

CHILDREN (CRIMINAL PROCEEDINGS) AND YOUNG OFFENDERS LEGISLATION
AMENDMENT BILL 2025

STATEMENT OF PUBLIC INTEREST

Need: Why is the policy needed based on factual evidence and stakeholder input?

The Bill implements key recommendations of an independent Review of the operation of *doli incapax* in NSW led by the Honourable Geoffrey Bellew SC and Mr Jeffrey Loy APM (**Doli Incapax Review**).

In May 2025, the NSW Government launched an independent review of the operation of *doli incapax* in NSW, a common law principle that presumes that children aged 10-13 lack capacity to be criminal responsible for their acts, unless it is proven otherwise.

The NSW Government announced the Doli Incapax Review in the context of community concerns about youth crime, and relevantly, after the NSW Bureau of Crime Statistics and Research found a decline in the number of children aged 10-13 found guilty of a criminal offence after the High Court case *RP v the Queen* (2016) 259 CLR 641, which clarified how *doli incapax* should be applied.

The Reviewers were asked to review and report on the operation of, and legislative options for, the common law presumption of *doli incapax* in NSW and recommend a framework to enable the enactment of the presumption in NSW legislation.

The Doli Incapax Review involved engagement with targeted stakeholders, including the NSW Police Force, Office of the Director of Public Prosecutions, Youth Justice NSW, the President of the Children's Court, Legal Aid NSW and the Aboriginal Legal Service NSW/ACT.

The Doli Incapax Review made clear that the current settings are not operating in the best interests of children or the broader community, and reform is needed.

Key reform recommendations of the Doli Incapax Review were:

- **Introduce legislation that codifies the current common law presumption of *doli incapax* (Recommendation 2)**

The Doli Incapax Review found that introducing legislation that reflects the current common law, including the test for rebuttal outlined by the High Court in *RP*, and that provides statutory guidance to help courts determine whether the presumption is rebutted, will better ensure the *doli incapax* principle is applied consistently, promote a better understanding of its operation and address misunderstandings about the test that currently exist.

- **Legislate a requirement to review the operation of the *doli incapax* legislation within 3-5 years of commencement (Recommendation 3)**

Statutory review will ensure the legislation's operation is assessed after implementation.

- **Amend the *Young Offenders Act 1997* to address constraints on diversion (Recommendation 4)**

Expanding diversionary measures under the *Young Offenders Act* will better enable police and courts to provide swift and proportionate responses to low level

offending without entrenching children in the justice system, which can lead to recurrent and more serious offending as they get older.

This Bill will implement these legislative recommendations, including with strong legislative guidance and an expedited timeframe for the review, which will commence within 18 months.

In the meantime, the NSW Government continues to carefully examine and undertake work on the other, more complex, recommendations.

Objectives: What is the policy's objective couched in terms of the public interest?

It is in the public interest that NSW has a clear, robust and evidence-based framework for responding to children in contact with the criminal justice system.

Amendments to the Children (Criminal Proceedings) Act 1987

The presumption of *doli incapax* is a longstanding feature of the criminal law that serves a critical protective function for children aged 10-13. Supported by modern neuroscience, *doli incapax* recognises that children aged 10-13 are still developing and have varying levels of understanding about moral wrongness. It is an essential safeguard against inappropriate findings of criminal responsibility against a child under 14 where the child is not mature enough to understand that what they did was seriously wrong.

This Bill will implement recommendations of the Doli Incapax Review and legislate the presumption of *doli incapax*, including to provide statutory guidance about what factors are relevant in determining whether the presumption has been rebutted.

This is intended to support criminal justice system participants to deliver effective and appropriate outcomes in these cases by:

- Enhancing the consistent application of *doli incapax* in the criminal justice system
- Promoting a better understanding of the operation of *doli incapax*
- Addressing any misunderstandings about *doli incapax* and what is required to rebut the presumption that presently exist.

Improving the current settings is in the public interest because it will support the law operating in the best interests of children and for the safety of the broader community.

Amendments to the Young Offenders Act 1997

In addition to legislating a clear *doli incapax* framework, it is also in the public interest that police and courts have tools to provide swift and proportionate responses to low level offending by children.

The Doli Incapax Review found that for less serious offending by children, diversion is likely to be the most suitable response, as it can provide a proportionate response to criminal behaviour while avoiding the negative consequences associated with young people's interaction with the criminal justice system, such as disruption to education and stable family life, and impact on future employment prospects.

To this end, this Bill also introduces key amendments to improve diversionary measures under the *Young Offenders Act*.

This Bill will better ensure that police and courts can safely and appropriately divert children away from the criminal justice system where needed and avoid a situation where young people committing relatively minor offences end up unnecessarily entrenched in the justice system, undermining community safety in the future.

Options: What alternative policies and mechanisms were considered in advance of the bill?

The reforms implement the recommendations of the Doli Incapax Review. Due to the nature of the recommendations, this can only be done through legislative amendment.

Analysis: What were the pros/cons and benefits/costs of each option considered?

Per the Terms of Reference, the Doli Incapax Review carefully considered matters including, but not limited to:

- The form that the legislation should take, noting different approaches across Australian jurisdictions.
- How the presumption is currently operating, including the nature and extent of the evidentiary burden on the prosecution and the evidence available to the court, including what improvements could be made to improve the available evidence.
- Any improvements in relation to the process by which the presumption is dealt with in criminal proceedings.
- The interaction between *doli incapax*, the *Young Offenders Act 1997*, and the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*.
- 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.
- Any other matters considered relevant, including those related to community safety and the interests of children.

The recommended reform to legislate the presumption of *doli incapax* will improve consistency of its application, provide greater legal certainty, and better fulfil the presumption's protective purpose.

The reform to the *Young Offenders Act 1997* strikes a balance between encouraging increased diversion wherever possible, in line with the vast majority of stakeholder submissions to the Review, while maintaining clear parameters about when diversion may not be appropriate.

The amendments are also expected to have a positive impact on the overrepresentation of Aboriginal young people in the criminal justice system and contribute efforts to meet Target 11 of the National Agreement on Closing the Gap, to reduce the rate of Aboriginal young people in detention by at least 30 per cent by 2031.

Pathway: What are the timetable and steps for the policy's rollout and who will administer it?

The Bill will commence on proclamation on a designated date to ensure that operational agencies have adequate time to prepare to implement the reforms. This includes ensuring adequate training is available for criminal justice system participants.

It is the NSW Government's intention for the Bill to commence as quickly as possible.

The NSW Department of Communities and Justice will be responsible for the general oversight of the implementation of these changes and monitoring the impacts of the reforms, in consultation with an Interagency Working Group involving NSWPF and key stakeholders.

The Bill also includes a statutory review mechanism, requiring the Attorney General to undertake a review of the amendments as soon as practicable after 18 months from commencement.

Consultation: Were the views of affected stakeholders sought and considered in making the policy?

The Doli Incapax Review engaged with targeted stakeholders. 28 written submissions were received from both Government and external stakeholders, including Legal Aid NSW, NSW Police Force, the Office of the Director of Public Prosecutions, the Law Society of NSW, the Aboriginal Legal Service (NSW/ACT) and the NSW Bar Association. Two group roundtables and a series of individual meetings were held with NSW Government agencies, the Children's Court, the Local Court and legal organisations.

In June 2025, Mr Bellew, Mr Loy and the Review Secretariat also visited Tamworth and Moree to engage with on-the-ground stakeholders and the wider community.

The Department of Communities and Justice consulted the NSW Police Force, Office of the Director of Public Prosecutions, Legal Aid NSW, Aboriginal Legal Service NSW/ACT, Public Defenders, Law Society of NSW, Bar Association, Youth Justice NSW, Children's Court of NSW, Local Court of NSW, District Court of NSW and Supreme Court of NSW on the amendments in the Bill.