THE LAW SOCIETY
OF NEW SOUTH WALES

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27 June 2025

The Hon. Geoffrey Bellew SC and Mr Jeffrey Loy APM
Policy, Reform and Legislation
Department of Communities and Justice
6 Parramatta Square, 10 Darcy Street
PARRAMATTA NSW 2150

By email: PRLIndependentReviewSecretariat@dcj.nsw.gov.au

Dear the Hon. Geoffrey Bellew SC and Mr Jeffrey Loy APM,

REVIEW OF THE OPERATION OF *DOLI INCAPAX* IN NSW FOR CHILDREN UNDER 14

The Law Society is grateful for the opportunity to contribute to the review of the operation of *doli incapax* in NSW (**Review**). This submission is informed by the Law Society's Children's Legal Issues, Criminal Law, Human Rights and Indigenous Issues Committees.

In our view, the presumption of *doli incapax* provides critical protection to children aged 10 to 13 who come into contact with the criminal justice system, and the test in *RP v The Queen* (2016) 259 CLR 641 (***RP***) is correct and appropriate.

The Review follows the recent NSW Bureau of Crime Statistics and Research report which found that the number of 10 to 13 year old children found guilty of a criminal offence has significantly declined over the last decade.[1] Rather than being cause for concern, we consider this decline to reflect the appropriate operation of a legal recognition that children under 14 typically lack the psychological and intellectual development to meaningfully engage in criminal proceedings designed for adults.

In our view, improving outcomes for this cohort and promoting community safety will require meaningful engagement in issues beyond the operation of *doli incapax* alone. In this context, we respectfully suggest that the focus of the Review should be on promoting earlier consideration of the presumption of *doli incapax* by police and the Courts to minimise children being exposed to, and becoming entrenched in, the criminal justice system, and improving the availability of effective diversionary therapeutic support services to these children to better address the underlying drivers of antisocial or harmful behaviour.

We also note that the relevant cohort of children is relatively small.[2] Of this already small cohort, it is an even smaller number of children who are engaging in serious or persistent offending.[3] We suggest that facilitating intensive, trauma-informed, therapeutic intervention for this small number of high-risk children is an achievable

[1] NSW BOCSAR, 'Did a High Court decision on doli incapax shift court outcomes for 10-13 year olds?' 8 May 2025.
[2] See answer to Question 10 for more detail.
[3] Australian Institute of Criminology, 'Children aged 10 to 13 in the justice system: Characteristics, alleged offending and legal outcomes' *Report to the Criminology Research Advisory Council,* January 2024, p. 83.

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and cost-effective investment, especially compared to the cost and resources involved in criminal justice responses to this cohort.

Children aged 10 to 13 years who come into contact with the criminal justice system

The presumption of *doli incapax* applies to children aged 10 to 13 years. At the outset, the Law Society emphasises that children in this age group who come into contact with NSW's criminal justice system are one of the most vulnerable cohorts in the state. Children whom the presumption protects typically have experienced significant childhood trauma and disadvantage prior to their contact with the criminal justice system:[4]

- 25% are in out of home care;
- 82% have been identified in a child protection report as at "risk of significant harm", and 60% have been reported at "risk of significant harm" over 10 times.
- 37% have accessed homelessness services.
- 56% have been recorded by NSW Police as a victim of violence.
- 40% have a parent who has been in custody.
- 41% are Aboriginal.
- The rate of legal proceedings against young people under 14 is three times higher in regional, remote or very remote areas of NSW than in major cities.

In the recent Legislative Assembly Committee on Law and Safety Interim Report on *Addressing the drivers of youth crime through early intervention*, it was emphasised that the underlying factors driving offending behaviour in children are complex and numerous, involving a mix of individual, family and community risk factors:[5]

- Individual risk factors include mental illness, cognitive impairment, disability, use of alcohol and other drugs, social isolation, disconnection from culture, prior contact with the criminal justice system, and socio-economic disadvantage and poverty.
- Family-based risk factors include intergenerational trauma, exposure to domestic and family violence, family breakdown, contact with the out of home care system, neglect, use of alcohol and other drugs in the home, parental incarceration, offending by family members, and socio-economic disadvantage and poverty.
- Community-level risk factors include socio-economic disadvantage and poverty, unstable or inadequate housing, limited employment opportunities, limited service availability, lack of suitable programs or activities for young people, poor access to health and welfare supports, inadequate access to public transport, over-policing and disengagement from education.

The Law Society suggests that consideration of the operation of *doli incapax* in NSW must recognise that this cohort of children exists at the intersection of compounding disadvantage, at individual, family and community levels. In our view, addressing the drivers of antisocial or negative behaviour in children will require long-term, whole of government investment into family capacity building, as well as the broader economic and social wellbeing of local communities, alongside appropriate criminal justice system reform.

[4] NSW BOCSAR 'The involvement of young people aged 10 to 13 years in the NSW criminal justice system' 14 August 2024.
[5] Legislative Assembly Committee on Law and Safety, 'Interim Report - Community safety in regional and rural communities: addressing the drivers of youth crime through early intervention' May 2025, p. 8-11.

Legal operation of doli incapax

1. How is the presumption of doli incapax operating in practice?

As stated above, the Law Society considers the long-standing legal presumption of *doli incapax* to be a critical protection for children aged 10 to 13 who come into contact with the criminal justice system. The presumption accords with expert evidence that, due to the psychological, cognitive and neurological development of a child under 14 years, this cohort is unlikely to have the required maturity and understanding to be criminally responsible.[6]

However, members identify several difficulties in the operation of *doli incapax* in NSW, explored throughout this submission:

- Some police are unaware of, or otherwise do not use, diversionary options under the *Young Offenders Act 1997* (NSW) (**YOA**) and will persist in charging a child aged 10 to 13 years with a criminal offence. Research confirms that this is particularly the case for Aboriginal children, even when other factors such as criminal history and offence type are controlled for.[7]
- It appears that some police presume a child aged 10 to 13 years to be *doli capax* and, only after charging, seek evidence to rebut the presumption.[8]
- The late stage at which the presumption of *doli incapax* is considered by the Court results in children under the age of 14 being exposed to various, often harmful, aspects of the criminal justice system before the prosecution is discontinued. In regional areas with delayed hearing dates, this exposure is particularly prolonged.
- Due to the late stage at which the presumption is considered by the Court, many children aged 10 to 13 will opt for diversion under the YOA if offered by police. Some will even enter a plea of guilty and proceed to sentence without the question of *doli incapax* being tested. Children often feel this is a more attractive option than having to wait several months for a *doli incapax* hearing, often while subject to strict bail conditions.
- Where *doli incapax* is relied upon, the child may not engage in therapeutic services while awaiting their hearing due to fear that information disclosed may be obtained by police and used against them in their hearing. This can cause delay to the child receiving necessary treatment and missed opportunities for therapeutic intervention.

a. Do you have any comments in relation to the nature and extent of the evidentiary burden on the prosecution?

The Law Society considers it appropriate and important that if the prosecution wishes to hold a child aged between 10 and 13 years old criminally responsible, the prosecution must bear the evidentiary onus to rebut the presumption of *doli incapax* beyond reasonable doubt.

The Law Society fundamentally opposes any suggestion to reverse the onus so as to require the accused child to prove he or she is *doli incapax*. It is a cornerstone of our legal system that the onus is on the prosecution to prove all elements of a criminal charge. It is clear that rebutting *doli incapax* is an element of an

[6] UN Committee on the Rights of the Child, *General Comment No 24 on children's rights in the child justice system*, 2019, p. 6 [22].
[7] Weatherburn, D., & Thomas, B. (2022). The influence of Indigenous status on the issue of police cautions. *Journal of Criminology*, *56*(2-3), 253-277.
[8] See: A Hadaway, 'Brief on 'doli incapax' in NSW, the minimum age of criminal responsibility & implications for advocacy & law reform' May 2025, p. 6.

offence involving a child aged under 14, given their lack of intellectual and moral development.[9] In our view, it is essential that the burden of rebutting the presumption continue to be borne by the prosecution. Reversing the onus of proof would place a grossly unfair burden on the youngest children, as well as depart from centuries of established jurisprudence[10] and undermine a fundamental principle of our justice system.

b. Do you have any comments in relation to the evidence available to the court in *doli incapax* matters, including what improvements could be made to improve the available evidence?

Anecdotally, our members report that, in some matters, police charge children aged 10 to 13 years old and make limited, or no effort to obtain evidence to rebut the presumption of *doli incapax*. The Law Society has also received concerning reports of police utilising criminal proceedings and bail conditions as an asserted "behaviour management strategy" for disruptive children. Members advise that often, once the prosecutor reviews the file close to the listed hearing date, charges are withdrawn due to there being limited or no evidence obtained by police to rebut the presumption. This experience is supported by statistics which demonstrate that prosecutors are increasingly withdrawing all charges against children in this cohort.[11]

We suggest that efforts to "improve" evidence available to the court in *doli incapax* matters should be cognisant of the potential harm this may cause to the child's support network. Evidence to rebut *doli incapax,* when sought by police, is often obtained from the child's parent or carer, teachers, psychologist, counsellor, support worker, or out of home care workers. In seeking evidence from these persons, the prosecution risks damaging relationships vital to the child's rehabilitation and, by tendering evidence the child may have conveyed in confidence to a support worker, psychologist, counsellor or carer, may erode the child's sense of safety and trust in his or her community.

2. Are there potential evidentiary or operational reforms (for example, improved training) that should be considered to improve the evidence available to the court in doli incapax matters?

As noted above, the Law Society expresses serious concern that efforts to "improve" the evidence available to the Court in *doli incapax* matters may come at the cost of undermining relationships integral to supporting the wellbeing of often highly vulnerable and disadvantaged children, and discourage these children from engaging in essential mental health, schooling and support services.

The Law Society opposes any suggestion that an accused child be required to participate in a court-ordered psychological assessment to determine the child's *doli incapax* status. While family law or care proceedings use court-ordered psychological assessments to help identify the needs of a child, court-ordered psychological testing to assess a child's capacity for criminal responsibility is of a fundamentally different nature. In our view, it would be a significant abrogation of an accused person's recognised right to silence for a child to be ordered to participate in psychological assessment which may be used as evidence against the child in the context of adversarial criminal proceedings. The Law Society would consider this an alarming and disproportionate response to the concerns articulated by the Review.

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[9] *RP v The Queen* (2016) 259 CLR 641, [8].
[10] See: Hale, *The History of the Pleas of the Crown* (1736) vol 1 at 25-28.
[11] Above n 1.

Approaches to doli incapax in Australian jurisdictions

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

The Law Society does not consider it necessary to legislate the presumption of *doli incapax*. In our view, the High Court clearly and correctly articulated the presumption in *RP*.

If the presumption is to be legislated, we suggest the principles expressed in *RP* should be codified without alteration. We suggest the following phrasing might appropriately articulate the common law test:

(1) It is presumed that a child who is aged 10 to 13 years cannot commit an offence.
(2) The presumption in subsection (1) is rebutted only if the prosecution proves beyond reasonable doubt that the child knew at the time of the alleged commission of the offence that the child's conduct was seriously wrong.
(3) Whether a child knew that their conduct was seriously wrong:
    a. is a question of fact; and
    b. cannot be inferred merely from the fact that the child engaged in the conduct which constituted the offence; and
    c. refers to the child's knowledge that it was seriously wrong in a moral sense to engage in the conduct that constitutes the physical element or elements of the offence.

The Law Society opposes departure from the common law test.

However, if the decision is taken to depart from the common law test, the test to rebut *doli incapax* might be articulated as a test that "the child had capacity to know that the offending conduct was seriously wrong". This test, in part, reflects that used in Queensland ("capacity to know").[12] If the rebuttal test threshold is lowered, in our view it must be accompanied by requiring early consideration of *doli incapax* (set out in more detail in response to question 4).

The Law Society also supports legislating an additional diversionary pathway to address the complex needs and behaviours of some children in this cohort. This pathway is discussed in response to question 8.

4. Should legislation require consideration of doli incapax at early or multiple stages of the criminal justice process?

Yes, legislation should require early consideration of *doli incapax.* In NSW, the presumption of *doli incapax* is often not considered by the Court until months after the child is charged, when the matter is listed for *doli incapax* hearing. This means a *doli incapax* child will be exposed to various, often harmful, aspects of the criminal justice system before the prosecution is discontinued. This can include the child being arrested and searched by police, handcuffed, put in a police vehicle, detained in police custody, questioned by police, detained on remand, required to appear before the Court and, if granted bail, required to comply with strict bail conditions, at risk of further arrest and incarceration following breach.

[12] See: *Criminal Code 1899* (QLD), s 29.

The Law Society suggests that the presumption of *doli incapax* should be considered at early, and multiple, stages of the criminal justice system process to facilitate the diversion of *doli incapax* children at the earliest possible opportunity. Similar to legislative amendments adopted in the Youth Justice Bill 2024 (Vic), to commence in September 2025, we suggest that:

- Before commencing criminal proceedings against a 10- to 13-year-old child, police must have regard to whether there is admissible evidence to rebut *doli incapax*.
- If police decide to commence criminal proceedings, the officer must record the reasons why he or she considers there to be admissible evidence to rebut *doli incapax*. The officer's statement containing these reasons must be filed in court with the charge-sheet.
- Within 21 days of charging the child, the prosecutor must review the charge against the child to assess if there is sufficient admissible evidence to rebut *doli incapax* and prove each element of the alleged offence, as well as a reasonable prospect of the child being found guilty.
- If it appears that the evidence to rebut *doli incapax* and/or prove the offence is insufficient, the prosecutor must discontinue proceedings as soon as practicable.
- For matters where the prosecutor considers there is sufficient admissible evidence, we suggest the Court must conduct a *doli incapax* hearing on an expedited basis. This hearing could involve adjudication on the element of *doli incapax* only, following the approach set out in *R v Greg* [2023] NSWChC 13.

Impact of doli incapax

5. How does the operation of the presumption of doli incapax impact on:
   a. criminal justice responses to offending behaviour by children aged 10 to 13, and/or
   b. the affected children themselves?

In our view, criminal justice system responses to offending behaviour by children aged 10 to 13 years old are, at best, often inappropriate and unhelpful in addressing the key drivers of the child's negative or antisocial behaviour and, at worse, further entrench the child in the criminal justice system and increase the child's likelihood of reoffending. Studies have frequently shown that childhood contact with the criminal justice system is a powerful determinant of later persistent recidivism,[13] and that exposure to the criminal justice system itself is a criminogenic factor.[14] Critically, the younger a child is at his or her first sentence, the more likely the child is to reoffend, violently, and to continue offending into adulthood.[15]

The Law Society considers the presumption of *doli incapax* an important protection for children who lack sufficient intellectual and moral development from the criminal justice system. However, the efficacy of *doli incapax* as a protective measure is, we suggest, limited by the late stage at which it is typically considered by police and the courts and, secondly, by the availability of therapeutic support services for this cohort of children.

[13] See: NSW BOCSAR, 'Offending over the life course: Contact with the NSW criminal justice system between age 10 and age 33' April 2018, p. 8.
[14] Standing Council of Attorneys-General,' Age of Criminal Responsibility Working Group Report' September 2023, p. 23.
[15] Sentencing Advisory Council, 'Children Who Enter the Youth Justice System Early Are More Likely To Reoffend' Media Release, 15 December 2016.

6. **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?**

In our view, the primary barrier inhibiting access to relevant services or support for accused children aged 10 to 13 is the limited services available, especially in rural and regional areas. Urgent funding and resourcing of these services is central to facilitating their access by children aged 10 to 13.

A second factor limiting engagement of accused children in therapeutic services is the risk that disclosures made while accessing these services might be used as evidence against the child. In our view, it is critical that children can access therapeutic services without fear that information they disclose will be shared with or obtained by police. Disclosure of confidential information provided by the child to support services may significantly undermine the child's trust in persons or organisations designed to support them, and may also contribute to the child's unwillingness to engage in support services in future. We suggest that, similar to Sexual Assault Communication Privilege provisions or s 871A of the *Children and Young People Act 2008* (ACT), consideration should be given to ensuring such services are not able to be subpoenaed or used in evidence against the child.

Interaction between doli incapax and diversion schemes

7. **How does the operation of doli incapax interact with:**
   a. **diversion under the Young Offenders Act 1997 ("YOA")?**

Our members advise that children aged 10 to 13 typically prefer diversion under the YOA if offered by police, especially for children who would otherwise be on bail. This is because YOA diversion will commonly result in the quicker resolution of their matter in circumstances where a *doli incapax* hearing may not be listed for several months.

However, the preference for YOA diversion is complicated by police cautions being limited to three (3). Members express concern that children under 14 often exhaust their cautions prior to turning 14 years old, leaving the child with limited diversionary options once they reach the age of full criminal responsibility. We strongly suggest that there should be no limitation on the number of cautions children presumed *doli incapax* may receive from police. The removal of this limitation would enable far more children aged under 14 to be diverted. This would also enable police to secure an outcome that is not a dismissal without the time and resource cost of prosecuting a child aged under 14.

   b. **mental health diversions under the Mental Health and Cognitive Impairment Forensic Provisions Act 2020?**

Applications pursuant to s 14 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) (**MHCIFP Act**) raise similar concerns as YOA diversion. Diversion under the MHCIFP Act typically enables matters to be resolved more promptly than running a *doli incapax* hearing, which may take several months to be listed, and can be an attractive option to children subject to strict bail conditions.

However, MHCIFP Act diversion can be problematic for this cohort. *Doli incapax* children typically have complex needs and vulnerabilities, with mental health or cognitive impairment being only one aspect contributing to the child's challenging behaviour. We generally consider it less than ideal for children aged 10 to 13 to be subject to 12 month treatment plans, at risk of being brought back before the Court if they fail to comply, in circumstances where the prosecution may have been unable to rebut *doli incapax* had the child defended the matter. Similar to the restriction on the number of cautions available to children, diversion of a child younger than 14 under the MHCIFP Act may prejudice them in future applications, given s 15(f) of the MHCIFP Act.

Again, this could be cured by protections that prevent diversions of children under the age of 14 from being considered by courts once a child turns 14.

8. Are there any ways to facilitate engagement in diversion by children aged 10 to 13 in contact with the criminal justice system? If so, what changes should be made to enable this?

As noted above, we consider the key barrier to effective diversion of this cohort from the criminal justice system is the limited services available, especially in rural and remote areas. We suggest that increased resourcing of preventative and early intervention programs, and the expansion of currently available diversionary pathways is vital to improving outcomes for this cohort. We also suggest consideration be given to developing a legislated diversionary pathway for accused children with complex needs, as well as specialist programs for children who engage in violent behaviour.

Early intervention and prevention

We suggest that diversion of *doli incapax* children should occur, as far as practicable, prior to contact with the criminal justice system. Early intervention programs are a cost-effective way to address the drivers of childhood offending behaviour.[16] Experts have recommended that children exhibiting early offending behaviours are best assisted by the provision of mental health and disability support, educational engagement, support for parents and families, and promoting the child's network of prosocial, culturally-appropriate activities and relationships.[17] This is the most effective way to achieve community safety and respond to the genuine concerns of victims of crime.

We suggest particular focus be placed on:

- Funding diagnostic and support services for children with disabilities, who are overrepresented in the youth justice system.[18]
- Promoting alternative schooling options for children disengaged or excluded from (due to suspension or expulsion) mainstream education.

[16] Above n 5, p. 30.
[17] Australian Institute of Criminology, 'Children aged 10 to 13 in the justice system: Characteristics, alleged offending and legal outcomes' *Report to the Criminology Research Advisory Council,* January 2024, p. xii.
[18] NSW BOCSAR, 'BOCSAR study reveals young people with a disability are overrepresented in the youth justice system' 18 January 2023.

- Ensuring children can access support services and pro-social activities in the evening and at night, especially in rural and regional areas.[19]
- Expansion of currently available diversionary programs, such as the Youth on Track Program, to children who have not yet had contact with the criminal justice system but are demonstrating behaviours of concern or other risk factors.[20]

The Law Society also considers the *Joint protocol to reduce the contact of young people in residential out of home care with the criminal justice system* (**Joint Protocol**)[21] to play an important role in early intervention and prevention for this cohort. The Joint Protocol recognises that children in residential services often have multiple, complex needs arising from the combined impact of abuse, neglect and separation from family, and are also at increased risk of coming into contact with the criminal justice system, as set out in the Australian Institute of Criminology's 2019 paper '*Crossover kids': offending by child protection-involved youth.*[22] The Joint Protocol provides vital guidance for police and residential service providers in responding appropriately to children in care who present with challenging or antisocial behaviours. Further training of both police and service providers on the Joint Protocol will further strengthen its ability to provide a meaningful and appropriate response to young children in care.

We note that early intervention programs and pathways are most effective when they are designed and led by local communities.[23] In particular, effective early intervention for First Nations children is best achieved when programs are co-designed and delivered by First Nations communities.[24] We suggest that the NSW Government consider prioritising funding to Aboriginal Community Controlled Organisations to deliver targeted, place-based early interventions to First Nations children and families, in alignment with Priority Reform 2 of the National Agreement on Closing the Gap.

Expansion of currently available diversionary pathways

We suggest that engagement in diversion by children aged 10 to 13 can be improved by expanding, and better resourcing, currently available diversionary pathways, especially in regional areas. We note that many recommendations made by the Legislative Assembly Law and Safety Committee in its 2018 report on *The Adequacy of Youth Diversionary Programs in New South Wales* are yet to be implemented.[25]

In particular, the Law Society suggests consideration of the following measures to improve currently available diversionary pathways:

[19] Above n 5, p. 54.
[20] Ibid, p. 40.
[21] NSW Government, Joint protocol to reduce the contact of young people in residential out of home care with the criminal justice system Version 2, 2 July 2019.
[22] Australian Institute of Criminology, 'Crossover kids': Offending by child protection-involved youth, December 2019. See also: S Baidawi and R Ball, 'Child protection and youth offending: Differences in youth criminal court-involved children by dual system involvement' (2023) Children and Youth Services Review, Vol 144, and Legal Aid NSW, *The Drift from Care to Crime: A Legal Aid NSW Issues Paper*, October 2011.
[23] Above n 5, p. 43.
[24] Ibid, p. 47.
[25] Legislative Assembly Law and Safety Committee, 'The Adequacy of Youth Diversionary Programs in New South Wales' September 2018, p. ix – xvii.

- Provide additional training to police to promote awareness and use of diversionary options in appropriate matters, including use of the Protected Admissions Scheme, cautions, warnings and Youth Justice Conferences under the YOA.
- Increase, or remove the limit to, the number of available police cautions under the YOA for children aged 10 to 13, noting the concerns set out at Question 7(a).
- Alter the requirement under the YOA for the accused child to formally "admit" the offence to instead "not deny" the offence.
- Expand the offences eligible for YOA diversion, noting that the objective seriousness of an offence, as well as the child's level of involvement, can vary significantly from matter to matter. In particular, we suggest that the offences of intimidation and contravene apprehended violence order (see: ss 13 and 14 of the *Crimes (Domestic and Personal Violence) Act 2007*) be made eligible offences for YOA diversion.
- Expand availability of the Youth on Track Program to a wider cohort of children, especially in regional and rural areas where there are currently long waitlists and limited program locations.[26] The Youth on Track Program has had extremely positive results, demonstrating a significant reduction in the risk of re-offending for program participants.[27] Youth on Track is also increasingly delivered by Aboriginal Community Controlled Organisations which enhances its effectiveness for Aboriginal children.
- Continued investment in New Street Services, which provide therapeutic services for children aged 10 to 17 years who have engaged in harmful sexual behaviours towards others. The service has achieved significant positive outcomes without relying on criminal charges.[28]

Legislated diversionary pathway

We suggest that consideration be given to developing a novel legislative diversionary pathway which could provide targeted, intensive therapeutic intervention to high-needs children under the age of 14.

We suggest the pathway could be legislated as a new Part of the YOA, and be available to children aged 10 to 14 years old who present with one or more risk factors, such as disengagement from schooling, being in out of home care or experiencing homelessness, subject to one or more reports identifying the child being at risk of serious harm, a family history of domestic violence, substance abuse issues, or mental health issues or disability.

To promote early intervention prior to criminal justice system contact, and to recognise that police are often not trained or resourced to triage children requiring intensive therapeutic intervention, we suggest that referral to the multi-agency panel could also be made by other entities, such as a health practitioner or the child's carer, as well as police.[29]

This pathway could be made available to children with more significant or complex needs and who require a multidisciplinary response to address their criminogenic risk factors. We conceive that a police or court referral under this pathway could trigger a comprehensive assessment of the child's needs by a multi-agency panel including, for example, the Department of Communities and Justice, the Department of Education and NSW Health. Such a process could reflect the ACT's Therapeutic Support Panel for Children and Young People.

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[26] Above n 5, p. 38.
[27] Department of Communities & Justice, *Youth on Track Snapshot Report: 2021 Calendar Year*, July 2022, p. 5-6.
[28] KPMG, 'Evaluation of New Street Adolescent Services Final Report', March 2014.
[29] See, for example: *Children and Young People Act 2008* (ACT) s 501A, which sets out entities which may refer a child to the ACT's Therapeutic Support Panel.

Similar to processes adopted by the Youth Koori Court and the Youth on Track Program, an intensive support plan could be developed in consultation with the child and his or her family or carer, to best address the child's individual needs and risk factors. This might include facilitating engagement in schooling, providing treatment for drug, alcohol or mental health issues, improving the child's cultural connections, or facilitating access to Centrelink, accommodation support services, and training or employment programs. The multi-agency panel could coordinate services to address the child's underlying risk factors, including facilitating relevant support services for the child's family or carer. Given the very small cohort of children under 14 who present the most concern (please refer to our response to question 10 for detail), such a response would not be disproportionately resource intensive, particularly when compared to the cost of a criminal justice system response to children with numerous charges.

We reiterate that to ensure the child feels able to openly engage in this pathway, we suggest that information about the child, or things said or done by the child, should not be provided to police or admissible in criminal proceedings against the child. We suggest similar protections to the Sexual Assault Communications Privilege or s 871A *Children and Young People Act 2008* (ACT) ought to be considered.

Should the plan not be completed, or interventions be unavailable, charges could return to the Children's Court in a similar manner to an incomplete Youth Justice Conference.

Specialist programs for children who use violence

The Law Society endorses the Legislative Assembly Committee on Law and Safety's recommendation for specialised programs for children who use violence.[30] Young people who engage in violent behaviour are often unable to access existing rehabilitative programs or diversionary pathways as they are assessed as posing a risk to service providers or other child participants. As a result, these children often do not receive critical therapeutic support despite often being most in need. It was noted in the Legislative Assembly Committee on Law and Safety's Interim Report:

> It is important to recognise that young people who use violence are commonly victims of violence themselves, and need support. Exposure to violence often overlaps with other risk factors, such as poverty and exposure to alcohol and other drug use, and out-of-home care placements.[31]

In 2023, thirty percent (30%) of offences committed by children aged 10 to 13 years involved violence.[32] It is important that these children, notwithstanding their use of violence, receive targeted intervention and support, and are not barred from accessing rehabilitative or diversionary programs due to the nature of their offending behaviour. We support the Legislative Assembly Committee on Law and Safety's recommendation that the NSW government invest in upskilling youth service providers so that they can work safely and constructively with children who engage in violent behaviour, and provide trauma-informed care to this cohort.

[30] Above n 5, 40.
[31] Ibid, 41.
[32] Above n 4.

Regional issues

9. Are there particular issues in regional or rural areas that may affect the operation of doli incapax?

As noted throughout this submission, we consider that the key issue in regional and rural areas affecting the operation of *doli incapax* is the critical under-resourcing of therapeutic support services for this cohort. For example, members report 6 month wait times for the Youth on Track Program in various regional locations, as well as limited specialist children's psychologists, lawyers and service providers.

A secondary issue impacting the operation of *doli incapax* in regional and rural areas are variances in court proceedings as compared to metropolitan courts. In our members' experience, there can often be longer delays experienced in obtaining court hearing dates, resulting in children being remanded or subject to strict bail conditions for extended periods. We suggest that children's criminal proceedings in regional areas might also benefit from the Children's Court conducting more frequent circuits, to ensure that these matters are heard by specialist magistrates familiar with Children's Court processes and law, including the application of the presumption of *doli incapax*.

Addressing offending by 10 to 13 year olds

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

As noted earlier, in considering the appropriate response to offending behaviours by children aged 10 to 13 years, we emphasise that this is a relatively small cohort of children: in 2023, there were 2,144 individual children under 14 who were legally proceeded against by the NSW Police.[33] Of this already small cohort, it is an even smaller number of children who are in engaging in behaviours of serious concern, with two thirds of legal proceedings against this cohort being for non-violent offences.[34]

Research indicates, however, that there is a small minority of 10-13 year old children who engage in more serious and persistent offending behaviour. One study found that less than 2% of children charged with offences accounted for one quarter of all youth offending over an eight-year period.[35] We suggest that facilitating intensive, trauma-informed, child-centred therapeutic intervention for this small number of high-risk children is an achievable objective that best promotes community safety while respecting the rights of the child.

While it is accepted that considerations of raising the minimum age of criminal responsibility is outside the scope of the Review's Terms of Reference, from a rule of law perspective, we take the opportunity to reiterate the longstanding Law Society view that, in line with international human rights standards, the age of criminal responsibility should be raised to 14, and, consistent with the views expressed in this submission, that children under 14 exhibiting harmful behaviour should receive therapeutic supports outside of the criminal justice

[33] NSW BOCSAR, 'The involvement of young people aged 10 to 13 years in the NSW criminal justice system' Revised October 2024, p. 19.
[34] Ibid.
[35] Above n 3, p. 83.

system. This position reflects the understanding that a criminal justice system response is fundamentally inappropriate and ineffective for children aged under 14.

We also note that the Convention on the Rights of the Child, ratified by the Australian Government, should represent an important source of normative standards for the NSW Parliament in its consideration of *doli incapax*.[36] In this context, we particularly note the comments in 2019 by the Committee on the Rights of the Child, where it was recommended that Australia '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'.[37]

We are grateful for the opportunity to contribute to the Review and remain available for further consultation. Inquires at first instance can be directed to Jade Fodera, Policy Lawyer, on (02) 9926 0218 or jade.fodera@lawsociety.com.au.

Yours sincerely,

Jennifer Ball

Jennifer Ball
President

[36] *United Nations Convention of the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[37] Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 82nd sess, CRC/C/AUS/CO/5-6 (1 November 2019) para [48].