SNAICC
National Voice for our Children

SNAICC Submission to the Review of *Doli Incapax* in NSW

June 2025

Acknowledgement

SNAICC shows respect by acknowledging the Traditional Custodians of Country throughout Australia and their continuing connections to land, waters and communities. SNAICC's head office is located on the lands of the Wurundjeri People of the Kulin Nation, and SNAICC operates nationally.

SNAICC acknowledges Traditional Owners of all lands and waters across this continent, and pays respects to Elders past and present. We acknowledge and respect their continued connection to Country, care for community and practice of culture for generations uncounted.

About SNAICC

SNAICC is the national non-government peak body for Aboriginal and Torres Strait Islander children. We work for the fulfilment of the rights of our children, to ensure their safety, development, and well-being.

SNAICC has a dynamic membership of Aboriginal and Torres Strait Islander community-based child care agencies, Multi-functional Aboriginal Children's Services, crèches, long day care child care services, pre-schools, early childhood education services, early childhood support organisations, family support services, foster care agencies, family reunification services, family group homes, services for young people at risk, community groups and voluntary associations, government agencies and individual supporters.

Since 1981, SNAICC has been a passionate national voice representing the interests of Aboriginal and Torres Strait Islander children and families. At the heart of SNAICC's work is championing the principles of community control and self-determination as the means for sustained improvements for children and families – whether in child protection and wellbeing or early childhood education and development. Today, SNAICC is the national peak body for Aboriginal and Torres Strait Islander children and for the sector supporting these children. Our work comprises policy, advocacy, and sector development. We also work with non-Indigenous services alongside Federal, State and Territory Governments to improve how agencies design and deliver supports and services for Aboriginal and Torres Strait Islander children and families.

As the national peak body for Aboriginal and Torres Strait Islander children, SNAICC consults with its member organisations and Aboriginal and Torres Strait Islander leaders to ensure the experiences, needs and aspirations of our leaders, our sector and ultimately, our children and families are the foundation for our submissions and recommendations.

Executive summary

The current application of *doli incapax* fails to protect Aboriginal and Torres Strait Islander children from the harms of criminalisation and does not address the underlying causes of these children's contact with the justice system – such as poverty, intergenerational trauma, systemic racism and social disadvantage. The presumption is inconsistently applied, procedurally complex, and often delays our children's access to appropriate supports, while allowing children as young as ten to be arrested, detained, and prosecuted.

SNAICC recommends replacing the *doli incapax* presumption for 10 to 13-year-olds in NSW with a legislated minimum age of criminal responsibility of 14 years, consistent with international human rights obligations and overwhelming medical evidence about children's development. This change must be accompanied by extending the operation of *doli incapax* to children aged 14 to 17, to account for cognitive disability, developmental delay, and the impacts of systemic disadvantage.

To divert children from unnecessary and prolonged contact with the justice system, *doli incapax* must be available from a child's first point of contact with that system. Reforms must also embed cultural authority into decision-making processes about *doli incapax*, ensuring that assessments of children's capacity are informed by community, kin and Elders. Aboriginal and Torres Strait Islander children must also have access to culturally safe, therapeutic supports from the outset, regardless of legal status or capacity, through investment in Aboriginal Community Controlled Organisations (ACCOs). SNAICC also strongly recommends the establishment of a national Aboriginal and Torres Strait Islander-led independent monitoring and oversight mechanism to monitor implementation of enforceable national child justice standards, including operationalisation of the presumption of doli incapax.

Ultimately, *doli incapax* alone cannot disrupt the criminalisation of our children. True reform requires shifting from punitive responses toward care, healing, and self-determination. Raising the age of criminal responsibility and embedding Aboriginal-led, community-based solutions are critical steps toward breaking the cycle of overrepresentation and upholding the rights and dignity of Aboriginal and Torres Strait Islander children.

Social and historic context for legislative reform

The presumption of *doli incapax* operates within a broader justice system that criminalises poverty, intergenerational trauma and disadvantage in the Aboriginal and Torres Strait Islander community.

In NSW, Aboriginal and Torres Strait Islander children comprise 41% of children between the age of 10-13 involved in police proceedings, despite representing only 6% of the child population (Poynton, 2023). Sixty percent of 10 to 13-year-olds in youth detention are Aboriginal and Torres Strait Islander (NSW Government, 2024). These statistics are not reflective of these children's relative moral culpability, but a direct result of systemic inequality, poverty, intergenerational trauma and the enduring impacts of colonisation.

Solutions to over-representation should draw on recommendations from SNAICC's 2024 submission to the *Australian Senate Inquiry Into Australia's Youth Justice And Incarceration System*, which calls for responses grounded in self-determination and targeted at addressing the social determinants of criminalisation, including through increased investment in ACCO-led early intervention and culturally safe supports (SNAICC, 2024).

Human and children's rights

Any legislative reform of the presumption of *doli incapax* must be underpinned by international human rights standards that affirm the dignity and unique needs of all children, particularly Aboriginal and Torres Strait Islander children.

In accordance with Article 37(b) of the UN Convention on the Rights of the Child (UNCRC), detention must be used only as a last resort, and for the shortest appropriate period. Article 40 further obliges governments to prioritise early diversion, rehabilitation, and reintegration, rather than punitive measures.

In addition, Articles 8 and 30 of the UNCRC and Articles 3 and 14 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) recognise the fundamental right of Aboriginal and Torres Strait Islander children to maintain their cultural identity and connection to family and community. Central to achieving this is the principle of self-determination, enshrined in Article 3 of UNDRIP, which affirms the right of Indigenous peoples to design and control services that affect their children and communities. These commitments must be embedded across all aspects of the youth justice system.

These principles demand that any legislative reform to the presumption of *doli incapax* recognise the developmental, cultural, and social contexts shaping a child's behaviour, and protects children from being unfairly criminalised.

In particular:

- The right to diversion – and detention as a last resort – requires decision-makers to apply the presumption of *doli incapax* at the earliest possible point of a child's contact with the justice system and explore culturally safe, non-carceral options *before* progressing to prosecution or remand.

- The right to culture and family affirms that assessments of a child's capacity should involve cultural authority in decision-making about the child's capacity and recognise the protective role of kin and community.
- The right to self-determination requires that Aboriginal-led organisations have authority and resources to develop culturally appropriate wrap-around supports for children to whom the presumption applies.

Essentially, if *doli incapax* is to serve its original protective purpose, it must be reimagined through a rights-based lens—one that centres children's dignity and their need for healing, not punishment.

Raising the age of criminal responsibility

As SNAICC's submission to the *Australian Senate Inquiry Into Australia's Youth Justice and Incarceration System* argues, children under 14 are still undergoing critical stages of cognitive, emotional and social development and are not equipped to navigate or fully comprehend the legal system (SNAICC, 2024). The *doli incapax* presumption is inconsistently applied and fails to offer adequate protection to Aboriginal and Torres Strait Islander children from unnecessarily punitive responses.

Displacing the operation of *doli incapax* with a legislated age threshold of 14 would significantly reduce this complexity, provide greater clarity for the legal system, and ensure that no child is criminalised for actions they are not developmentally capable of fully comprehending. (Law Council of Australia, 2023).

However, research shows that brain development continues into the early twenties, and children mature at different rates. In addition, the overrepresentation of young people with cognitive and intellectual disabilities in the youth justice system means many 14 to 17-year-olds may also lack the emotional, mental, and intellectual capacity to fully comprehend the consequences of their actions (VALS, 2022). Therefore, the presumption of doli incapax should be retained and strengthened for children and young people aged 14 to 17 (VALS, 2022).

Recommendation 1: Expand the Scope of the Review to Include Raising the Minimum Age of Criminal Responsibility to 14 Years, and retaining doli incapax for 14–17-year-olds.

Current operation and impact on addressing the underlying causes of children's behaviour

In practice, the presumption of doli *incapax* is inconsistently applied, procedurally complex, and often results in children being investigated by police, held in custody, or denied

diversion while their 'capacity' is tested (YLA, 2020). Requiring the prosecution to disprove the *doli incapax* presumption can result in harmful and inappropriate legal tactics, including collecting questionable evidence and pursuing tenuous arguments. For Aboriginal and Torres Strait Islander children in particular, '*doli incapax*' has not disrupted overrepresentation - it has simply delayed or complicated the path into criminalisation (Russel et al, 2023).

Doli incapax is inimical to diversion at the earliest possible point

Where children seek to rely on the presumption of doli incapax, the process is often subject to delays, resulting in children and their families being required to attend court repeatedly over several months – sometimes only for the charges to be dropped. This is contrary to the diversion of children from the justice system at the earliest opportunity.

Additionally, while awaiting a hearing or trial to determine their charges and address the issue of *doli incapax*, a child under 14 can be held on remand in a Youth Justice Centre for extended periods or released on bail only to be re-arrested for breaching bail conditions and subsequently detained again (Hadaway, 2025).

For Aboriginal and Torres Strait Islander children, this disrupts their education, family life, and cultural connections, but also increases their contact with the youth justice system (VALS, 2022).

Reforming *doli incapax*

Doli incapax must be from a child's first contact with the justice system and the burden must remain with the prosecution

To prevent children's unnecessary escalation through the justice system, the presumption of doli incapax should be available from a child's first point of contact with the justice system. This includes first police contact, police investigation, charging decisions, and bail assessments. A clearer, earlier application of doli incapax would also help ensure responses are developmentally and culturally appropriate.

Legislative codification of *doli incapax* should keep the current common law test unchanged in order to protect children from unnecessary criminalisation within the justice system. It must also ensure that the prosecution continues to carry the burden of proving, beyond reasonable doubt, that the child understood their actions were seriously wrong, not just whether they were capable of knowing.

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Recommendation 2: Legislate the operation of doli incapax from a child's first contact with the justice system.

Any legislation codifying the substance of the test for doli incapax should not make any changes to the common law test as formulated in the High Court case of RP v The Queen, *and should ensure the burden remains on the prosecution to rebut the presumption beyond reasonable doubt. The test must remain that a child had actual knowledge that the alleged conduct was seriously wrong, not mere capacity to know.*

The role of Aboriginal elders in decision-making about doli incapax

The presumption underlying the *doli incapax* framework relies on statutory actors' interpretation of a child's cognitive and moral understanding, often with a lack of consideration to cultural context and social determinants that shape the child's behaviour (Cuneen, 2021). This reliance on discretionary assessments by police and legal actors often fails to reflect the lived realities of children, particularly those experiencing systemic disadvantage. These assessments also frequently overlook the cultural and social contexts that influence behaviour, especially for Aboriginal and Torres Strait Islander children.

To ensure culturally safe and developmentally appropriate decisions are made pertaining to *doli incapax*, police and courts should be required to engage in meaningful consultation with Aboriginal and Torres Strait Islander Elders, family, trusted community leaders, and other nominated cultural authority figures identified by the child and their community. Embedding cultural authority in the assessment of a child's capacity and context reflects principles of self-determination and collective care. It also acts as a practical safeguard against inappropriate or discriminatory criminalisation, particularly where systemic bias or limited cultural understanding may otherwise influence decision-making.

Recommendation 3: Embed Aboriginal and Torres Strait Islander Independent Oversight in the operation of doli incapax

Access to wrap around supports

Current practices related to *doli incapax* often delay or deny children's access to therapeutic, diversionary, or culturally safe supports while a child's legal capacity is being tested. This disproportionately affects Aboriginal and Torres Strait Islander children, who are often left unsupported in the very moments they have an unmet need for additional care. Culturally therapeutic and grounded responses must be accessible at the earliest point of contact, regardless of whether charges are laid, or 'capacity' is established (ALRC, 2019).

As SNAICC's recent Senate Inquiry into Youth Justice submission highlights, Aboriginal and Torres Strait Islander Community Controlled Organisations (ACCOs) provide culturally safe, wraparound support from early life stages and should be resourced to intervene to support children prior to and upon contact with the justice system, regardless of whether charges are laid or 'capacity' is established.

ACCOs are best placed to support children at risk of contact with the justice system. ACCOs deliver a continuum of culturally safe supports, from universal services – such as early childhood education, health, and disability support – to more intensive, tailored interventions that respond to the complex needs of families facing adversity. They also play a vital role in helping families access and navigate the broader service system, ensuring connections are made early and with cultural integrity.

Recommendation 4: Ensure Aboriginal and Torres Strait Islander children have access to culturally appropriate wrap around supports which are not contingent on criminal responsibility

Independent oversight

Aboriginal and Torres Strait Islander people's right to self-determination extends to having a seat at the table when reforms are proposed to laws and systems that impact our children and young people. Under Priority Reform One of the *National Agreement on Closing the Gap*, all states and territories have committed to shared decision-making and formal partnerships in all areas that affect Aboriginal and Torres Strait Islander people.

Currently, there is no national mechanism to ensure the consistent monitoring or public accountability of how child justice standards are applied. While individual jurisdictions have developed their own monitoring frameworks, these are fragmented and inconsistent. Data collection is frequently inadequate, and public reporting is rare (AHRC, 2024).

Across Australia, mechanisms for reporting, investigating, and remedying rights breaches or misconduct within child justice systems also vary significantly. This lack of coherence undermines efforts to uphold accountability and transparency (Save the Children, 2023). Given the well-documented concerns about the treatment and rights of Aboriginal and Torres Strait Islander children in child justice settings, there is a clear and urgent need for robust, independent oversight.

Australia is a signatory to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), and has ratified the *Optional Protocol to CAT* (OPCAT). OPCAT requires states to establish a system of independent inspections - National Preventive Mechanisms (NPMs) - to monitor conditions and treatment in all places of detention, ensuring compliance with CAT's obligations. However, in 2020, the Australian

Human Rights Commission found that progress towards implementing OPCAT and the NPM system has been far too slow (AHRC, 2020).

Accordingly, Aboriginal and Torres Strait Islander-led independent participation and oversight must be embedded into both the future reform and implementation of *doli incapax*. This must include access to key data related to the operation of *doli incapax* and its impact on Aboriginal and Torres Strait Islander children.

SNAICC calls for the urgent establishment of a national, independent mechanism to monitor and report on the implementation of enforceable child justice standards, applicable across all jurisdictions, as outlined in SNAICC's submission to the *Australian Senate Inquiry Into Australia's Youth Justice and Incarceration System* (SNAICC, 2024).

This mechanism could serve as Australia's National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture (OPCAT), providing a vital framework for oversight in places of detention. It also presents a key opportunity to strengthen national data collection and ensure the regular public reporting of conditions in youth justice settings (SNAICC, 2024).

Recommendation 5: All Australian governments develop a national Aboriginal and Torres Strait Islander-led independent monitoring and oversight mechanism to monitor implementation of enforceable national child justice standards, including operationalisation of the presumption of doli incapax.

The mechanism should give full effect to the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Publishment across all jurisdictions.

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