



CRIMINOLOGY  
RESEARCH GRANT

# Children aged 10 to 13 in the justice system: Characteristics, alleged offending and legal outcomes

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The views expressed are the responsibility of the author and are not necessarily those of the Council.

*Celebrating*  
**50** years

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This project was approved by the Victorian Department of Justice Human Research Ethics Committee (CF 21/5121 and CF 21/15911) and the Victoria Police Research Coordinating Committee (RCC 985).





# Acronyms and abbreviations

ABS	Australian Bureau of Statistics
ACCOs	Aboriginal community controlled organisations
ADHD	attention deficit hyperactivity disorder
AIHW	Australian Institute of Health and Welfare
CCC	Children's Court Clinic
IVO	intervention order
TTO	therapeutic treatment order



# Abstract

This study sought to generate new knowledge about children aged 10 to 13 years who are charged with offending, including their characteristics and support needs, the application of *doli incapax* provisions with this group, and their offending, criminal justice outcomes and trajectories. The study analysed data from national criminal justice statistics, Victoria Police and Children’s Court, a sample of *doli incapax* assessment reports, and consultations with professionals. The findings indicate that the alleged and proven offending of 10–13-year-olds is predominantly non-violent and time-limited, and this is particularly the case for younger children in this cohort. The study also identified significant opportunities to improve early therapeutic and social support interventions for children aged 10 to 13 years who have alleged offending and concluded that the legal presumption of *doli incapax* should be applied, interpreted and recorded in a more consistent and rigorous manner by police, clinicians undertaking *doli incapax* assessments, and the Children’s Court.





# Executive summary

Numerous submissions by legal experts and by medical and justice bodies advocate for an increase in the minimum age of criminal responsibility across Australia to meet international human rights recommendations (a minimum age of 14 years; United Nations Committee on the Rights of the Child 2019). Yet policymakers and practitioners have little to draw on to understand the characteristics of younger children charged with offending, the nature of their alleged offending and criminal justice outcomes, and what alternatives to criminal justice responses might look like. Accordingly, the Australian Institute of Criminology funded this research, via a Criminology Research Grant (CRG 41/20–21), to address these research gaps.

## Methodology

This study sought to investigate:

- the characteristics and support needs of children charged with early offending;
- the application of *doli incapax* provisions for this group; and
- the offending, court outcomes and criminal justice trajectories of children charged with early offending.

The study analysed data from national criminal justice statistics, Victoria Police and Children's Court, a sample of *doli incapax* assessment reports, and consultations with professionals.

## Children's characteristics and support needs

The study found that children aged 10 to 13 years comprise around one-fifth of Australian children and young people proceeded against by police, and seven percent of those supervised by youth justice. Compared with children 14 years and older who experience police and justice system contact, those aged 10 to 13 years are more frequently Aboriginal and/or Torres Strait Islander children and female, and most are aged 13 years at the time of alleged offending.

Professionals described high levels of early adversity and trauma, family difficulties, and child protection involvement among children charged with early offending. These observations were reflected in other data analysed, which showed that half of 10–13-year-old children with police contact for alleged offending had a prior intervention order (mostly as victim-survivors of family violence) and three-quarters of children who underwent *doli incapax* assessments at the statewide Children's Court Clinic had child protection involvement.

The study findings also highlighted considerable educational exclusion or disconnection of 10–13-year-old children with alleged offending alongside substantial mental health and disability-related needs among this group. Sixty percent of children undergoing *doli incapax* assessments were noted to have at least one diagnosed psychiatric disorder, 11.3 percent had a diagnosed intellectual disability or acquired brain injury, and 28.7 percent had multiple psychiatric and disability-related diagnoses. Despite a considerable level of apparent need, there was little evidence of engagement with clinical or therapeutic services among this group of children.

### **Alleged offending, Children’s Court outcomes and criminal justice trajectories**

Most alleged and proven offending among 10–13-year-old children was found to relate to property offences, while around one-third related to offences against the person. The study found that children often had charges laid in relation to their behaviour in public and commercial spaces, but nearly one in five children had charges laid in a residential out-of-home care setting. Additionally, in two-thirds of *doli incapax* assessment reports, children had co-offenders. These observations accord with what professionals described as drivers of children’s offending behaviour, including seeking acceptance and belonging, the influence of peers, criminal exploitation, and cycles of violence reflecting their own histories of victimisation.

Victorian statewide data indicate that 80.2 percent of younger children with alleged offending do not come before the Children’s Court. Overall, 55.3 percent of 10–13-year-olds received police cautions, a further 24.8 percent had police contact other than a caution (ie no court involvement), and 17.8 percent had index matters which proceeded to the Children’s Court (nearly half of which were struck out or dismissed). Nine percent of children received a court diversion, while 2.0 percent received a sentence involving statutory youth justice supervision in the community or a sentence of detention. These findings suggest that most 10–13-year-olds encountering the police in relation to alleged offending will not receive any support through these processes.

In relation to their trajectories, half of 10–13-year-old children (48.8%) had no further alleged offending in the following two years, and 68.0 percent had no violent alleged offending in the following two years. That said, around 20 percent of children had more than 10 police incidents (charges occurring on the same day) in the two years following their index matter. These findings indicate that most offending of 10–13-year-olds is neither violent nor enduring, while a smaller proportion have more violent behaviour, and more repeated police and justice system contact.

## The *doli incapax* process

In undertaking *doli incapax* assessments, clinicians most commonly assessed children's cognitive and sociomoral development. Based on current or recent assessments of cognitive development, 50.0 percent of children fell in the borderline to extremely low range, and 46.8 percent were assessed as either average or low average in estimated IQ. Clinicians provided evidence to support the *doli incapax* presumption being upheld or partially upheld in approximately 50 percent of cases. The child's understanding (or lack thereof) of the legal consequences of behaviours was most common among clinicians' considerations, alongside the child's level of cognitive development and sociomoral reasoning. The child's capacity to regulate emotion and behaviour due to underlying mental health conditions, lack of awareness of the illegality of certain acts, and behaviour following the charges were other factors underpinning clinicians' recommendations.

Importantly, two areas of discrepancy were identified, namely the way in which the impact of a child's experience of developmental trauma, and prior justice system involvement, should inform the clinician's opinion regarding *doli incapax*. Current *doli incapax* processes were viewed positively in supporting the diversion of younger children from the justice system. However, identified deficiencies in the application of the *doli incapax* presumption were considerable, including: the time taken to arrive at an outcome; its inability to address children's underlying needs; its criminalising nature; inconsistency in the understanding, assessment and application of the principle; the resources required to assess and apply the principle; and the lack of understanding among the children involved.

## Service system reflections and suggested reforms

Deficiencies in current service system responses to younger children charged with early offending were identified across child protection and education systems. Further limitations in overall system responses to younger children charged with offending include a lack of consistency between services in the conceptualisation of and responses to early offending behaviours, and limited targeted services for children with early offending behaviour. Professionals outlined specific limitations in service system responses for Aboriginal and/or Torres Strait Islander children and migrant children, including a lack of culturally responsive services, particularly early intervention services, and systemic racism, most often described by professionals in terms of perceived differential policing. Key strengths of current service responses included police and court-based early intervention and diversion programs, and culturally responsive service provision.

## Study implications

**The alleged and proven offending of 10–13-year-olds is predominantly non-violent and time-limited, and this is particularly the case for younger children in this cohort.**

The study found that most alleged offending of 10–13-year-olds is non-violent, and that the alleged offending of 10–12-year-olds is less violent, voluminous and persistent in nature than that of 13-year-olds. At the same time, a minority of 10–13-year-old children appear to engage in more serious or persistent offending behaviour. This is consistent with other Australian research suggesting that a small proportion of children (less than 2% of those charged with offences), accounted for one-quarter of all youth offending over an eight-year period (Sutherland & Millstedt 2016).

Such findings lend support to raising the minimum age of criminal responsibility; however, consideration of alternative responses is also required, particularly for the minority of 12- and 13-year-old children who are engaged in more serious or persistent offending behaviours.

**There is significant scope to improve early therapeutic and social support interventions for children aged 10 to 13 years who have alleged offending.**

Current responses to children with early offending result in substantial missed opportunities to better support this group, while continuing to criminalise such children with little therapeutic benefit. The findings suggest that justice responses (as opposed to those of the youth justice statutory system) are not currently used as a last resort in responding to this group of children. Much can be done to better support this group.

Professionals' recommendations for approaches to better support children with early offending behaviours typically centred on mental health and disability assessment and support, educational engagement, referral to diversion programs, supporting families and parents, and development of the child's network of prosocial and culturally supportive activities and relationships. Clinical recommendations arising in *doli incapax* reports were often about addressing needs related to children's offending (eg mental health and emotion regulation, educational engagement, family relations, problem solving), but rarely related to interventions to directly target the specific behaviours of concern (eg aggression, attitudes to violence, negative peer pressure, risk-taking).

The findings suggest children with early offending behaviours could be better supported through justice reinvestment towards trauma-informed approaches that centre child wellbeing. Other suggested service reforms include a secure therapeutic setting as an alternative to custody, investing in therapeutic services already working with children with early offending behaviours, and multidisciplinary early intervention programs focusing on child and family welfare, educational engagement and community-based cultural support. Suggested service provision models should the minimum age of criminal responsibility be raised include a diversionary multidisciplinary case management service (independent of the youth justice system) providing intensive outreach and family support. Additionally, expanding court-mandated therapeutic treatment orders (beyond children with sexually abusive behaviours) was seen as a suitable option for responding to more serious behaviour. Such treatment could be delivered through a community-based service with forensic expertise.

**The presumption of *doli incapax*, where retained, should be applied, interpreted and recorded in a more consistent and rigorous manner.**

The study findings make clear the need for a more consistent approach to the legal and clinical assessment of *doli incapax*, clearer guidelines for police and judicial officers in applying and interpreting this principle, improved recording of the application of the principle, and better use of *doli incapax* reports to support children.

First, it is recommended that national standards be produced to guide clinicians conducting *doli incapax* assessments. Second, it should be reiterated that the presumption of *doli incapax* rests on the prosecution to rebut. Third, it is recommended that police and children's courts in Australian jurisdictions clearly record and retain in a manner accessible to government and others data concerning the application of the principle of *doli incapax*. Finally, the study findings give rise to a recommendation that, where this is not already standard practice such as in Victoria, children's courts adopt a routine practice (with judicial discretion) of releasing *doli incapax* assessment reports to the defence. Where consented to, these reports should also be shared with others caring for, supporting or treating the child.

The study findings and recommendations regarding the application of *doli incapax* make clear that, while helpful, such provisions as they currently operate are not a reliable legal safeguard for children with alleged offending. The existence of *doli incapax* provisions cannot therefore be tendered as a robust argument against the need to raise the minimum age of responsibility.



# Introduction

Responses to younger children charged with offending have recently been a subject of considerable Australian debate. In this research, ‘children charged with early offending’ are defined as those aged 10 to 13 years at the time of alleged offending. Two major legislative provisions currently direct Australian criminal justice responses to this group. The first is the minimum age of criminal responsibility. This is currently 10 years of age across all Australian jurisdictions except the Northern Territory, which recently raised it to 12, but similar increases are now before the ACT and Victorian parliaments). The second legal provision affecting responses to children in the justice system is the presumption of *doli incapax*. This principle requires that, to be held criminally responsible, a child aged less than 14 years at the time of alleged offending must understand that their actions are ‘seriously wrong’ rather than merely ‘naughty or mischievous’ (Fitz-Gibbon & O’Brien 2019). *Doli incapax* is a rebuttable presumption, meaning that all children aged under 14 years must be presumed to be incapable of such understanding, unless the prosecution can provide evidence refuting this presumption. Evidence can include observations or admissions of the child during arrest and interview processes, previous dealings with police, the circumstances of the alleged offending, or formal psychological assessments, which may include an assessment of a child’s level of sociomoral reasoning.



In July 2020, the Australian Council of Attorneys-General met to consider alternative responses to children charged with offending at younger ages. Current debates propose amending the above provisions by raising the age of criminal responsibility to 12 or 14 years, and abolishing, retaining or expanding *doli incapax* provisions. Numerous submissions by legal experts and by medical and justice bodies have advocated for an urgent increase in the minimum age of criminal responsibility across Australia to meet international human rights recommendations (a minimum age of 14 years; United Nations Committee on the Rights of the Child 2019). The Council of Attorneys-General resolved to defer decision-making and called for further information about alternative responses (Ralston & Whitbourn 2020). Since the commencement of this study, the Northern Territory Government (2023) has raised the age of criminal responsibility, and several other Australian jurisdictions have outlined similar intentions (Brennan 2023; MacDonald 2022; Premier of Victoria 2023). Specifically:

- In October 2021, the Australian Capital Territory committed to raising the age of criminal responsibility to 14 through a progressive process expected to be completed by 2027 through the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 (ACT).
- In June 2022, Tasmania committed to raising the age of criminal detention from 10 to 14 years, with amendments expected to be implemented at the end of 2024.
- In November 2022, the Northern Territory government passed the Criminal Code Amendment (age of criminal responsibility) Bill to raise the minimum age of criminal responsibility from 10 to 12 years, retaining *doli incapax* provisions for children aged 12 and 13 years. The amendments came into effect on 1 August 2023.
- In April 2023, the Victorian government announced it would initially raise the minimum age of criminal responsibility to 12 years, and subsequently to 14 years by 2027 (with exceptions for certain serious crimes).

## Key issues concerning the application of *doli incapax*

Human rights, youth, Indigenous and medical bodies, as well as researchers, have raised concerns about the application of the *doli incapax* presumption (Armstrong 2019; Attorney-General's Department 2020; Australian Human Rights Commission 2020). Concerns include the inconsistent application of *doli incapax* due to:

- the challenges of retrospectively assessing a child's understanding of their actions at the time they were committed;
- the frequency with which the onus of proof is reversed, such that defence lawyers seek to prove a child lacked capacity rather than prosecutors having to rebut the presumed incapacity;
- the vagueness of the principle in legislation, leaving much to the discretion of police, courts and assessors (United Nations Committee on the Rights of the Child 2019); and
- regional variations in service provision and specialisation that affect access to *doli incapax* assessments (Fitz-Gibbon & O'Brien 2019).

A second concern is that children may become criminalised by their contact with the justice system (eg police, lawyers, courts, remand) while waiting on the outcome of *doli incapax* assessments (Fitz-Gibbon & O'Brien 2019). This contact occurs at a crucial point in their development, putting them at risk of assuming a criminal identity, particularly if they are ultimately found to be *doli incapax*. Third, clinical, legal and judicial professionals are concerned that, in seeking to avoid unnecessary criminalisation, *doli incapax* might lead to children not receiving the interventions necessary to divert them from future justice system involvement. This lack of targeted support can result in more entrenched behavioural challenges, and a lack of timely access to key therapeutic interventions (Baidawi & Sheehan 2019). As noted by a study participant in the 'Crossover Kids' research study (Baidawi & Sheehan 2019: 194): 'I'm not suggesting that it would be good to be found guilty of the crime, but somehow there needs to be a follow up for that child because [they] wouldn't be in this situation if there weren't needs.'

### Children charged with early offending: A high-risk and vulnerable group

Evidence suggests that, while only comprising a minority of children charged with offending and under youth justice supervision, 10–13-year-old children are more likely than other justice-involved children to experience future youth justice involvement (Australian Institute of Health and Welfare (AIHW) 2013; Sentencing Advisory Council 2016). For example, the AIHW (2013) reported that 85 percent of young people born in 1993–94 who came under youth justice supervision at age 10 to 14 returned to (or continued under) supervision when they were aged 15 to 17. The available research also shows greater complexity and vulnerability among early offending children across several domains. For instance, younger children charged with offending are more likely to be Aboriginal and/or Torres Strait Islander children, to have child protection involvement, and to have a neurodisability (AIHW 2020; Baidawi 2020; Baidawi & Piquero 2020). The greater risk and complexity further support the need to strengthen Australia's evidence base concerning this cohort. At the same time, supportive and preventative interventions are likely to have the greatest impact on early offending children, by virtue of their youth, reducing their entrenchment in criminal justice systems and pro-criminal relationships.

Understanding and implementing effective responses to younger children with police and justice system contact should therefore be a priority for Australian jurisdictions. More effective state and territory responses to this high-risk group are critical to addressing vulnerability, disadvantage, risks and needs; to better responding to younger children in contact with the police; and to diverting them from entering into and becoming entrenched in the criminal justice system. While there is considerable support for raising the age of criminal responsibility among governments and advocates alike, there remains negligible empirical data on which Australian governments can draw to assist their decision-making. Accordingly, the Australian Institute of Criminology has funded this research, via a Criminology Research Grant, to address these research gaps and expand the evidence base concerning younger children charged with offending.

# Methodology

## Aims

This study aimed to generate new knowledge about children between the ages of 10 and 13 years who are charged with offending. Specifically, it sought to investigate:

- the characteristics and support needs of children charged with early offending;
- the application of *doli incapax* provisions for children with early offending; and
- the offending, court outcomes, and criminal justice trajectories of children charged with early offending.

## Research questions

The study originally sought to address its aims through seven research questions, many of which required the identification of children who were not proceeded against by police or whose charges were struck out by the Children's Court due to the presumption of *doli incapax* not being rebutted. (The original research questions are presented in the *Appendix*). While matters struck out by the Children's Court due to the presumption of *doli incapax* being upheld were identifiable, the inability to access data identifying police outcomes relating to *doli incapax* for a statewide sample is a key finding of the study and is revisited in this report's *Discussion*. As a result, the research questions were revised as follows:

1. How does early offending vary across Australian states and territories (eg number and rate of children charged with offending, gender, and offence type breakdowns)?
2. What are the observed demographic and social characteristics of children aged 10 to 13 at the time of alleged offending?
3. What are the police and court outcomes of children aged 10 to 13 years who come to the attention of police for alleged offending (ie what proportion have their matters withdrawn, receive a police caution, are charged by police, or have their matters struck out, diverted or sentenced at court)?
4. What differences are observed (eg in age, gender, offence types, and priors) between children who are cautioned and charged by police for alleged offences occurring between the ages of 10 and 13 years?

5. What proportion of children aged 10 to 13 years coming to the attention of police and courts are charged by police for further offending in the following two years?
6. What factors influence clinicians' opinions about *doli incapax* in their assessments of children?
7. What do professional stakeholders (magistrates, police prosecutors and lawyers, youth justice and legal professionals, and non-government youth and Aboriginal specific support services) describe as the strengths and limitations of current criminal justice processes (including *doli incapax* provisions) in reducing the criminalisation and criminal justice involvement of younger children?

## Methods

The study was both qualitative and quantitative in approach, using a mixed exploratory and descriptive research design to address the research questions. Data collection was fourfold, comprising:

- secondary analysis of national criminal justice statistics from the Australian Bureau of Statistics (ABS) and AIHW;
- examination of statewide administrative data from Victoria Police and the Children's Court of Victoria;
- professional stakeholder consultations; and
- analysis of a sample of Victorian Children's Court Clinic *doli incapax* assessment reports.

Except for ABS and AIHW data, all data were specific to Victoria. These triangulated methods provide comprehensive detail about police charges and court outcomes for children charged with early offending and detail the strengths and limitations of current approaches for this group. The research methods are detailed below.

### *Secondary analysis of national data*

To address research question 1, secondary analysis of ABS (2014–22) data (*Recorded Crime - Offenders*) and AIHW (2023) data (*Youth justice in Australia 2020–21*) was undertaken to summarise and compare the number and proportion of younger children charged by police and supervised by youth justice across Australian jurisdictions.

### *Retrospective analysis of statewide police and Children's Court data*

To address research questions 2 to 5, a retrospective follow-up study was conducted of all children aged 10 to 13 years who had contact with Victoria Police in relation to alleged offending in 2017, the year in which Victoria implemented its statewide Children's Court Youth Diversion Service (Children's Court of Victoria 2021).

### Case identification and data linkage

The Children’s Court of Victoria identified all children who came before any Victorian Children’s Court in relation to alleged offending in 2017 when they were aged 10 to 13 years (Children’s Court sample,  $n=272$ ). Victoria Police then identified a broader group comprising all children who came to police attention in relation to alleged offending in 2017 when they were aged 10 to 13 years but who did not appear in the court sample (police sample,  $n=1,097$ ).

### Data collection

For each child in the Children’s Court sample, the Children’s Court of Victoria supplied socio-demographic characteristics (age and sex) and data on each child’s index matter (the first matter for which they came before the court in relation to alleged offending occurring in 2017 when aged 10 to 13 years), including the court outcome and finalisation date. Then, for each child in both the Children’s Court sample and police sample, Victoria Police provided data in relation to each child’s index matter (the first matter for which they had contact with Victoria Police or the court in relation to alleged offending occurring in 2017 when aged 10 to 13 years). The police data included:

- age;
- sex;
- Aboriginal and/or Torres Strait Islander status (algorithmic data based on most frequent counting rule; see Crime Statistics Agency 2023);
- police charge(s);
- police result (eg processed/not authorised);
- method of processing (eg caution, summons, arrest);
- bail/remand status;
- number of prior charges and of prior charges for offences against the person; and
- subsequent police incidents as an alleged offender until end 2019.

### Data analysis

Data were entered into SPSS for simple descriptive analysis. Tests of statistical significance are reported at the  $p<0.05$  (2-tailed) level unless indicated otherwise.

### *Analysis of doli incapax assessment reports*

To address research question 6 (factors influencing clinicians’ *doli incapax* assessments and recommendations) and to contribute to addressing research question 2 (characteristics of 10–13-year-old children charged with offending), a retrospective analysis of Victorian Children’s Court Clinic (CCC) *doli incapax* assessment reports was conducted.

## Sampling

The sample consisted of 80 *doli incapax* psychological assessment reports completed by psychologists at the Victorian CCC, an independent, statewide service that provides psychological, psychiatric and neuropsychological assessments of children and families for the Children's Court of Victoria. Sampling of *doli incapax* reports was carried out in reverse chronological order, beginning with reports completed from 31 December 2019 until the quota of 80 reports was reached. The rationale for this sample selection was twofold. First, we aimed to gather a contemporary sample of *doli incapax* reports prepared by CCC clinicians, to ensure that reports were representative of current CCC guidelines and practices concerning *doli incapax* cases. Second, we restricted the sampling frame to cases before 2020 to avoid any COVID-19 related impacts that may have influenced the nature of children referred to the clinic, or assessment processes, from 2020 onwards.

## Data collection and analysis

The research team developed a data collection form *a priori* which was piloted by the research assistant with a sample of 10 CCC reports held on the secure CCC database. No significant alterations were made following the piloting phase. Data were extracted concerning each assessed child's sociodemographic characteristics and support needs, past and current police charges and justice system involvement, other formal and informal supports and services which were in place for the child, the *doli incapax* assessment process (including duration and tests administered), key factors (eg immaturity, disability) relevant to the clinician's opinion concerning *doli incapax*, and the clinician's opinion (including any reasoning, caveats and further recommendations). Data extraction was completed in March 2022. Data were entered into SPSS for simple descriptive analysis. Tests of statistical significance are reported at the  $p < 0.05$  (2-tailed) level.

## Professional stakeholder consultations

To address research question 7, consultations were undertaken with professional stakeholders in Victoria whose roles involve direct work with 10–13-year-old children with alleged offending.

## Recruitment

Study information was emailed to professionals and agencies working with children charged with early offending in both metropolitan and regional Victoria. In some instances, information about the study was passed on to potential participants by their agency management (eg Victoria Police, Children's Court of Victoria). The following professionals were targeted for inclusion in the study: judicial officers, police prosecutors, frontline police members, criminal defence lawyers, youth justice professionals, psychologists experienced in undertaking *doli incapax* assessments, and non-government and government agencies providing programs or advocacy for children charged with offending. Participants opted in to the study by emailing the researcher to register interest in an interview or focus group.



### Data collection

Semi-structured interviews and focus groups invited participants to share their views and observations on a range of topics, including:

- characteristics and life circumstances of children charged with early offending;
- nature of offending among children charged with early offending;
- factors underpinning Aboriginal and/or Torres Strait Islander children's over-representation among children charged with early offending;
- typical supports and service system involvement of children charged with early offending;
- appropriateness and efficacy of current minimum age of criminal responsibility and *doli incapax* provisions; and
- what improved responses to children charged with early offending should encompass.

### Data analysis

Interviews and focus groups were transcribed verbatim and entered into NVivo 12 for inductive thematic analysis. Open coding, searching for the repetition of words, information and ideas led to the development of common themes and sub-themes, that as closely as possible reflect participant contributions to the focus groups and interviews. Such an approach is appropriate given the limited literature in this area, particularly that which captures the views of the range of professionals participating in this study (judicial officers, police, lawyers, and psychologists, for instance). Themes reported in the findings constitute those most commonly recurring across focus groups, as well as those highlighting alternative or unique viewpoints.

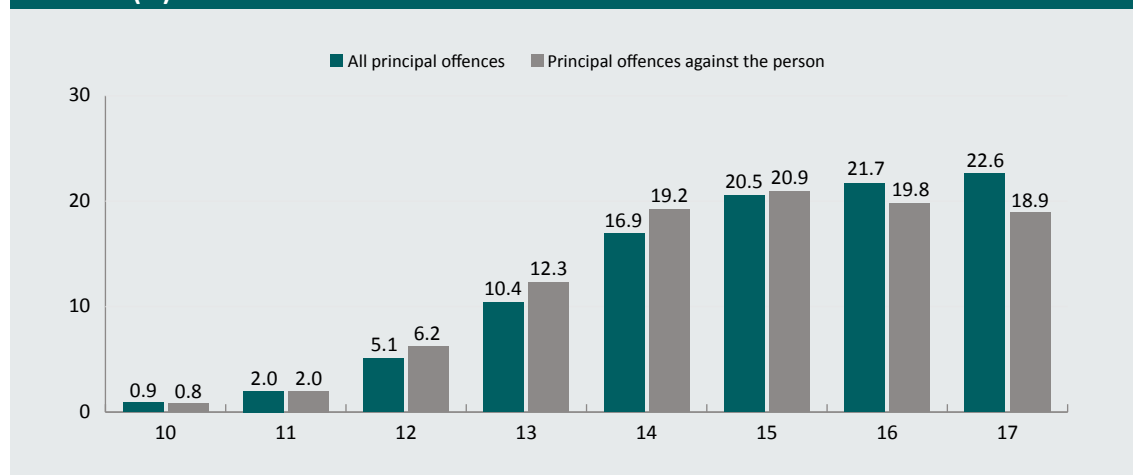
# A national picture of children charged with early offending

This section summarises recent data from the ABS and the AIHW in relation to children charged with early offending.

## Children aged 10 to 13 years proceeded against by police

Children aged 10 to 13 years comprised 18.4 percent of the 45,210 children aged 10 to 17 years proceeded against by police in 2021–22 (Figure 1; ABS 2023). Since 2018, this figure has remained stable, with 10–13-year-olds comprising between 17.0 percent (2018–19) and 18.5 percent (2020–21) of 10–17-year-olds charged with offending during this period (ABS 2020, 2021, 2022, 2023).

**Figure 1: Proportion of children aged 10 to 17 charged with offending, by age in years, 2021–22 (%)**



Source: ABS 2023

ABS data from 2021–22 (ABS 2023) also indicate the following:

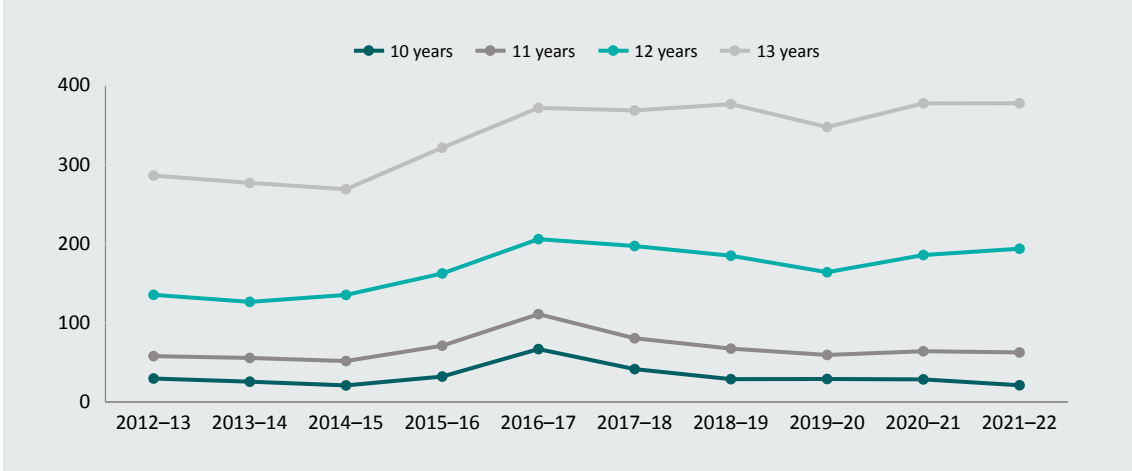
- **Age:** Among 10–13-year-olds proceeded against by police, few were aged 10, 11 or 12 years (8.0% of all 10–17-year-olds proceeded against, and 43.5% of 10–13-year-olds proceeded against), while most were aged 13 years (56.5% of 10–13-year-olds proceeded against, and 10.4% of all 10–17-year-olds proceeded against).
- **Sex:** 5,498 boys and 2,785 girls aged 10 to 13 years were proceeded against by police, representing 17.4 percent of boys and 20.6 percent of girls aged 10 to 17 years proceeded against by police during that period. Boys comprised two-thirds (66.4%) of 10–13-year-olds proceeded against by police in this period. Girls comprised a greater proportion of 10–13-year-olds proceeded against police, compared with children aged 14 years and over proceeded against by the police (33.5% vs 29.2%,  $p < 0.05$ ).
- **Principal offence type:** Children aged 10 years were most often proceeded against by police in relation to unlawful entry with intent (29.7% of 10-year-olds proceeded against), while children aged 11 to 13 years and over were most often proceeded against in relation to acts intended to cause injury (23.1–27.6% of children aged 11, 12 or 13 years).
- **Principal offence against the person:** Children aged 10 to 13 years comprised 21.3 percent of children aged 10 to 17 years proceeded against by police in relation to principal offences against the person (Figure 1). Again, children aged 13 years accounted for most of those aged under 14 years proceeded against in relation to principal offences against the person.

## Longitudinal trends in violent crime

Given concerns around the nature of violent offending among younger children in contact with police and courts, ABS recorded crime data were examined in relation to the two most violent offence types: homicide and related offences, and acts intended to cause injury (ABS 2014–2023). The data indicated the following:

- **Principal offence of homicide or related offences:** From 2012–13 to 2021–22, no children aged 10 to 12 years were charged with homicide or related offences. There were also no 13-year-old girls charged with these offences during this period, though for four out of 10 of these years, between three and seven 13-year-old boys were charged with these offences each year.
- **Principal offence of acts intended to cause injury:** Despite some minor fluctuations from 2012–13 to 2021–22, the rate of principal offence of acts intended to cause injury (per 100,000 persons for age group of interest) remained relatively stable for 10- and 11-year-olds, though some increases were evident for 12- and 13-year-olds (Figure 2). It should be noted that many factors external to offending behaviour can impact offending rates, including the introduction of new offence types and changes in policing practice (for example around adolescent family violence). These factors should be considered in the interpretation of Figure 2.

**Figure 2: Principal offence of acts intended to cause injury by age, 2012–13 to 2021–22 (rate per 100,000 children in relevant age group)**



Source: ABS 2014–2022

### Children aged 10 to 13 years under youth justice supervision

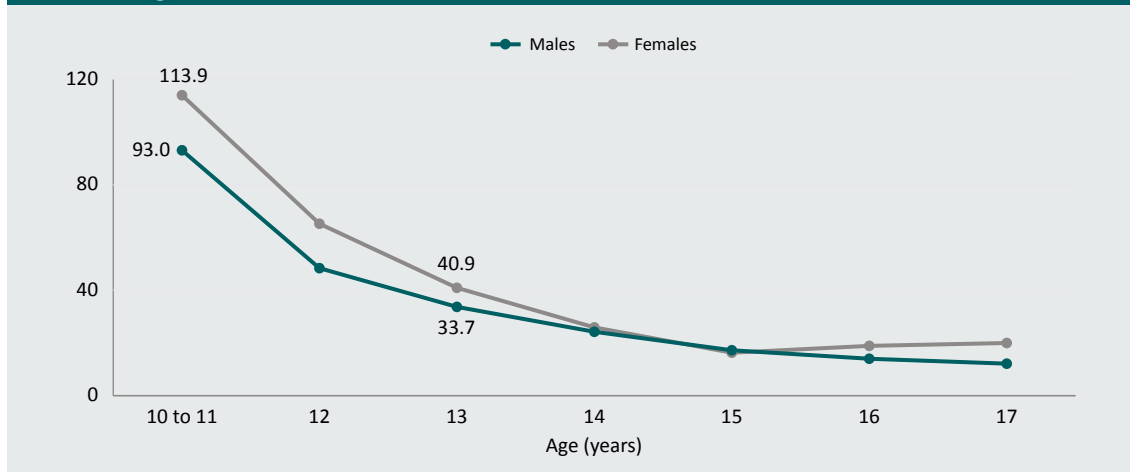
The AIHW (2023) reported that children aged 10 to 13 years comprised 7.4 percent of all children under statutory youth justice supervision (667 of 8,982 children under supervision) in 2021–22. However, the proportion of youth justice clients who were aged 10 to 13 years varied considerably between jurisdictions, from 1.9 percent in Victoria to 14.8 percent in the Northern Territory. Table 1 outlines the number and proportion of children aged 10 to 13 years under youth justice supervision in each state and territory in 2021–22.

**Table 1: Number and proportion of children aged 10 to 13 years under youth justice (YJ) supervision during the year by age and jurisdiction, 2021–22**

Age	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Australia
10–13 years (n)	115	26	207	181	61	10	10	57	667
% of all children under YJ supervision	4.8%	1.9%	7.9%	12.9%	11.8%	5.3%	7.8%	14.8%	7.4%
14+ years (n)	2,291	1,320	2,400	1,222	456	180	118	328	8,315
Total under YJ supervision (N)	2,406	1,346	2,607	1,403	517	190	128	385	8,982

Source: AIHW 2023

Figure 3 outlines the rate ratio of Indigenous to non-Indigenous children under youth justice supervision in 2021–22 by age group and sex. Rates are expressed as the number of young people per 10,000 relevant population. The figure illustrates that Indigenous over-representation among children under youth justice supervision is highest among children aged 10–13 years, for both boys and girls. For example, among 10–11-year-old children, the rate of youth justice supervision was 114 times higher among Indigenous girls and 93 times higher among Indigenous boys compared to their non-Indigenous peers.

**Figure 3: Rate ratio of children under youth justice supervision by age and sex, Indigenous to non-Indigenous, 2021–22**

Source: AIHW 2023

### Longitudinal trends in Aboriginal and Torres Strait Islander children under youth justice supervision

The data in Table 2 indicate that some jurisdictions (notably Victoria and New South Wales) had substantial reductions between 2017–18 and 2021–22 in the proportion of 10–13-year-olds under youth justice supervision who are Aboriginal and/or Torres Strait Islander (AIHW 2023). Reductions in these jurisdictions may be attributable to various policy and practice changes. For example, in Victoria specific justice reforms to practice during this period include:

- the Aboriginal Community Justice Panels Program (expanded since 2018);
- ongoing upgrading of mandatory Aboriginal Cultural Awareness and Human Rights training for police, personal safety officers and prosecutors; and
- collaborative early intervention pilot initiatives involving police, legal and non-government providers (eg the Embedded Youth Outreach Program and the Youth Crime Prevention and Early Intervention Project; Luebbers et al. 2020; State of Victoria 2023a, 2023b).

Conversely, other jurisdictions such as Queensland, South Australia, Western Australia and the Northern Territory saw little change during this period in the proportion of 10–13-year-olds supervised by youth justice on an average day who were Aboriginal and/or Torres Strait Islander children. It should be noted that small jurisdictions (eg Tasmania and ACT) can have large fluctuations in these proportions resulting from very small changes in the actual number of children under youth justice supervision.

Table 2: Average proportion of 10–13-year-old children under youth justice supervision who are Aboriginal and/or Torres Strait Islander, by jurisdiction, 2017–18 to 2021–22 (%)								
Year	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
2017–18	70.1	27.6	76.3	81.3	73.5	29.2	15.4	97.0
2018–19	64.6	36.3	76.3	68.4	57.3	28.3	6.3	95.5
2019–20	54.1	46.3	83.2	59.7	65.7	28.0	26.5	98.5
2020–21	50.9	21.7	86.6	70.5	71.8	30.4	5.9	100.0
2021–22	53.7	8.6	85.9	71.1	70.3	78.3	23.8	94.9

Source: AIHW 2023

In summary, despite jurisdictional variations, national data indicate that children aged 10 to 13 years comprise around one-fifth of Australian children and young people who were proceeded against by police (18.4%) and around one-tenth of those supervised by youth justice (7.4%) in recent years. Among children aged 10 to 17 years proceeded against by police, 10–12-year-olds constitute a minority (9% collectively), while 13-year-olds comprise around 10 percent. Finally, relative to older children with police or youth justice contact, those aged 10 to 13 years are more frequently Aboriginal and/or Torres Strait Islander children, and girls.





# Analysis of police and Children's Court data

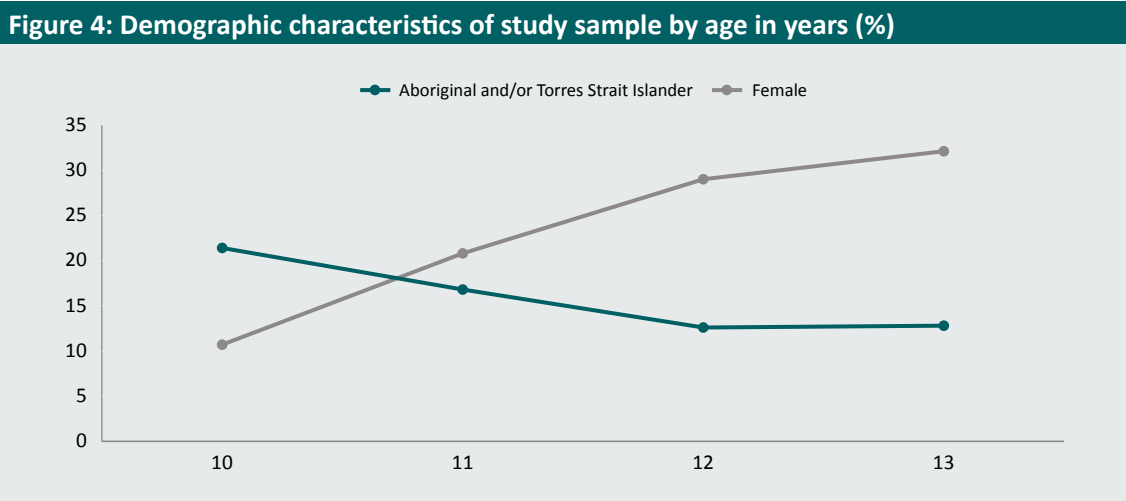
This section presents an analysis of Victoria Police and Victorian Children's Court data for children with alleged offending occurring in 2017 when they were aged 10 to 13 years (the study sample).

## Demographic characteristics

There were relatively few 10- and 11-year-olds in the study sample. As expected, the proportion of 10- and 11-year-olds was higher in the police sample (16.8%,  $n=185$ ) relative to the Children's Court sample (8.8%,  $n=24$ ; Table 3). On average, children in the sample were aged 12.4 years. While the Children's Court sample were older on average (12.6 years), this difference is insubstantial in a practical sense. Overall, 70.9 percent of the children in the sample were male and there was no significant sex difference between the police and Children's Court samples. While 13.7 percent of the overall sample were Aboriginal and/or Torres Strait Islander, those whose matters proceeded to Children's Court were significantly more likely to be Aboriginal and/or Torres Strait Islander than those whose matters did not proceed to Children's Court (21.3% vs 11.82%,  $p<0.001$ ).

<b>Table 3: Demographic characteristics of study sample</b>			
	<b>Police sample (n=1,097) n (%)</b>	<b>Children’s Court sample (n=272) n (%)</b>	<b>All children (N=1,369) n (%)</b>
<b>Age at index matter</b>			
10 years	75 (6.8%)	9 (3.3%)	84 (6.1%)
11 years	110 (10.0%)	15 (5.5%)	125 (9.1%)
12 years	231 (21.1%)	62 (22.8%)	293 (21.4%)
13 years	681 (62.1%)	186 (68.4%)	867 (63.3%)
<b>Sex</b>			
Male	774 (70.6%)	197 (72.4%)	971 (70.9%)
Female	323 (29.4%)	75 (27.6%)	398 (29.1%)
<b>Indigenous status</b>			
Non-Indigenous	908 (82.8%)	206 (75.7%)	1,114 (81.4%)
Aboriginal and/or Torres Strait Islander	129 (11.8%)	58 (21.3%)	187 (13.7%)
Unknown	60 (5.5%)	8 (2.9%)	68 (5.0%)

Among the study sample, compared with those aged 13 years at their index matter, those aged 10 years were more likely to be Aboriginal and/or Torres Strait Islander children, and less likely to be female (Figure 4).

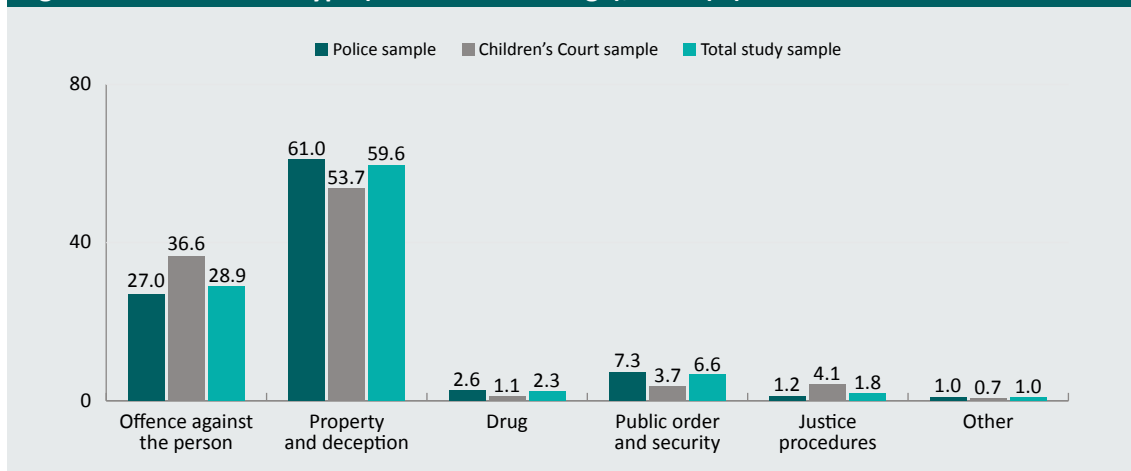


## Offence type of index matter

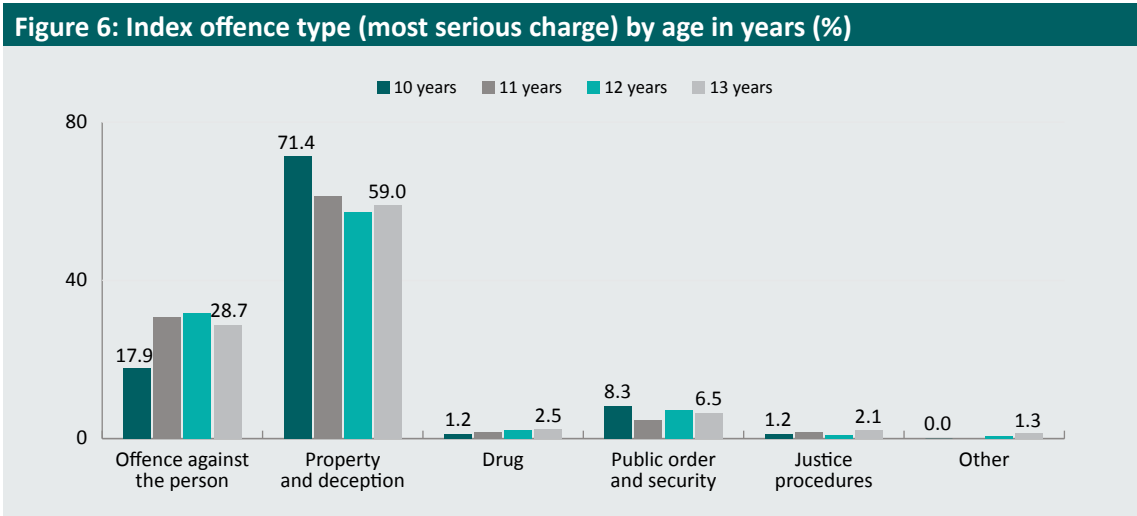
Each child’s index matters were classified by type based on the Australian and New Zealand Standard Offence Classification (ABS 2011). Offences against the person include homicide and related offences, acts intended to cause injury, sexual assault and related offences, dangerous or negligent acts endangering persons, and abduction, harassment and other offences against the person. Property offences include unlawful entry with intent, theft and related offences, and fraud, deception and related offences. Public order and security offences include prohibited and regulated weapons or explosives offences, and disorderly or offensive public conduct. Justice procedures offences include breaches of custodial, community-based, violence or non-violence orders, as well as offences against government operations, security, or justice procedures.

Figure 5 displays the most serious offence type of children’s index matters. Most of children’s alleged offending related to property offences (59.6%) and offences against the person (28.9%; Figure 5). Compared with children in the police sample, those in the Children’s Court sample more often had a most serious charge involving an offence against the person (36.6% vs 27.0%,  $p < 0.01$ ).

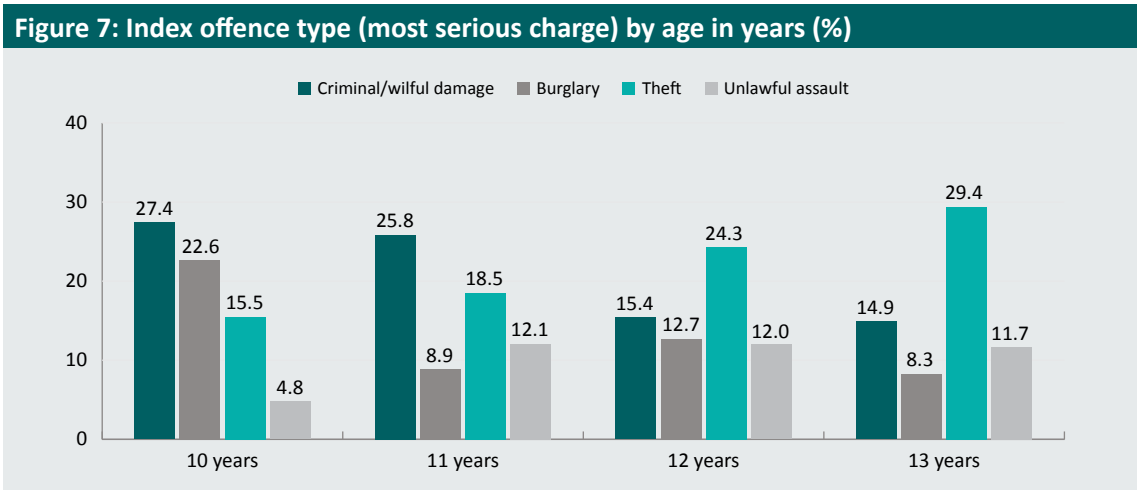
**Figure 5: Index offence type (most serious charge), 2017 (%)**



Index offence types also varied by the child’s age (Figure 6). Compared with 11–13-year-olds, 10-year-old children were more likely to have a most serious charge related to property and deception offences, and less likely to have a most serious charge related to offences against the person.



Across all age groups, the four most common charges (most serious offence type) were consistently criminal/wilful damage, burglary, theft, and unlawful assault (Figure 7). Together, these four offence types accounted for 64 to 70 percent of the most serious index charges across the sample.



**Prior police charges and incidents**

Table 4 outlines children’s prior police charges and prior police incidents (defined as charges occurring on the same day). Overall, 74.2 percent of children had no police contact in relation to alleged offending prior to their index matter. Compared with children whose index matter did not proceed to court, children whose matter did were significantly more likely to have prior police charges (68.4% vs 15.2%,  $p<0.001$ ) and prior police charges involving offences against the person (32.7% vs 6.6%,  $p<0.001$ ). Additionally, boys were more likely to have prior charges (but not prior charges for offences against the person) relative to girls (28.0% vs 20.4%,  $p<0.01$ ), and Aboriginal and/or Torres Strait Islander children were more likely to have prior charges (but not prior charges for offences against the person) compared with non-Indigenous children (39.6% vs 24.5%,  $p<0.001$ ).

<b>Table 4: Prior police charges and police incidents</b>			
	<b>Police sample (<i>n</i>=1,097) <i>n</i> (%)</b>	<b>Children’s Court sample (<i>n</i>=272) <i>n</i> (%)</b>	<b>All children (<i>N</i>=1,369) <i>n</i> (%)</b>
<b>Prior police charges</b>			
None	930 (84.8%)	86 (31.6%)	1,016 (74.2%)
1	76 (6.9%)	48 (17.6%)	124 (9.1%)
2	20 (1.8%)	39 (14.3%)	59 (4.3%)
3+	71 (6.5%)	99 (36.4%)	170 (12.4%)
<b>Prior police incidents</b>			
None	930 (84.8%)	86 (31.6%)	1,016 (74.2%)
1	76 (6.9%)	51 (18.8%)	127 (9.3%)
2	20 (1.8%)	39 (14.3%)	59 (4.3%)
3+	71 (6.5%)	96 (35.3%)	167 (12.2%)
<b>Prior police charges involving offences against the person</b>			
None	1,025 (93.4%)	183 (67.3%)	1,208 (88.2%)
1	28 (2.6%)	26 (9.6%)	54 (3.9%)
2	9 (0.8%)	17 (6.3%)	26 (1.9%)
3+	35 (3.2%)	46 (16.9%)	81 (5.9%)
<b>Prior police incidents involving offences against the person</b>			
None	1,025 (93.4%)	183 (67.3%)	1,208 (88.2%)
1	28 (2.6%)	35 (12.9%)	63 (4.6%)
2	9 (0.8%)	17 (6.3%)	26 (1.9%)
3+	35 (3.2%)	37 (13.6%)	72 (5.3%)

## Prior intervention orders

At the time of their index matter, half of children (49.2%, *n*=673) had a prior intervention order (IVO), including 33.0 percent (*n*=452) solely as a complainant (person in need of protection), 1.0 percent (*n*=14) solely as a respondent (person whom the order was made against) and 15.1 percent (*n*=207) as both a complainant and a respondent. Among children with a previous IVO at their index matter, 96.7 percent were the complainant (victim-survivor) in their first IVO, while 3.3 percent were the respondent.

Intervention orders include family violence intervention orders, issued where the respondent is a family member (partner, ex-partner, parent, or sibling) and personal safety intervention orders (where the respondent is not a family member of the complainant). Among children with a previous IVO at their index matter ( $n=673$ ), most had solely family violence intervention orders ( $n=528$ , 78.5%), while a smaller proportion had solely personal safety intervention orders ( $n=42$ , 6.2%) or both family violence and personal safety intervention orders ( $n=103$ , 15.3%). Therefore, intervention orders prior to children’s index matters mostly related to violence occurring within their family relationships. As shown in Table 5, personal safety intervention orders were more common among children who had been the respondent in one or more intervention orders.

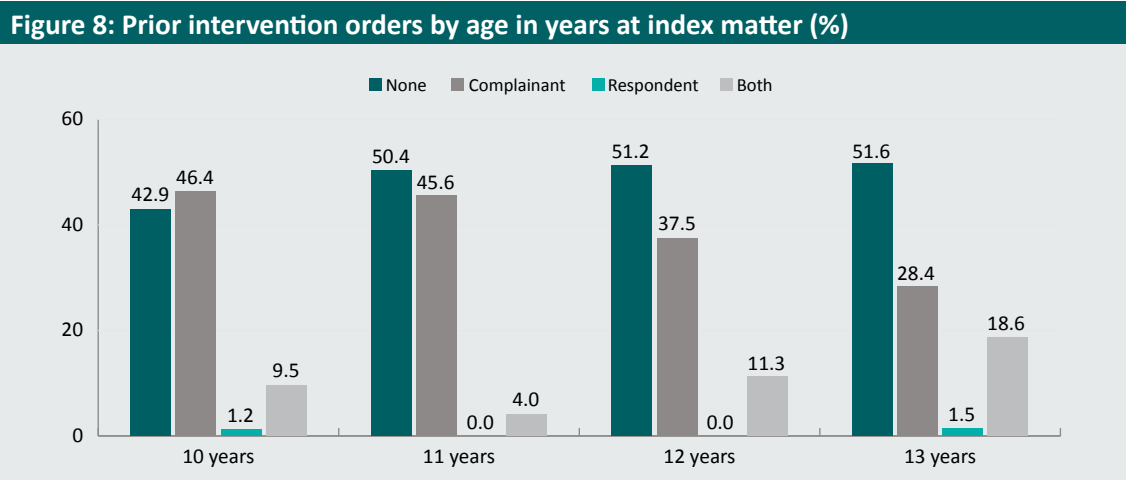
**Table 5: Intervention order types for children with intervention orders at time of index matter**

	Only complainant/ victim-survivor ( $n=452$ )	Respondent only ( $n=14$ )	Both complainant & respondent ( $n=207$ )
Family violence intervention order	381 (84.3%)	8 (57.1%)	139 (67.1%)
Personal safety intervention order	21 (4.6%)	5 (35.7%)	16 (7.7%)
Both types	50 (11.1%)	1 (7.1%)	52 (25.1%)
Total	100%	100%	100%

At their index matter, some children were more likely to have had prior IVOs, including:

- children whose matters proceeded to court (63.6% vs 45.6% of children whose matters did not proceed to court,  $p<0.001$ ); and
- Aboriginal and/or Torres Strait Islander children (60.4% vs 48.0% of non-Indigenous children,  $p<0.001$ ).

There was no difference based on sex or age in the proportion of children with prior IVOs at the time of their index matter. However, children aged 10 to 11 years at their index matter were significantly more likely to have prior IVOs solely as complainants compared with children aged 12 to 13 years at their index matter (45.9% vs 30.7%,  $p<0.001$ ; Figure 8). This suggests that the ages of 10 to 13 years, and perhaps some years prior, may be a critical period for disrupting victim-to-perpetrator cycles of violence (Maxfield & Widom 1996).



### Manner of police proceeding and use of bail or remand

As shown in Table 6, among the police sample, most children received a caution (69.0%) or were not proceeded against (19.9%), with fewer children’s matters proceeding via summons (6.1%) or arrest (4.5%). Conversely, among the Children’s Court sample, index matters primarily proceeded via summons (61.0%) or arrest (38.9%). Eight children (0.6%) were remanded in relation to their index matter, including five whose index matter proceeded to Children’s Court (1.8% of the court sample) and three whose index matter did not proceed to court (0.3% of the police sample). Furthermore, among the Children’s Court sample, 13.6 percent (37 children) had been placed on remand between the time of their index matter and the Children’s Court outcome in relation to these index matters (not shown in Table 6).

**Table 6: Manner of police proceeding, index matter, children aged 10 to 13 years**

	Police sample ( <i>n</i> =1,097) <i>n</i> (%)	Children’s Court sample ( <i>n</i> =272) <i>n</i> (%)	All children ( <i>N</i> =1,369) <i>n</i> (%)
Not proceeded against <sup>a</sup>	218 (19.9%)	0 (0.0%)	218 (15.9%)
Infringement	2 (0.2%)	0 (0.0%)	2 (0.1%)
Caution	757 (69.0%)	0 (0.0%)	757 (55.3%)
Intent to summons	67 (6.1%)	166 (61.0%)	233 (17.0%)
Arrest			
Bail	46 (4.2%)	101 (37.1%)	147 (10.7%)
Remand	3 (0.3%)	5 (1.8%)	8 (0.6%)
Unknown—data missing	4 (0.4%)	0 (0.0%)	4 (0.3%)

a: ‘Not proceeded against’ includes children found to be under 10 years, or whose matter was otherwise not authorised, including children for whom there were capacity concerns (eg due to intellectual disability)



## Children’s Court outcomes

Table 7 outlines the court outcomes of children’s index matters expressed as a percentage of the Children’s Court sample ( $n=270$ ) and the overall sample of children ( $N=1,367$ ). Of children’s index matters that proceeded to court, only 10.0 percent received a sentence involving statutory youth justice supervision in the community or a sentence of detention. Another 37.0 percent of children had their index matters struck out or dismissed (including where the child was found *doli incapax*), and 45.2 percent received a court diversion or therapeutic treatment order (TTO). Therapeutic treatment orders are made in the Family Division of the Children’s Court and require a child with sexually abusive behaviours to participate in treatment. Where a TTO has been made, and the Criminal Division of the Children’s Court has not made a finding in the criminal proceedings, the court must adjourn those criminal proceedings for a period not less than the period of the TTO.

When considering the entire sample of children aged 10 to 13 years who came to the attention of police in 2017 in relation to alleged offending, 17.7 percent of children had index matters which proceeded to court but for which the outcome did not involve youth justice supervision, while two percent had a Children’s Court outcome that involved youth justice supervision in the community (1.9%) or custody (0.1%).

**Table 7: Children’s Court outcomes, court sample and all children in the study sample**

	Outcome	Children’s Court sample ( $n=270$ )	All children 10–13 years ( $N=1,367$ )
No court	No court	0 (0.0%)	1,097 (80.2%)
Court outcome without youth justice supervision	Struck out	75 (27.8%)	75 (5.5%)
	Struck out— <i>doli incapax</i>	23 (8.5%)	23 (1.7%)
	Diversion/TTO <sup>a</sup>	122 (45.2%)	122 (8.9%)
	Dismissed	2 (0.7%)	2 (0.1%)
	Undertaking/good behaviour bond	21 (7.8%)	21 (1.5%)
Court outcome with youth justice supervision	Community youth justice order <sup>b</sup>	26 (9.6%)	26 (1.9%)
	Detention order	1 (0.4%)	1 (0.1%)

a: TTO=therapeutic treatment order

b: Includes probation orders, youth supervision orders and youth attendance orders

There was no difference in Children’s Court outcomes by sex or Aboriginal and/or Torres Strait Islander status; however, outcomes differed by the child’s age (Table 8). Among children aged 10 to 12 years whose index matter proceeded to court, two-thirds were struck out or dismissed (65.9%), including where children were found *doli incapax*. A further 27.1 percent of 10–12-year-olds whose index matter proceeded to court completed a diversion (which requires a child to take responsibility for the offence and to engage with the Children’s Court Youth Diversion service) or a therapeutic treatment order (which requires contact with a clinical service provider). Only 2.4 percent of 10–12-year-olds whose matters proceeded to Children’s Court received an outcome that included statutory youth justice supervision in the community or a sentence of detention (all of whom were aged 12 years). This trend was different for 13-year-old children, who were more likely to receive a court outcome of diversion (53.5%), a youth justice order in the community (13.0%) or a sentence of detention (0.5%).

**Table 8: Court outcomes by age in years at index matter, Children’s Court sample**

	Outcome	10 years n (%)	11 years n (%)	12 years n (%)	13 years n (%)
Court outcome without youth justice supervision	Struck out	3 (33.3%)	6 (40%)	29 (47.5%)	37 (20%)
	Struck out— <i>doli incapax</i>	3 (33.3%)	3 (20%)	10 (16.4%)	7 (3.8%)
	Diversion/TTO <sup>a</sup>	2 (22.2%)	5 (33.3%)	16 (26.2%)	99 (53.5%)
	Dismissed	1 (11.1%)	1 (6.7%)	0 (0.0%)	0 (0.0%)
	Undertaking/good behaviour bond	0 (0.0%)	0 (0.0%)	4 (6.6%)	17 (9.1%)
Court outcome with youth justice supervision	Community youth justice order <sup>b</sup>	0 (0.0%)	0 (0.0%)	2 (3.3%)	24 (13.0%)
	Detention order	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (0.5%)
<b>Total</b>		<b>9 (100%)</b>	<b>15 (100%)</b>	<b>61 (100%)</b>	<b>185 (100%)</b>

a: TTO=therapeutic treatment order

b: Includes probation orders, youth supervision orders and youth attendance orders. Good behaviour bond/undertaking and TTO excluded from this analysis as outcome date may include completion of order

Given that the previous literature identifies concerns around the timeliness of *doli incapax* outcomes, further analyses were undertaken to determine the time to court outcomes. For children’s index matters, the average time to a court outcome involving a finding of *doli incapax* was significantly longer than that taken for an outcome of diversion ( $p<0.001$ ) or a community youth justice order ( $p<0.05$ ; Table 9). This was the case when considering time to court outcomes from either the date of alleged offending or the date of police charge.

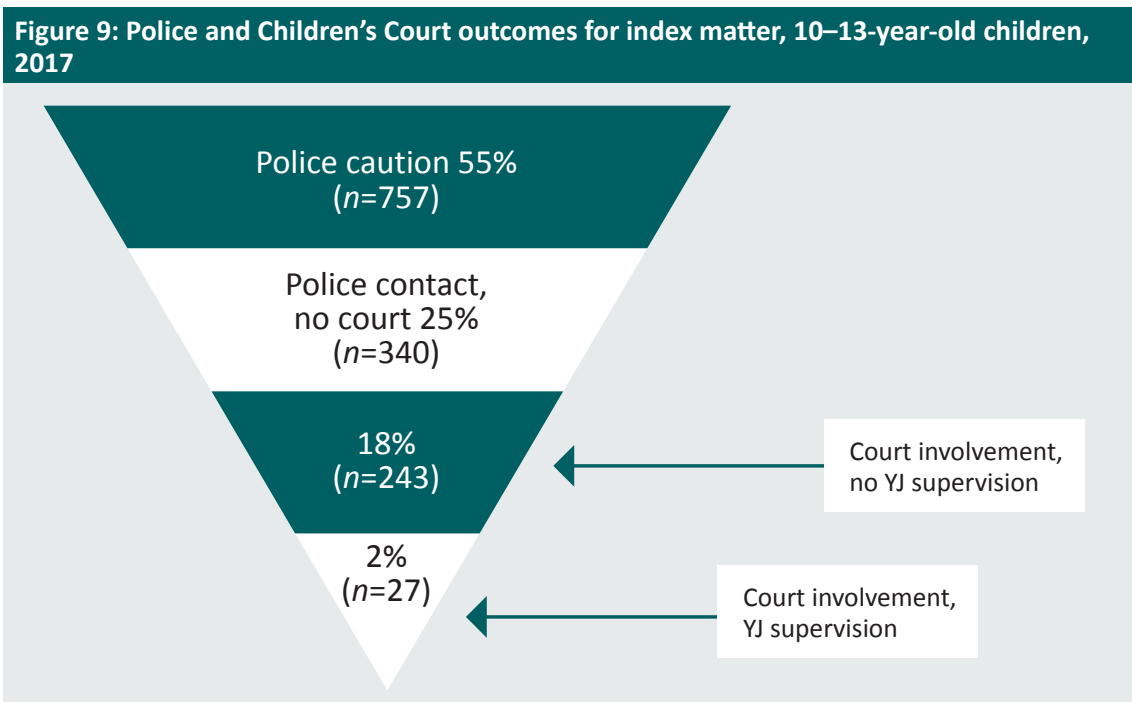
Table 9: Time to court outcomes, Children’s Court sample		
Outcome (n)	Average days from alleged offence to court outcome	Average days from police charge to court outcome
Struck out <sup>a</sup>	337 (n=73)	251 (n=73)
Diversion	249 (n=119)	182 (n=116)
Struck out— <i>doli incapax</i>	406 (n=23)	335 (n=22)
Community youth justice order <sup>b</sup>	255 (n=25)	208 (n=24)

a: Excludes matters struck out by the court for reasons other than application to withdraw by the prosecution (n=2) (eg duplicate charges), and matters struck out due to *doli incapax* considerations

b: Includes probation orders and youth supervision orders, with a youth attendance order (n=1) excluded as an outlier

Note: Undertaking/good behaviour bond and TTO excluded from analysis as outcome date may include order completion

Figure 9 draws together data concerning police and Children’s Court outcomes across the study sample. In relation to their index matter, 55.4 percent of children were cautioned by police, one-quarter had police contact other than police caution (ie no court involvement), and one-fifth had index matters proceeding to court, the majority of whom received an outcome not involving statutory youth justice supervision in the community or a sentence of detention.



### Police contact over the following two years

Table 10 shows the number of police charges, police incidents, charges for offences against the person, and police incidents involving offences against the person, and remand that children experienced in the two years following their index matter. It is emphasised that these charges are in relation to alleged offending and do not represent proven charges.

Additionally, many of these subsequent charges and incidents were dealt with at the same time as the child's index matter—that is, index and subsequent matters were consolidated in the same police or Children's Court outcome. Data in Table 10 therefore do not represent reoffending or recidivism following a police or court outcome but do provide a longitudinal picture of police contact among younger children charged with offending.

<b>Table 10: Police and remand contact within 24 months of index matter</b>			
	<b>Police sample (n=1,097) n (%)</b>	<b>Children's Court sample (n=272) n (%)</b>	<b>All children (N=1,369) n (%)</b>
<b>Police charges within 24 months</b>			
None	632 (57.6%)	36 (13.2%)	668 (48.8%)
1	115 (10.5%)	21 (7.7%)	136 (9.9%)
2	51 (4.6%)	13 (4.8%)	64 (4.7%)
3–5	76 (6.9%)	34 (12.5%)	110(8.0%)
6–10	64 (5.8%)	49 (17.7%)	113 (8.3%)
>10	159 (14.5%)	119 (43.8%)	278 (20.3%)
<b>Police incidents within 24 months</b>			
None	632 (57.6%)	36 (13.2%)	668 (48.8%)
1	160 (14.6%)	39 (14.3%)	199 (14.5%)
2	64 (5.8%)	18 (6.6%)	82 (6.0%)
3–5	92 (8.4%)	66 (24.3%)	158 (11.5%)
6–10	79 (7.0%)	43 (16.0%)	122 (9.0%)
>10	70 (6.4%)	70 (25.7%)	140 (10.2%)
<b>Police charges involving offences against the person within 24 months</b>			
% of all 24-month charges	25.5%	26.6%	26.1%
None	830 (75.7%)	101 (37.1%)	931 (68.0%)
1	67 (6.1%)	28 (10.3%)	95 (6.9%)
2	40 (3.6%)	24 (8.8%)	64 (4.7%)
3+	160 (14.8%)	119 (43.8%)	279 (20.2%)
<b>Police incidents involving offences against the person within 24 months</b>			
% of all 24-month incidents	28.3%	30.8%	29.5%
None	830 (75.7%)	101 (37.1%)	931 (68.0%)
1	119 (10.8%)	58 (21.3%)	177 (12.9%)
2	50 (4.6%)	29 (10.7%)	79 (5.8%)
3+	98 (9%)	84 (30.8%)	182 (13.3%)
<b>Remanded</b>			
n (%)	63 (5.7%)	55 (20.2%)	118 (8.6%)

After their index matter, approximately half of children (668 children, 48.8%) had no alleged offending in the subsequent two years. Furthermore, three-quarters (75.7%) of the police sample, and 37.1 percent of the Children’s Court sample, had no police charges or incidents involving offences against the person in the subsequent two years. Higher proportions of the Children’s Court sample had more than 10 subsequent police charges or subsequent police incidents (43.8% and 25.7% respectively), compared with children in the police sample (14.5% and 6.4% respectively). While 30.8 percent of the Children’s Court sample had three or more violent subsequent incidents, this figure was only nine percent for the police sample.

The level of subsequent alleged offending did not differ by sex. Children who were older at their index offence, and Aboriginal and/or Torres Strait Islander children, had significantly more subsequent police charges and incidents, but this alleged offending was not any more violent in nature. Finally, 8.6 percent of the entire sample were remanded in the two years following their index matter, including 20.2 percent of the Children’s Court sample and 5.7 percent of the police sample. While there was no significant difference by sex or Aboriginal and/or Torres Strait Islander status in the likelihood of subsequent remand, children’s likelihood of subsequent remand increased with age (eg 0% for 10-year-olds vs 10.7% for 13-year-olds). Additionally, while children sentenced to youth justice orders (either in the community or in detention) in relation to their index matter were the most likely to have experienced remand in this period (50–100%), one-quarter of those initially found *doli incapax* were also remanded in the two years following their index matter (26.1%).

### Children’s Court contact over the following two years

Of the Children’s Court sample, 83.0 percent did not have any further Children’s Court outcomes relating to alleged offending in the two years after their index matter, while for 6.7 percent the most serious Children’s Court outcome was struck out or dismissed (including those found *doli incapax*) (Table 11). A further 5.9 percent had a most serious Children’s Court outcome of diversion or an undertaking/good behaviour bond, while 4.5 percent were sentenced to a statutory youth justice order in the community or to detention during this period.

**Table 11: Children’s Court outcomes (most serious court outcome) within 24 months of index matter**

	Outcome	Children’s Court sample (n=270)
No court		224 (83.0%)
Court outcome without youth justice supervision	Struck out	10 (3.7%)
	Struck out— <i>doli incapax</i>	6 (2.2%)
	Dismissed	2 (0.8%)
	Diversion	7 (2.6%)
	Undertaking/good behaviour bond	9 (3.3%)
Court outcome with youth justice supervision	Community youth justice order <sup>a</sup>	8 (3.0%)
	Detention order	4 (1.5%)

a: Includes probation orders, youth supervision orders and youth attendance orders

There was no significant difference by age, sex or Indigenous status in children's likelihood of receiving a Children's Court outcome of diversion or a sentence relating to alleged offending in the 24 months after their index matter. Among children who received a court determination of *doli incapax* in relation to their index matter ( $n=23$ ), most did not have any further Children's Court contact in the following 24 months ( $n=16$ , 69.6%). The remainder received subsequent Children's Court determinations of *doli incapax* (two children), or outcomes of withdrawal of charges (two children), *doli incapax* and withdrawal of charges (one child) or diversion (two children) in this period.

## Summary

Among all 10–13-year-old Victorian children with police contact for alleged offending in 2017, there were relatively few 10- and 11-year-olds (15.2%). Most children were aged 13 years at their index matter (63.3%), and most of the study sample were boys (70.6%). While 13.7 percent of the overall sample were Aboriginal and/or Torres Strait Islander children, those whose matters proceeded to Children's Court were more likely to be Indigenous.

Most alleged offending among the study sample related to property offences (59.6%) and offences against the person (28.9%), though children whose index matter proceeded to the Children's Court were more likely to have a most serious charge involving an offence against the person. Compared with 11–13-year-olds, 10-year-old children were more likely to have a most serious charge related to property and deception offences, and less likely to have a most serious charge related to offences against the person. Most children (74.2%) had no prior police contact, though children whose matter proceeded to court were more likely to have prior charges (68.4% vs 15.2%) and prior police charges involving offences against the person (32.7% vs 6.6%). Boys were more likely to have prior charges (but not prior charges involving offences against the person) relative to girls (28.0% vs 20.4%), and Aboriginal and/or Torres Strait Islander children were more likely to have prior charges (but not prior charges involving offences against the person) compared with non-Indigenous children (39.6% vs 24.5%). At the time of their index matter, 49.2 percent of children also had a prior IVO, including 33.0 percent solely as a complainant (person in need of protection), 1.0 percent solely as a respondent, and 15.1 percent as both a complainant and a respondent. Among children with a previous IVO at their index matter, 96.7 percent were the complainant (victim-survivor) in their first IVO, while 3.4 percent were the respondent. Children aged 10 to 11 years were significantly more likely to have prior intervention orders where they were solely the complainant than children aged 12 to 13 years.

Of all children aged 10 to 13 years with alleged offending in 2017, 55.3 percent were cautioned by police, 24.8 percent had police contact other than a police caution (ie no court involvement), and 17.8 percent had index matters which proceeded to court but for which the outcome did not involve a sentence of statutory youth justice supervision in the community or a sentence of detention. Finally, 2.0 percent had a Children's Court outcome involving youth justice supervision in the community (1.9%) or custody (0.1%). The children's subsequent police contact was often dealt with by police and/or the Children's Court at the same time as their index matters. It therefore does not represent 'reoffending' or 'recidivism' following a police or Children's Court outcome but provides a longitudinal picture of police contact among younger children. After their index matter, 48.8 percent of children experienced no further alleged offending in the subsequent two years, and 68.0 percent had no alleged offending involving offences against the person in the subsequent two years. Higher proportions of the Children's Court sample had more than 10 subsequent police charges or follow-up police incidents (43.8% and 25.7% respectively), compared with children in the police sample (14.5% and 6.4% respectively). Finally, 8.6 percent of the entire sample were remanded at some point in the two years following their index matter, including 20.2 percent of the Children's Court sample and 5.7 percent of the police sample. Of the Children's Court sample, 83.0 percent did not have any further Children's Court outcomes relating to alleged offending in the two years after their index matter, while 6.7 percent had a most serious Children's Court outcome of their matter being withdrawn, struck out or dismissed (including those found *doli incapax*). A further 5.9 percent had a most serious Children's Court outcome of diversion or an undertaking/good behaviour bond, while 4.5 percent were sentenced to a youth justice order in the community or to detention in this period.



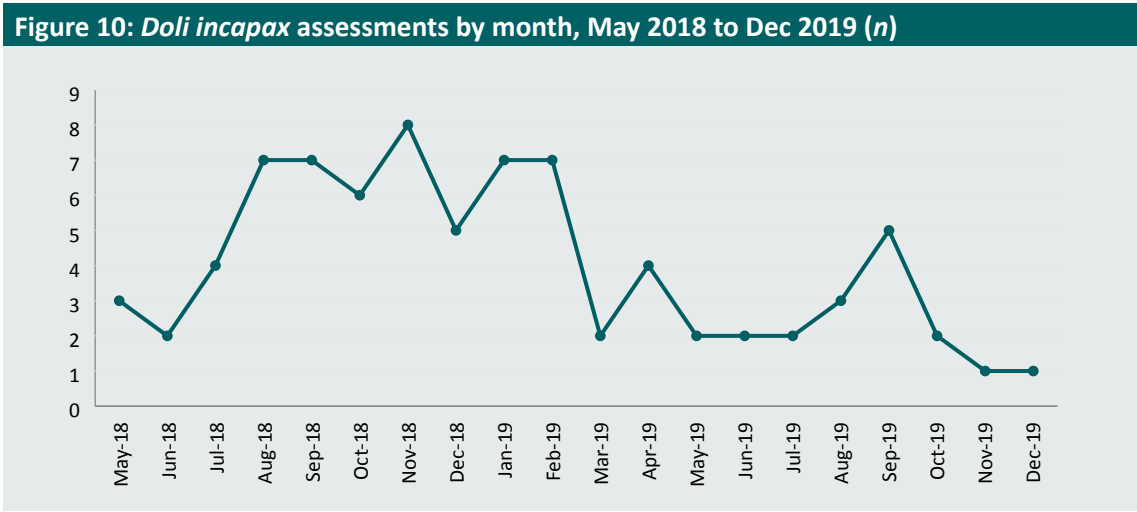


# Analysis of *doli incapax* assessment reports

This section of the report describes the sample of *doli incapax* Children's Court Clinic assessment reports as well as findings relating to assessed children's sociodemographic characteristics, current and past police and criminal justice system involvement, child protection and educational system involvement, psychiatric diagnoses and cognitive difficulties, followed by analyses of domains assessed by clinicians and clinical opinions.

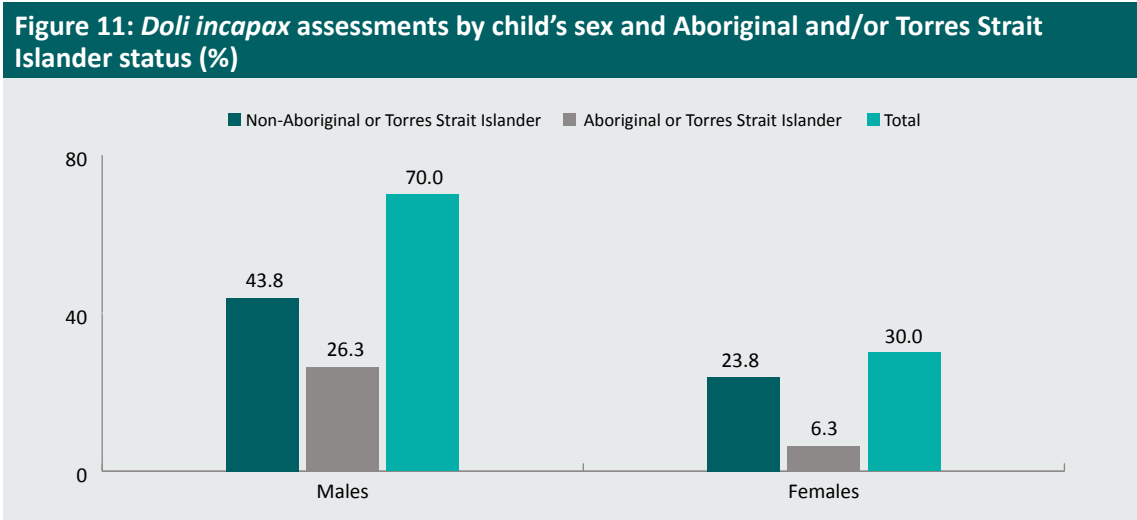
## ***Doli incapax* assessment sample**

*Doli incapax* assessments in the sample ( $n=80$ ) were completed between 23 May 2018 and 4 December 2019, with a frequency of between one and eight assessments per month (Figure 10). Three children within this sample had two reports each, and one child had three reports, resulting in 75 unique children being represented in the sample of reports. All four children with multiple *doli incapax* reports during the sampling period were boys with diagnosed neurodisability and child protection involvement. However, the unit of analysis was the individual *doli incapax* report rather than the individual child, as variables of interest (eg clinician opinions, nature of offending) could differ between assessments. Assessment reports were also completed during this same period, with a generally minor delay between assessment and the report date ( $M=10.4$  days, range=0–66 days,  $n=78$  reports with data). Where reported (25.0% of reports,  $n=20$ ), assessment duration varied between 10 minutes (where a child was unable to be engaged in the assessment) and three hours, with a mean duration of 111 minutes.

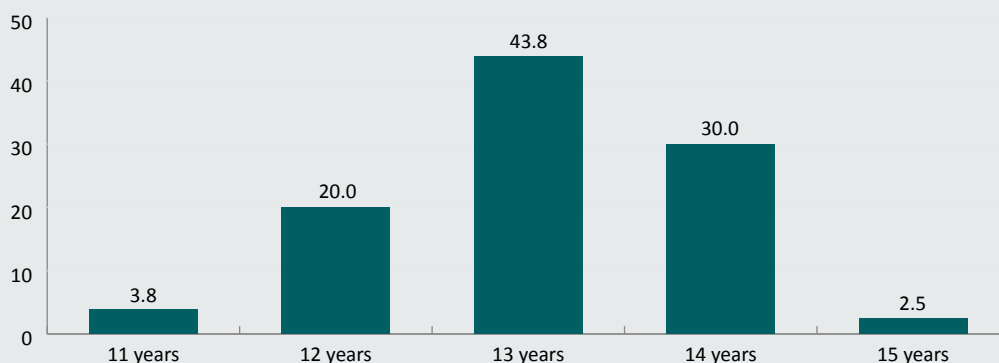


### Sociodemographic characteristics

Most of the reports assessed boys (70.0%), and Aboriginal and/or Torres Strait Islander children were over-represented in the sample (32.5%; Figure 11). Additionally, in 10 reports (12.5%) it appeared that the child was from a culturally and linguistically diverse background.



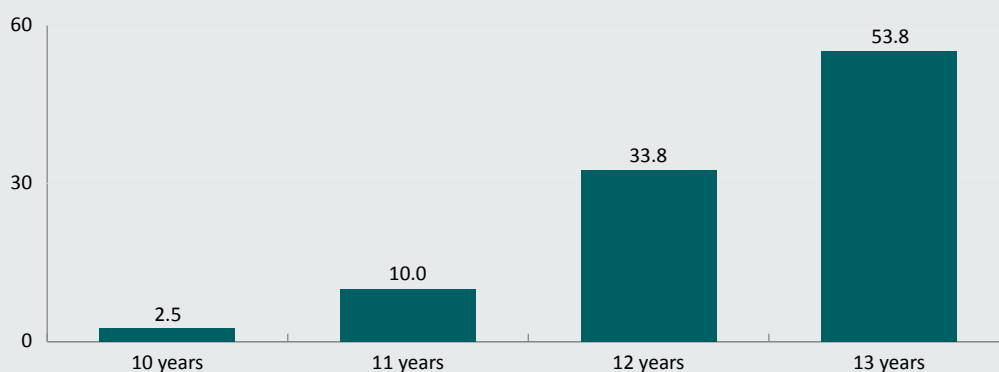
Children’s age at the time of assessment ranged from 11.1 to 15.1 years, with an average of 13.1 years (Figure 12). There was no significant difference in age at assessment between girls and boys, nor by Aboriginal and/or Torres Strait Islander status.

**Figure 12: *Doli incapax* assessments by child's age (%)**

## Police charges related to the *doli incapax* assessment

### *Age at time of charges*

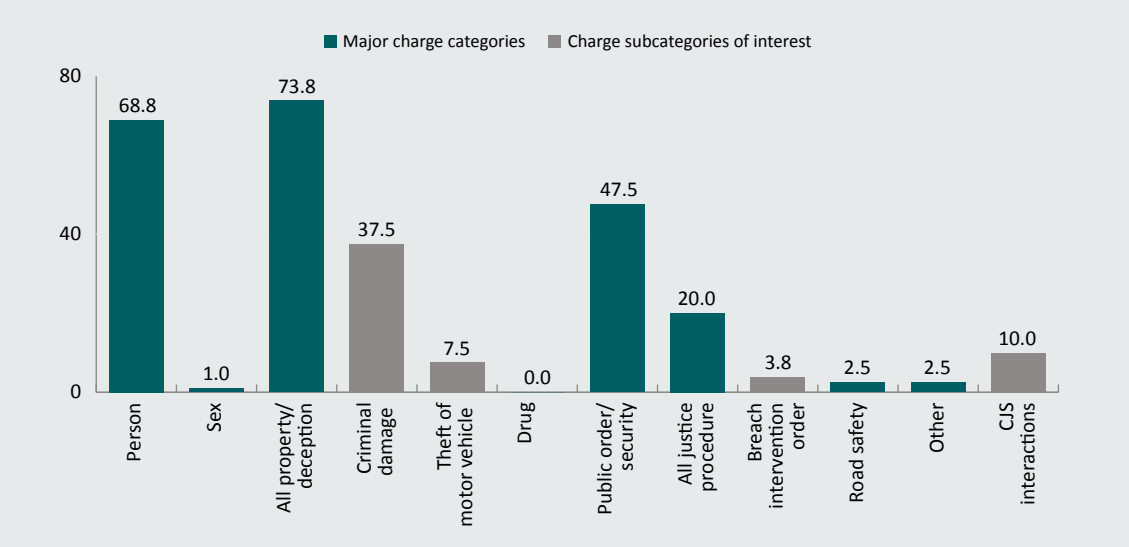
Most children (85.0%) were assessed in relation to more than one charge. Children's age at the first charge relating to the *doli incapax* assessment was on average 12.5 years (range=10–13.1 years; Figure 13) with no significant differences by sex or Aboriginal and/or Torres Strait Islander status.

**Figure 13: *Doli incapax* assessments by age of child at first police charge (%)**

### *Details of charges*

The most common charge types for which children were assessed included property/deception offences, offences against the person, and public order/security offences (Figure 14). Figure 14 shows the proportion of *doli incapax* assessments relating to each category of charge, as well as specific subcategories of interest. More than half of the assessments which included property/deception offences had at least one charge related to criminal damage, while 7.5 percent of reports included a theft of motor vehicle charge. On the other hand, no assessments were completed in relation to drug charges. Charges related to children's interaction with the criminal justice system primarily related to assaulting or resisting police or other emergency services workers.

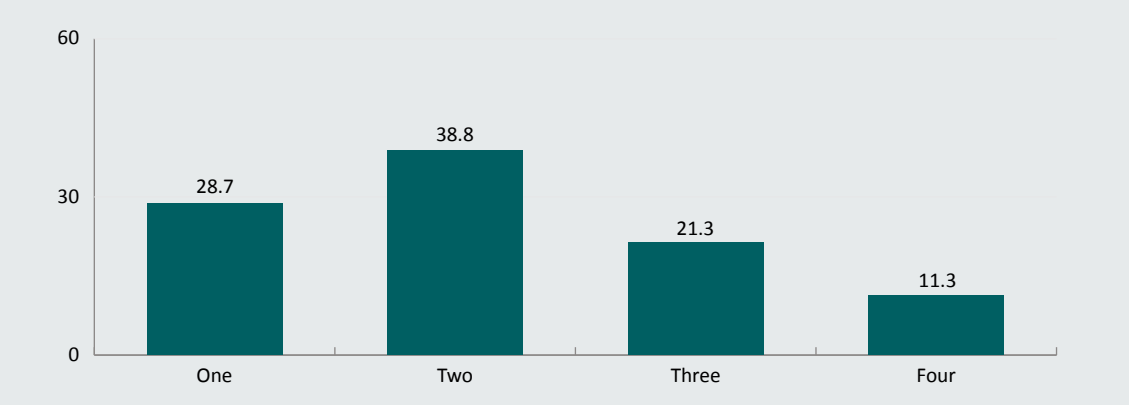
**Figure 14: *Doli incapax* assessments by charge types (%)**



Note: Person=offences against the person. Sex=sex offences. CJS=criminal justice system. Public order and security offences include charges classified under Divisions 11 and 13 of the ANZSOC, including prohibited and regulated weapons or explosives offences, and disorderly or offensive public conduct (ABS 2011). Justice procedures offences include charges classified in Division 15 of the ANZSOC, encompassing breaches of custodial, community-based, violence or non-violence orders, as well as offences against government operations, security or justice procedures (ABS 2011). CJS interactions offences include charges stemming from a child’s interaction with the justice system, including damaging police or youth justice property, hindering or assaulting police, refusing to state their name to police, and assaulting staff or other young people in custodial environments

In relation to the diversity of charges to which the *doli incapax* assessments related, the number of major charge types (Figure 14) ranged from one to four ( $M=2.2$ ,  $SD=1.0$ ) across the reports (Figure 15). The number of charge types did not differ significantly by sex, Aboriginal and/or Torres Strait Islander status or age at first offence to which the assessment related.

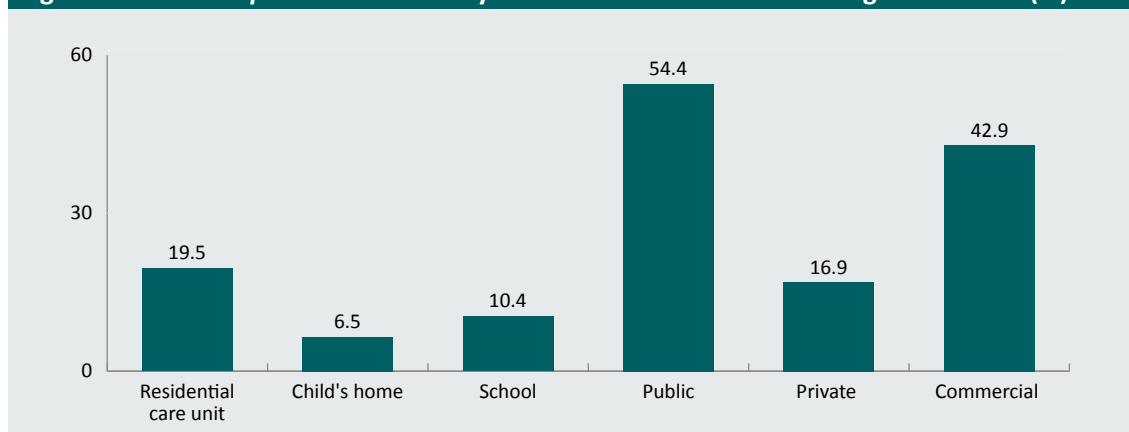
**Figure 15: *Doli incapax* assessments by number of major charge types (%)**



### Context of charges

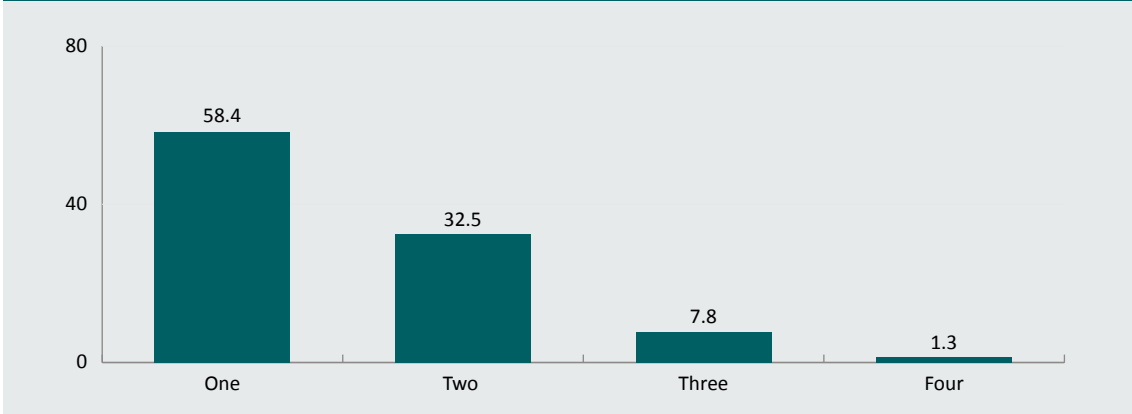
The contexts of the offending for which children under assessment had been charged by police were identifiable in 96.3 percent of reports (77/80; Figure 16). These most prominently included public spaces and forums (eg streets, public transport, online) and commercial areas (shopping centres and shops). Private areas included private residences and other private property. Police charges laid in relation to behaviour in residential care were classified separately to charges laid in the context of children's behaviour in their own family home. No differences in the categories of offending context were identifiable by sex or the child's age at the first of the relevant charges. However, Aboriginal and/or Torres Strait Islander children were less likely than non-Indigenous children to have had charges laid in relation to their behaviour in a school setting (0% vs 15.7%,  $p < 0.05$ ).

**Figure 16: *Doli incapax* assessments by context in which relevant charges were laid (%)**



The charges to which children's *doli incapax* assessments related allegedly occurred in between one and four of the above contexts ( $M=1.5$ ,  $SD=0.7$ ), with most children (58.4%) assessed in relation to charges in only one of the above contexts (Figure 17). No significant differences in the number of contexts of children's charges were seen by sex, age at first relevant charge or Aboriginal and/or Torres Strait Islander status. However, children whose charges had been laid in the context of public, private or commercial settings had a greater average number of contexts of charges ( $p < 0.05$ ).

**Figure 17: *Doli incapax* assessments by number of contexts in respect of which children’s charges were laid (%)**

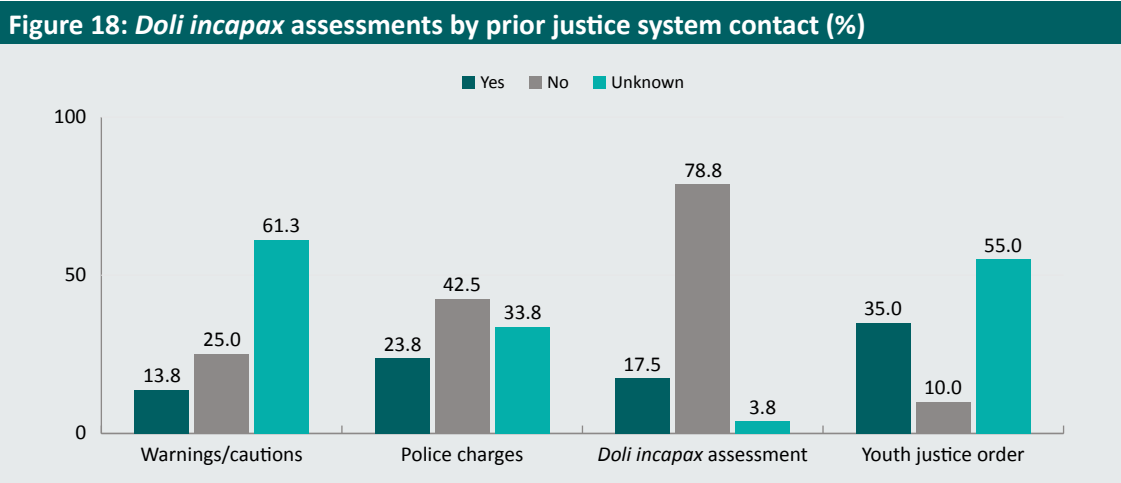


### *Charges involving substance use and peer involvement*

In two-thirds of assessment reports (66.3%), children’s charges involved alleged co-offending with peers. Where data were available (36 assessments or 45.0%), one-quarter of children (25.0%) were noted to have been substance-affected at the time of at least one of their charges. This finding should be interpreted with caution due to significant missing data. No differences in the involvement of peers or substance use were observed by children’s age at first offence to which the assessment related, sex, or Aboriginal and/or Torres Strait Islander status.

### **Prior justice system contact**

Relatively small proportions of children assessed had prior warnings or cautions (13.8%, 11 children), prior police charges (23.8%, 19 children) or *doli incapax* assessments (17.5%, 14 children). Overall, 35.0 percent (28 children) had other contact with the justice system recorded in their report, and where known (89.2% or 25/28 children) this mostly consisted of having been placed on bail (88.0%, 22 children). Two reports related to children who had been placed on remand, and one had previously been placed on diversion (Figure 18). These figures should be interpreted with caution given that information about prior justice system contact was frequently missing from reports.



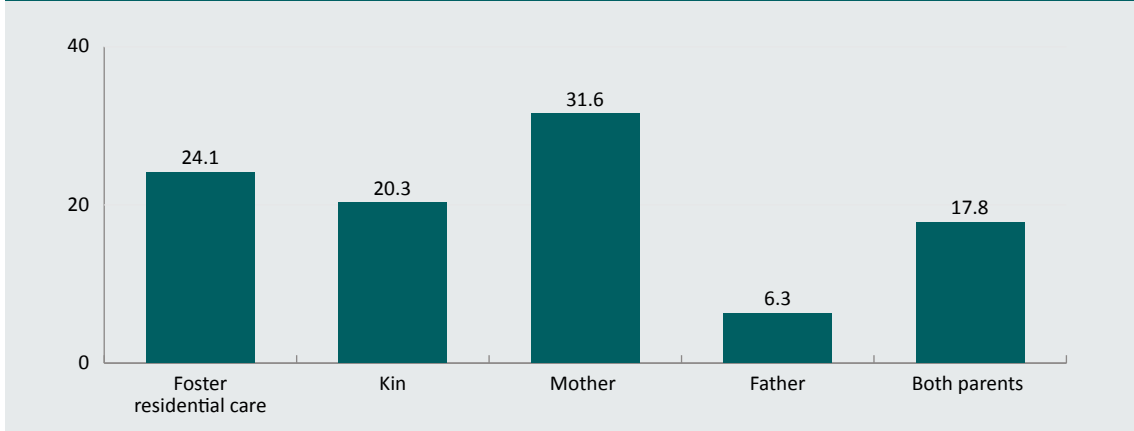
There was no significant difference in current age or Aboriginal and/or Torres Strait Islander status of children by prior justice system contact (including police warnings/cautions, charges, bail, remand or diversion). Of children with prior charges (19 children), four were noted to have had prior warnings or cautions (21.1%), and 14 (73.7%) were noted to have one or more prior *doli incapax* assessments. For the 14 children with previous *doli incapax* assessments, clinicians undertaking these prior assessments often recommended that the *doli incapax* presumption could be upheld (11/14 children, many of whom had multiple *doli incapax* assessments). For the remaining children, the prior *doli incapax* assessment recommended that the presumption could be rebutted (one child), the child terminated the prior assessment (one child), or the clinician’s recommendation was unknown (one child).

### Child protection involvement and carers

Where known (92.5% of reports), most children (75.7%) who were the subject of *doli incapax* assessments had child protection involvement. Similarly, where known (85.0% of reports) 63.2 percent of children had been on a statutory child protection (Children’s Court) order, and 43.0 percent were in out-of-home care at the time of assessment. Figure 19 presents data concerning children’s caregiver at the time of the *doli incapax* assessment. While just over half of assessments were made for children residing with one or both parents (55.7%), nearly one-quarter of assessments were for children residing in residential (16.5%) or foster care (7.6%), and 20.3 percent of children were cared for by kin (eg grandparents, aunts/uncles, siblings). All but one of the children cared for by kin were in formal out-of-home kinship care placements, and the child’s carer could not be ascertained from one assessment report.



Figure 19: *Doli incapax* assessments by children’s carer (%)



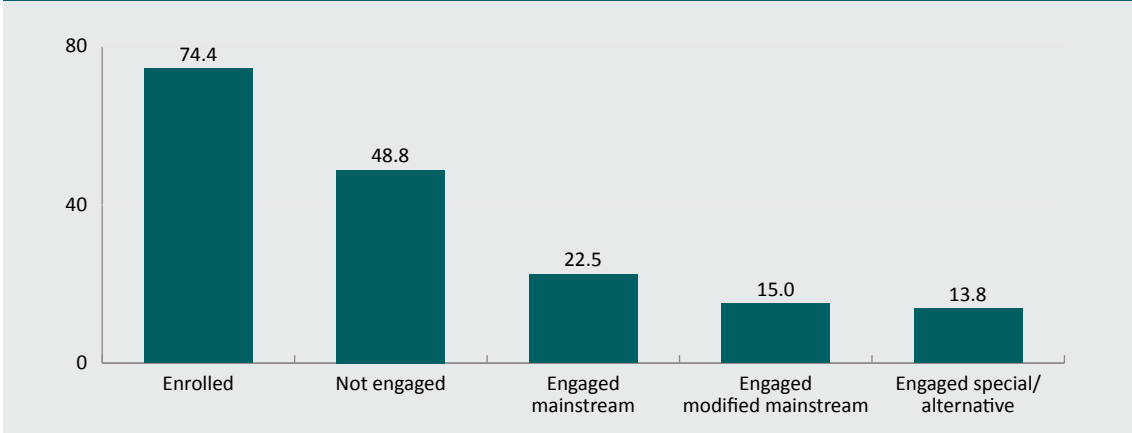
Note: One assessment report related to a child with kinship carers who was not in a formal out-of-home care placement

### Educational involvement

Children’s educational involvement at the time of assessment is depicted in Figure 20. While three-quarters of children were currently enrolled in school, just over half (52.5%) were engaged in education (that is, attending at least sometimes) at the time of assessment. Most reports of children who were engaged in education indicated this was in a mainstream educational environment, but some children were engaged in modified mainstream environments (eg on a modified timetable, with a classroom aide, or in a specialist therapeutic learning environment).

One-quarter of the reports described children who were not currently enrolled in school ( $n=20$  reports) and, of these, one-quarter ( $n=5$ ) had been expelled, sometimes in relation to the charges under assessment. There was no significant difference in the current age, sex or Aboriginal and/or Torres Strait Islander status of children who were and who were not *enrolled* in school at the time of their assessments. Likewise, there was no significant difference in age or sex of children who were *engaged and not engaged* in education. However, Aboriginal and/or Torres Strait Islander children were significantly more likely than non-Indigenous children to be engaged in education at the time of assessment (73.1% vs 42.6%,  $p<0.05$ ).

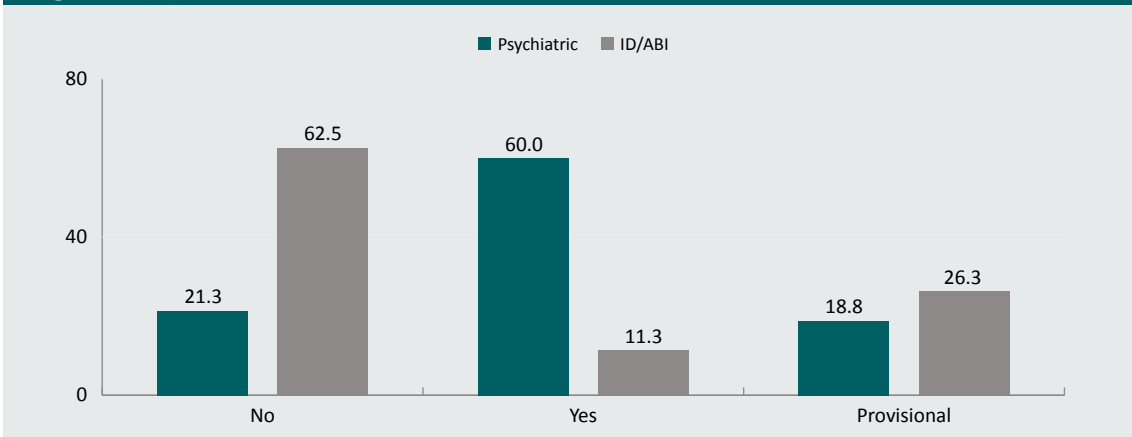
**Figure 20: *Doli incapax* assessments by educational engagement (%)**



### Psychiatric diagnoses and cognitive difficulties

Confirmed and provisional psychiatric diagnoses and cognitive difficulties are shown in Figure 21, including those made by assessing clinicians and those noted from prior reports available to the assessing clinician. Most children assessed (60.0%) had at least one diagnosed psychiatric disorder, while 11.3 percent had a diagnosed intellectual disability or acquired brain injury. A significant minority of children also had other provisional (suspected) psychiatric or disability-related diagnoses (18.8–26.3%).

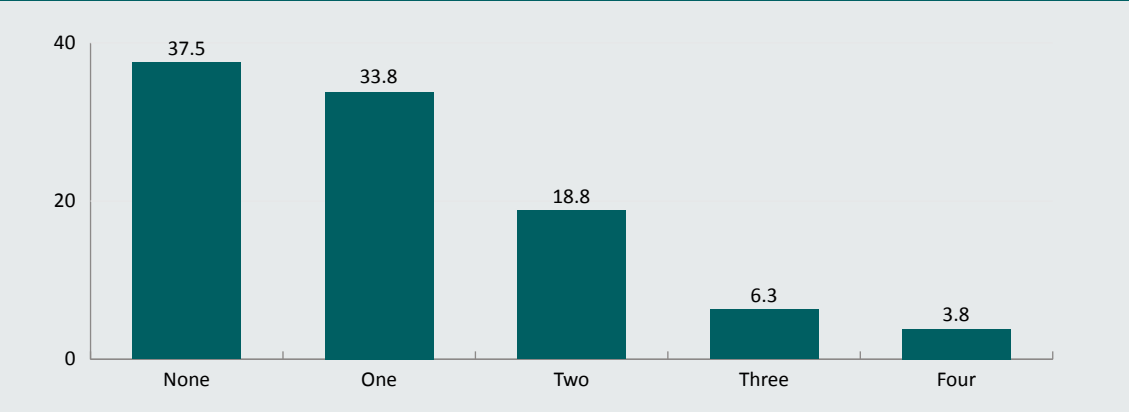
**Figure 21: *Doli incapax* assessments by children’s psychiatric and disability-related diagnoses (%)**



Note: ID=intellectual disability. ABI=acquired brain injury

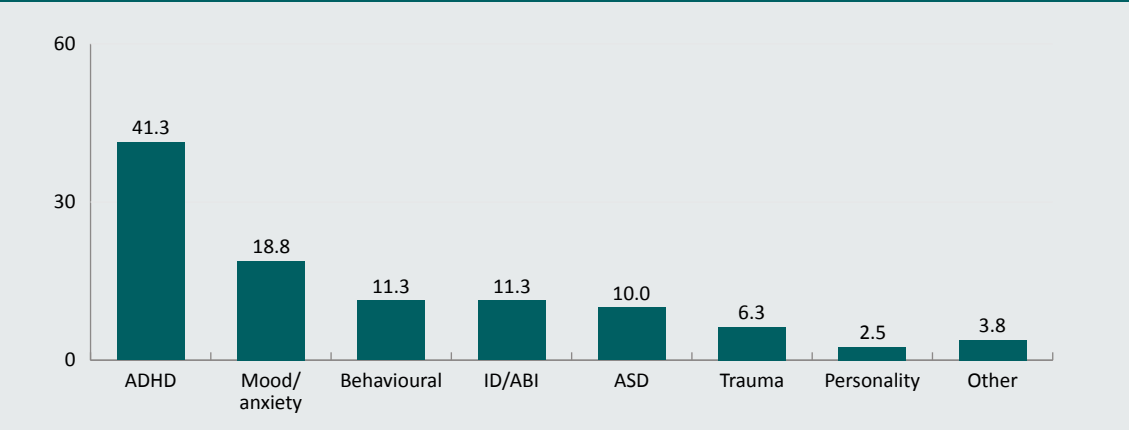
While 37.5 percent of children had not been diagnosed with any psychiatric or disability-related conditions, a third had received such a diagnosis (Figure 22). Another quarter had between two and four diagnoses, reflecting the complexity of mental health and disability-related support needs among the sample.

**Figure 22: *Doli incapax* assessments by number of psychiatric and disability-related diagnosis types (%)**



Where known, the most common psychiatric or disability-related diagnosis among the children assessed was attention deficit hyperactivity disorder (ADHD; 41.3%), followed by mood and anxiety-related disorders (eg anxiety, depression, obsessive compulsive disorder), behavioural disorders (including oppositional defiant disorder and conduct disorder), intellectual disability or acquired brain injury, and autism spectrum disorder (Figure 23). Smaller proportions of children had been diagnosed with trauma-related disorders (eg complex/post-traumatic stress disorder), emerging personality pathology or other disorders. In addition, 10 percent of reports indicated that previous cognitive testing showed that the child was performing in the borderline range of intellectual functioning (eg IQ of 70–79).

**Figure 23: *Doli incapax* assessments by psychiatric and cognitive diagnoses (%)**

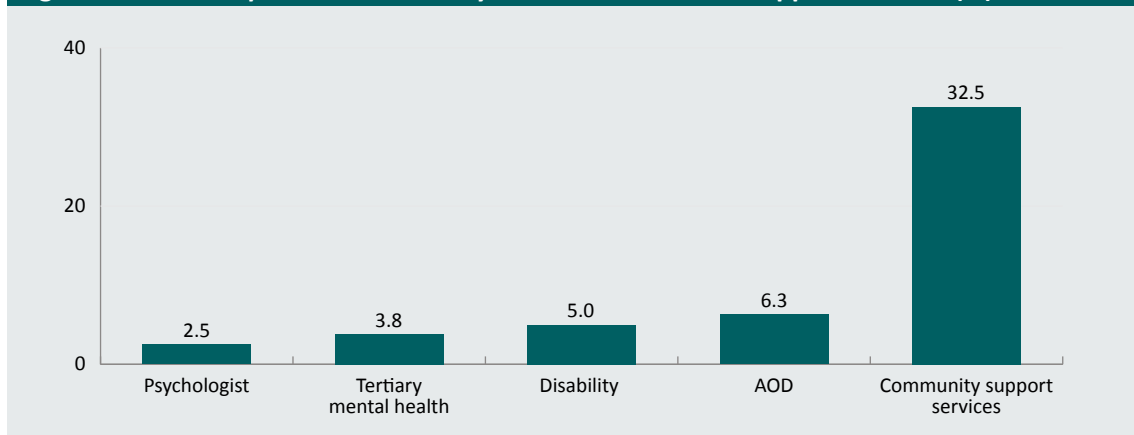


Note: ADHD=attention deficit hyperactivity disorder. ID=intellectual disability. ABI=acquired brain injury. ASD=autism spectrum disorder. Trauma=post-traumatic stress disorder or complex developmental trauma. Personality=emerging borderline personality disorder. 'Other' includes learning disorder, Tourette's syndrome and non-organic sleep disorder

## Other service involvement

While nearly one-third of children had been involved with community support services (government and non-government child and family welfare services), information contained in the reports suggested that only 11.3 percent of children were involved with either disability services ( $n=4$ ), alcohol and other drug services ( $n=5$ ), or mental health services ( $n=6$ ; including Child and Youth Mental Health Services/Child and Adolescent Mental Health Services or seeing a psychologist; Figure 24). It should be noted that these categories are not mutually exclusive, as a child could be accessing several of these listed services, while others accessed none.

**Figure 24: *Doli incapax* assessments by child involvement in support services (%)**

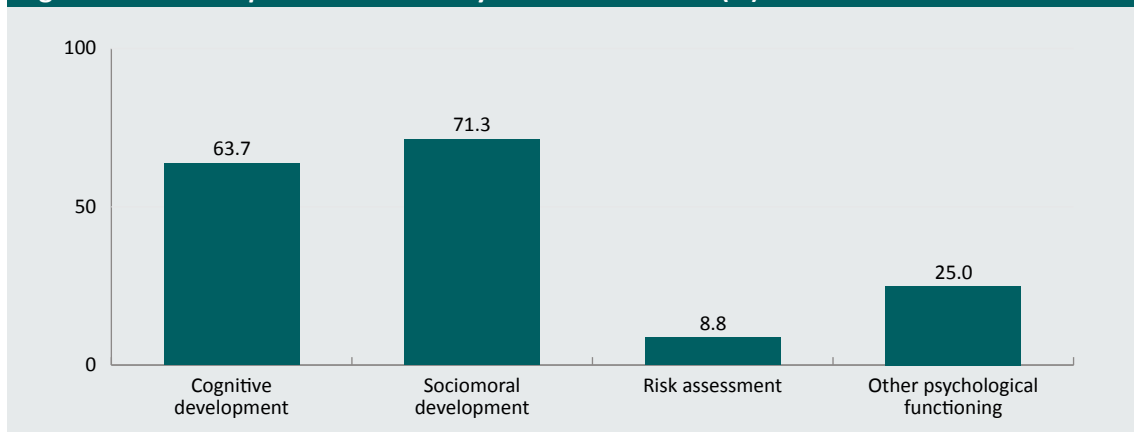


Note: AOD=alcohol and other drugs

## Domains assessed by clinicians

The domains clinicians commonly assessed in informing their opinions concerning *doli incapax* were children’s cognitive and sociomoral development (Figure 25).

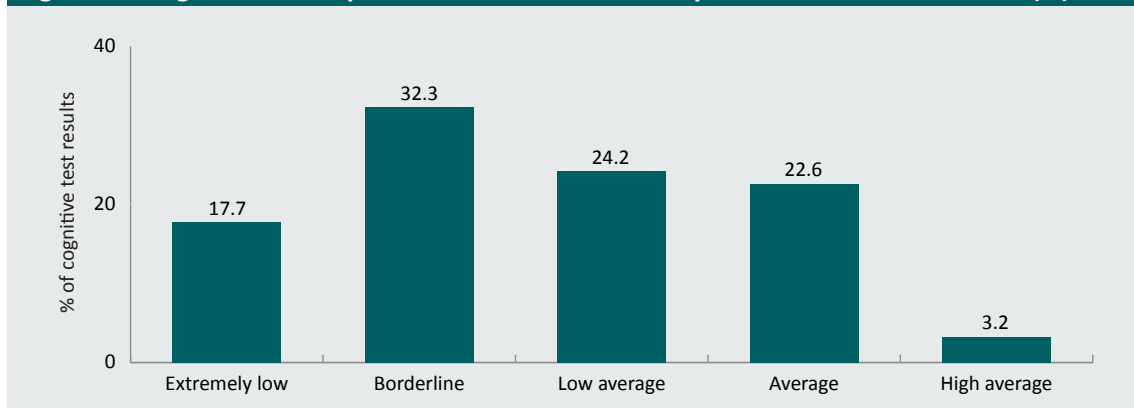
**Figure 25: *Doli incapax* assessments by domains assessed (%)**



### Cognitive development

Cognitive development was assessed by the WASI-II (Wechsler Abbreviated Scale of Intelligence – Second Edition), apart from two cases in which Raven’s Progressive Matrices were used. Where cognitive development was able to be assessed and results were valid (44 children), 38.6 percent of children fell in the borderline (70–79) to extremely low range (<70). However, over half of these children (56.8%) were assessed as either average (90–109) or low average (80–89) in estimated IQ. Where cognitive development was not assessed as part of the current *doli incapax* report, the primary reasons were the clinician being unable to engage the child or the child or parent terminating the assessment (10/28 children), and/or a previous assessment being available (20/28 children). Previous cognitive assessments had either been conducted by external services/clinicians, for school, as part of family assessments for court purposes, and for other recent *doli incapax* assessments. When combining findings of recent and current cognitive assessments, around half of the sample of children were in the borderline (70–79) or extremely low range (<70) in estimated IQ, while one-quarter were average (90–109) or high average (110–119; Figure 26).

Figure 26: Cognitive development of child as assessed by current or recent clinician (%)

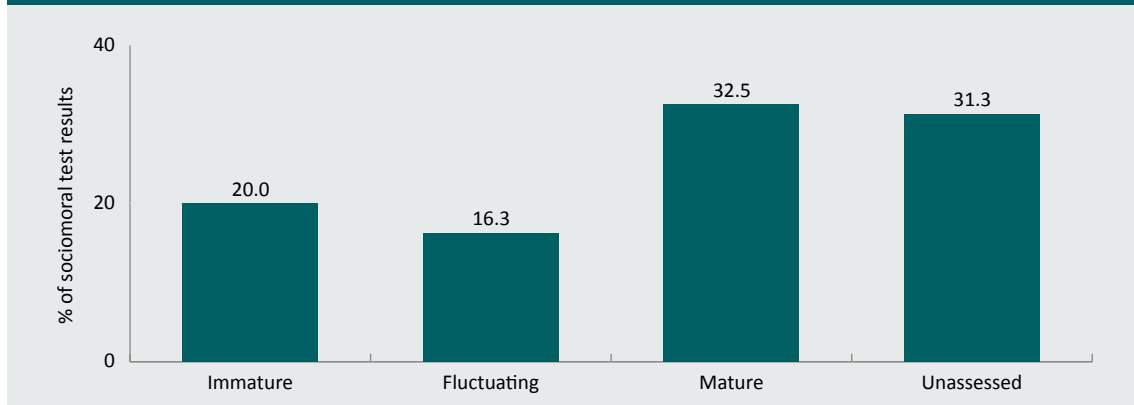


### Sociomoral development

Sociomoral development was assessed using a version of the Sociomoral Reflection Measure (SRM) in all cases. Like cognitive development, the primary reason (where available) for this domain being unassessed was the clinician being unable to engage the child and/or the child terminating the interview (9/23 children). Other reasons for a lack of assessment included the child being unable to understand the questions or task.

Sociomoral development was assessed and validly interpreted for 55/80 children (68.7%). Children were broadly found have developed or be developing a mature level of sociomoral reasoning, to have an immature level of reasoning, or to be fluctuating between these two. Results are shown in Figure 27; however, these should be interpreted with caution as nearly one-third of children were not directly assessed in this domain. For example, children diagnosed with an acquired brain injury or intellectual disability were significantly less likely to have been assessed in relation to sociomoral development ( $p=0.02$ ). Aboriginal and/or Torres Strait Islander children were also less likely to have been assessed in this domain, though this difference only approached significance ( $p=0.07$ ).

**Figure 27: Sociomoral development of children directly assessed using SRM by CCC clinician (%)**



Note: SRM= Sociomoral Reflection Measure. CCC=Children’s Court Clinic. Percentages do not total 100 due to rounding

### *Risk and needs*

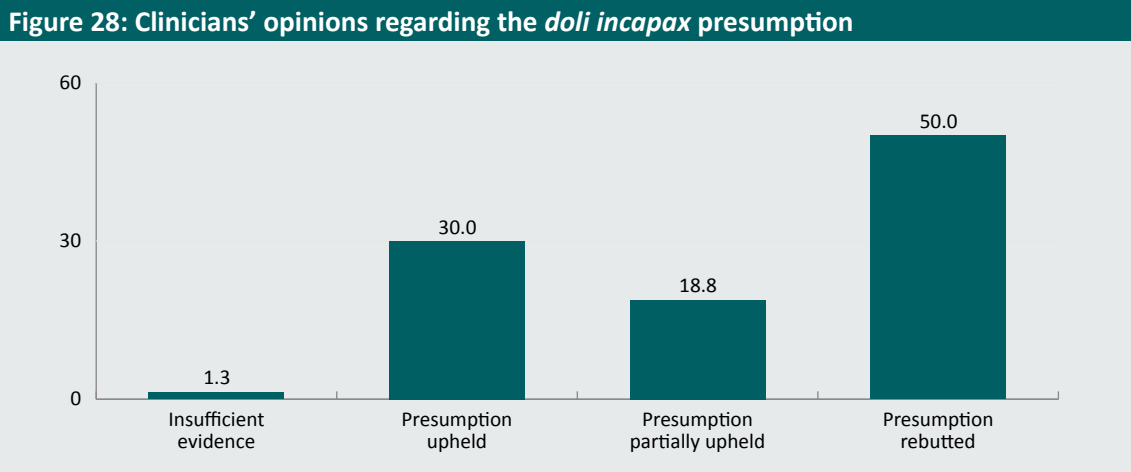
Risk/needs assessments were completed by clinicians for seven children (8.8%), using the Structured Assessment of Violence Risk in Youth in all cases. In most cases (6/7) the risk of further violence was assessed to be high, while in one case it was assessed as moderate.

### *Other psychological assessments*

In one-quarter of *doli incapax* assessments (20/80), clinicians administered one or more other assessments, most commonly the Adolescent Anger Rating Scale ( $n=12$ ) and the Beck Youth Inventories ( $n=6$ ), as well as the Adolescent Dissociative Experiences Scale ( $n=3$ ), the Rohde Sentence Completion Method ( $n=1$ ) and the Personality Assessment Inventory – Adolescent ( $n=1$ ).

## Clinician opinions

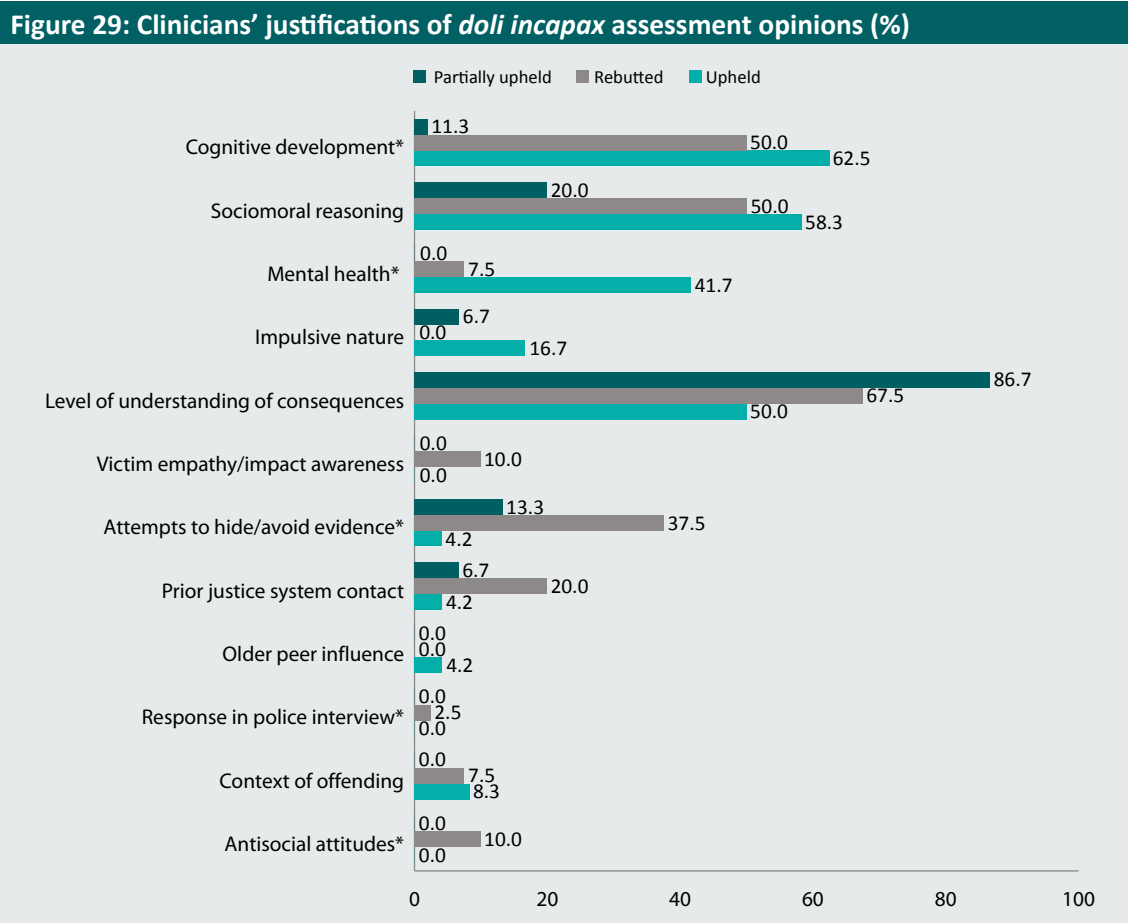
Clinicians provided evidence to support the *doli incapax* presumption being upheld or partially upheld (ie for at least some of the child’s charges) in approximately 50.0 percent of cases (Figure 28).



### Justification for clinician opinions

The key considerations clinicians noted when forming their opinions about *doli incapax* were coded where possible. A child’s understanding of the legal consequences of behaviours (or lack of such understanding) was the most common consideration cited for recommendations about the applicability of *doli incapax*, alongside the child’s level of cognitive development and sociomoral reasoning (Figure 29). Where the clinician recommended that the presumption be upheld, another common reason was the child’s underlying mental health conditions, primarily those that impaired impulse control or involved high emotional distress. Clinicians also submitted evidence supporting an opinion for the presumption being upheld or partially upheld when it was apparent that the child had no awareness of the illegality of certain behaviours (eg being in the vicinity of others’ offending behaviour, such as being in a stolen car). Where clinicians formed opinions for the presumption to be rebutted, this was often supported by evidence of the child’s attempts to conceal, deny or blame offending on others, and on the child’s prior justice system contact (eg previous police cautions).





\*statistically significant difference in justification by recommendation outcome

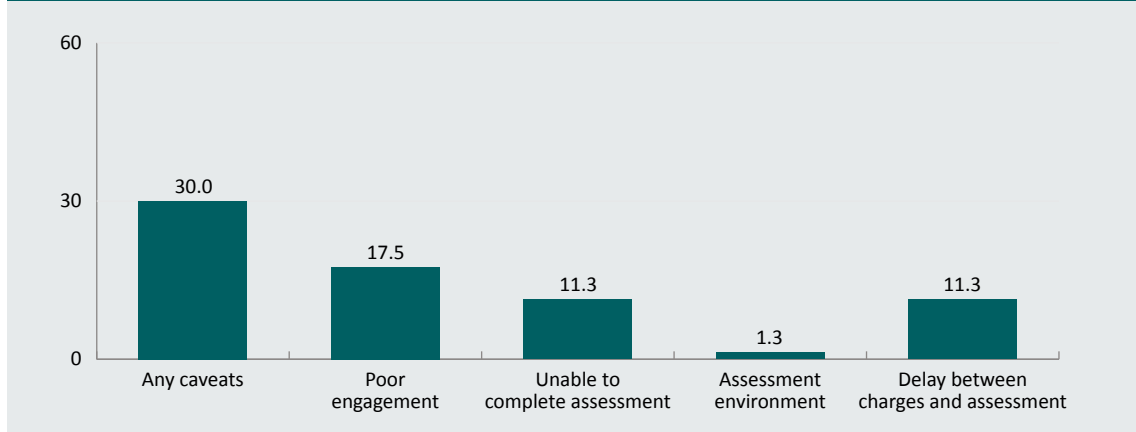
Points of difference emerged between clinicians' opinions, namely:

- Impact of developmental trauma:** There were differences in how clinicians viewed the impact of developmental trauma on children's culpability. Some cited the impact of developmental trauma on children's capacity for emotional regulation as evidence for upholding the presumption *doli incapax*, while others cited the child's capacity to understand the wrongfulness of their behaviour outside of the times they were emotionally heightened as evidence to rebut the presumption. Overall, the impact of trauma was assessed in conjunction with other factors contextualising the child's behaviour.
- Impact of prior justice system contact:** While some clinicians cited prior justice system involvement (and the opportunity to learn from this) as evidence to rebut the presumption of *doli incapax*, others discriminated between the nature of offending or prior justice system contact, and the need to consider this in conjunction with other factors.

### Caveats

In 30.0 percent of reports, clinicians listed at least one caveat to their opinion (Figure 30), primarily the poor engagement of the child in the assessment, the assessment being incomplete, and a delay between the police charges and the assessment.

**Figure 30: *Doli incapax* assessments by clinicians' caveats (%)**



### Mitigating factors and other sentencing considerations

In 15/80 cases (18.8%), the clinician brought mitigating factors and other sentencing considerations to the court's attention. Mitigating factors concerned assessments that were supportive of the presumption of *doli incapax* being partially or fully rebutted, and included:

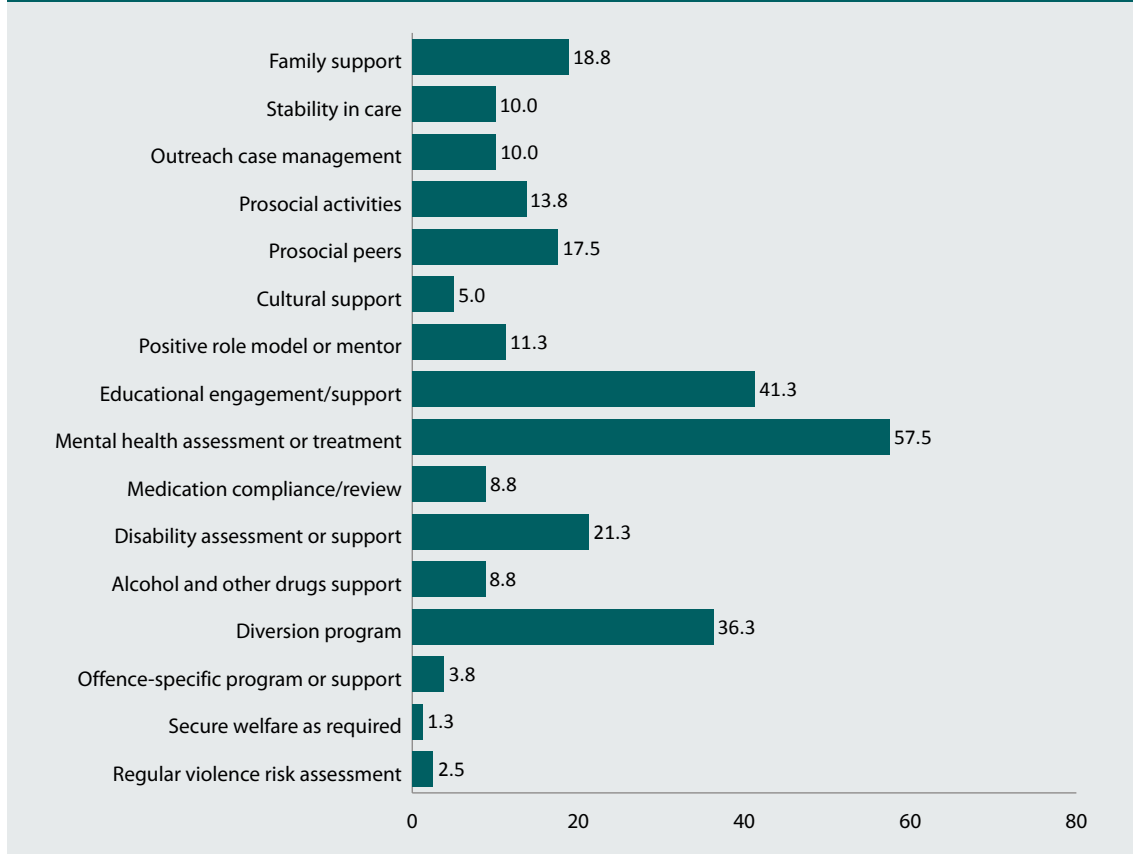
- **peer-related factors:** for example, the child's vulnerability to the influence of (often older) peers or siblings engaging in offending behaviour, or the child's desire for acceptance by peer group (9 children);
- **family-related factors:** for example, normalisation of antisocial or criminal behaviour by family members (2 children), loss of primary caregivers (1 child), ongoing family conflict or its impacts (2 children);
- **cognitive development:** for example, impact of the child's low/immature intellectual functioning on decision-making capacity (4 children);
- **socioemotional development:** for example, immaturity, vulnerability to peer influence, or limited capacity to regulate emotions or extract themselves from group situations (3 children); and
- **trauma-related factors:** for example, ongoing impacts related to experiences of abuse or neglect including unresolved anger or heightened reactivity (3 children).

Other sentencing considerations listed by clinicians included mental health conditions and protective factors such as family support, school engagement, and a lack of prior history of offending behaviour.

### Recommendations concerning therapeutic and other supports

In 75/80 cases (93.8%), other clinical recommendations were included in the *doli incapax* assessment report (Figure 31). These most commonly concerned mental health and disability assessment or support (eg counselling or therapy, referral to the National Disability Insurance Scheme or other disability assessments, and medication compliance/review), engagement in education, and referral to a diversion program. Clinicians also often recommended a greater level of support to families and parents where the child was not in out-of-home care, as well as the development of the child’s network of prosocial peers, activities and relationships (eg mentoring or cultural supports). Most clinical recommendations related to enhancing social, educational and mental health or disability supports. Fewer reports recommended forensic interventions or supports directly attending to the antisocial or offending behaviours of concern.

**Figure 31: *Doli incapax* assessments by other clinical recommendation domains (%)**



Note: Family support includes any interventions targeting the family or family members (eg parents), rather than the individual child. This includes family services, family mediation, family assessment and therapy, and recommendations of counselling or therapeutic services for individual parents

## Summary

This section presented an analysis of 80 *doli incapax* assessment reports prepared by the Victorian Children's Court Clinic. In 78.8 percent of these reports, children had not had a prior *doli incapax* assessment, and boys (70.0%) and Aboriginal and/or Torres Strait Islander children (32.5%) were over-represented across the reports. Most reports (75.7%) related to children with current or historical child protection involvement, and 42.6 percent of children were in out-of-home care at the time of assessment, including those residing in kinship (18.9%), foster (7.6%) and residential care (16.5%) placements.

Across the *doli incapax* assessment reports, 60.0 percent of children had a diagnosed psychiatric disorder and 11.3 percent had a diagnosed intellectual disability or acquired brain injury, yet in only 11.3 percent of reports were children noted to have engagement with therapeutic services. Clinicians often used psychological testing of sociomoral reasoning and cognitive development to inform their *doli incapax* assessments, and in 50.0 percent of cases clinicians gave evidence supporting the presumption of *doli incapax* being upheld. The analysis identified areas where consistency could be strengthened, particularly in relation to how clinicians ought to consider the impact of developmental trauma and previous justice system contact on children's criminal responsibility. Useful clinical recommendations were made as part of the *doli incapax* assessment process which can be used by children's families and service providers to support understanding of children's needs related to their development and access to therapeutic services.

# Analysis of professional stakeholder consultations

This section presents findings from consultations with a range of professionals.

Following a description of the sample, the findings of professional stakeholder consultations are presented in five sections:

- characteristics of children with early offending;
- nature of offending in this group;
- *doli incapax* strengths and limitations;
- views on the minimum age of criminal responsibility; and
- service system responses to early offending—strengths, limitations and suggestions.

## Sample characteristics

Twenty-four semi-structured focus groups and interviews were completed with 47 professionals from June 2021 to December 2022 (Table 12). Interviews and focus groups proceeded online, averaging 61 minutes in duration (range=26–92 minutes).

**Table 12: Professional stakeholder sample**

Participant group	Number of participants
Judicial officers	7
Lawyers	10
Police prosecutors	4
Police officers	2
Psychologists and mental health clinicians	5
Youth support and advocacy professionals	16
Youth justice professionals	3
Total	47

## Characteristics of children charged with early offending

This section explores participants' observations of children charged with early offending, including their experiences, needs, developmental stage, family, relationships, and offending behaviour.

### *Family challenges and disadvantage*

Families of children charged with early offending were often seen as having unmet social and financial needs, leaving them challenged in meeting the often complex support needs of their children. Even when children were referred to voluntary community supports, participants outlined that parents sometimes lacked the capacity to 'encourage the young person to engage or get to appointments', which could result in service closure. Parents were described as struggling with their own difficulties, including mental health, substance use or trauma, and lacking in formal and informal supports, resulting in children engaged in early offending not accessing the intervention, boundaries or supervision needed to prevent or address justice system involvement.

... you definitely see kids with complex needs and the family might be struggling with how best to support the young person, and where there are challenging behaviours, at a bit of a loss to know how to deal with it. (Participant 14)

Families of children with early offending were often observed to experience poverty, impacting children's access to needed supports.

... we know about the postcodes of disadvantage ... these kids are coming from the same pockets year after year after year after year. So, there's something there about understanding the structural sort of factors that really impact more on some sections of our communities rather than others. (Participant 23)

Some parents who had migrated to Australia were observed to face additional barriers when caring for children, including carrying trauma from past experiences, experiencing isolation and a lack of support, and sometimes struggling financially due to Centrelink ineligibility.

... a lot of children that do come from those migrant families, you can't ignore the trauma that their parents have undergone, and how that can impact on family dynamics as well ... even the fact that if you're from New Zealand, you can't get Centrelink, the disadvantage that that places on children ... One of the first questions I'll ask a child if they're not complying with bail conditions is, "Why aren't you?" And, "Why do you keep going to this house?" And often, it can be food or shelter, that's related to really basic needs are being met, that aren't being met at home. (Participant 32)

Some children with early offending were also impacted by the justice system involvement of their parents or older siblings and were seen to be desensitised to the seriousness of involvement in the justice system, or they aspired to emulate family members.

... I definitely think that the older brother had a bearing on why she came into the court system. She was at court all the time watching her brother go through proceedings and almost thought it was all a bit of fun. And I remember watching her in court thinking oh, you find this too cool, you find this too fun, so you can sort of see the warning signs ... obviously we got to the point where she was *doli*. (Participant 20)

As a result of the above factors, this group of children were often observed to be emotionally disconnected from family. Professionals described a lack of attachment to key adults as leaving children vulnerable to seeking acceptance elsewhere.

They don't have the emotional support that they need. Needs are not getting met in their family of origin. And they're certainly not getting met in the residential units, in the child protection system. Their need for acceptance and their need for just emotional support and being loved, really. (Participant 35)

### *Early childhood trauma and child protection involvement*

Early offending children were often described as being victims of family violence, resulting in some children engaging in offending behaviours themselves at young age.

... at a really young age, usually there's a lot more involvement in terms of family violence. Not always, but quite often. It might be that they will witness or be a child present for a family violence incident and then, of course, been affected by that moving forward ... with the persistence in many cases of family violence ... in my experience it quite often leads to some earlier offending from the young person. (Participant 45)

Participants also asserted that unaddressed early childhood trauma was a key factor influencing children's likelihood of involvement in early offending behaviour.

... whether it's sexual abuse, family violence, deprivation, neglect ... lots of placements in child protection ... typically people who end up in the criminal justice system in those early teenage years, have serious difficulties in the zero to 10. (Participant 4)

Some participants observed children entering the justice system at earlier years as having more severe trauma compared to children who enter the justice system in their later teenage years. They described multiple adverse childhood experiences and particularly traumatic upbringings.

There are kids coming into the youth justice system at 15 or 16, you don't necessarily have a story of horrendous trauma. That younger group, I think – the under-13s who are offending in that way – are more likely to have had traumatic backgrounds. (Participant 9)

Participants observed that many children charged with early offending have experienced child protection involvement and out-of-home care placement, particularly in residential care.

There aren't many kids from well-functioning families who are committing offences at 11 ... They're in the child protection system, and they're often not living with their own families. (Participant 36)

... very much an overrepresentation of residential kids ... I think it would even be higher for the 10–13-year-old group. A lot of that offending is very close to the residential care facility. (Participant 39)

### *Disability and complex needs*

Participants frequently discussed the high prevalence of disability among children with early offending, including intellectual disability, behavioural difficulties, autism spectrum disorder, ADHD, developmental delays, significant mental health issues and learning disabilities.

Undiagnosed or diagnosed mental health issues, intellectual disability, disabilities of other sorts. ADHD and autism seem to be, at least on my radar, two continual presentations that connect with involvement of the justice system. (Participant 31)

Participants also noted reasons why such children may not have access to the required supports. For example, it was asserted that disabilities were frequently undiagnosed for children charged with early offending, resulting in school disengagement and lack of early intervention.

... in the [education support program] we find that we're working very hard to often support young people to get the appropriate assessments for undiagnosed [disability] – whether it's a neurological issue or anything down to dyslexia, dysgraphia, ADD, and even sort of those more neurotypical children who may have autism. (Participant 26)

Many children charged with early offending were also noted to have borderline intellectual functioning, and thus did not meet clinical thresholds to access supports.

They've got a lot of needs, but they don't meet clinical thresholds or thresholds of diagnoses or whatever the labels may be, to fit into current service providing. (Participant 6)



### *Disconnection from education*

Children charged with early offending were often seen to be disconnected from education. Participants asserted that such children sometimes had behavioural difficulties or undiagnosed disabilities, and were often excluded by schools who faced difficulty responding to the child's behaviour and supporting their learning.

... they've got other developmental difficulties and some of those have been formally assessed, and many haven't though. But some have varying forms of intellectual disabilities, which may or may not reach thresholds, but varying specific learning disorders.

And then the combination often manifests that these kids have got these trajectories where they've had varying forms of social difficulties through school, educational difficulties and challenges, and behavioural disturbances along those lines. And often they have had difficulties being maintained in conventional educational settings. (Participant 6)

Once disengaged from school, children were seen to lose access to support and a daily routine, leaving them more vulnerable to early offending.

... So I see a lot of these younger 10 to 13-year-old kids who are disengaged from school or their behaviours at school are problematic, kind of flows on. (Participant 15)

### *Lack of prosocial connections with adults and peers*

Children with early offending behaviours were described as lacking 'suitable adult role models' (Participant 41) who demonstrate prosocial and healthy ways of being and relating. Participants observed these children being unable to rely on the adults in their lives for a sense of safety, support or meaningful connection, leaving them without guidance when experiencing difficulties. As a result, participants believed that children with early offending behaviours gravitated towards children who similarly lack a supportive community.

They have very little connection to their community, and other anchors such as other sports or activities that provide them opportunities to flourish in other ways. They're often kids who have never been afforded that opportunity, or they drop out. Not only dropping out of school, it's dropping out of these community anchors really. And they end up migrating or sliding towards kids who are similarly disenfranchised. (Participant 6)

### *Intellectual, social and moral immaturity*

Children involved in early offending behaviours were described as immature, impulsive, impressionable, vulnerable, and lacking in consequential thinking. Participants felt that this group were often not supported to develop these skills due to their circumstances, including lack of access to appropriate adult guidance, and in some cases the presence of undiagnosed or unsupported disability. It was asserted that children charged with early offending often did not understand the seriousness of their behaviour.

... there is a strong bias with this younger cohort, to having these dysfunctions and difficulties at younger ages. And their other intellectual disabilities and learning difficulties that there is a strong basis for them not being mature enough to understand the wrongfulness of what they're doing. (Participant 6)

In addition to their developmental immaturity, participants highlighted the impact of this group of children's disproportionate exposure to antisocial behaviour, typically through no choice of their own, on their moral development.

... a lot of these kids by virtue of their backgrounds, haven't necessarily had a conventional moral pathway in terms of their normal development. So it's sort of set them up as being a little bit morally deficient if you like, so therefore they don't understand the seriousness of what they're doing is wrong. From that point of view, we need to give considerations to these kids who haven't been afforded the equal opportunities that most people do. (Participant 6)

## **Nature of offending among children aged 10 to 13**

### *Seriousness of offending*

Participants consistently stated that only a small cohort of children, approximately 'five percent' or '10 percent' of those charged between 10–13 years, repeatedly engaged in very serious offending. This small group were believed to be of concern and requiring intervention.

The small cohort that causes a lot of problems is because they commit such horrendous offending in terms of getting in cars and driving at excessive speeds and evading police. But, yeah, they're a small percentage of it, but obviously they're the concerning ones. (Participant 37)

At the same time, participants highlighted that most offending that occurs among 10–13-year-olds is of a low level of severity.

... the vast majority of children under the age of 14, they're low risk, low need and their offending is the shop stealing, is the broken window, or whatever, graffiti, they're children who least intensive interventions is most appropriate. (Participant 11)

### Contexts of offending

Two common contexts of offending observed among 10–13-year-olds included group-based offending and offending in residential care. Participants stated that offending rarely occurs alone and more often happens in the context of peers of the same age or older children.

... younger group very rarely offend on their own. They're always offending with groups of other young people and often groups of young people that might be a bit older than them. (Participant 25)

Younger children charged in relation to offending occurring in residential care contexts were described as often having behavioural difficulties and disabilities, and repetitively engaging in the offending behaviours.

... there's a significant group who are the low functioning, residential child who is offending against property and staff. And they keep doing that repetitively. And they rack up a myriad of offences and they come in ... they're the ones who are the repeat offenders who are often asked about *doli* many times. (Participant 6)

### Recent trends in offending

Participants believed that the nature of offending among 10–13-year-old children had become 'much more severe, much more violent, much more significant' (participant 35) in recent years.

... in the early 90s, you come across kids and they're pinching lollies from Coles. These kids are starting with robberies, armed robberies, violent assaults, which is something I haven't seen before. (Participant 40)

A trend towards internet involvement in the offending of 10–13-year-old children was also noted, with social media supporting the organisation of offending and providing a platform for interpersonal violence, and online environments being a platform for sexual offending.

### Pathways into offending

#### Seeking acceptance and belonging from peers

Many of the children who engage in early offending were believed by participants to be seeking connection and belonging. It was observed that many children charged with early offending, and who lack connection with their families, communities and peers, 'gravitate towards those children that will accept them, which are the ones that are already in the criminal justice system' (participant 35).

When you're looking at people 10 to 13 who are highly impressionable, they might just commit these crimes because they feel that it'll give them acceptance and that will make them part of that group or that association, which is – in my view, it's terrifying. Because if you're already looking at a young person that might be vulnerable or have low self-esteem or otherwise not feel accepted in the world, then that connection – someone bringing them in but into a really negative environment. (Participant 44)

### **Cycles of victimisation and perpetration**

Some participants observed a cycle whereby children transitioned from being a victim of offending to becoming a perpetrator at a younger age. One participant outlined the need to acknowledge children's victimisation in subsequent responses to their behaviour.

... if they're hitting the justice system, there's no consideration to them as victims. They're seen as perpetrators. There's reasons for their behaviours and it's usually because they suffered trauma themselves. (Participant 42)

### **Child criminal exploitation**

Finally, some participants outlined that children became involved in early offending through criminal exploitation by adults or older children. It was reported that adults would prey upon vulnerable children and groom them to commit offences such as stealing, ostensibly because younger children would receive less severe legal penalties than older children or adults for the same offences.

... a lot of the young people I worked with said that they would get involved with these entrenched motorcycle gangs and then they would get the young ones to do the dirty work because they would get off on menial charges, whereas the older ones would potentially end up in prison. So, yes, I have heard of that and seen that. (Participant 1)

### ***Aboriginal and/or Torres Strait Islander children charged with early offending***

While there are similarities across this cohort, Aboriginal and/or Torres Strait Islander children charged with early offending were seen to have unique experiences, alongside greater disadvantage and vulnerability within the justice system. Key experiences seen as contributing to Aboriginal and/or Torres Strait Islander children's criminalisation include the ongoing impacts of colonisation, racism, and children's disproportionate child protection system involvement.

### **Ongoing impacts of colonisation, the stolen generation and racism**

Many participants spoke of the intergenerational trauma that Aboriginal and/or Torres Strait Islander children experience, stemming from the ongoing impacts of colonisation. This was seen to result in Aboriginal and/or Torres Strait Islander children more often growing up in poverty, disconnected from culture and family, and with less access to supports and education. Participants attributed Aboriginal and/or Torres Strait Islander children's increased likelihood becoming involved in the justice system at a young age to these experiences.

... one of the main factors of involvement has got to be colonisation and genocide and generational trauma for 230 years of a community that's been so terribly set upon ... You see families everywhere who deal with fractured family units, with broken attachment to culture, who live in poverty, who live on the edge of white communities anyway, live on the edge of communities of privilege and who suffer for that. (Participant 31)

... in the case of the overrepresentation of Aboriginal children, which is where I think we see the failure of *doli incapax* most notably, where we're seeing children who are basically the victims of the impact and legacy of colonialism over 200+ years. (Participant 23)

The over-representation of Aboriginal and/or Torres Strait Islander children in the justice system was also attributed to racism, including in policing and school settings, resulting in children being excluded from opportunities, connection and support.

... it's still obviously very rife and kids can be still subject to racial prejudices in school environments. So they're more likely to engage in reactive behaviours in that setting, and be ostracised and marginalised ... So, they will be leaving schools prematurely.  
(Participant 6)

Participants spoke of the over-policing of Aboriginal and/or Torres Strait Islander communities, and racism within the police force resulting in Aboriginal and/or Torres Strait Islander children being treated more punitively and harshly.

I think there's still some racism in policing, that we would see. There is at least some research that we did through [organisation] showing differential responses to first time offenders and young offenders particularly, where Indigenous young people or children are more likely to enter into the criminal justice system than non-Indigenous kids. So there is still a systemic response there that – or a systemic bias there. (Participant 7)

#### **Link between child protection and early justice system involvement**

Participants identified a clear link between Aboriginal and/or Torres Strait Islander children being removed from their families at high rates and their over-representation in the justice system at young ages. Participants spoke of the ongoing intergenerational trauma caused by Aboriginal and/or Torres Strait Islander child removal, referring to the 'third, fourth, fifth, sixth generation' of traumatised families (participant 34) since colonisation. The resulting 'trauma, abuse, disadvantage, and neglect' was seen to underpin offending behaviours.

It's colonisation, you're still getting effects of that ... this is a particular group where that child protection into youth justice pathway or pipeline, is very prominent. And it is often that you've got families where the whole family system, the network, and this might be generations, has been disrupted. So you'll often have stolen generation grandparents, potentially parents, but often the grandparents. That's caused significant disruption in how the parents were then parented. And then that's sort of flowing through now to the young person who we're seeing, who is now maybe entering the criminal justice system ...  
(Participant 7)

## ***Doli incapax* strengths and limitations**

### *Strengths: Supporting diversion from the justice system*

Participants observed that *doli incapax* provisions allow for some younger children to be successfully diverted from the justice system, sometimes with no further justice system involvement.

... they get to have that chance of not having charges. And we see it. We see young people who had this runoff, random charge, they get *doli* ... and we just never see them again, which is what we want. (Participant 28)

Another participant described *doli incapax* legislative provisions as a 'safety net', while also suggesting that children found *doli incapax* may still require further support.

It filters those that shouldn't be in the criminal justice system, if we use the questions properly. But it catches those that do need consequences for actions and some intervention to stop them doing what they're doing. (Participant 35)

Similarly, participants stated that *doli incapax* provides the discretion to only prosecute children of 'sufficient maturity'.

... children just develop at different paces. They progress differently, they have different experiences. And that's why *doli incapax* ... there is a discretionary measure ... there is a period of time in which they may be capable or they may not. (Participant 44)

### *General limitations of doli incapax*

Limitations of *doli incapax* commonly related to shortcomings in the application of this provision (ie observing the process to be lengthy or inconsistent), or negative impacts of the process on children (ie concerns that processes associated with *doli incapax* criminalise children).

#### **Duration of the *doli incapax* process**

One of the most frequent critiques of *doli incapax* processes was its lengthiness, which was said to leave children 'in limbo' waiting for matters to be resolved. The process was noted to involve several court appearances, taking children away from education and other prosocial activities. Participants stated that *doli incapax* processes should be fast-tracked to enable children to connect consequences with their behaviours, as it was not uncommon for children to forget the offending incident by the time their *doli incapax* matters had resolved.

... One of [the young people with whom I worked], it took us a year and a half to get her matter sorted and that was an armed robbery. She stole some items off someone. She used a box cutter. But by the time we got there, she was, like, "I don't even remember it." She hadn't re-offended in that time, but it really didn't hit home that that was not something that you should do. It kind of becomes this thing where she was at court, her dad would buy her Maccas and sit there all day and miss a day of school. Then it would get adjourned and we'd be back ... the system needs to be quicker, especially with these younger people ... it needs to have a quicker turnaround to make sense for them and to really link in with their criminal behaviour. (Participant 30)

### Inconsistent application

Participants commonly noted how variable the application of *doli incapax* provisions could be, depending on a child's location, lawyer, police prosecutor, psychologist or magistrate. Given the many individuals involved in the *doli incapax* process, this was seen to result in significant disparities in who is seen as *doli incapax*.

... if you have a lawyer who doesn't know much about [*doli incapax*]. A lawyer who doesn't have much experience, doesn't have other people they can bounce ideas off ... if they happen to turn their mind to that stuff, which a lot of them won't, if they don't have good support and experience around them. And they get some report and it's a shit report, but they take it as a grain of salt ... it's just so much inconsistency, and access to justice issues. (Participant 5)

### *Doli incapax* pursued by the defence rather than rebutted by the prosecution

Participants described a culture in Victoria whereby defence lawyers raised issues of *doli incapax*, rather than the presumption being rebutted by the prosecution. Defence lawyers often acquired their own *doli incapax* assessments with a view to speeding up legal proceedings, aiming to encourage police to drop charges against a child based on a clinician's assessment.

We've stuffed ourselves to be perfectly honest, the legal profession, with the way that we've dealt with *doli* by getting assessments ... it's not our onus to rebut, it's their onus. But we've created this culture now where the police will say 'no but where's your report? We don't want to make a decision until you get a report'. So, then a lot of people get delayed and you run around in this circle. (Participant 15)

... for a lot of our criminal lawyers, we have had to pursue assessments ... we've had to go about organising our assessments to prove that a child would be *doli*, to then get the prosecution to properly consider it ... (Participant 20)

However, such practices did not appear to occur consistently across the jurisdiction, with some participants reporting regional variations in practice:

... [in Metropolitan Court A], the prosecutions are pretty unique and they will consider withdrawing *doli* charges without much work ... [Regional Court B] is changing a bit but it's generally getting reports is the standard. (Participant 21)

While such processes do not align with the presumption of *doli incapax*, participants outlined the legal advantage of the defence obtaining these reports is in choosing who conducts the assessment and whether it is released to the court.



### Negative impacts on children

Participants outlined a range of concerns regarding the potential negative impacts of *doli incapax* processes on children, including its failure to address the underlying needs contributing to offending behaviour, the criminalising nature of the process, the potential for children to believe they are impervious to consequences, and the likelihood of children not understanding the process.

### Failure to address offending behaviour

Participants expressed concern that children found *doli incapax* do not receive support or interventions to address the underlying drivers of their behaviour and may continue to engage in offending.

... it's not really going to deter that young person from further behavioural incidents, or going back to what they were doing previously, without putting in interventions to have that circuit breaker for that young person. So, you're not really addressing any underlying causes ... (Participant 1)

### Criminalising contact with the justice system

While intended as a diversionary mechanism, participants suggested *doli incapax* processes can be criminalising, due to children's required contact with police, courts and sometimes remand settings while awaiting finalisation of their matters.

... we most recently had someone, it took maybe 12 months before they were found *doli*, and their involvement in the justice system through that period, they had I think 190 charges that were all found *doli* at the time, but would have in that period of time, maybe had 20 court appearances, and had periods in remand. (Participant 3)

... the danger of all of this is you've already criminalised the young person without a finding of guilt. The child not only would have been charged with an offence ... most ... would be arrested. I've had kids in handcuffs, I had a kid who is so skinny and so small they had to put both of his wrists in to one handcuff ... I've had kids transported in the back of paddy wagons across vast distances. Sit in a police station, sometimes for hours, often multiple days if they're in remote areas to be interviewed, interrogated ... we're basically harming the most vulnerable kids through a criminal process that has been designed for adults to punish, confine and control adults. (Participant 11)

Further concerns were raised about the remanding of children whose offences, even if convicted, would not warrant a custodial sentence.

With the current state of bail laws you've got a very real risk of kids being remanded even where their offending has been low level ... I think the community would be quite horrified at the situation that even very young children can find themselves in very quickly where they're waiting for a determination as to whether they're *doli incapax* and in the meantime they can be cycling in and out of remand and all of the damage that that causes. (Participant 14)



### Lack of consequences

Some participants also expressed concern that children found *doli incapax* might believe that there are no consequences to their offending behaviour, particularly those children who do not understand the concept of *doli incapax*.

I don't think they understand it. But I think they have that ... 'I'm invincible' sense about them. And these are the ones that do a lot of crime. Not the ones that might offend in the resi unit or steal from Kmart or something like that. The ones that are aware of no consequence, are actually sometimes very consciously aware that there's no consequences for what they do. (Participant 35)

Some participants believed that such implicit messages risk damaging a child's moral development.

... some kids acquire a knowledge that they're *doli* ... we've had a recent case that represents this I think, where a kid – it's like a badge of honour almost. And he's impervious to consequences because he's learnt that he's like Teflon. And so that's not helpful. (Participant 6)

### Children's understanding of *doli incapax* processes

Participants frequently advised that many children considered or assessed in this area understand neither the concept of *doli incapax* nor its application. Professionals sometimes struggled to explain the processes surrounding *doli incapax* to children with whom they worked.

... a lot of them don't get it ... and that was really the hardest thing for me to figure out, how am I going to explain this to kids? (Participant 34)

### *Limitations of doli incapax related to specific professions*

While the above section summarised general concerns around *doli incapax* processes, this section outlines limitations pertaining to the way specific professions apply *doli incapax*.

#### Judicial officers

It was observed that, for judicial officers, decision-making around *doli incapax* was not a straightforward process, and that a lack of clarity persisted in applying the presumption.

... there's a lot of discretionary elements and about where your weight should be put. There's been cases on it but some cases turn on one very, very minor thing, and they say they are *incapax*. Or as other cases are much more serious in their way they look at it ... it's very hard to get clear rules about what the court should apply and should not apply. (Participant 39)

Furthermore, participants asserted that judicial officers hold diverse understandings and levels of support for the presumption of *doli incapax*, leading to variability in its application.

... the problem is too I think that there's various views about it ... you're not necessarily going to get a Magistrate that knows – it's the luck of the draw with the Magistrates whether they have a knowledge of *doli incapax*. And whether ... they are on board with it really. (Participant 5)

### Police

Similarly, participants reported that police officers often have limited knowledge of *doli incapax* due to a lack of education on this area of law, which can disadvantage children eligible for *doli incapax*.

I was actually shocked because I thought maybe they would at least know about it because when they called me about one of my clients and they said, 'She's done this and this and this, will you accept service of the charges?' and I said, 'Do you guys realise that charges got withdrawn two weeks ago where she was found *doli incapax*?' and he was like, 'Sorry, *doli* what?' and I was like, 'Oh, okay'... they had no idea, never heard of it. (Participant 13)

... they actually don't get taught about it properly in the academy. We talk about the rebuttable and irrebuttable presumptions. And that's about as much [as] you know about *doli incapax*. Most members don't know what the term means. They don't really understand that it means this child is incapable of crime unless you prove otherwise. (Participant 35)

Some participants also perceived that police hold a negative attitude towards *doli incapax* and are resistant to a child being found *doli incapax*. Participants reported experiences of police refusing to withdraw charges on the grounds of *doli incapax*, even where there was evidence to the contrary.

... they will fight tooth and nail and they will complain and they will complain ... saying, 'This lawyer's trying to argue *doli* and they're always arguing this'. And it's like, well they're doing that for a reason. And they just cannot get their head around it. Nine times out of ten I would say, they can't get their head around the concept and they are offended by the concept. (Participant 5)

### Clinicians conducting *doli incapax* assessments

*Doli incapax* assessment processes and reports were observed to vary considerably between clinicians. Participants believed this variation was attributable to clinician experience, skill, level of understanding of *doli incapax*, and the particular assessment measures applied. Concerns were expressed regarding the variable understanding of the concept of *doli incapax* across clinicians conducting these assessments, with one participant stating that ‘there’s a very small few clinicians that you can rely on that actually understand the concept of *doli incapax*’ (participant 5). Furthermore, there are no standard clinical guidelines or direct methods of assessing *doli incapax*, resulting in clinicians’ freedom to apply the measures and processes they deem appropriate. Perhaps as a result, participants also advised that it was not uncommon for clinicians to disagree on whether a child is *doli incapax*.

... one [clinician] saw [a child] for two hours where he didn’t really say much, and the other one saw him for one hour. So, they’re basing their assessment on a one hour interview on one particular day ... we’ve got so much conflict between them. They’ve used different tests. They put different weight on different factors and they’ve come to completely opposite ends of the spectrum in terms of their opinion. (Participant 39)

Some participants even questioned the appropriateness of psychologists providing a psychological evaluation of *doli incapax* given the difficulty of clinically assessing a legal concept.

... *doli incapax* is a legal concept. This idea of is it wrong, or seriously wrong? That’s not a psychological concept or an understanding with a developmental lens to it ... I do see clinicians saying, ‘And for these reasons the young person should be found to be *doli incapax*.’ I think that’s a gross overextension of what you could actually say. You could say ‘These relevant elements might inform *doli incapax*’ but ultimately, it’s up to the Court. (Participant 7)

Finally, it was outlined that the retrospective nature of *doli incapax* assessments makes it challenging for psychologists to assess a child’s knowledge at the relevant time.

You can’t definitively know what that child knew or understood at that point in time. We’ve got models that we can use, and you can look at the police interview at that time and what the child is saying. But it’s probability, isn’t it? ... normally, you’re assessing them 8, 9, 12 months ... you’re interviewing a 13-year-old about the actions of their 12-year-old self ... (Participant 9)

### Defence lawyers

Participants stated that many defence lawyers choose not to use the statewide Children's Court Clinic for *doli incapax* assessments, citing long waiting times and the automatic release of reports conducted by the clinic to the Children's Court.

... the Clinic, the delay is crazy and they've only been getting longer and longer. I mean it was like 12 to 18 weeks at one point to get someone assessed ... the other thing is, if you get a report from the Clinic because the Court orders it ... the Court releases it to everyone. If we get our own report from a psych and we don't like the report, if the child says something in that report that is really unhelpful, maybe they're not *doli* but there's also material in that report that is not something that you would want to put before police in the Court, we don't have to use it. So that's the benefit of seeing that report before everyone else. (Participant 22)

### Youth justice practitioners

Some participants stated that children under assessment in relation to *doli incapax* can be placed on a supervised bail order with youth justice to prevent the child from being remanded. Participants stated, however, that the work youth justice is permitted to do with the child during that time is limited and cannot be offence-specific so that it doesn't affect court proceedings. At the same time, there was a sense from participants that such youth justice involvement could still impact *doli incapax* assessments.

[Youth Justice] don't talk about the offending, but [they] try and upskill them ... we do want to divert, but what damage are [youth justice] doing to a *doli* assessment in that process? (Participant 3)

## Views on the minimum age of criminal responsibility

This section explores the participants' views regarding the current minimum age of criminal responsibility in Australian jurisdictions (10 years in most jurisdictions), alongside key arguments for and against reforms, and suggested caveats to raising the minimum age of criminal responsibility. Not all participants could be asked directly for their views in this area, as some were prevented from commenting on government policy by virtue of their professional roles. The findings below should therefore be regarded in a qualitative rather than quantitative manner.

### *Arguments for raising the minimum age of criminal responsibility*

Of the 47 participants, only one made a direct statement against raising the minimum age of criminal responsibility. The remaining participants outlined arguments in support of jurisdictions raising the minimum age of criminal responsibility, for the reasons outlined below.

### **Developmental stage of children**

The stage of brain development among children charged with early offending was seen to relate to the likelihood of their engagement in offending, due to underdevelopment of impulse control and consequential thinking.

From a neurological perspective, the child's brain is not adequately formed in terms of that frontal lobe until the age of 25. That's why our justice system attempts to cater for what we call young offenders that are under 25 by having a separate correctional facility, but what it doesn't take into account is the difference between 10 and 25 in terms of that frontal lobe development. (Participant 41)

Children's early developmental stage was also seen to impair their understanding of criminal justice processes, leading professionals to question the value of these responses.

... developmentally there isn't that cognitive ability to truly understand the criminal system and what's happening to them or what the processes are. So, it's hard to agree that they should go through those same processes. Not that there shouldn't be consequence, but I don't think the same approach for every age group is suitable. (Participant 30)

### **Criminogenic, traumatic and stigmatising nature of the justice system**

Justice system contact was seen as more harmful than helpful to children charged with early offending. Such contact, from court attendance to incarceration, was viewed as criminogenic, increasing children's likelihood of reoffending. Because of their developmental stage, children with early offending were perceived as particularly vulnerable to the detrimental impacts of justice system contact.

... exposing them to this sort of process at such a young age is going to have a longer-term detrimental impact on the community than taking a softer approach and trying to refer them away from it early on ... I don't think they get that. (Participant 15)

... one of the things that really makes me feel that age is too young is the effect of incarceration on a young person in terms of recidivism ... The effect of incarceration is so oppositional to what we would hope it would be in terms of being a positive disincentive to involvement in criminal activity. It has the complete opposite effect. (Participant 31)

### **The justice system's inability to support children**

Participants stressed the importance of children charged with early offending receiving therapeutic supports to address offending behaviours, alongside the unsuitability of the justice system for providing these responses. Instead, child welfare or clinical services were considered better placed to deliver the required responses.

... you don't need to be tangled up in the criminal justice system to receive therapeutic response to problematic behaviours. It's much better done away from the criminal justice system. (Participant 14)

### **Caveats to raising the minimum age of criminal responsibility**

Participants who believed that the age of criminal responsibility should be raised also emphasised the importance of children's access to support to address unmet needs. It was asserted that justice system-involvement was not necessary to deliver such support, which community services could provide in a voluntary and therapeutic manner. Others were open to the idea of court-directed child engagement with therapeutic supports, particularly for more serious offending, but absent the element of criminal responsibility. The required therapeutic supports (outlined later in this section) should be:

- focused on supporting a child's educational engagement;
- sufficiently flexible to meet individual needs, including being culturally appropriate;
- able to support a child's learning about the wrongfulness of their offending behaviours; and
- able to work with a child's family.

### *Arguments against raising the minimum age of criminal responsibility*

Of the 47 participants, only one made a clear assertion that Australian jurisdictions should not raise the minimum age of criminal responsibility. This participant still advocated for expanding the capacity of services to support children charged with early offending. While not advocating against reforms, other participants also outlined considerations against raising the age of criminal responsibility.

### **Need for offending behaviours to have consequences**

Participants explained that victims and their families can be frustrated with a perceived lack of consequences and penalties for offending behaviours, placing police in a difficult position.

Mum and dad of the victim are just going, 'That kid belted him and nothing happened to him.' Well, something did happen to him, but explaining that clearly and thinking that there's been some form of justice undertaken can be really hard ... And even worse when the offender starts running around school going, 'Whacked him on the nose, nothing happened to me,' and that infuriates everybody. (Participant 40)

The broader community was also seen to sometimes become frustrated with a lack of response to offending behaviour. One participant detailed an example in which community members took it upon themselves to respond.

... there's two kids that are under the threshold now, one, he – it's a 10-year-old and a 12-year-old and they're creating havoc in a very small community ... Graffiti, threatening behaviour, just really anti-social stuff and the community's had enough. Where one fellow ended up on mum's front door ... It's got to a point where there's a local Facebook group that's calling for – basically for their blood. (Participant 40)

### Addressing children's unmet needs

Some participants believed that some children charged with early offending 'know what they are doing' and can 'wreak havoc' through their continued offending. Without any other mechanisms, the justice system was seen by some as necessary for providing interventions to address the underlying needs of some children.

If there was no opportunity for charging anybody, how do you draw them to the attention of anybody? No consequence at all in the community. Sometimes they would slip through the net. Sometimes the best way to get a child some intervention is to charge them and to bring them to court, because then there's an alert to say, this child needs something in place. (Participant 35)

### Need for police discretionary powers

Similarly, some participants believed police require discretionary powers to charge children who engage in particularly dangerous behaviour, and who are aware of the seriousness of their actions.

I'm just thinking of that 13-year-old. Imagine breaking into the house of a 90-year-old woman and stabbing her to death, for example, and us just not doing anything about that. How would the family feel? ... and I'm not saying lock these children up, but there is some value in having a discretion. (Participant 44)

## System responses to children charged with early offending

This final section explores participants' views of the limitations and strengths of current service responses to children aged 10 to 13 charged with offending, including specific consideration of Aboriginal and/or Torres Strait Islander children, and suggestions for improved responses.

### *Limitations of child protection system responses*

Child protection systems were described as limiting or withdrawing support to children with early offending behaviours in anticipation of, or deference to, a youth justice response. This raised concerns that the needs of children with early offending were left unmet, criminalising behavioural issues that could be supported through child and family services, or therapeutic supports.

Child protection takes the backseat, and they're like, 'We'll let the justice system work it out. It's not up to us'. Everyone's clear that this is – these are behavioural issues, this is not criminal. Stop taking a backseat, this is where you guys should be definitely on the forefront trying to get all of the supports in place. (Participant 13)

Participants also expressed concerns about out-of-home carers and residential care staff calling police in response to behavioural issues, a response which would rarely be enacted for children residing with family.

... it's property damage or assaults on staff. Whereas if it occurred within a family-based setting, it still yes, is assault. But it might be a push of an adult or something that wouldn't be reported to police. It would be managed within the family. (Participant 7)

Children in residential care were also observed to be often placed with peers with behavioural issues and justice system involvement, negatively influencing their own development.

... you've got young people that are potentially aged 9, 10, living with 17-year-olds that are already kind of entrenched in the criminal justice system. Then, due to the high number of kids with disabilities or undiagnosed disabilities in that space are then kind of getting a bit led astray with the young people that they're spending time with due to power dynamics and just being fearful being in those units ... a lot of substance use, crime goes up as soon as they enter into the resi space. (Participant 29)

Participants asserted that children in out-of-home care engage in offending behaviours due to a lack of boundaries, emotional safety, and care from staff and carers.

... that's what a lot of the kids complain about, there's no-one at the [residential] unit who cares about them and it's just like you're rotating staff in and out, they don't have anyone to build a relationship with. So they don't get those role models to then be able to help develop the skills that would help them remain offending-free. (Participant 15)

Finally, the unnecessary exposure of children in out-of-home care to police due to welfare needs was also seen as criminalising.

... in the out-of-home care space is a lot of the absconding and safe custody warrants. They're getting more introduced to the police space at an earlier age for things that aren't necessarily criminal. (Participant 29)

### *Limitations of education system responses*

Children charged with early offending were observed to often be unsupported in or excluded from school. Some schools were seen to withdraw support for this group of children, who have a high prevalence of disability, behavioural issues, and parents who struggle to meet their needs.

... I think that the schools are like 'you're a troubled kid, we don't want you'. They'll try to find every way to get them out of their school and into someplace else. (Participant 15)

Simultaneously, participants identified a significant lack of flexible learning options for children with early offending. Specialised schools were seen to typically only accept older children (eg 15 years and above), leaving children charged with early offending, who may have exited mainstream schooling, with limited or no educational options.



### *Limitations of overall system responses*

Various limitations of overall system responses to children with early offending were described, including differing service ideologies and knowledge, and a lack of targeted services.

#### **Differing ideologies on how to support children**

Services and even workers were seen to differ in their conceptualisation of best practice for responding to children with early offending. For example, services may focus on a child's welfare, their mental health or their criminogenic needs. Approaches for meeting children's needs also vary, with some taking more punitive approaches and others adopting more therapeutic or rehabilitative orientations. These diverging ideologies, frameworks and approaches were seen to result in suboptimal responses to children with early offending behaviour.

... becoming involved in the justice system under 14, you run the risk of being a life course persistent offender, if we don't do something. There's no way that a resi worker from [a non-government organisation] is going to have any of that knowledge, unless they've worked with YJ ... this cohort, it is a welfare response that's required. But the welfare sector itself, understanding their role in this cohort of young people – that includes education, police, child protection, or parents – there's been times where they think custody is a circuit breaker for the young person, and really not understanding any of the connections to criminalising a young person, or the connections with antisocial peers that that will provide. (Participant 3)

#### **Services not targeting children's needs**

Few services currently target the unique needs of children aged 10 to 13 years with early offending behaviour. Instead, most of the available services focus on older teenagers, young adults, or younger children.

... the system sometimes isn't well equipped to work with the age group ... I think there's something about understanding ... not just brain development, but there's got to be more program responses or something that's a little bit more in tune with that age group. (Participant 26)

Participants identified a lack of early intervention programs and voluntary services for this group, with professionals emphasising the need for specialised models focused on diversion, including assertive outreach, and capable of responding to children's multiple needs.

... services tend to disengage or don't feel capable, or can't tolerate a level of risk that might be there with that young person. And therefore the young person doesn't get the service. Or the young person doesn't engage in that standard model of attending an office. And they maybe don't have a parent who's bringing them into that office. If they don't fit that mould, they don't tend to get the service. There are services that exist for each of those issues, but not when you've got the kind of complexity or multiple needs and challenging behaviour that we would see with this kind of group. (Participant 7)

### **Inadequate and stigmatised responses to migrant children and their families**

Migrant children with early offending behaviours and their families were seen as particularly unsupported by services. Such children and families might struggle financially, emotionally and socially, and were often seen to be ineligible for services due to citizenship requirements. Some participants also stated that migrant children of colour were racially discriminated against and received harsher penalties for offending behaviours.

... it's seen widely that I will have a black or brown young person commit the same crime and be a co-offender of a white young person, and my white young person will get let off with nothing. And this has happened. I had two kids on my caseload, one black, one white, and I was in court with my South Sudanese young person for eight months. And the white co-offender had two court sessions and was done. (Participant 28)

### *Limitations of system responses for Aboriginal and/or Torres Strait Islander children*

#### **Lack of culturally responsive services**

Participants stated that, except for Aboriginal-controlled or focused organisations, the majority of available services are not culturally responsive or sensitive to Aboriginal and/or Torres Strait Islander children.

... we've got the system we've brought across 200-plus years ago, without the recognition of the local customs, law, etcetera, that was being applied prior to European settlement, clearly there's some incompatibility issues there that need to be continued to work through. (Participant 45)

Service providers' ignorance of the unique needs and experiences of Aboriginal and/or Torres Strait Islander children was seen to disadvantage these children and contribute to their poorer outcomes. This was attributed to services perceiving Aboriginal and/or Torres Strait Islander children as 'too difficult and/or transient' and 'not able to engage in therapeutic alternatives to incarceration' (participant 41). Participants noted a distinct lack of culturally responsive early intervention services for this group, which is particularly concerning given the high rate of Aboriginal and/or Torres Strait Islander children who are criminalised at younger ages.

... the availability of early intervention cultural services is non-existent. It's hard enough to find an Aboriginal worker in most services, and that's in a statutory space. So, to find an Aboriginal worker in Child First or Families First, I think would be quite difficult. (Participant 3)

### **Inadequate funding of Aboriginal community controlled organisations**

Aboriginal community controlled organisations (ACCOs) were seen as not appropriately funded to deliver the required services to children with early offending behaviours. ACCOs were noted to often be funded through tender processes, resulting in unreliable and short-term funding, compromising organisational capacity.

... the Aboriginal community refers to what we provide as ‘white goods’. As soon as they break down, we just chuck them out, get a new one. But we just want to keep the one we’ve got that works and fix it up and get it going. It’s a frustrating process because it takes a while for the community that has – the courts have traditionally taken children away, locked up their community – so it’s very hard to get them to trust the justice system. (Participant 37)

Furthermore, participants criticised the lack of investment in ACCOs, despite growing acknowledgement of the efficacy of Aboriginal community-led solutions.

In the 18 years that I’ve worked in this space, I’m not sure that I understand why government continue to fund in the same manner ... and expect different results. Recently seven million dollars was given by government to expand youth justice hubs that have very little data to suggest that they’re actually effective. (Participant 41)

### **Police bias against Aboriginal and/or Torres Strait Islander children**

Participants also noted more punitive police approaches evident in the over-policing of and harsher responses to Aboriginal and/or Torres Strait Islander children. For the over-representation of Aboriginal and/or Torres Strait Islander children in the justice system to be addressed, racism within the police force was seen to require a systemic solution.

We need to think about over-policing of Aboriginal young people and the way in which Victoria Police interact with [Aboriginal] young people. Because ultimately charges can’t come before a court without police bringing charges before a court. I think that there exists still a great deal of systemic racism within [police], and I think it’s around a lack of understanding of why Aboriginal children continue to present before [police] in these types of offences. (Participant 41)

### ***Strengths of diversion and early intervention programs***

Police and court diversionary approaches were seen as effective for directing children with early offending behaviour away from the justice system. Specific police programs that were viewed positively included the Proactive Policing Unit, the Parental Engagement and Referral Service and the Youth Early Intervention Program.

They listen to what the kid’s saying. They talk to the parents. They make those enquiries. Maybe they’ve been involved with Headspace before. They contact Headspace. (Participant 34)

## *Strengths of system responses for Aboriginal and/or Torres Strait Islander children*

### **Aboriginal community controlled organisations and culturally focused intervention**

Many participants expressed that ACCOs typically have better engagement, connection and relationships with Aboriginal and/or Torres Strait Islander children, contributing to better outcomes. This was attributed to ACCOs being organisations 'who know their communities, who generally employ Aboriginal staff working with Aboriginal communities' (participant 23). Culturally responsive programs were seen to connect with Aboriginal and/or Torres Strait Islander children in a unique way, helping to create positive change.

... this particular young person. He is absolutely blossoming with the support of culturally-appropriate people. He said to me, 'Oh,' whoever he called him, someone from the footy club. He said, 'Oh yeah, yeah. He looks after me and I like him.' You just need one person that they like and they're off. It doesn't have to be world changing 23,000 people helping them. If they just find a fit for them, kids can do amazing things and change. But without a connection, there's no hope. (Participant 39)

### **Connecting children with family, culture, identity and community**

Reconnecting children with their Aboriginal and/or Torres Strait Islander identity was seen to result in children taking pride in their identity, finding support within their community and finding value and meaning in their lives, all of which assist their desistance from offending.

... if they can be connected back to Culture, back to Country, there is actually really strong prognostic experience from that, if they can do that. If they find that connection, that identity, somewhere more pro-socially, and often that is back in community, or back in at least connection, discovering their mob, their connections. Because a lot of the time that's been lost for these kids. (Participant 7)

## *Improving responses to children with early offending behaviours*

### **Secure therapeutic settings as an alternative to custody**

Youth justice custody was viewed as an inappropriate response for children with early offending. A secure, therapeutic alternative was suggested as a last resort where containment is required. Participants stated that such environments should not be 'prison like' but 'homelike' and 'comfortable', allowing children to attend school and connect with visitors.

If we do have to lock kids up, then we should look at alternate settings for secure environments that are not prison-like ... we could invest in small homelike sort of facilities in communities, close to where people can visit them, close to where they could go to school. So, it's really caring. It's kind of awful that they call it care services, because there's very little caring there sometimes. (Participant 23)

Others suggested that the alternative should be a hospital-like environment, focused on mental health:

... it's in the correctional facility, but it's run as a hospital. If there was something like that where you come through the gate, you're detained, but you're now treated within a medical, therapeutic setting but within a prison setting. Thomas Embling manages to do it with the mentally ill, so I'm sure we could do it for the most vulnerable in our community. (Participant 37)

### **Viewing children through a trauma-informed, child wellbeing lens**

According to participants, many services fail to view this group as children, legal minors who are 'still very young physically, emotionally, psychologically' (participant 42). Participants suggested children with early offending are best supported by focusing on their welfare needs and adopting trauma-informed approaches that respond to their often significant histories of victimisation.

... there should be a trauma focused response, particularly to children that are in the child protection system. There should be that in the back of everybody's mind that these are traumatised children right from the outset. So that they've got understanding of why they're doing the things that they're doing. (Participant 35)

### **Investing in support for children with early offending behaviours**

Participants identified a need to reorient current approaches, beginning with justice reinvestment to meet the needs of children with early offending behaviours:

All the money that we spend at the [custodial] end ... and we know that it works around the world, justice reinvestment, so it's not like we're talking about something that is unknown. (Participant 34)

It was suggested that government could prioritise reinvestment in therapeutic services already performing this work:

... a response that is a therapeutic response away from the criminal justice system is what we see as most effective and we don't think that there needs to be a whole new response dreamed up to meet the needs of this cohort. There are many very good existing services and really it's properly resourcing those services and bolstering those services so that they are equipped to respond to this cohort. (Participant 14)

Participants also emphasised the need for coordinated early intervention strategies focusing on child welfare and educational engagement.

... early intervention is key ... I do think that it's an interagency responsibility that young people – it's probably more families – that are identified as being at risk are targeted ... Ensure children are engaged in education and have those pro-social supports. I know that's a standard solution, but I don't know how effectively it's happening. (Participant 44)

The education system has a lot to be held accountable for and I just think that there's issues that occur within the school system quite early on. I don't know whether it's resourcing, or lack of education around how to support these young people, but trying to intervene at that earlier point – so whether it's the wellbeing coordinator doing assertive outreach and getting case management involved – but I think it probably starts even earlier, before the police contact, with the school. (Participant 1)

Additionally, investment in community-based cultural support was seen as pivotal for children to enhance prosocial connection and positive belonging.

We talk about culture a lot, and for me – and this doesn't only relate to the Indigenous or the Aboriginal kids, it relates to kids from all communities, about a disconnect from culture, and perhaps to reengage those young people with their culture might go some way from stopping that yearning for belonging to another group or gang. (Participant 40)

### **Changes to policing approaches to children with early offending behaviours**

Participants outlined a recommendation for improved police training and support to respond to children with early offending. Child-centred specialist approaches, focusing on diversion via cautions or service referral, were supported. Participants also recommended that police have minimal involvement with children with early offending and, if necessary, their approach should be rehabilitation focused.

... an ideal response would be the police probably being supported around, or education around, what services are out there. So, if they're seeing young people coming to their attention quite frequently, they can enact those referrals at that point, as soon as possible, because they're seeing it first. (Participant 1)

... in New Zealand, they have a specialised youth police force, so if you had members who actually had a specialist knowledge of how to deal with challenging behaviours that young people may be exhibiting, then that would certainly assist. (Participant 14)

### *Recommended alternative system responses*

Participants who were supportive of raising the minimum age of criminal responsibility outlined recommendations for service provision models to support children with early offending behaviours. These fell into the three categories outlined below.

### **Diversionsary case management**

Some participants supported a diversionsary approach offering case management for children with early offending behaviour. It was suggested that this service could be provided by an independent community service not affiliated with the justice system, and with practice knowledge around children's early offending behaviours. It should offer intensive, assertive outreach, alongside family support.

... if there was something that existed that wasn't Youth Justice, that was from community, like a diversionsary sort of program with case management, and it would have to be assertive case management, that might be more than enough for the court to feel like, 'OK, they're going to be case managed' ... they can do case management, they can respond quickly, intervene with the family and use that sort of holistic approach. I think it would be beneficial ... by the time you reach a criminal justice response, you've already failed I think that young person. (Participant 1)

Participants held differing views as to whether it should be mandatory for children to attend such a service; however, many argued a voluntary service with assertive engagement would be the optimum model.

I don't feel like it necessarily has to be court-mandated. If you have a service that is adaptive, can go out to the home, do outreach, try and build relationship and rapport with that young person, connect to them with schooling or other support services, I think that would go a long way, it might not need to get to the point where it's court-mandated. (Participant 1)

### **Expansion of therapeutic treatment orders**

Participants also expressed support for an expansion of court-mandated therapeutic treatment orders—similar to therapeutic treatment orders (TTOs), which are currently restricted to children with sexually abusive behaviours. These order could replace a justice system response for children with early offending behaviours who require a more intensive, therapeutic intervention.

... have a service in place that actually provides that treatment, in a very intensive way and an assertive way. So it's not just existing services where they will struggle to ever engage these kids, because they won't have outreach capacity, or they won't be assertive enough. So, if the kid doesn't rock up for two or three appointments, and then they're out. So you need a service that is actually willing to stick in there and be assertive and do more assertive follow up with that young person and their families. (Participant 7)

Other participants supported the expansion of mandated therapeutic orders (similar to TTOs) for children with violent behaviours.

... something similar to the TTO for violent offending, absolutely. It should cover it like the adult criminal justice does ... where they can get some therapy to stop this trajectory of violence ... (Participant 35)



### **Community-based support with forensic expertise**

Some participants stated that workers with forensic expertise—including Youth Justice workers and forensic mental health clinicians—could achieve more positive outcomes for children with early offending behaviours. Should the minimum age of criminal responsibility be raised, these participants believed children should receive community support from staff with forensic expertise.

... I don't think the criminal justice system should be dealing with them, but there should be an alternative ... there are people with expertise – Youth Justice workers, in the main, are very effective at what they do. And somehow to use their expertise because they're good at assessing the kids, looking at their needs, looking at risk factors, so in a way it would be good to call on that experience but without criminalising the kids.  
(Participant 36)

### *Recommended alternative service system responses for Aboriginal and/or Torres Strait Islander children*

#### **Decolonised services and investment in cultural programs**

Participants stated there is benefit in creating and sustaining existing cultural programs that successfully divert Aboriginal and/or Torres Strait Islander children with early offending behaviours away from the justice system.

... cultural camps where young kids can go with their carers, go out on these cultural camps and look at what's their role in the community. (Participant 11)

Mainstream services that are not culturally responsive were seen as inaccessible to Aboriginal and/or Torres Strait Islander children, 'so you get hardly any Aboriginal kids engage, let alone completing it' (participant 11). For this reason, participants outlined:

... needing to decolonise services if you actually want to have effective services. Because I think there is an element of that as well. It's that hesitancy, suspiciousness, hostility sometimes towards your mainstream services. (Participant 7)

#### **Individual support packages**

One participant suggested that services for Aboriginal and/or Torres Strait Islander children with early offending behaviour could be delivered through individual support packages, managed by a third party, 'preferably an ACCO', to provide culturally appropriate support to children.

... the 10- to 14-year-olds, they're given more money to youth justice than if they had given that money to individual children, so the data on the spreadsheet, they would've given each child something like \$50,000 and they would've covered every child across the state rather than funding the youth justice system to continue to make the same mistakes ... Money needs to follow the child. (Participant 41)



### Expanding Koori Court

Finally, in the absence of raising the minimum age of criminal responsibility, participants suggested that Koori Court could be expanded, making it accessible to children not pleading guilty.

... you have to enter a plea of guilty to have your matter heard ... and it's not until sentencing where elders play a role in terms of helping the judiciary understand the personal circumstances of the individual. But it doesn't make sense to me that this issue wouldn't be something that could go before the Koori Court or where Koori Court Elders couldn't be invited to sit on the matters. (Participant 41)

### Summary

This section presented analysis of consultations with 47 Victorian professionals who directly work with children charged with offending between 10 and 13 years. Professionals described high levels of early adversity and trauma, family difficulties and child protection involvement among children charged with early offending, leading to their disconnection from family, peers and community. This group of children were seen to often experience complex disability and mental health related needs, many of which went undiagnosed and unsupported. They were also said to be disconnected from education, as schools were unwilling or unable to meet their specific developmental and learning needs. This group were also noted to be still developing, including morally, socially and intellectually.

A small cohort of children charged with early offending were seen to repeatedly engage in more serious offending behaviours and were believed to require intervention. However, professionals described most offending behaviours among 10–13-year-old children as non-violent and not persistent, and as best responded to with limited intervention. Common observed contexts of children's early offending included group-based offending, often influenced by older peers from whom they sought acceptance and belonging, and residential out-of-home care, where behavioural issues were often seen to be inappropriately criminalised. Children's offending behaviours at these early ages were seen to be driven by their seeking of acceptance and belonging from peers, by victimisation to perpetration cycles of violence, alongside children's criminal exploitation by older peers and adults. For Aboriginal and/or Torres Strait Islander children, professionals considered the drivers of early offending behaviour and criminalisation to include the ongoing impacts of colonisation, racism and children's disproportionate child protection system involvement.

Professionals viewed the presumption of *doli incapax* positively in its capacity to divert 10–13-year-olds, particularly those without sufficient maturity, away from justice system responses. However, participants outlined a wide range of limitations and shortcomings to the application of the presumption. For example, they observed that the process is lengthy, understanding and application of the concept across many professions is inconsistent, and the process can have negative impacts on children. Potential negative impacts included criminalising children and not addressing underlying needs contributing to offending behaviour, and potentially giving children the impression of being impervious to consequences. Another key concern in the Victorian context was the observation that defence lawyers were often acquiring assessments with a clinical opinion supporting a *doli incapax* finding, rather than the presumption being refuted by the prosecution. While financially costly to the defence, and at odds with the *doli incapax* presumption, advantages of this approach included the defence being able to choose the clinician, any assessment report not being automatically provided to the court, and the time taken to resolve matters potentially being reduced.

While only one participant voiced opposition to raising the minimum age of criminal responsibility, other participants outlined arguments in favour of such reforms. Reasons for asserting that jurisdictions should raise the minimum age of criminal responsibility included the inappropriateness of holding children criminally responsible at this developmental stage, alongside the risk of significant criminogenic, traumatising and stigmatising impacts of justice system involvement on younger children. At the same time, participants emphasised the importance of children with early offending receiving culturally appropriate welfare and clinical supports. Some stated that these services should be provided voluntarily in the community. Others were open to court-mandated child engagement with therapeutic supports, particularly for more serious offending, but absent the element of criminal responsibility. While participants overall did not oppose raising the minimum age of criminal responsibility, potential concerns from the perspective of victims, their families and the broader community were noted. Some also suggested that justice responses are currently the only mechanism by which to respond to some younger children's concerning or harmful behaviour and that, in the absence of other options, police need discretionary powers for responding to particularly dangerous behaviour.

Key deficiencies in current service responses to children with early offending behaviours were identified, particularly across child protection systems. These included child protection practitioners withdrawing support in deference to youth justice responses, youth justice workers criminalising behaviour in residential care (compounding the broader criminogenic nature of these placements), and schools excluding children with offending behaviours and complex support needs. Further limitations in overall system responses to this group of children were identified, including inconsistency between services in the conceptualisation of and ideal responses to early offending behaviours, and the limited availability of services tailored to children with early offending behaviours. Professionals also outlined additional limitations in service system responses for Aboriginal and/or Torres Strait Islander children and migrant children, including a lack of culturally responsive services (particularly early intervention services) alongside systemic racism, most often described in terms of perceived differential policing.

Key strengths of current service responses included police and court-based early intervention and diversion programs, and culturally responsive services for Aboriginal and/or Torres Strait Islander children, particularly those provided by ACCOs. Participants highlighted collaborative response models such as the pilot Youth Crime Prevention and Early Intervention Project, involving Victoria Police, Victoria Legal Aid and the Youth Support and Advocacy Service, as promising approaches. Service reforms recommended to better support children with early offending behaviours were largely focused on justice reinvestment, coupled with ensuring a trauma-informed approach which centres child wellbeing. Other specific service reforms included having a secure therapeutic setting as an alternative to custody, investing in therapeutic services already carrying out work with younger children with early offending behaviours, and investing in multidisciplinary early intervention programs focusing on child and family welfare, educational engagement and community-based cultural support.

Professionals outlined potential service provision models should the minimum age of criminal responsibility be raised. These included a diversionary multidisciplinary case management service (independent of the youth justice system), drawing on intensive outreach and family support. For children requiring more intensive therapeutic intervention, the expansion of court-mandated therapeutic treatment orders (like therapeutic treatment orders, which are currently restricted to children with sexually abusive behaviours) was seen as an option. This therapy could potentially be delivered through a community-based service with forensic expertise.

# Discussion

This study aimed to generate new knowledge about children aged 10 to 13 years who are charged with offending. While undertaken in Victoria, its findings are nationally relevant, as *doli incapax* provisions are common across Australian jurisdictions. To address its aims, the study drew on national criminal justice statistics, data from Victoria Police and the Children’s Court concerning a statewide sample of 10–13-year-old children with alleged offending in 2017, an analysis of 80 *doli incapax* assessment reports completed by clinicians at the Victorian Children’s Court Clinic, and consultations with 47 criminal justice, legal, judicial, child and family welfare, and clinical professionals. The research findings present evidence about police charges and court outcomes for children charged with early offending, how *doli incapax* provisions are applied, children’s subsequent criminal justice involvement, current service responses for children with early offending, and professionals’ suggestions for service reform. Importantly, the study findings were remarkably consistent across all four data sources. Given the current national debates concerning the minimum age of criminal responsibility and *doli incapax* provisions, such evidence is critical for informing jurisdictions’ decisions about legislative, criminal justice and social services directions in each of these areas. This discussion summarises the study findings, limitations and implications.

## Children’s characteristics and support needs

Despite some jurisdictional variations, contemporary national data indicate that children aged 10 to 13 years comprise around one-fifth of Australian children and young people proceeded against by police, and seven percent of those supervised by youth justice. Compared with children 14 years and older who experience police and justice system contact, those aged 10 to 13 years are more frequently Aboriginal and/or Torres Strait Islander children and girls. Most of these children (56–63%) are aged 13 years at the time of police charges. Among children aged 10 to 13 years proceeded against by police, both boys and Aboriginal and/or Torres Strait Islander children are most heavily over-represented among 10-year-olds, relative to 11–13-year-olds.

Professionals described high levels of early adversity and trauma, family difficulties and child protection involvement among children charged with early offending—observations that were also reflected in the secondary data analysed. Half of 10–13-year-old children with police contact in relation to alleged offending had a prior intervention order, which in nearly all cases initially related to being the victim-survivor of family violence. Among children charged with early offending, the youngest (those aged 10–11 years) were the most likely to have experienced intervention orders solely as victim-survivors. Likewise, three-quarters of children who underwent *doli incapax* assessments at the statewide Children’s Court Clinic had child protection involvement (75.7%), and 42.6 percent were in out-of-home care at the time of the assessment.

The study findings also highlight considerable educational exclusion or disconnection among this group, with only half of 10–13-year-olds undergoing *doli incapax* assessments being engaged in school. Professionals also stated that this group had considerable mental health and disability-related needs, including suspected or undiagnosed disability and complex (comorbid) diagnoses. Likewise, most children undergoing *doli incapax* assessments (60.0%) were noted to have one or more diagnosed psychiatric disorders, 11.3 percent had a diagnosed intellectual disability or acquired brain injury, and 28.7 percent had multiple psychiatric and disability-related diagnoses. A significant minority of children (19–26%) also had other suspected psychiatric or disability-related diagnoses.

Despite 62.5 percent of children referred for *doli incapax* assessments having a psychiatric or disability-related diagnosis, and over one-quarter having suspected or provisional diagnoses, only 11.3 percent had evidence of engagement with clinical or therapeutic services. While further research is required to understand this apparent unmet need, it may reflect the challenges clinicians experience in effectively engaging some justice-involved children and their caregivers in recommended services, where issues such as low treatment motivation, parent–child conflict, housing instability and lack of caregiver involvement can represent key barriers (Kapoor, Peterson-Badali & Skilling 2018; Papalia et al. 2022). However, the capacity to work flexibly to address these barriers may in turn reflect the characteristics, skills or approaches of workers and clinicians in these programs and services, factors that can be modified through training and supervision (Papalia et al. 2022; Smallbone, Crissman & Rayment-McHugh 2009). Finally, the comparatively low level of clinical or therapeutic service access may also reflect systemic issues, including the lack of coordinated clinical services available for this age group, service exclusion due to the child’s assessed level of ‘risk’ or behavioural presentation, or the ‘handballing’ of children with complex needs related to mental health, complex trauma and neurodisability between clinical service systems (Baidawi & Sheehan 2019).

At the same time, these characteristics are unsurprising and are consistent with other Australian evidence that children who acquire police charges before the age of 14 years disproportionately experience child protection involvement, are Aboriginal and/or Torres Strait Islander children, and live with complex support needs (AIHW 2013; Baidawi 2020; Baidawi & Sheehan 2019; Papalia et al. 2019). Similarly, the proportion of children who were not enrolled in school or who had evidence of school expulsion is concerning and reflects broader observations around school exclusion of children with complex support needs related to disability (Armytage & Ogloff 2017; Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 2019). Together, these findings reflect the exclusion and marginalisation of children from prosocial and therapeutic settings and relationships and reinforce the relationship between such exclusion and children's criminalisation.

### **Alleged offending, Children's Court outcomes and criminal justice trajectories**

The findings demonstrate that most alleged and proven offending among 10–13-year-olds relates to property offences, while around one-third relates to offences against the person. There are also important variations among younger children charged with offending. A consistent finding across the study is that the alleged and proven offending of 10-year-olds is less likely to be violent in nature compared to that of 12- and 13-year-olds, and more often relates to property charges such as property damage or burglary/unlawful entry with intent.

Analysis of *doli incapax* assessment reports indicated that children often had charges laid in relation to their behaviour in public and commercial spaces, but nearly one in five children had charges laid in a residential care setting. Additionally, in two-thirds of *doli incapax* assessment reports, children had co-offenders. These observations accord with what professionals described as the drivers of children's offending behaviour, including seeking acceptance and belonging, peer influence, criminal exploitation by adults or older children, and cycles of violence reflecting their own histories of victimisation.

Victorian statewide data indicate that most younger children with alleged offending do not come before the Children's Court (80.2%). Overall, 55.3 percent of 10–13-year-olds received police cautions, a further 24.8 percent had police contact other than a caution (ie no court involvement), and 17.8 percent had index matters which proceeded to the Children's Court (nearly half of which were struck out or dismissed). Nine percent of children received a court diversion, while 2.0 percent received a sentence involving statutory youth justice supervision in the community or a sentence of detention. Although consistent with a youth diversionary approach, this means that the vast majority of 10–13-year-olds encountering police in relation to alleged offending do not receive any formal intervention. While such a response may be appropriate for many of this cohort, feedback from professionals as well as findings from the analysis of *doli incapax* reports suggests that the neglect of key social, developmental, health and mental health needs of some children is likely to contribute to their reinvolvement in the justice system.

In relation to their trajectories, half of 10–13-year-old children (48.8%) had no further alleged offending in the two years following their index matter, and 68.0 percent had no violent alleged offending in the two years following their index matter. That said, a significant minority of children (around 20%) had more than 10 police incidents (charges occurring on the same day) and more than two police incidents involving offences against the person in the subsequent two years. The findings align with the observations of professionals, who asserted that most offending behaviour among 10–13-year-olds is neither violent nor enduring, while a smaller proportion of younger children in contact with police have more violent behaviour, and repeated contact with the police and justice system.

### The *doli incapax* process

In undertaking *doli incapax* assessments, clinicians most commonly administered testing measures that assessed children’s cognitive and sociomoral development. Based on current or recent assessments of cognitive development, 50.0 percent of children fell in the borderline to extremely low range, and 46.8 percent were assessed as either average or low average in estimated IQ. Clinicians provided evidence to support the *doli incapax* presumption being upheld or partially upheld in approximately 50 percent of cases. The child’s understanding of the legal consequences of behaviours (or lack of such understanding) was most common among clinicians’ considerations, alongside the child’s level of cognitive development and sociomoral reasoning. The child’s incapacity to regulate emotion and behaviour due to underlying mental health conditions, lack of awareness of the illegality of certain acts, and behaviour following the charges were among the other factors underpinning clinicians’ recommendations.

Importantly, two areas of discrepancy were identified—namely, the way in which the impact of a child’s experience of developmental trauma and prior justice system involvement should inform the clinician’s opinion regarding *doli incapax*. The existence of such discrepancy reflects the challenge of translating the legal concept of *doli incapax* into a clinical one, and leads to a conclusion that further guidance is required for clinicians to encourage a consistent national approach to assessment.



Professionals were of the view that current *doli incapax* processes were positive in that they supported the diversion of younger children from the justice system. However, in accord with previous research (Fitz-Gibbon & O'Brien 2019), the overwhelming consensus was that deficiencies in the application of the *doli incapax* presumption were considerable. The described deficiencies included:

- the length of the process;
- the inability to address children's underlying needs;
- the criminalising nature of the process;
- inconsistency in the understanding, assessment and application of the principle within and between professions;
- the resources required to assess and apply the principle, and that these costs are often incorrectly borne by the defence; and
- the lack of understanding among children engaged in the *doli incapax* process.

## Service system responses and suggested reforms

Key deficiencies in current service system responses to younger children charged with early offending were identified across child protection and education systems. Further limitations in these responses include inconsistency between services in the conceptualisation of and ideal responses to early offending behaviours, and limited availability of services specifically targeting children with early offending behaviour. Professionals outlined specific limitations of service system responses for Aboriginal and/or Torres Strait Islander children and migrant children, including a lack of culturally responsive services, particularly early intervention services, and systemic racism, most often described in terms of perceived differential policing. Further quantitative analyses, beyond the scope of this research, would be helpful in determining whether systemic racism continues to influence younger Aboriginal and/or Torres Strait Islander children's justice system involvement, despite the range of recent reforms implemented in jurisdictions such as Victoria.

At the same time, key strengths of current service responses included police and court-based early intervention and diversion programs, and culturally responsive services (particularly those provided by ACCOs) for Aboriginal and/or Torres Strait Islander children. Consistent with the existing literature (eg Luebbers et al. 2020), participants highlighted collaborative response models such as the pilot Youth Crime Prevention and Early Intervention Project involving Victoria Police, Victoria Legal Aid and the Youth Support and Advocacy Service as promising approaches.



## Limitations

While this study has generated useful and novel findings regarding younger children charged with alleged offending, the Victoria Police and Children's Court data analysed related to the period 2017 to 2019. As such, these data may not represent current circumstances of, and responses to, this cohort in Victoria. Notably, the examined national data indicate there is likely to have been a decrease in the proportion of 10–13-year-olds with police contact in Victoria who were Aboriginal and Torres Strait Islander children since this period (AIHW 2023). In addition, the voices of young people charged with offending and their families were not represented in the findings. Additionally, much of the data analysed were generated in the Victorian context, and therefore may not generalise to other jurisdictions due to variations in alleged offending or police and court processes. Still, the nature of the alleged offending among 10–13-year-old Victorian children mirrored the available national data, suggesting there are similarities across jurisdictions.

Regarding the application of *doli incapax*, we were unable to generate a feasible approach to identify matters where Victoria Police had withdrawn charges due to the application of this principle. While these data exist, they are not accessible to researchers in their current format. Conversely, we were able to work with the Children's Court of Victoria to identify matters where children in the study court sample were found *doli incapax*. These matters led to a critical recommendation of the study, reiterated in the *Implications* section below, that police and children's courts in Australian jurisdictions should clearly record (including in electronic form) and retain in a manner accessible to government and others (eg researchers) data concerning the application of the principle of *doli incapax*. Such evidence is critical given the intended centrality of this principle for protecting the legal rights of younger children alleged to have offended, and may require additional funding of agencies such as police. Without such data it is impossible to determine whether the principle is being applied, for whom, its impact, and trends associated with these processes.

Regarding the analysis of *doli incapax* assessment reports, it is unclear how representative the sample was of *doli incapax* assessments in the state of Victoria, as many of these assessments are privately funded (including by the child's criminal defence, as outlined in the focus groups). Given that the Victorian Children's Court Clinic has a practice framework for *doli incapax* assessments, it is likely that the approach to assessment across the study sample is more consistent than would be observed across the state or country.

## Implications

### **The alleged and proven offending of 10–13-year-olds is predominantly non-violent and time-limited, and this is particularly the case for younger children in this cohort.**

The study found that most alleged offending of 10–13-year-olds is non-violent, and that the alleged offending of 10–12-year-olds is less violent, voluminous and persistent in nature than that of 13-year-olds. At the same time, a minority of 10–13-year-old children appear to engage in more serious or persistent offending behaviour. This is consistent with other Australian research suggesting that a small proportion of children (less than 2% of those charged with offences), accounted for a quarter of all youth offending over an eight-year period (Sutherland & Millsteed 2016). Such findings lend support to arguments for raising the minimum age of criminal responsibility, given that most of the alleged offending of 10–13-year-olds is non-violent and non-persistent in nature. At the same time, the findings suggest that consideration of alternative responses is required, particularly for the minority of 12- and 13-year-old children who engage in more serious or persistent offending behaviours.

### **There is significant scope to improve early therapeutic and social support interventions for children aged 10 to 13 years who have alleged offending.**

Current responses to children with early offending result in substantial missed opportunities to better support this group, while continuing to criminalise such children—directly and indirectly—with little therapeutic or developmental benefit. Victorian statewide data indicated that 98 percent of 10–13-year-olds charged with offending did not receive an outcome involving youth justice supervision in the community or in custody. These outcomes reflect a system that is rightfully focused on diverting younger children from formal justice processes and are consistent with findings in other Australian jurisdictions (Papalia et al. 2019). The findings also suggest that justice responses (as opposed to the youth justice statutory system) are not currently being used as a last resort in responding to this group of children. Equally, these findings suggest that much can be done to better support this group.

Examination of professionals' recommendations for other services or approaches to better support children with early offending behaviours can inform the range of supports and services that are required in the event of raising the age of criminal responsibility. These recommendations should be explored even in the absence of such reforms. Suggestions typically centred on mental health and disability assessment and support, educational engagement, referral to diversion programs, supporting families and parents, and development of the child's network of prosocial and culturally supportive activities and relationships. Clinical recommendations arising in *doli incapax* reports were often about addressing needs related to children's offending (eg mental health and emotion regulation, educational engagement, family relations, problem solving) but rarely recommended specific interventions or services directly targeting behaviours of concern related to the alleged offending (eg aggression, attitudes to violence, negative peer pressure, risk-taking). Undoubtedly, this would have been influenced by the limited availability of such specialist service options (Armytage & Ogloff 2017). Victoria does not currently have a fully functioning community forensic mental health service system that delivers case management and treatment for children with complex, overlapping needs (Royal Commission into Victoria's Mental Health System 2021).

Service reforms recommended to better support children with early offending behaviours should focus on justice reinvestment and trauma-informed approaches that centre child wellbeing. Other suggested service reforms include a secure therapeutic setting as an alternative to custody, investing in therapeutic services already working with younger children with early offending behaviours, and multidisciplinary early intervention programs focusing on child welfare, educational engagement, and community-based cultural support. Suggested service provision models should the minimum age of criminal responsibility be raised include a diversionary multidisciplinary case management service (independent of the youth justice system), providing intensive outreach and family support. For children seen to require more intensive therapeutic intervention, the expansion of court-mandated therapeutic treatment orders (similar to the therapeutic treatment orders which are currently restricted to children with sexually abusive behaviours) was seen as a suitable option. This could potentially be delivered through a community-based service with forensic expertise.

**The presumption of *doli incapax*, where retained, should be applied, interpreted and recorded in a more consistent and rigorous manner.**

The study findings make clear the need for a more consistent approach to the legal and clinical assessment of *doli incapax*, clearer guidelines for police and judicial officers in applying and interpreting this principle, improved recording of the principle's application (particularly by police), and better use of *doli incapax* reports to support children. Such an approach is critical given the intended centrality of the principle of *doli incapax* in protecting the legal rights of younger children alleged to have offended.

First, it is recommended that national standards be produced to guide clinicians conducting *doli incapax* assessments. Second, it should be reiterated that the presumption of *doli incapax* is for the prosecution to rebut. Third, it is recommended that police and children's courts in Australian jurisdictions clearly record (including in electronic form) and retain in a manner accessible to government and others (eg researchers) data concerning the application of the presumption of *doli incapax*. Without such data it is impossible to determine whether the principle is being applied, for whom, its impact, and trends associated with these processes.

Finally, clinicians also often made useful recommendations for better supporting the children assessed; however, it is unclear whether and how such recommendations are used by the child, the child's carers or their care team where applicable. This perhaps represents an unrealised opportunity for early intervention to be provided to this group of children, with a view to avoiding further justice system involvement and supporting children's healthy development more broadly. The study findings therefore give rise to a recommendation that, where this is not already standard practice such as in Victoria, the Children's Court consider adopting a routine practice (with judicial discretion) of releasing *doli incapax* assessment reports to the defence. Where consent is given, the reports could also be shared with others caring for, supporting or treating the child. It is noted that in Victoria s 562 of the *Children, Youth and Families Act 2005* provides for the release of Children's Court Clinic reports to the child, the parent and other persons nominated, including 'any other person specified by the court'. This could include a treating practitioner, for example.

The study findings and recommendations regarding the application of *doli incapax* make clear that, while helpful, such provisions as they currently operate are not a reliable legal safeguard for children with alleged offending. The existence of *doli incapax* provisions cannot therefore be tendered as a robust argument against the need to raise the minimum age of criminal responsibility. Even if these provisions were enhanced, or made clearer and more consistent, the proportion of 10-, 11- and 12-year-olds before the court (16–33%) and under clinical assessment (50%) for whom there was evidence supporting the presumption of *doli incapax* being upheld suggests that too many younger children continue to be inappropriately drawn into criminal justice system processes.

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# Appendix: Original research questions

1. How does early offending vary across Australian states and territories (eg number and rate of children charged with offending, gender and offence type breakdowns)?
2. What proportion of Victorian children aged 10 to 13 years at the time of their alleged offending undergo formal *doli incapax* assessments?
3. What are the observed demographic and social characteristics of children aged 10 to 13 at the time of alleged offending?
4. What are the court outcomes of children aged 10 to 13 years before the court for offending matters (ie what proportion are found *doli incapax*, diverted or sentenced)?
5. What proportion of children found to be *doli incapax* subsequently return before the court on further offending matters in the subsequent three years?
6. What differences (eg in offence types and sentencing trajectories) are observed between children found *doli incapax*, and other children charged with offences between the ages of 10 and 13 years?
7. What factors influence decisions about *doli incapax*?
8. What do key stakeholders (magistrates, police prosecutors, lawyers and others) describe as strengths and limitations of current criminal justice processes (including *doli incapax* provisions) in reducing the criminalisation and criminal justice involvement of younger children?

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