

Legal Reform – Response to the Review of the Principle of *Doli Incapax*

About IDRS

IDRS provides legal and disability advocacy services for people throughout NSW living with cognitive impairment. IDRS is the only service of its kind in Australia and offers two main service functions. Firstly, the IDRS Ability Rights Centre (ARC), offers free legal assistance to people living with a disability across NSW, prioritizing those with intellectual disability. ARC supports on average 850 people per year. In addition to legal advice and representation, ARC services include support for parents with intellectual disability involved in care and protection matters, education and group programs for people with cognitive disability and support for people appealing to the Administrative Review Tribunal for review of decisions made by the National Disability Insurance Agency.

Secondly, the IDRS Justice Advocacy Service (JAS) provides 24/7 support across NSW to people with cognitive impairment in criminal proceedings. Each year, JAS supports on average 2,500 people with cognitive impairment, including approximately 2,250 people recorded as offenders and 200 people recorded as victims of crime. We successfully advocate for over 300 people per annum to receive diversion in place of a custodial sentence.

IDRS has a lived experience advisory panel - The Making Rights Real Group – who provide advice and insight into the policy, legal and systemic reform work we engage in.

IDRS's Justice Advocacy Service has supported 55 children aged 14 or younger since 2019.

IDRS's response to the Review

IDRS acknowledges the review of *doli incapax* announced by the NSW Attorney General, the Hon Michael Daley MP in May 2025. IDRS will engage in the review and welcomes the opportunity to provide this submission.

This paper addresses the general principles arising from a review of the operation of *doli incapax*, and the issues paper provided to IDRS as part of the Panel's targeted consultation.

The age of criminal responsibility

A review of *doli incapax* cannot be considered without reference to the age of criminal responsibility. In NSW, s5 of the *Children (Criminal Proceedings) Act 1987* provides that a child under the age of 10 years cannot commit an offence. This statutory presumption is irrebuttable.

The common law presumes that a child between the age of 10 and 14 years does not possess the necessary knowledge to have criminal intention, that is, the child is incapable of committing a crime due to a lack of understanding of the difference between right and wrong.

The presumption of *doli incapax* is a presumption that can be rebutted by the prosecution calling evidence. In addition to proving the elements of the offence, the onus is on the prosecution to prove beyond reasonable doubt that the child knew that what they did was seriously wrong.

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The existence of the presumption of *doli incapax* in the common law was affirmed in *RP v The Queen* (2016) 259 CLR 641 (RP)ⁱ. This is the High Court decision referred to by the Attorney in announcing the review. The announcement emphasised the ‘significant decline in the number of young people aged 10-13 years found guilty of a criminal offence following [this] High Court decision. This should not be the purpose, focus or cause of the review.

Doli incapax is an important legal safeguard for young vulnerable people and must be protected. It reflects modern scientific research that, at this young age, the brains of children are still developing. The UN Committee on the Rights of the Child deemed the age of criminal responsibility of 12 years to be too low and encourages state parties to ‘take note of recent scientific findings, and to increase their minimum age to at least 14 years’.

The recommendation to increase the minimum age of criminal responsibility reflects current research in child development and neuroscience which provides evidence that the capacity for abstract reasoning is not fully developed in children aged 12 and 13 (UN Committee on the Rights of the Child 2019)ⁱⁱ. For children with intellectual disability or cognitive impairment, their brain development will be entirely different from the general population and will not reflect the same developmental trajectory. This population of young people and children should not experience the weight of the criminal legal system; rather they should be protected from it.

The utility of *doli incapax* should not be measured by the number of children found guilty of offences. As a civil society organisation dedicated to upholding the rights of vulnerable people within our community, we believe that we have a duty to protect children and particular vulnerable children. Children with disability are most vulnerable and systems of correction are not places for them. We should instead, invest in the service and support infrastructure that ensures their needs are met, and the social and criminogenic factors that might contribute to their offending, minimised.

Instead, the focus of the review should be on addressing the causes of children’s and young people’s vulnerability and on reducing the opportunities that vulnerable young people and children have in connecting with the criminal justice system. We should instead focus on developing and implementing interventions that stop this contact and that help reduce recidivism. For families with children with intellectual disability, this means family support through prevention, early intervention, and post-vention programs and services. The Children’s Court should be supported by a preference for placing vulnerable children in well-resourced diversion programs. Incarceration of children and young people with intellectual disability should cease or at the very least be a last resort. We should do all we can to reduce a child’s or young person’s vulnerability.

We urge the NSW Government to uphold the rights of children and young people, particularly those with intellectual disability, and enact evidence-based policies that reduce their vulnerability by addressing the cause of their contact with the criminal justice system.

Age of Criminal Responsibility

IDRS supports raising the age of criminal responsibility to 14 years of age in the context of current debates and believes that it should be higher. Children should not be in gaol.

According to the AIHW (2024), 4,542 children aged 10 and over were under youth justice supervision. 82% of these were in the community, and the remainder (818 children) were in gaol (detention). First Nations children comprised 57% of those in youth justice supervisionⁱⁱⁱ.

Terms of Reference in the Review of the operation of *doli incapax* in NSW for children under 14 discussion paper.

1. The form that the legislation should take, noting different approaches across Australian jurisdictions.

IDRS believes that the principle of *doli incapax* is an important one and ought not be legislated. IDRS prefers it remains a rebuttable presumption. However, if the Government pursues a legislative reform, the form of legislation be determined in parallel with the raising of the age of criminal responsibility, and to a minimum of 14 years of age with no exceptions or carve outs. This is because:

- a. Medical evidence highlights the distinct brain development of children and adolescence which is entirely inconsistent with a lower age of criminal responsibility. Children lack the awareness and understanding of the legal or moral consequences of their behaviour. This is exacerbated for children with intellectual disability.
- b. Exposure to the criminal justice system is damaging for vulnerable people and that the younger that exposure occurs, there is an increased likelihood of ongoing exposure.

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.

IDRS believes that any evidence should indicate the capacity of the child being charged. We note the absence in the discussion paper of the presence of cognitive impairment in that vulnerable cohort. The BOCSAR characteristics data contains no reference to cognitive impairment although mentions 'complex needs' which indicates social disadvantage and intergeneration connection with the criminal justice system. This should give rise to the contemplation of policies and programs for early intervention, not additional policies or legislation that enforces that connection.

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).

Any young person or child brought before the courts should have access to a cognitive assessment, particularly for FASD (Foetal Alcohol and Drug Spectrum Disorder) which is a critical tool and early diagnosis for assessing appropriate support and intervention. Early medical assessment and diagnosis improves the potential for intervention and support, and diversion away from detention. Gaol is no place for a vulnerable child.

4. The interaction between doli incapax, the Young Offenders Act 1997, and the Mental Health and Cognitive Impairment Forensic Provisions Act 2020.

Access to a s14 support plan might be viewed as useful but it comes with a range of complications and unintended consequences. A child aged between 10 and 14 years of age would still need to understand the process (even in the absence of a cognitive impairment, diagnosed or otherwise). Their ability to give consent is compromised particularly if they are also in out-of-homecare and or their responsible person is a precarious relationship. Support plans will need careful construction and supervision and community-based services are under resourced and scarce, especially in rural, regional and remote areas of the state. The Justice Reform Initiative paper on [Bail](#) notes that on an average night in March 2023, 83% of children in custody were unsentenced.

Support plans that should be struck for children should be different than those struck for diverted adults. They should be tailored to the cohort they are designed to support. The services need urgent investment to enable the appropriate levels of support that vulnerable children deserve.

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.

The Justice Reform Initiative has published a series of papers that the panel may find useful. These include on [Youth Justice](#) which also discusses appropriate options for intervention and alternatives to imprisonment.

6. Any other matters considered relevant, including those related to community safety and the interests of children.

IDRS is concerned that the notion of 'community safety' has resulted in presumption against bail, based in the risk that those granted bail might reoffend while waiting for their court appearance. While the judgement and weighing of risk of harm to the community might be argued as having validity for adult offenders, it is difficult to contemplate for alleged child offenders when the research reveals^{iv} most offending is for non-violent offences (especially for 10-year-olds), most matters resulting in a police caution.

Additionally, research reveals^v that child offenders have adverse childhood experiences, including a combination of maltreatment and household dysfunction, trauma, substance use, and

behaviours that require defined clinically. This suggests that developmentally focused and trauma-informed approaches may offer the greatest promise in assisting young people safe from crime and contribute to actual and perceived community safety.

Thank you for considering IDRS's feedback on the review of *doli incapax*.

We look forward to the opportunity to discuss this paper with you or to assist your deliberations in any way that the review might find useful.

Yours sincerely



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Chief Executive Officer

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https://www.judcom.nsw.gov.au/publications/benchbks/children/CM_Doli_incapax.html#:~:text=The%20common%20law%20presumes%20that,law%20presumption%20of%20doli%20incapax.

ii <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2024/contents/understanding-youth-detention-in-australia/raising-the-age-of-criminal-responsibility>

iii <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-annual-report-2022-23/contents/about>

iv <https://www.aic.gov.au/publications/tandi/tandi679>

v <https://www.aic.gov.au/publications/tandi/tandi651>