

27 June 2025

www.alhr.org.au

Policy, Reform and Legislation
Independent Review Secretariat
By email: PRLIndependentReviewSecretariat@dcj.nsw.gov.au

Dear Secretariat

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

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to make this submission into the **Review** of the operation of *doli incapax* in NSW for children under 14.

1. Acknowledgement

ALHR acknowledges the traditional owners and custodians of the lands, rivers and seas on which we work, live and travel across Australia as the first people of this country. We recognise that the land belonging to these peoples was never ceded. We pay our deep respect to Elders past and present. We recognise First Nations peoples' cultural authority and rights to self-determination. We also recognise that when First Nations people and communities receive the respect and support they deserve, they have a proud history of designing and implementing robust, holistic and culturally safe Aboriginal and Torres Strait Islander led solutions.

2. About Australian Lawyers for Human Rights

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees.

ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international law and human rights law in Australia to:

- promote Federal and State laws across Australia that comply with the principles of international human rights law;
- engage with the United Nations in relation to Australian human rights violations;
- promote and support lawyers' practice of human rights law in Australia; and
- engage internationally to promote human rights and the rule of law.

Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

3. Executive Summary

This submission addresses the Terms of Reference of the Review through the lens of Australia's international human rights obligations, particularly under the UN Convention on the Rights of the Child (**CRC**)¹ and related international juvenile justice standards.² These international instruments emphasise the best interests of the child, non-discrimination, and the rights of children to participate in decisions affecting them.

ALHR has consistently urged the NSW Government to pursue evidence-based reforms that prioritise children's rights, development, and rehabilitation over punitive responses.

ALHR strenuously opposes any reform to the presumption of *doli incapax* that would:

- be inconsistent with international human rights law and standards;
- be inconsistent with the significant body of expert advice and evidence consistently put forward by medical, legal and community-led grassroots organisations working with children;
- result in a net-widening of the number of children in contact with the criminal law;
- disproportionately impact children who are already egregiously overrepresented in the NSW criminal justice system, including Aboriginal and Torres Strait Islander children, children with disabilities, and children from culturally and linguistically diverse backgrounds.

ALHR submits that the doctrine of *doli incapax* should be applied in a manner consistent with the international standards, irrespective of whether it is based in the common law or legislated. In practice, this means the **avoidance of any measure that would weaken the protection of the presumption of *doli incapax*.**

4. Exclusion of the Minimum Age of Criminal Responsibility from Terms of Reference

ALHR notes that the Issues Paper states that 'Consideration of the minimum age of criminal responsibility in NSW is outside the scope of the Terms of Reference of this Review.'

We submit that it is not desirable, practicable or consistent with Australia's approach to its international legal obligations to attempt to divorce a review of the operation of, and legislative options for, the common law presumption of *doli incapax* in NSW from the low age of criminal responsibility.

Indeed, ALHR notes that in Australia's reporting to the UN Committee on the Rights of the Child regarding its progress in implementing its CRC obligations relevant to the age of criminal responsibility, the Australian government has consistently referenced the application of *doli incapax* as a measure that 'safeguards' children. For example, as part of its most recent reporting cycle, in its Combined Fifth and Sixth Report under the CRC, Australia stated:

¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

² *UN 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) (**General Comment No 24**); *Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*, GA Res 40/33, UN GAOR, 56th sess, 96th plen mtg, UN Doc A/RES/40/33 (29 December 1985); *United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)*, 68th plen mtg, UN Doc A/RES/45/112 (14 December 1990) (**Riyadh Guidelines**); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, GAOR, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990); *Convention of the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

*The minimum age of criminal responsibility in Australia is 10 years old. In all Australian jurisdictions there is a rebuttable presumption that a child aged between 10 and 14 years of age is not criminally responsible (called *doli incapax*). A child of this age can only be found criminally responsible where the child knows that their conduct was wrong. This is a question of fact and the onus of proof falls on the prosecution. This provides a safeguard for children between 10 and 14 years and recognizes each child's evolving capacities.*³

The nexus between the application of *doli incapax*, Australia's human rights law obligations and the low age of criminal responsibility in jurisdictions such as NSW is unequivocal.

NSW has one of the lowest ages of criminal responsibility in the world, well below the global median of 14 years, and entirely out of step with medical science. The UN Committee on the Rights of the Child consistently calls upon Australia to raise the minimum age of responsibility to accord with international obligations, despite Australia's appeal to the operation of the doctrine of *doli incapax*.⁴ This call has been echoed repeatedly throughout the UN human rights system, including by the UN Human Rights Council,⁵ the UN Human Rights Committee,⁶ the UN Committee on the Elimination of Racial Discrimination,⁷ and the UN Special Rapporteur on the Rights of Indigenous Peoples.⁸

Any weakening of the 'safeguard' of the presumption of *doli incapax* takes Australia further away from its international obligations in respect of the rights of the child, and should be avoided at all costs.

5. Review Process

ALHR is concerned by aspects of this Review process including the short time frame given for responses to the Issues Paper and the lack of transparency in the consultation. We are especially concerned by failure to consult a broad range of stakeholders such as grassroots organisations and individuals with expertise and lived experience in the juvenile justice space. We note that the failure to consult broadly is inconsistent with Australia's human rights obligations, including the obligation under art 12 of the CRC to ensure children have their views heard and take into account matters that affect them and the obligation under art 4(3) of

³ *Committee on the Rights of the Child, Combined Fifth and Sixth Periodic Reports Submitted by Australia under Article 44 of the Convention*, UN Doc CRC/C/AUS/5-6 (22 November 2018) at [65]. See also *Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, Fourth Periodic Report of States Parties due in 2007: Australia*, 25 June 2009, UN Doc CRC/C/AUS/4 (14 July 2011) at [278]: 'there is a rebuttable presumption that a child aged between 10 and 14 years of age is incapable of wrong. The Australian Government believes the age limit for the application of this principle is appropriate as it is a practical way of acknowledging differences in children's developing capacities, allows for a gradual transition to full criminal responsibility, and protects children between 10 and 14 from the full force of the law'.

⁴ See eg: *UN Committee on the Rights of the Child, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) at [48(a)] ('the Committee urges the State party to bring its child justice system fully into line with the Convention and ... raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which *doli incapax* applies'); *UN Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012) at [84(a)]; and *UN Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding observations: Australia*, UN Doc CRC/C/15/Add.268 (20 October 2005) at [74(a)].

⁵ Eg, *UN Human Rights Council, Report of the Working Group on the Universal Periodic Review, Australia*, UN Doc A/HRC/47/8 (24 March 2021), Recommendation 146.140 at [146].

⁶ Eg, *United Nations Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) at [44].

⁷ Eg, *UN Committee on the Elimination of Racial Discrimination, Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) at [26].

⁸ Eg, *UN Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, 36th sess, UN Doc A/HRC/36/46/Add.2 (8 August 2017).

the Convention on the Rights of Persons with Disabilities that States Parties closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.

We urge the NSW Government to make the Issues Paper and submissions publicly available on the Review's website, and to open the consultation process to all stakeholders.

ALHR emphasises the need for such consultation to include the participation of children and people with disabilities. We commend the international best practice Lundy Model of Children's Participation as an appropriate model and would be happy to provide further information to the Review in this regard.

We call on the NSW Government to ensure that this Review and any subsequent processes relating to reform of the application of *doli incapax* in NSW includes direct, meaningful and comprehensive consultation with the whole NSW community.

6. Focus questions

Q3. How should the principle of *doli incapax* be legislated in NSW?

Having ratified the CRC in 1990, Australia has accepted international legal obligations to ensure that all children in Australia enjoy the rights set out in the treaty. The CRC recognises that children have the same human rights as adults, while also needing special protection due to their developmental needs and vulnerability to exploitation and abuse. However, thirty five years since ratification, NSW continues to fall short in realising the legal protection of children's CRC rights, particularly in relation to the administration of justice. This failure adversely impacts all children in NSW, but most acutely groups experiencing intersectional disadvantage and systemic discrimination, including Aboriginal and Torres Strait Islander children and children with disabilities.

ALHR suggests that any legislative approach to the principle of *doli incapax* must be developed through the prism of Australia's obligations under core international human rights law standards.

Relevantly, the CRC provides:

*Art 3(1): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the **best interests of the child** shall be a primary consideration...*

*Art 37(b): The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a **measure of last resort** and for the shortest appropriate period of time.*

*Art 40(3)(b): Whenever appropriate and desirable, measures for dealing with such children **without resorting to judicial proceedings**, providing that human rights and legal safeguards are fully respected...[and that a] variety of dispositions...shall be available to ensure that children are dealt with in a manner **appropriate to their well-being and proportionate both to their circumstances and the offence**.⁹*

As the law stands in Australia, the presumption of *doli incapax* is seen to protect children between the ages of 10 and 13 years from the harshness of criminal proceedings. However, it is abundantly clear from the findings and unequivocal recommendations of the Northern

⁹ More broadly, Article 40 relates to age-appropriate justice responses.

Territory Royal Commission into Youth Detention that the doctrine of *doli incapax* alone does not provide an adequate safeguard for children between the ages of 10 and 13 years.

With that in mind, ALHR takes the position that any proposed legislative codification of the doctrine of *doli incapax* should:

1. strengthen rather than weaken the presumption of *doli incapax* for children aged 12 and 13 such that the presumption for 12 and 13 year olds ensures children under 14 cannot be held criminally responsible unless such mental capacity is proven by the prosecution beyond reasonable doubt;
2. be drafted so as to be consistent with the High Court's ruling in *RP v The Queen* (2016) 259 CLR 641;¹⁰ and
3. specifically include the following safeguards:
 - (a) **Codify a strong presumption** against criminal responsibility for children between the ages of 10 and 13 years, aligned with CRC Article 40's emphasis on age-appropriate treatment.
 - (b) **Maintain an onus on the prosecution** to rebut the presumption.
 - (c) **Maintain the 'actual knowledge' test** but with enhanced safeguards requiring clear and compelling evidence of moral understanding.
 - (d) Require consideration of *doli incapax* at the **earliest practical stage** of criminal proceedings.
 - (e) **Maintain the requirement that the child understand the conduct to be 'seriously wrong'** as opposed to merely 'wrong'. Appreciation of a trivial wrong does not render a child sufficiently culpable for exposure to criminal prosecution.
 - (f) **Include developmental considerations** explicitly recognising children's evolving capacities, in line with CRC Article 5, and require courts to hear evidence of the environment in which the child has been raised, their progress at school and associated matters, in order to draw conclusions about their moral and intellectual development.
 - (g) **Mandate cultural assessment** for Aboriginal and Torres Strait Islander children, consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*.

Expanding on developmental considerations above, ALHR notes the Committee on the Rights of the Child's **General Comment No 24**. General Comments from UN treaty bodies are somewhat akin to a Guideline Judgment, providing detailed interpretations and guidance to state parties on how to implement specific articles of the CRC. These comments also clarify the Committee's understanding of the Convention and help state parties ensure children's rights are respected, protected, and fulfilled.

¹⁰ This includes the principle that the prosecution must prove that the child understood their actions were seriously wrong, not merely naughty.

ALHR submits that any legislative measures that undermine *doli incapax* for children aged 10 to 13 in NSW, or entail a net-widening of the number of children in that age group in contact with the criminal law, would be tantamount to a retrogressive position contrary to the principles in General Comment No 24 at [2], [13], 25] and [27]. This is because it would, in practice, remove or reduce protections that Australia cites in justifying its low age of criminal responsibility.

In relation to **developmental considerations**, General Comment No 24 notes:

[22] Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence. As the Committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 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. States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with article 41 of the Convention.

These developmental considerations go directly to the question of culpability. In circumstances where NSW does not move to raise the minimum age of criminal responsibility, it is crucial to maintain a strong presumption of *doli incapax* in order to meet Australia's international obligations in respect of the rights of the child.

Q6. 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?

NSW must develop a children's rights framework that enables the delivery of trauma-informed supports and services to children in a holistic manner outside of criminal justice processes and which takes into account the full spectrum of children's human rights.

ALHR stresses that the operation of, and legislative options for, the common law presumption of *doli incapax* in NSW should not be a basis for any reforms that would lead to an increase in the number of NSW children drawn into the NSW criminal justice system.

Rather, the aim should always be that children aged 10 to 13 are diverted away from formal contact with the criminal justice system, noting the evidence around a child's first contact with the criminal justice system.¹¹ Since June 2023, for example, there has been a 31% increase in the number of young people in custody.¹²

¹¹ Jesuit Social Services, Thinking Outside, Alternatives to Remand for Children (Research Report) (2013), 38-41. See further the Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016), 6.

¹² NSW Bureau of Crime Statistics and Research dashboard accessed 26 June 2025.

As the Committee on the Rights of the Child also notes in General Comment No 24:

[11] Evidence-based intervention programmes should be developed that reflect not only the multiple psychosocial causes of such behaviour, but also the protective factors that may strengthen resilience. Interventions must be preceded by a comprehensive and interdisciplinary assessment of the child's needs. As an absolute priority, children should be supported within their families and communities. In the exceptional cases that require an out-of-home placement, such alternative care should preferably be in a family setting, although placement in residential care may be appropriate in some instances, to provide the necessary array of professional services. It is to be used only as a measure of last resort and for the shortest appropriate period of time and should be subject to judicial review.

[12] A systemic approach to prevention also includes closing pathways into the child justice system through the decriminalization of minor offences,...which often are the result of poverty, homelessness or family violence.¹³

In relation to diversion, the Committee also emphasises that:

[18] (a) Diversion should be used only when there is compelling evidence that the child committed the alleged offence, that he or she freely and voluntarily admits responsibility, without intimidation or pressure, and that the admission will not be used against the child in any subsequent legal proceeding.

ALHR emphasises that the criminal justice system is not the appropriate framework through which to provide children with access to essential services or supports. As noted in the Riyadh Guidelines:

Fundamental principle 2: The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood.

Fundamental principle 6: Community-based services and programmes should be developed for the prevention of juvenile delinquency... Formal agencies of social control should only be utilized as a means of last resort.

Fundamental principle 45: Government agencies should give high priority to plans and programmes for young persons and should provide sufficient funds and other resources for the effective delivery of services...for adequate medical and mental health care, nutrition, housing and other relevant services, including drug and alcohol abuse prevention and treatment, ensuring that such resources reach and actually benefit young persons.

Fundamental principle 48: Programmes to prevent delinquency should be planned and developed on the basis of reliable, scientific research findings, and periodically monitored, evaluated and adjusted accordingly.

Any diversionary scheme should be developed in a manner that is consistent with these principles.

¹³ See also General Comment No 24 at [15]-[16] (interventions that avoid resorting to judicial proceedings).

Q10. Are there other matters that you wish to raise about the appropriate response to offending behaviours by 10 to 13 year olds?

The Issues Paper properly notes the shameful overrepresentation of First Nations children in the NSW criminal justice system, as well as the issues with regard to children in remote and regional areas. ALHR is concerned that the Issues Paper has not noted the overrepresentation of children with disabilities in the NSW criminal justice system. A January 2024 report on children aged 10 to 13 in the justice system highlighted that:

Sixty percent of children undergoing doli incapax assessments were noted to have at least one diagnosed psychiatric disorder, 11.3 percent had a diagnosed intellectual disability or acquired brain injury, and 28.7 percent had multiple psychiatric and disability-related diagnoses. Despite a considerable level of apparent need, there was little evidence of engagement with clinical or therapeutic services among this group of children.¹⁴

ALHR suggests that any review of *doli incapax* is incomplete without an assessment of its impact on children with disabilities. As General Comment No 24 notes:

[28] Children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility. If not automatically excluded, such children should be individually assessed.

ALHR reiterates its concern that the lack of transparency associated with this Review process renders it impossible to objectively assess whether people with disability and their representative organisations have been appropriately engaged in consultation.

7. Cost and remand population implications

Finally, ALHR is concerned about the potential for increased costs to the NSW taxpayer, reduced efficiency in the administration of justice, and increased unnecessary periods spent on remand for children, should a legislative codification of *doli incapax* lead to an increase in the number of defended *doli incapax* hearings in the Children's Court.

ALHR submits that weakening *doli incapax* in NSW will come at a cost to taxpayers and cause harm to children who may be remanded in custody yet ultimately found to lack capacity, with no articulated efficiency benefit. In this regard, ALHR endorses the Australian Human Rights Commission's 2024 report, '*Help way earlier!*' *How Australia can transform child justice to improve safety and wellbeing*.¹⁵

8. Conclusion

ALHR is happy to provide any further information or clarification in relation to the above if the Reviewers so require.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au

¹⁴ Susan Baidawi, Rubini Ball, Rosemary Sheehan, and Nina Papalia, [*Children aged 10 to 13 in the justice system: Characteristics, alleged offending and legal outcomes*](#). Report to the Criminology Research Advisory Council Grant: CRG 41/20–21(January 2024), p. x.

¹⁵ Australian Human Rights Commission, [*Help way earlier!': How Australia can transform child justice to improve safety and wellbeing*](#). Sydney: Australian Human Rights Commission (21 June 2024) see pp14, 64, 72.

Yours faithfully,

Nicholas Stewart, President, ALHR

Kerry Weste, Vice President and Chair of Children's Rights, ALHR

Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.