sup> The criminal legal system is not an appropriate pathway for children and their families to access services; it serves only to compound the trauma experienced by this group of children. This is particularly the case for proceedings where *doli incapax* applies, which in NSW’s current arrangements involve multiple court mentions and a defended hearing over a period of many months.

Mandated court appearances and restrictive bail conditions disrupt children’s engagement with school and supportive programs. Children are also deterred from participating in therapeutic programs because of the risk their participation may be used as evidence by police to rebut the

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<sup>34</sup> Most recently, see Australian Human Rights Commission, [Help way earlier! How Australia can transform child justice to improve safety and wellbeing](#) (2024) 40.

<sup>35</sup> Standing Council of Attorneys-General, [Age of Criminal Responsibility Working Group Report: September 2023](#) (4 Dec 2023)

presumption of *doli incapax*. A proposal regarding enhanced diversion to facilitate access for children aged 10 to 13 to services and support outside of the court process is outlined below.

The provision of early intervention programs has been found to ‘reduce crime at a population level by as much as 31% [and] reduce offending among at-risk populations by 50%.’ Such programs can enhance the health and wellbeing outcomes of young people, their families and the wider community. However, while some programs exist, they are not widespread, and have limited capacity due to chronic underinvestment, leaving many communities without vital social and therapeutic supports.<sup>36</sup>

Increasing the likelihood of a guilty finding at court will not address service gaps, and Aboriginal children are generally not adequately or effectively supported through court-ordered interventions due to the well-known accessibility barriers associated with lack of cultural safety in service delivery and well-founded mistrust of state agencies on the part of many Aboriginal communities. Investment should be focused on expanding evaluated community-based interventions that work, not increasing criminalisation.

#### *NSW-specific advice on improving and facilitating access by children aged 10–13 to services & support*

The NSW Government has received advice and recommendations on many previous occasions with regards to how it might facilitate access relevant services or support for children who are, or at risk of, being criminalised.

#### Inquiry into Community Safety in Regional and Rural Communities

We refer the Reviewers to the recommendations in [our submission](#) to the NSW Legislative Assembly Committee on Law & Safety *Inquiry into Community Safety in Regional and Rural Communities*: see pages 9–12.<sup>37</sup> We reiterate those recommendations in full.

We also draw the Reviewers’ attention to the following findings in the Committee’s interim report:

- *Effective early interventions for First Nations young people need to be codesigned with Elders and community and must focus on strengthening connections to culture and Country.*
- *Inquiry participants reflected on the strength and resilience of Aboriginal cultures. They commented that early intervention programs need to draw on the strengths of culture and Country. Programs that connect Aboriginal young people with culture and Country have a strong protective effect and help to prevent recidivism.*
- *Co-design and culturally appropriate delivery through Aboriginal Community Controlled Organisations (ACCOs) is the best way to recognise self-determination, and provide support in a way that is accessible and culturally appropriate.*
- *Government and service providers need to work to understand Aboriginal communities and respect their ways of doing, instead of imposing standardised models of service delivery. Support from government is best delivered through ACCOs.*

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<sup>36</sup> NSW Legislative Assembly Committee on Law and Safety Community safety in regional and rural communities, [Interim Report: Addressing the Drivers of Youth Crime through early intervention](#) (Report 2/58, May 2025).

<sup>37</sup> [https://www.parliament.nsw.gov.au/ladocs/submissions/86775/Submission%20194%20-%20Aboriginal%20Legal%20Service%20\(NSW%20ACT\)%20Limited.pdf](https://www.parliament.nsw.gov.au/ladocs/submissions/86775/Submission%20194%20-%20Aboriginal%20Legal%20Service%20(NSW%20ACT)%20Limited.pdf)

We further draw the Reviewers' attention to the Committee's recommendations, which include that:<sup>38</sup>

- *the NSW Government prioritise funding to Aboriginal Community Controlled Organisations (ACCOs) to deliver targeted early interventions to First Nations young people and families. It is important that program delivery and effectiveness is measured using appropriate metrics;*
- *the NSW Government consult with communities on the feasibility of local on Country diversionary centres for young people, offering accommodation, alternative education pathways, and cultural enrichment.*

### Therapeutic Pathways for Children

We draw the Reviewers' attention to a key initiative delivered in partnership between the NSW Government and NSW CAPO under the [NSW Closing the Gap Implementation Plan 2022–24, Therapeutic Pathways for Children](#). This was a 12-month, Treasury-funded policy development project co-led by DCJ and the ALS, which produced a systems review report focusing on ACCO and non-government service system across NSW, and a final report presenting a number of co-designed options, models and required actions identified for immediate and staged delivery to strengthen and implement therapeutic pathways for children in NSW, especially children aged 10–13, which can operate alongside and/or in the alternative to current criminalisation responses. While the report is not yet publicly available, it is expert advice that is available to government which can, and should, be used to inform evidence-based law- and policy-making.

The co-design process was intensive and involved Deputy Secretary and Executive level personnel, policy and service delivery staff from relevant NSW Government agencies (including NSW Police, DCJ, Youth Justice, Justice Health, Education and NSW Health), NSW CAPO members and other ACCOs from across regional and metropolitan NSW, and systems-impacted Aboriginal young people with lived experience of criminalisation and out-of-home care. Models identified include:

- ***Prevention and community-based pathways:*** An ACCO led model whereby family supports and interventions are led by culturally safe, community-controlled services. Any needs identified through schools or early contact with the police would be met with a response that connects a child with an ACCO led support.
- ***Alternative responder model:*** An alternative responder model which involves commissioning place-based ACCOs working together as alternative responders or co-responders to incidents involving children where there is no imminent safety risk, or a co-responder model with ACCOs working with a government agency or agencies.
- ***ACCO Sector Strengthening:*** Resource a team to specifically work with ACCOs that are ready to stand-up youth wellbeing services in their communities, and to build the evidence and practice base that can be shared more broadly and embedded.
- ***Multidisciplinary Panel:*** Consider establishing a multidisciplinary panel for children and young people who need intensive support.

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<sup>38</sup> NSW Legislative Assembly Committee on Law and Safety Community safety in regional and rural communities, [Interim Report: Addressing the Drivers of Youth Crime through early intervention](#) (Report 2/58, May 2025).

## *How does the operation of *doli incapax* interact with: (a) diversion under the Young Offenders Act 1997? (b) mental health diversions under the Mental Health and Cognitive Impairment Forensic Provisions Act 2020?*

### *Young Offenders Act 1997*

At a minimum, the Government should implement the existing review of the YOA to ensure more children are diverted away from court and into community-based support. The ALS notes that the YOA review has been underway since 2011. Implementing the existing draft legislation would ensure children are able to access to supports and interventions which effectively prevent offending faster, without going through the extended delay and trauma caused by the court process. Diversions continue to be disproportionately under-utilised for Aboriginal children.

Youth Justice Conferences are a largely effective diversionary mechanism which respond to the interests of victims, the wider community and the child without further criminalisation. A conference is often an appropriate response to a child presenting with concerning behavior, particularly where the Aboriginal community leaders are involved as enabled by s 47(2)(a) and (f). Conferences are also chronically under-utilised for this group, with only 6% of children aged under 14 receiving a Youth Justice Conference in 2023.<sup>39</sup>

### *Removing the cap on cautions and expanding the types of offences eligible for a YOA diversion*

The cap on cautions under the YOA in some cases leads to a child exercising their right to run a *doli* charge to hearing in order to 'save' their cautions (particularly for when they reach the age of 14, and *doli incapax* is no longer available to them). The limit on cautions under the YOA should be removed, in line with the *Youth Justice Act 1992* (Qld).<sup>40</sup>

The types of offences that are eligible for cautions should be expanded to include offences under the *Crimes (Domestic and Personal Violence) Act 2007*, the *Drug Misuse and Trafficking Act 1985* and the *Graffiti Control Act 2008*.<sup>41</sup> The existing blanket exclusion of certain offences creates inconsistencies in outcomes. For example, presently a child is ineligible for diversion if they threaten to assault someone (charge of intimidation) but are eligible for diversion if they follow through with that threat (charge of common assault).

There is precedent for targeted diversions for even serious offending or concerning behaviours in NSW – for example, New Street Services provides therapeutic services for children aged 10 to 17 years who have engaged in harmful sexual behaviours towards others. The service has achieved significant positive outcomes without reliance on a criminal legal system response.

### *Strengthening protections for Young Offenders Act warnings*

In our experience, warnings issued under the YOA are often relied upon by prosecutors as evidence to rebut *doli incapax* in subsequent proceedings. As legislation is presently drafted, the fact that a

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<sup>39</sup> BOCSAR, [The involvement of young people aged 10 to 13 years in the NSW criminal justice system](#) (Bureau Brief, August 2024).

<sup>40</sup> See Legislative Assembly of New South Wales: Law and Safety Committee, [The Adequacy of Youth Diversionary Programs in New South Wales](#) (September 2018) Recommendation 1: "That the NSW Government review whether the number of cautions that Police and the Courts can give under the *Young Offenders Act 1997* should be increased, or limits removed."

<sup>41</sup> *Ibid*, Recommendation 4: "That the NSW Government review the *Young Offenders Act 1997* to determine: whether the offences covered by the Act remain appropriate; whether any additional offences should be able to be dealt with under the Act in appropriate cases; and whether Police should be able to issue warnings and cautions and refer young people to youth justice conferences for additional offences in appropriate cases."

child has been diverted via a YOA warning may be subsequently relied upon to rebut the presumption of *doli incapax*. This is the case even where an admission is not required for a YOA warning, due to gaps in the protection of diversions under the YOA.

Any admission a child makes for the purpose of receiving a warning, or during the issuing of a warning, should be subject to the same legal protections as admissions made for a caution or conference.

#### *Strengthening protections for Young Offenders Act cautions and youth justice conferences*

We also recommend bolstering admissibility protections for cautions and conferences under s 66 and s 67 of the YOA to encourage children's participation in diversion. Section 66(1) should be strengthened to prevent the disclosure of information given to a child during a diversion except in the circumstances prescribed by s 66(2). We recommend that s 67(1) of the YOA be amended to read: 'Any statement, confession, admission or information made or given by a child or stated to a child during the giving of a caution or a conference under this Act is not to be admitted in evidence in any subsequent criminal or civil proceedings', to ensure that all children subject to diversionary measures are adequately protected.

Presently these protections are incomplete, and lead to police youth liaison officers giving evidence against children regarding their participation in diversions. This in turn dissuades legal representatives from advising children to accept diversions, as it may prejudice their legal interests in future criminal matters.

#### *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (MHCIFP)*

*Doli incapax* largely operates alongside the MHCIFP, with both the presumption and the MHCIFP providing protection for children under the age of 14 with mental health and cognitive impairments. Children under 14 can choose whether they defend their criminal charge on the basis of *doli incapax* (or any other basis) or seek to finalise their matters via a MHCIFP diversion. For many accused children, a diversion under the MHCIFP is an appropriate option, as it may reduce time spent on bail or on remand while a criminal charge progresses.

However, in many instances, the ability to finalise a charge via a MHCIFP diversion is constrained by a lack of access to both court- and community-based services for children with disabilities and mental health conditions. These barriers are especially pronounced for children in regional and remote areas who do not have access to specialist adolescent Justice Health clinicians, specialist Children's Court magistrates, and culturally safe and effective community-based mental health, disability and AOD supports.<sup>42</sup> Where a MHCIFP diversion is not available, these children may rely on the presumption.

For other children protected by the presumption, a diversion under the MHCIFP will not be appropriate. This may be due to their not having a relevant mental health or cognitive impairment, or their inability or unsuitability to engage with a court-mandated treatment plan for up to 12 months.

Like the restriction on the number of cautions available to children, diversion of a child younger than 14 under the MHCIFP may also prejudice them in future applications for diversion under the MHCIFP, given the operation of s 15(f) of the MHCIFP (which allows a magistrate to consider whether a

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<sup>42</sup> Children at non-specialist Children's Court venues are diverted under the MHCIFP at a much lower rate than children at specialist courts (9.3% compared to 4.7%), and Aboriginal children are diverted at an even lower rate at both specialist and non-specialist courts (6.9% of Aboriginal children are diverted at a specialist children's court compared to 11.9% of non-Aboriginal children; 3.5% of Aboriginal children are diverted at a non-specialist children's court compared to 9.4% of non-Aboriginal children). See BOCSCAR, Target 11 Subgroup presentation – Activity 2.2D Data April 2023 to March 2024.

defendant has previously received a section 14 diversion in deciding to order a further diversion). Again, this could be cured by legislative protections that prevent section 14 diversions of children under the age of 14 from being considered by courts once a child turns 14.

While there are barriers to diversion under the MHCIFP for some children, abolishing or weakening *doli incapax* is not a solution – instead, the NSW Government must strengthen these diversionary frameworks and associated service systems to make them more accessible to all defendants.

*Are there any ways to facilitate engagement in diversion by children aged 10 to 13 in contact with the criminal justice system? If so, what changes should be made to enable this?*

Despite the availability of diversionary options under the *Young Offenders Act 1997* in NSW, Aboriginal children are more likely to be criminalised and prosecuted by NSW Police instead of diverted.<sup>43</sup> BOCSAR data for 2022 also show that Aboriginal children are less likely than non-Aboriginal children to receive cautions, and more likely to receive Youth Justice Conferences – the ‘diversionary’ option that brings children closest to a criminal charge.<sup>44</sup> Warnings, the least serious YOA option, were issued to only 889 Aboriginal children, in contrast with 2,889 warnings issued to non-Aboriginal children.<sup>45</sup>

In addition to the recommendations in relation to the YOA and MHCIFP Act above, we make the following recommendations to increase diversion for currently criminalised children aged 10–13.

*Incentivise increased use of diversions by NSW Police*

In September 2024, BOCSAR reported that there has been a decline in the proportion of children formally diverted from the court system by way of a police-issued warning, caution, or youth justice conference, stating:<sup>46</sup>

Over the past two years the youth diversion rate fell from 51.3% in 2022/23 to 46.8% in 2023/24. While the total number of legal actions against young people has remained stable, the nature of youth legal actions has changed. From 2022/23 to 2023/24, youth court actions increased 10.0% (up 1,060 additional court actions) while the number of cautions under the *Young Offenders Act* fell 10.5% (down 765 cautions) and formal warnings fell 7.3% (down 225).

The Productivity Commission’s latest Report on Government Services (**ROGS**) found that, in 2023-2024, youth diversions as a proportion of accused children was 59.5% for non-Indigenous children, but only 27.6% for Aboriginal and Torres Strait Islander children.<sup>47</sup>

As discussed above, the use of YOA diversions for children of all ages by NSW Police should be increased as a matter of priority, especially the use of youth justice conferences, and the cap on cautions should be removed. Police should be incentivised by leadership to divert children, especially

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<sup>43</sup> See Donald Weatherburn and Brendan Thomas, ‘The Influence of Indigenous Status on the Issue of Police Cautions’ (2023) 56 *Journal of Criminology* 253.

<sup>44</sup> BOCSAR, ‘NSW Recorded Crime Statistics January to December 2022: Number of proceedings under the *Young Offenders Act* initiated by NSW Police by postcode of incident, Aboriginality of person of interest, type of YOA proceeding, and proportion that were a warning (excl. transport regulatory)’ (2023; reference: ac23-22377).

<sup>45</sup> *Ibid.*

<sup>46</sup> BOCSAR, [NSW Recorded Crime Statistics Quarterly Update June 2024](#).

<sup>47</sup> Productivity Commission, ‘Report on Government Services: Youth Justice Services (30 January 2025), Table 6A.12; available at <https://www.pc.gov.au/ongoing/report-on-government-services/2025/community-services/youth-justice>

Aboriginal children, for example through individual officer and police local area command performance reviews, ongoing training, and internal policies reinforcing this expectation.

#### *A new diversionary pathway for high-needs children aged under 14*

There is scope for innovative changes to be made to the operation of the YOA to enable children aged 10–13 who are alleged to have committed serious offences to receive holistic community and multi-agency intervention and support without the delay associated with adjudicating an allegation through the adversarial criminal court process.

Crucially, pre-court diversion provides a more timely and urgent response to behaviours of concern. If the common law requirements for the presumption of *doli incapax* were weakened through legislative codification, there would still be a criminal process through which that test, and any related issues regarding substantive charges, must be adjudicated. The criminal court process is resource-intensive and slow-moving; it does not provide a rapid intervention that has the capacity to meaningfully influence behaviour and while the court process is ongoing, often for many months, a child will often remain subject to the criminogenic experiences of remand and court appearances.

One avenue to achieve this using the existing mechanism of the YOA would be to insert a new Part in the YOA for children aged 10–13 for whom a more intensive response is required than that available under the existing regime of warnings, cautions and Youth Justice conferences. Such a regime would address community safety concerns by responding effectively to the causes of children’s behaviours, as opposed to elevating risk of future offending by entrenching a child more deeply into criminality through a criminalization response.

A procedure established under a new Part of the YOA could enable police and courts to divert children from the criminal court process by referring them to a multidisciplinary panel authorised to proactively respond to the underlying causes of their alleged offending. The panel could include senior representatives from DCJ, the Department of Education, Youth Justice and ACCOs and service providers from the child’s community. Such a panel has precedent in the ACT’s Therapeutic Support Panel for Children and Young People, which addresses the needs of a similar cohort. That Panel has a cross-section of members across pediatrics, psychology, law enforcement, Aboriginal and Torres Strait Islander representatives and experts, social work, disability and child protection. The ACT Panel can respond to the child holistically, including working with the child’s family, siblings and other carers. By taking the child out of an adversarial context, agencies are no longer limited by the rigid constraints, roles and obligations of parties in criminal proceedings.

The model could also draw from the experience of the Youth Koori Court (**YKC**), where an accused child is able to express their own insights into what their unmet needs and goals are, and participate fully in the plan generated to address risk factors. The YKC has been evaluated and found to be a successful model that reduces incarceration without an attendant increase in offending, and which returns \$2 for every dollar invested.<sup>48</sup> The YKC is, however, a sentencing procedure which exists within the adversarial criminal legal process as part of the Children’s Court of NSW. Access requires a guilty plea, and living in an area serviced by a YKC (currently only Parramatta, Surry Hills and Dubbo).

Establishing a similar response outside of the court process for very young children with complex unmet needs would obviate the need for a finding or plea of guilt. Like the YKC, where a child’s

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<sup>48</sup> Inside Policy, [An Evaluation of the Youth Koori Court Process](#) (Final Report, 6 June 2022).

participation influences their sentence outcome, children would be incentivised to participate in the Panel process as an alternative to a criminal legal system response.

Given the small number of children under the age of 14 charged with serious offences each year (being an even smaller subset of the already small number of children under 14 charged by police), and the expense currently incurred by a criminal legal system response, the Panel could be resourced to respond quickly and significantly to the underlying needs of the child, create support plans, and impose accountability measures on service providers to ensure community protection.

Participation in the Panel, and a diversion in lieu of a finding of criminal liability, would not prevent victims' participation in processes of restorative justice, redress or compensation. Similar provisions to Division 3A.3A – 'Victims rights – harm statement' in the ACT *Victim's of Crimes Act 1994* could be introduced.

To enable the child to participate fully in intervention, the Part must protect information shared by or about the child through the Panel process from being admitted in any future criminal proceedings, in a similar manner to the Protected Admissions Scheme, ss 66 and 67 of the YOA, the Sexual Assault Communications Privilege or s 871A *Children and Young People Act 2008* (ACT).

### *Are there particular issues in regional or rural areas that may affect the operation of *doli incapax*?*

The children least likely to receive the benefit of the protections under *doli incapax* are those who appear before regional courts without access to culturally safe legal support from the ALS, without specialist children's lawyers, and before magistrates who predominately deal with adults. They are would also be the most vulnerable to the harms associated with criminalisation should *doli incapax* be weakened or made more difficult to rely upon by accused children.

The structural disadvantage imposed on these children is compounded by the fact that regional communities have been chronically under-invested in for decades. We refer the Reviewers again to our submission to the *Inquiry into Community Safety in Regional and Rural Communities*, in particular, the Annexure which summarises findings from our consultation with 95 ALS staff members from our offices across 15 regional communities in the preparation of that submission (Armidale, Bathurst, Bourke, Broken Hill, Coffs Harbour, Dubbo, Griffith, Kempsey, Lismore, Moree, Moruya, Nowra, Tamworth, Wagga Wagga and Walgett). A number of common client experiences are summarised relating to the under-servicing of the communities we serve in regional NSW which have implications for community safety and wellbeing, including: lack of stable and safe housing; lack of transport and access to driver licensing; lack of community-based specialist services; extended wait times to access basic health services, such as a GP appointment to obtain a mental health treatment plan; lack of on-Country residential rehabilitation and alcohol and other drug programs; lack of forensic mental health services; poor police–community relationships due to intergenerational histories of racist and discriminatory policing; lack of affordable after-hours services and activities for children; and lack of access to effective court-based supports for children who are criminalised, such as Justice Health and the Youth Koori Court.

We reiterate our recommendations to that Inquiry that the NSW Government invest in increasing the availability of public transport in regional communities, along with the quality and serviceability of roads, footpaths, street lighting and other essential infrastructure and access to driver licensing, and increase investment in alcohol and other drug supports for adults and young people in regional areas, including residential rehabilitation and in-patient programs, counselling and health education and group programs, prioritising funding for ACCOs.

## *Are there other matters that you wish to raise about the appropriate response to offending behaviours by 10 to 13 year olds?*

### *Support for victims*

It is noted that neither the preservation of the operation of *doli incapax* in its current form, nor our proposal for enhanced diversion for children set out above, preclude victims of crime from accessing supports, compensation or insurance claims.<sup>49</sup>

### *The views of systems-impacted children*

Young people themselves recognise the impacts that early criminalisation has had on them and their communities, and are able to articulate what they need to thrive. In accordance with the commitments made by the NSW Government under Closing the Gap, Aboriginal people, including systems-impacted young people, should be involved in the full development life cycle of policies and programs that impact them, and their voices should be heard in any proposed reform process affecting their rights – including this Review.

Aboriginal young people in Moree have themselves directly highlighted the lack of adequate and accessible healthcare in regional areas and the poor availability of health pathways to clinics and healthcare professionals. At the JustReinvest NSW Moree Youth Forum in 2022, young people advocated for more doctors and health centres and voiced the need for holistic mental health support which caters to the specific needs of young people.<sup>50</sup> Young people did not identify a need for supports tied to justice systems involvement or court orders.

Participants in the *Therapeutic Pathways for Children* co-design workshops with lived experience of being criminalised as children expressed in the strongest terms that incarceration is damaging and undermines rehabilitation. They also reported that incarceration has been significantly detrimental to their wellbeing, with many experiencing mental health issues, such as anxiety, as well as a lack of identity and understanding of self.

*We don't want the next generation to go through what we went through. We want to be a voice so others don't have to keep rotating their stories. We need to make sure young fullas' voices are being heard now. – Participant in Therapeutic Pathways for Children co-design workshops*

We recommend to the Reviewers these reports which centre the voices of Aboriginal and Torres Strait Islander young people, documenting their experiences and recommendations for improved community safety and wellbeing for Aboriginal young people in NSW:

- [JustReinvest NSW Moree Youth Forum Report](#) (2022)
- [Mounty Yarns: Lived Experiences of Aboriginal Young People in Mount Druitt](#) (2023)

Young clients of the ALS consistently report that they lack trust in prison personnel and other state-affiliated organisations, and are often unwilling or unable to engage with or confide in these figures. This is a reality that weighs heavily against the positioning of courts and youth prisons as a site of effective therapeutic intervention and support for criminalised children.

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<sup>49</sup> See the 'How to Respond to Incidents under the Joint Protocol' resource attached to the 'Joint Protocol to Prevent the Criminalisation of Children in out-of-home care'; available at [https://dcj.nsw.gov.au/documents/children-and-families/Cheat\\_sheet.pdf](https://dcj.nsw.gov.au/documents/children-and-families/Cheat_sheet.pdf).

<sup>50</sup> JustReinvest NSW, [Moree Youth Forum 17 – 18 March 2022](#) (Report).