

Youth justice reforms

Children (Criminal Proceedings) and Young Offenders Legislation Amendment Act 2025 (NSW)

Part 1: Changes to *doli incapax*

Introduction

The *Children (Criminal Proceedings) and Young Offenders Legislation Amendment Act 2025 (NSW)* (**Amendment Act**) makes significant amendments to the *Children (Criminal Proceedings) Act 1987 (NSW)* (**CCPA**), the *Young Offenders Act 1997 (NSW)* and the *Young Offenders Regulation 2016 (NSW)*.

This document only highlights changes made to the CCPA. These changes commenced on **1 March 2026** and are currently in effect.

The amendments to the *Young Offenders Act 1997 (NSW)* and the *Young Offenders Regulation 2016 (NSW)* will commence on proclamation at a later date. Information about these amendments will be published by the Law Society in a second publication closer to their commencement.

This document is intended for general information purposes only and does not purport to summarise all changes made by the Amendment Act. The document highlights key changes brought about by the new legislation and does not replace a thorough reading of the Amendment Act, CCPA, *Young Offenders Act 1997 (NSW)* and the *Young Offenders Regulation 2016 (NSW)*. Practitioners are encouraged to read the relevant legislation in full.

The intention of Parliament

In the second reading speech for the *Children (Criminal Proceedings) and Young Offenders Legislation Amendment Bill 2025 (NSW)*, the Attorney General explained the intention of Parliament in introducing the Bill:¹

The bill implements the legislative recommendations of the recent independent review of the operation of *doli incapax* in New South Wales, a criminal law principle that applies to children aged 10 to 13. The term *doli incapax* means "incapable of deceit or incapable of crime or incapable of evil" and is the name given to the presumption at common law that children aged 10 to 13 lack capacity to be criminally responsible for their acts, unless proven otherwise. It is a longstanding and important common law presumption.

[...]

A key recommendation to improve the current settings was to codify the presumption of *doli incapax* and provide statutory guidance about relevant factors in determining whether the presumption has been rebutted. Implementation of this recommendation will strengthen responses to youth offending and ensure that the application of the *doli incapax* presumption is clear and consistent across the State. We are introducing legislation that implements that

¹ New South Wales, Parliamentary Debates, Legislative Assembly, 18 November 2025 (Michael Daley, Attorney General).

recommendation today. The review found that legislating the test would help to ensure that the *doli incapax* presumption is applied consistently, promote a better understanding of its operation and address misunderstandings that presently exist about the test.

The *doli incapax* review recommended that legislation should reflect the current *doli incapax* presumption, as articulated in the High Court case of *RP (RP v The Queen [2016] HCA 53)*. This is because the review found that the rationale underpinning the presumption still holds true and the presumption reflects the developmental limitations of children. The presumption, and threshold articulated in *RP*, acts as an important safeguard against inappropriate findings of criminal responsibility against children under 14 when those children are not mature enough to understand what they did was wrong. The bill will implement this recommendation in full by introducing statutory provisions that, firstly, confirm the presumption that a child over the age of 10 and under the age of 14 years old cannot commit an offence; and, secondly, confirm that the prosecution has the onus of rebutting that presumption and must prove beyond reasonable doubt that the child knew at the time of the alleged commission of the offence that their conduct was seriously wrong.

Legislative presumption of *doli incapax*

The Amendment Act inserts a new section 5 to the CCPA.

Section 5(2) sets out the presumption of *doli incapax*:

It is presumed that a child who, at the time of the alleged commission of an offence, is 10, 11, 12 or 13 years of age cannot be guilty of the offence.

Section 5(3) identifies when the presumption will be rebutted:

The presumption in subsection (2) 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.

Section 5(4) defines what is meant by "seriously wrong":

Whether a child knew that the child's conduct was seriously wrong -

- (a) is a question of fact, and
- (b) must not be inferred merely from the fact that the child engaged in the act or acts which constituted the alleged offence, and
- (c) refers to the child's knowledge that it was seriously wrong in a moral sense to engage in the act or acts which constituted the alleged offence.

Section 5(5) sets out several mandatory considerations:

In determining whether the presumption has been rebutted, a court must have regard to the following matters, if known to the court -

- (a) the conduct that constitutes the alleged offence,
- (b) the circumstances surrounding the commission of the alleged offence,
- (c) the child's intellectual and moral development and education,

(d) the environment in which the child was raised.

Section 5(5)(b) includes the following example of circumstances surrounding the commission of the alleged offence:

the child taking steps to plan the conduct, including equipping themselves for the conduct or to avoid detection.

Section 5(6) states that subsection 5(5) does not limit other matters to which the court may have regard.

Section 5(7) provides the following clarification:

To avoid doubt—

(a) a court may determine that the presumption has been rebutted based on evidence of the conduct that constitutes the alleged offence and the circumstances surrounding the commission of the alleged offence, and

(b) the determination may be made without or despite other evidence of the child's intellectual and moral development if the court is satisfied that evidence of the conduct that constitutes the alleged offence and the circumstances surrounding the commission of the alleged offence is sufficient to satisfy the requirement set out in subsection (3).

The Amendment Act makes clear that the Court must not consider certain processes under the *Young Offenders Act 1997* (NSW) in determining whether the presumption of *doli incapax* has been rebutted. Section 5(8) states:

Despite subsections (5) and (6), a court must not have regard to the following occurring under the *Young Offenders Act 1997*—

- (a) the child being given a caution or being a participant in a youth justice conference,
- (b) an admission or non-denial statement made by the child in order to be eligible for a caution or youth justice conference, other than a formal guilty plea referred to in the *Young Offenders Act 1997*, section 10(5),
- (c) an admission, statement, confession made, or information given, by the child during the giving of a caution or a youth justice conference.

Commencement and review of amendments to the CCPA

The Amendment Act provides that amendments made to the CCPA apply only to proceedings commenced **after** the commencement of the amendment.

Eighteen (18) months after commencement of the amendments, the Attorney General must review the amendments to determine whether the policy objectives of the amendments remain valid and the terms of the CCPA remain appropriate in securing those policy objectives.

A report on the outcome of the review must be tabled in each House of Parliament within twelve (12) months after the end of the period of eighteen (18) months.