

MEDIA RELEASE



NEW SOUTH WALES
BAR ASSOCIATION

Statement on proposed *doli incapax* reforms

20 November 2025

The NSW Bar Association is concerned that legislative reforms proposed by the NSW Government will undermine the presumption of *doli incapax*, which is a critical legal protection for children between 10 and 14 years of age.

Despite claims to the contrary, the [Children \(Criminal Proceedings\) and Young Offenders Legislation Amendment Bill 2025](#) does not codify the common law with respect to *doli incapax*.

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 establishing that the child knew at the time that what they were doing was seriously wrong.

In [RP v The Queen](#) [2016] HCA 53, the High Court of Australia determined that the presumption of *doli incapax* cannot be rebutted merely as an inference from the doing of the act said to constitute the offence. The High Court said that the prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that the child knew that it was morally wrong to engage in the conduct. The Court observed that this directs attention to the child's education and the environment in which the child has been raised.

The NSW Bar Association is concerned that the Bill unduly focuses on the child's alleged offending behaviour rather than the child's intellectual and moral development.

By allowing a court to determine that the presumption has been rebutted based on the evidence of the alleged conduct and the surrounding circumstances alone, without or despite evidence of the child's intellectual or moral development, the Bill is inconsistent with the High Court's authoritative statement.

The Bill is also inconsistent with the key recommendation of the "[Review of the operation of *doli incapax* in NSW for children under 14](#)" by the Honourable Geoffrey Bellew SC and Mr Jeffrey Loy APM. The review stated that "Having taken into account stakeholder feedback, we recommend that NSW legislation should reflect, and be consistent with, the current common law position as expressed in *RP*".

Doli incapax recognises that, at a young age, the brains of children are still developing, and that children lack the maturity required properly to appreciate the significance of their actions. In the absence of the age of criminal responsibility being raised to 14 years, the important presumption of *doli incapax* should be retained and not undermined.

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