

MEDIA RELEASE



NEW SOUTH WALES
BAR ASSOCIATION

STATEMENT ON REVIEW OF DOLI INCAPAX

9 May 2025

The NSW Bar Association acknowledges the review of *doli incapax* announced by NSW Attorney General, the Hon. Michael Daley MP. The Association will engage constructively with this review.

Doli incapax is an important safeguard which must be protected. It is a long-standing presumption. It reflects the scientific reality that, at a young age, the brains of children are still developing. Children lack the maturity and skills required properly to appreciate the nature of their actions.

The Association is concerned that the announcement emphasised the “significant decline in the number of young people aged 10 to 13 years found guilty of a criminal offence following a 2016 High Court decision”. This should not be the focus of a review.

The utility of *doli incapax* is not measured in the number of children found guilty of offences. It is a long-standing recognition of the vulnerability of children and the need to protect them. The focus of the NSW Government should be on reducing the contact young people have with the criminal justice system and addressing the root causes of a child’s vulnerability, which in turn reduces recidivism.

In NSW, a child under 10 years of age cannot commit a criminal offence. The common law presumption of *doli incapax* presumes that children aged between 10 and 14 years are also incapable of committing a crime because they lack an understanding of the wrongness of their conduct. It is a rebuttable presumption. It can be rebutted if there is evidence that establishes that the child in fact knew that what they did was seriously wrong.

The High Court of Australia’s decision in *RP v The Queen* [2016] HCA 53 clarified the common law in relation to *doli incapax*. The prosecution bears the onus of proof to present evidence, beyond the circumstances of the offence, to rebut the presumption to the criminal standard. That is, “the presumption cannot be rebutted merely as an inference from the doing of that act or those acts”. The onus is not, and should never be, upon the child to prove *doli incapax*.

In addressing the complex area of children in the criminal justice system, considerable care must be taken to avoid measures apt to exacerbate recidivism and intensify a child’s vulnerability.

The NSW Government should act in the long-term interests of children and the wider community by proactively implementing evidence-based policies that address the root causes of youth crime. The Association supports raising the age of criminal responsibility to 14 years of age, which is an evidence-

based policy that should be prioritised. The NSW Government does not need to reform *doli incapax* in order to provide the vital services and support needed by vulnerable children and their communities.

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