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## THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY AND THE PRESUMPTION OF *DOLI INCAPAX*

**The Council of the Law Society of NSW reaffirms its support for raising the age of criminal responsibility in NSW to 14 years old in accordance with international children's rights recommendations. Until the minimum age of criminal responsibility is raised, we consider the presumption of *doli incapax* a critical protection for children aged 10 to 13 who come into contact with the criminal justice system. Evidence shows that this is a vulnerable group of children and that positive outcomes for the whole community, including crime reduction, is better achieved through addressing the root causes of youth crime.**

In NSW, children aged under 10 are considered incapable of criminal responsibility. Children aged 10 to 13 are presumed *doli incapax*, meaning presumed to lack sufficient sociomoral development to understand the difference between right and wrong necessary to be held criminally responsible by adult standards. However, the presumption is rebuttable. This means that where it can be shown that an accused child aged 10 to 13 does understand his or her conduct was seriously wrong, they may be held criminally responsible.

In *RP v The Queen* (2016) 259 CLR 641 the High Court provided welcome clarification as to how and when the presumption of *doli incapax* may be rebutted. Importantly, the High Court confirmed that the prosecution must prove beyond reasonable doubt the child knew his or her conduct was seriously wrong in a moral sense, not just that their behaviour was naughty or mischievous.

The Law Society considers the presumption of *doli incapax* to be correct and appropriate. It is legal recognition of scientific evidence that, due to the psychological, cognitive and sociomoral development of a child under 14 years, this cohort typically does not have the required maturity for criminal responsibility nor for criminal punishment to be meaningful. Children in this age group are generally still developing the ability for abstract thinking, understanding consequences, impulse control, risk assessment and moral judgment. The ability of individual children to develop and exercise executive function can further be affected by adverse and traumatic experiences. The presumption also provides necessary and important protection to children under 14 from entrenchment in the criminal justice system, as childhood contact has been consistently demonstrated to be a powerful criminogenic factor.

In our view, promoting community safety and improving outcomes for this relatively small cohort of children, who have often experienced significant trauma and disadvantage prior to contact with the criminal justice system, is best achieved by approaches that address the underlying drivers of offending by children. These drivers are numerous and complex. The evidence shows that children in this cohort are significantly more likely to have been a victim of violence, be in out of home care, have experienced family breakdown or parental incarceration, and to live with disability. They are more likely to have experienced homelessness, be disengaged from school, and have poor access to health and welfare services, and pro-social or recreational activities. Further entrenchment in the criminal justice system will not address these drivers nor improve community safety in the long-term.

Until the minimum age of criminal responsibility is raised, the Law Society considers the presumption of *doli incapax* to provide vital protection to a vulnerable cohort of young children. In our view, improved outcomes will be best achieved by targeted, therapeutic intervention for children who engage in antisocial or harmful behaviour, as well as ongoing government investment in family and community capacity building.