

Review of the operation of doli incapax in NSW for children under 14

Independent review led by the Honourable
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August 2025

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Executive summary

The common law presumption of *doli incapax*

At common law, it is presumed that a child under the age of 14 years lacks the capacity to be criminally responsible for their acts. Such a child is said to be *doli incapax*, or in other words, *incapable of wrong*. In NSW, the operation of the presumption is governed largely by the decision of the High Court of Australia in *RP v The Queen* (2016) 259 CLR 641 (*RA*), in which the Court concluded (amongst other things) that in order for the presumption to be rebutted (the onus of doing so being on the prosecution) it must be established that the child knew that their conduct was seriously wrong in a moral sense.

Recent statistical data supports the conclusion that in the vast majority of cases, the prosecution is unable to rebut the presumption. The inevitable consequence of that failure is that the charge(s) against the child are withdrawn or dismissed. As a result, the child will not have the benefit of rehabilitation efforts or supervision. Repeat offending, within a short period of the finalisation of the charge(s), is often the result. It is generally recognised that these outcomes are largely unsatisfactory, both for the child, as well as in terms of the broader safety of the community.

The Review

In May 2025, the Attorney General for NSW, the Honourable Michael Daley MP, appointed us to conduct a review of the presumption of *doli incapax* and report our findings to the Attorney General in the second half of 2025. The Terms of Reference asked that we recommend a framework to enable the enactment of the presumption in NSW legislation, and to consider a number of other matters including, but not limited to:

- The form that the legislation should take, noting the different approaches which have been taken across Australian jurisdictions.
- How the presumption is currently operating.
- Any improvements in relation to the process by which the presumption is dealt with in criminal proceedings.
- The interaction between *doli incapax*, the *Young Offenders Act 1997 (YOA)*, and the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*.
- The impact of the operation of the presumption on available responses to address underlying causes of behaviour by children aged under 14, including appropriate options for intervention.
- Any other matters considered relevant, including those related to community safety and the interests of children.

In our engagement with a large number of stakeholders, the need for protection of a child's legal rights, and the importance of the presumption in protecting those rights, were rightly emphasised. At the same time, we heard powerful accounts of the real fears felt by members of the public as a consequence of criminal activity by children, and the emotional and psychological impacts on victims, and on the broader community.

Youth crime is a justifiable concern for many communities in NSW. That said, statistical data indicates that most police-initiated legal proceedings against young people are directed towards 14–17 year olds, rather than 10–13 year olds. That supports the consistent message we received from stakeholders that it is only a small proportion of children in the 10–13 year age group who engage in serious or persistent offending. It is *this* offending which was the focus of our review. It is therefore

important not to conflate that focus with broader concerns stemming from youth crime which involves older children.

Our conclusions

The operation of the presumption of *doli incapax*

We acknowledge that the current test for determining whether the presumption has been rebutted imposes a high threshold. It requires proof that the child knew that their conduct was seriously, morally wrong. However, proving any person's state of mind for the purposes of establishing a criminal offence is likely to be challenging, and in our view, this difficulty does not justify introducing legislation which imposes a different standard for 10-13 year olds. On the contrary, such a change would risk creating an inconsistency within the broader framework of criminal law.

The test in its current form is generally consistent with criminal law principles applicable to the mental element of any offence. It also provides an important safeguard against the possibility of inappropriate findings of criminal responsibility when a child lacks that knowledge, and recognises the considerable vulnerability of children aged 10–13 years and the significant impact upon such children of a criminal conviction.

Quite apart from these considerations, there appears to be a degree of misunderstanding on the part of some participants within the criminal justice system as to the application of aspects of the test, and the decision in *RP*. We have concluded that these challenges are best addressed by the introduction of legislation which reflects the current common law position as expressed in *RP*. That, in our view, is a more appropriate response than one which adopts a test which departs from the common law.

At the same time, we consider that any legislation should also provide assistance and guidance to those who are engaged in the criminal justice system by prescribing a non-exhaustive list of considerations which can be taken into account in determining whether the presumption has been rebutted. Such a step will, in our view, enhance the consistent application of the test, promote a better understanding of its operation, and clarify the misunderstandings which presently exist. Importantly, we consider that the prosecution should be permitted to rely upon, and the court should be permitted to take into account, any inference(s) which are open to be drawn from the circumstances of the offending when considering whether the presumption has been rebutted.

Our review highlighted to us that there is a need for additional training to address a number of issues with the current operation of *doli incapax* in NSW, including consideration of the presumption at late stages of the justice process and inconsistent understanding or application among criminal justice system participants. We consider that any statutory guidance on *doli incapax* should be complemented by enhanced training for police, given their role as the first point of contact in the criminal justice system and the significant influence their decisions have on outcomes for children.

Training should cover the nature of the presumption and the evidentiary requirements for rebutting the presumption. Training should also address the need for the issue of *doli incapax* to be considered at the time of determining whether a charge is to be laid. This responds to concerns raised by a range of stakeholders that the issue is often considered at a late stage of the criminal justice process, only to find that the prosecution concedes that the presumption cannot be rebutted.

This can have the effect of exposing children to unnecessary and potentially harmful contact with the criminal justice system, the impacts of which can be wide-ranging. Significantly, these impacts can include the child becoming entrenched in the criminal justice system, which can increase the likelihood of reoffending and ultimately undermine community safety.

Related considerations

The operation of the presumption aside, we received feedback from a significant number of stakeholders concerning the benefits of diverting children away from the criminal justice system,

firstly by enhancing existing diversionary schemes, and secondly by implementing new therapeutic intervention measures. Views were consistently expressed that approaches of that kind would be better suited to addressing the individual needs of the child, and would more likely result in a better outcome in terms of overall community safety.

That feedback runs contrary to the proposition that simply making the *doli incapax* presumption easier to rebut, and thereby increasing the likelihood of conviction for 10–13 year olds, is the key to achieving better outcomes for children and the community. Instead, such feedback shifts focus to a different, and more complex, issue: namely how to ensure that children receive timely and effective responses outside of the criminal justice system, which meet their needs without compromising community safety.

At present, criminal justice processes (such as charges, bail conditions or short-term remand) are sometimes utilised as a temporary circuit breaker or de-escalation tool where there are community safety concerns or alternative options are limited. While we understand why this approach may be taken, using such processes in that way is unproductive for a variety of reasons, not the least of which is that they fail to provide a meaningful, long-term solution for the child and the community.

Instead of exposing a child to the criminal justice process, we consider that diverting them from that process, and engaging them in diversion processes or therapeutic interventions, could provide a more constructive and cost-effective approach. At the same time, we acknowledge that any diversionary process involves balancing a number of factors, including:

- the need for the community to have confidence that police have effective tools available to respond to offending behaviour
- the need to ensure that statutory diversion pathways can be used more effectively for 10–13 year olds where appropriate
- recognising that diversion from the criminal justice system can be an effective and efficient response to less serious offending by children, and
- recognising that children who engage in more serious or persistent offending behaviour often have complex needs that require more intensive support.

In our view, engaging the child in targeted therapeutic interventions may be more effective in addressing the root causes of their behaviour, such as unmet support or health needs. We have made recommendations for new therapeutic intervention measures to support this approach.

Our recommendations

We have made a series of recommendations to the NSW Government. Those recommendations include, but are not limited to:

1. Providing additional police training and guidance on *doli incapax* (see **Recommendation 1** and **Chapter 3**).
2. Enacting legislation which, amongst other things:
 - a. states the principle of *doli incapax* in terms consistent with those formulated in *RP* (see **Recommendation 2** and **Chapter 4**), and
 - b. provides guidance to the courts as to circumstances which may be taken into account in determining whether the presumption has been rebutted (see **Recommendation 2** and **Chapter 4**).
3. Amending the YOA to address existing barriers to 10–13 year olds accessing diversion processes under that Act (see **Recommendation 4** and **Chapter 5**).
4. Introducing a voluntary alternative intervention pathway for children who are in contact with, or who are at risk of contact with, the criminal justice system, which can receive referrals, conduct

assessments, and develop support plans for children with complex needs (see **Recommendation 6** and **Chapter 6**).

5. Consideration of introducing court orders to mandate engagement by a child in therapeutic treatment in appropriate circumstances (see **Recommendation 7** and **Chapter 6**).

If adopted, the successful implementation of such recommendations will depend on behavioural, operational and legal changes across the criminal justice system. Further effort will also be needed within agencies and among justice practitioners to ensure a shared commitment to, and active engagement with, diversion and intervention measures.

The law is stated as at August 2025.

Recommendations

Recommendation 1: Additional police training and guidance on *doli incapax*

There should be additional training and operational guidance for police in respect of the operation of the presumption of *doli incapax*, including in relation to:

- (a) the nature of the presumption and the evidentiary requirements for rebutting the presumption
- (b) the need to consider the presumption, both at the point of charge and in the course of the preparation of the brief of evidence, and
- (c) potential evidentiary issues that may be encountered both before and at the time of any hearing.

Recommendation 2: Legislating the common law test for rebutting *doli incapax*

There should be a new legislative framework for enacting the presumption of *doli incapax* in NSW which should:

- (1) Confirm the presumption that, unless rebutted, a child over the age of 10 and under the age of 14 years old cannot commit an offence.
- (2) Confirm, as articulated in *RP v The Queen* (2016) 259 CLR 641, that the prosecution must rebut the presumption and prove, beyond reasonable doubt, that the child knew at the time of the relevant act that their conduct was seriously wrong in a moral sense.
- (3) Provide guidance for determining whether the presumption has been rebutted, by:
 - (a) Providing a non-exhaustive list of statutory considerations for determining whether the presumption has been rebutted.
 - (b) Expressly including that the circumstances surrounding the commission of the offence with which the child is charged shall be a relevant consideration.

Recommendation 3: Statutory review mechanism

The new legislative framework for enacting *doli incapax* in NSW should include a requirement to review the operation of the legislation within 3–5 years of commencement.

Recommendation 4: Addressing constraints on diversion under the *Young Offenders Act 1997*

The *Young Offenders Act 1997* should be amended to:

- (1) Change the threshold requirement for 10–13 year olds to be eligible for a caution or Youth Justice Conference, such that the child need not ‘admit’ the offence, but instead may ‘not deny’ the offence.
- (2) Introduce a three-year expiry period for cautions received by 10–13 year olds.
- (3) Expand the offences for which 10–13 year olds can access diversion under the Act.
- (4) Clarify that evidence relating to diversion, including any non-denial, cannot be used to rebut the presumption of *doli incapax*.

Recommendation 5: Limiting impact of previous orders under section 14 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*

The NSW Government should consider ways to ensure that any previous order made under section 14 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* before a person turns 14 years of age does not limit the availability of section 14 orders once the person is over 14 years of age.

Recommendation 6: Voluntary alternative intervention pathway for at-risk children aged 10–13 years

The NSW Government should consider introducing, by any legislation necessary, a voluntary alternative intervention pathway for 10–13 year olds who are in contact, or who are at risk of contact, with the criminal justice system which:

- (1) Operates independently of criminal justice proceedings or outcomes.
- (2) Includes the following features:
 - (a) A scheme that can receive referrals, conduct assessments and develop support plans for children who have complex needs, for example through a multidisciplinary body or panel.
 - (b) A case management function to enable implementation of the support plan and coordinate service delivery.
 - (c) Restrictions on the admissibility in criminal proceedings against a child of statements made by the child while engaging in this pathway.

Recommendation 7: Mandatory court orders for at-risk 10–13 year olds to engage in therapeutic treatment

- (1) The NSW Government should explore introducing mandatory court orders that can direct engagement by a child aged 10–13 years in therapeutic treatment in appropriate circumstances.
- (2) The new treatment order scheme should include:
 - (a) A high threshold for the making of such orders, such as where: other measures have been considered or attempted but were unsuccessful or inappropriate; there is a significant risk of harm to the child or another person; and the order would be in the child's best interests.
 - (b) A requirement for multidisciplinary advice to be provided about whether a treatment order is needed in a particular case.
 - (c) Restrictions on the admissibility in criminal proceedings of statements made by the child while participating in treatment pursuant to an order.

1 Background and context

At a glance

While our Review was, by virtue of the Terms of Reference, focused specifically on the operation of *doli incapax* for children aged 10–13 years, it is situated within a wider legal, social and policy context. We engaged with a range of stakeholders and considered relevant prior work to ensure we understood the broader issues.

The contextual factors underpinning our Review have also guided the development of our recommendations, which are discussed further in later Chapters.

1.1 Introduction

This Chapter explores the context underpinning our Review, including significant court decisions, relevant NSW Government commitments, and recent initiatives and reviews relating to youth crime. It also provides an overview of our Terms of Reference and the approach taken to stakeholder engagement.

1.2 The presumption of *doli incapax*

In NSW, the law presumes that a child aged above 10 and under 14 years lacks the capacity to be criminally responsible for their acts. Such a child is said to be *doli incapax*.¹ Put simply, the term *doli incapax* means ‘incapacity for crime’. It is a common law presumption in the same way that innocence is a common law presumption.²

The presumption is a rebuttable one. A court can find a child aged 10–13 years criminally responsible, and impose a criminal penalty, if the prosecution can prove beyond reasonable doubt that the child understood their actions were seriously, morally wrong.³ The rationale for the presumption is discussed in **Chapter 2** and its current legal operation is outlined in **Chapter 3**.

1.3 This Review

In May 2025 we were appointed by the Attorney General, the Honourable Michael Daley, to review and report on the operation of, and legislative options for, the presumption of *doli incapax* in NSW, and to report to the Attorney General on our findings in the second half of 2025.

The Terms of Reference asked that we recommend a framework to enable the enactment of the presumption in NSW legislation, and consider matters including, but not limited to:

- The form that the legislation should take, noting different approaches across Australian jurisdictions.
- How the presumption is currently operating, including:
 - the nature and extent of the evidentiary burden on the prosecution, and
 - the evidence available to the court, including what improvements could be made to improve the available evidence.

¹ *RP v The Queen* (2016) 259 CLR 641, [4] (the plurality).

² *Ibid*, [38] (Gageler J).

³ *Ibid*, [8]–[9] (the plurality).

- Any improvements in relation to the process by which the presumption is dealt with in criminal proceedings (e.g. if it should be considered earlier in proceedings or dealt with in a separate hearing).
- The interaction between *doli incapax*, the *Young Offenders Act 1997 (YOA)*, and the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*.
- The impact of the operation of the presumption on available responses to address underlying causes of behaviour by children aged under 14, including appropriate options for intervention.
- Any other matters considered relevant, including those related to community safety and the interests of children.

The Terms of Reference required us to consult the following stakeholders, in addition to any further stakeholders considered appropriate:

- the NSW Police Force
- the Office of the Director of Public Prosecutions (ODPP)
- legal practitioners and experts with expertise in these matters, including the Law Society of NSW, the NSW Bar Association, Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT)
- victims' groups
- local and regional communities
- relevant NSW Government agencies
- the NSW Children's Court, and
- Aboriginal-led organisations.

1.4 Context underpinning this Review

1.4.1 The minimum age of criminal responsibility in NSW

The minimum age of criminal responsibility in NSW is 10 years. Section 5 of the *Children (Criminal Proceedings) Act 1987* provides that it shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence. This means that a child under 10 years cannot be charged with, prosecuted for, or found guilty of, an offence.

The minimum age of criminal responsibility was considered at a national level by the Age of Criminal Responsibility Working Group (**Working Group**), established by the Standing Council of Attorneys-General (**SCAG**) between 2020 and 2023. At the SCAG meeting on 1 December 2023, participants agreed⁴ to publicly release a report prepared by the Working Group, which outlines principles for jurisdictions to consider in any reform to the minimum age of criminal responsibility in each jurisdiction, noting that implementation of detailed settings must be jurisdiction-specific.⁵ NSW contributed to the Working Group.

The minimum age of criminal responsibility remains 10 years in all Australian jurisdictions, except:

- Victoria, which is committed to raising the age to 12 (by legislation to commence later this year),⁶ and

⁴ Standing Council of Attorneys-General, *Communiqué* (1 December 2023) 1.

⁵ Standing Council of Attorneys-General, *Age of Criminal Responsibility Working Group Report* (September 2023).

⁶ *Youth Justice Act 2024* (Vic) s 10. The *Youth Justice Act 2024* (Vic) pt 1.2 ch 1 is to commence on a date fixed by proclamation or, if a date is not so fixed, on 30 September 2025: at s 2.

- the Australian Capital Territory, where the minimum age of criminal responsibility is now 14 (as of 1 July 2025), with exceptions for 12 and 13 year olds who commit certain serious and intentionally violent offences, and who know that their conduct is wrong.⁷

1.4.2 The High Court decision of *RP v The Queen*

In *RP v The Queen* (*RP*),⁸ a decision which is canvassed in detail in **Chapter 3**, the High Court restated the principles of the presumption.⁹ The plurality concluded that in order to rebut *doli incapax* under common law, the prosecution must prove, beyond a reasonable doubt, that the child understood that what they were doing was ‘seriously wrong in a moral sense’, as distinct from it being ‘rude’ or ‘naughty’.¹⁰ It was found that the prosecution in that case had not adduced any evidence, apart from the circumstances of the alleged offences, to establish that despite the appellant’s intellectual deficits, his development was such that he understood the moral wrongfulness of his acts.¹¹

1.4.3 The BOCSAR study on the impact of *RP*

NSW Bureau of Crime Statistics and Research (**BOCSAR**) research published in May 2025 indicates that, between 2016 and 2023, the number of 10–13 year olds found guilty of an offence in the Children’s Court of NSW ‘fell markedly’.¹² BOCSAR concluded that by stipulating what is required to rebut *doli incapax*, the *RP* decision likely reduced the number of 10–13 year olds found guilty of a criminal offence.¹³

BOCSAR found that *RP* does not appear to have impacted the volume of court appearances involving 10–13 year olds.¹⁴ However, among 10–13 year olds that police proceeded against to court, ‘there has been a dramatic decline in the proportion with a proven court outcome’: the percentage of proven matters fell from 76% in the 2015–16 financial year to 16% in 2022–23, temporally coinciding with the *RP* decision.¹⁵

The decline in proven matters is associated with an increase in prosecutors withdrawing all charges (from 12% in 2015–16 to 53% in 2022–23) and a decline in the percentage of 10–13 year olds entering a guilty plea (from 54% in 2015–16 to 14% in 2022–23).¹⁶

Victoria and South Australia exhibited similar trends to those in NSW.¹⁷ Queensland and Western Australia, where the rebuttal of the presumption is enshrined in legislation and involves a slightly different test, experienced less pronounced changes.¹⁸ The approaches to *doli incapax* in other jurisdictions are outlined in **Chapter 4**.

This BOCSAR research is discussed further in **Chapters 3** and **4**.

⁷ *Criminal Code 2002* (ACT) ss 25–26.

⁸ *RP v The Queen* (2016) 259 CLR 641.

⁹ Judicial Commission of NSW, *Children’s Court of NSW Resource Handbook* (CCRH16, May 2023) [12-1000].

¹⁰ *RP v The Queen* (2016) 259 CLR 641, [33].

¹¹ *Ibid* [32], [36].

¹² Jonathan. Gu, *Did a High Court decision on doli incapax shift court outcomes for 10-13 year olds?* (Crime and Justice Bulletin No 268, NSW Bureau of Crime Statistics and Research, May 2025) 1.

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Ibid*, 11.

¹⁸ *Ibid*.

1.4.4 The Young Offenders Act 1997

The YOA provides a legislative framework for the diversion of young offenders from the NSW criminal justice system. It is underpinned by key principles, including that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence, and that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.¹⁹

The YOA, and its application to 10–13 year olds in contact with the criminal justice system, is discussed further in **Chapter 5**.

1.4.5 Closing the Gap targets

The National Agreement on Closing the Gap seeks to enable Aboriginal and Torres Strait Islander people and governments to overcome the entrenched inequality experienced by Aboriginal and Torres Strait Islander people, and achieve life outcomes equal to all Australians.²⁰ It is built around four Priority Reform outcomes (including building and strengthening formal partnerships and shared decision-making) and 17 socio-economic targets.²¹ The NSW Government and the NSW Coalition of Aboriginal Peak Organisations are co-signatories to the National Agreement on Closing the Gap.

Socio-economic Target 11, ‘Young people are not over-represented in the criminal justice system’, seeks to reduce the rate of Aboriginal and Torres Strait Islander young people (aged 10–17 years) in detention by 30% by 2031. The Productivity Commission’s *Closing the Gap Annual Data Compilation Report July 2025* reported that, in respect of Target 11, Aboriginal and Torres Strait Islander young people continue to be over-represented in the criminal justice system and no progress has been made.²²

We acknowledge the force of submissions to this Review urging that:

- any recommendations should align with Closing the Gap targets, particularly Target 11,²³ and
- any legislative changes that ensure more Aboriginal children are convicted and criminally punished would contradict the commitments made under the National Agreement on Closing the Gap to reduce the over-representation of Aboriginal children in the criminal justice system.²⁴

1.4.6 Broader considerations relating to youth crime

1.4.6.1 Community concerns

There is significant community concern surrounding youth crime in NSW, particularly in regional communities, and the impact on community cohesion and the mental health of victims of crime and their families.²⁵ During our visit to Moree and Tamworth (discussed further below), we heard that communities are living in fear. We heard accounts of the profound emotional and psychological impacts that crime is having on victims, and the broader community.

¹⁹ *Young Offenders Act 1997* (NSW) ss 7(a), (c).

²⁰ *National Agreement on Closing the Gap*, Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments, agreed July 2020, 15.

²¹ *Ibid*, 17.

²² Australian Government, Productivity Commission, *Closing the Gap Annual Data Compilation Report July 2025* (July 2025) 6.

²³ Legal Aid NSW, *Submission 2* (27 June 2025).

²⁴ AbSec, *Submission 25* (4 July 2025).

²⁵ Legislative Assembly Committee on Law and Safety, Parliament of NSW, *Community safety in regional and rural communities – Interim Report: Addressing the drivers of youth crime through early intervention* (Report No 2/58, May 2025) vii, 19.

We also recognise the impact on families who have lost loved ones, and their fortitude in advocating for reform. We particularly acknowledge the thoughtful contribution to the issues under consideration made by the Morris family following the loss of their son, Brody,²⁶ and the McNamara family following the loss of their son and brother, Daniel.²⁷

Research shows that youth crime in Australia has declined over the past 20 years,²⁸ and while BOCSAR data indicates that this is also the case in NSW, there are some notable counter trends. For example, a 2023 BOCSAR report noted that young people appear to have significantly contributed to the increase in vehicle theft in regional NSW, with a 179% increase in legal actions against young people in regional NSW over the five years to March 2023.²⁹ Recent BOCSAR data shows that police-initiated proceedings against young people have been stable over the two years to March 2025, for all offences including motor vehicle theft.³⁰

Stakeholder perspectives on matters of community safety and the interests of children, and relevant BOCSAR data on youth crime, are outlined in **Chapter 2**.

1.4.6.2 Recent inquiries into youth crime and justice

There have been a number of recent reviews to investigate the issues of youth crime and youth justice, notably:

- The NSW Legislative Assembly Law and Safety Committee inquiry into the adequacy of youth diversionary programs in NSW was finalised in 2018. Among other things, this review recommended that the NSW Government consider a number of changes to the YOA to improve access to diversion where possible.³¹
- Following that inquiry, the NSW Government committed to a review of the YOA.³² We understand the YOA review remains under consideration.³³
- The Australian Human Rights Commission released a report, *'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing*, in August 2024 (**'Help way earlier' report**). This report reflects the findings of a 12-month inquiry into opportunities for reform to child justice and related systems across Australia and makes 24 recommendations.³⁴
- The NSW Legislative Assembly Committee on Law and Safety is currently conducting an inquiry into community safety in regional and rural communities. The Committee released its Interim Report on 29 May 2025, which concerns the drivers of youth crime and the need for early

²⁶ Kristie Morris, *Submission 23* (2 July 2025).

²⁷ We spoke with members of the family on 21 August 2025: **Appendix D**.

²⁸ See generally Molly McCarthy, 'How Universal is the Youth Crime Drop? Disentangling Recent Trends in Youth Offending through a Socio-Economic Lens' (2021) 16(6) *Victims and Offenders* 796.

²⁹ Alana Cook, *The increase in motor vehicle theft in NSW up to March 2023* (Bureau Brief No 166, NSW Bureau of Crime Statistics and Research, June 2023) 7.

³⁰ 'Young People' NSW Bureau of Crime Statistics and Research (Web Page, 11 June 2025) <<https://bocsar.nsw.gov.au/topic-areas/young-people.html>>.

³¹ Legislative Assembly Law and Safety Committee, Parliament of NSW, *The Adequacy of Youth Diversionary Programs in New South Wales* (Report No 2/56, September 2018) rec 1, 2, 4.

³² NSW Government, *Report of the Legislative Assembly Committee on Law and Safety - Inquiry into the Adequacy of Youth Diversionary Programs in NSW: NSW Government Response* (2019) 3, 6.

³³ Evidence to Portfolio Committee No 5 — Justice and Communities, Legislative Council, Parliament of NSW, Sydney, 6 March 2024, 71 (Paul McKnight).

³⁴ See generally Australian Human Rights Commission, *Help way earlier!': How Australia can transform child justice to improve safety and wellbeing* (August 2024).

intervention for at-risk young people.³⁵ We understand that the NSW Government is currently reviewing the Interim Report, and any response is due in late November 2025.

- The Australian Senate Legal and Constitutional Affairs References Committee released the interim report of its inquiry into Australia's youth justice and incarceration system in February 2025 and its final report in June 2025. The inquiry recommendations include that the Senate consider referring an inquiry into Australia's child justice and detention system to the Senate Legal and Constitutional Affairs References Committee, with particular reference to Commonwealth responsibilities in areas such as responding to the 'Help way earlier' report recommendations.³⁶

1.4.6.3 Recent initiatives in NSW

In addition to the NSW Government's commitment to review the YOA, we are aware there are a number of other NSW Government initiatives to respond to youth crime. For example:

- In March 2024, the Premier announced a \$26.2 million package of reforms to support community safety and wellbeing, particularly in regional NSW, including a \$13.4 million investment in a place-based response in Moree. The funding is for initiatives including a bail accommodation and support service in Moree for young people, an Action Plan to optimise service delivery in Moree, out-of-hours activities for young people, and ongoing NSW Police Force operations in the Moree area.³⁷
- Also in March 2024, the *Bail and Crimes Amendment Act 2024* passed NSW Parliament and inserted a new temporary bail test in section 22C of the *Bail Act 2013* (**Bail Act**), applying to 14–17 year olds charged with committing certain serious break and enter offences or motor vehicle theft offences while on bail for the same offences. It also created a new offence of 'performance crime', which imposes an additional penalty of two years' imprisonment for people who commit motor vehicle theft or break and enter offences and share material to advertise their involvement in this behaviour.³⁸
- In February 2025, the NSW Government committed a further \$2 million to help address community safety issues in Moree. It also announced that three local Aboriginal organisations will deliver the new youth bail accommodation centre.³⁹
- On 25 March 2025, the *Bail Amendment (Extension of Limitation on Bail in Certain Circumstances) Act 2025* passed NSW Parliament and extended the sunset date for section 22C of the *Bail Act* until 1 October 2026.
- Under the *2022–2024 NSW Implementation Plan for Closing the Gap*, the NSW Government and the NSW Coalition of Aboriginal Peak Organisations committed to co-designing and establishing therapeutic pathways that meet young people's individual needs as an alternative to and/or to

³⁵ Legislative Assembly Committee on Law and Safety, Parliament of NSW, *Community safety in regional and rural communities – Interim Report: Addressing the drivers of youth crime through early intervention* (Report No 2/58, May 2025).

³⁶ Legal and Constitutional Affairs References Committee, Australian Senate, *Australia's youth justice and incarceration system* (Interim Report, February 2025) rec 2; Legal and Constitutional Affairs References Committee, Australian Senate, *Australia's youth justice and incarceration system* (Report, June 2025) rec 1.

³⁷ NSW Government, 'NSW Government Takes Action to Make Communities Safer and Support Young People in Regions' (Media Release, 12 March 2024) <<https://www.nsw.gov.au/media-releases/nsw-government-takes-action-to-make-communities-safer-and-support-young-people-regions>>.

³⁸ *Crimes Act 1900* (NSW) s 194K.

³⁹ The Premier of NSW and NSW Minister for Youth Justice, 'Ministerial media release: More than \$2 million in additional funding for Moree as Youth Justice NSW marks milestones' (Media Release, NSW Government, 7 February 2025) <<https://www.nsw.gov.au/ministerial-releases/more-than-2-million-additional-funding-for-moree-as-youth-justice-nsw-marks-milestones>>.

work alongside the criminal justice system.⁴⁰ The 2025–26 NSW Budget includes \$202.4 million of new funding for Closing the Gap initiatives, including \$13.4 million to develop Therapeutic Pathways for Children.⁴¹

1.5 Matters outside our Terms of Reference

1.5.1 Offending by 14–17 year olds

Our Review is focused only on 10–13 year olds. Issues relating to offending by 14–17 year olds are beyond scope.

In the context of this Review, it is relevant to note that most proceedings that police initiate against young people are against 14–17 year olds, rather than 10–13 year olds. For example, BOCSAR data shows that, in 2023:

- police commenced 23,768 proceedings against young people aged under 18 years at the time of the offence, and
- the vast majority — 19,106 or 80% — involved 14–17 year olds, with 4,662 or 20% involving 10–13 year olds.⁴²

Relevant BOCSAR data is outlined further in **Chapter 2**.

1.5.2 Reform to the minimum age of criminal responsibility

We note that a number of submissions strongly support legislating a minimum age of criminal responsibility of 14 years, obviating the need for the presumption of *doli incapax* for 10–13 year olds.⁴³ Other submissions advanced a primary position that NSW should raise the minimum age of criminal responsibility to at least 14 years, without exception.⁴⁴ It was suggested that this would better align with international human rights obligations.⁴⁵

We acknowledge these submissions, but we must emphasise that raising the minimum age of criminal responsibility is beyond the Terms of Reference of our Review. We note that a number of the submissions we received considered that, in circumstances where the minimum age of criminal responsibility remains at 10 years, it is crucial to maintain a strong presumption of *doli incapax*.⁴⁶

⁴⁰ NSW Government, *2022-2024 NSW Implementation Plan for Closing the Gap* (August 2022) 99.

⁴¹ NSW Government, *NSW Budget 2025–26: Budget Paper No 1 – Budget Statement* (June 2025) 3-6, 7-6; NSW Minister for Aboriginal Affairs and Treaty, ‘Ministerial Media release: NSW Government invests \$246.8 million to Close the Gap in unprecedented partnership with Aboriginal organisations’ (Media Release, NSW Government, 20 June 2025) <<https://www.nsw.gov.au/ministerial-releases/nsw-government-invests-2468-million-to-close-gap-unprecedented-partnership-aboriginal-organisations>>.

⁴² Karen Freeman and Neil Donnelly, *The involvement of young people aged 10 to 13 years in the NSW criminal justice system* (Bureau Brief No 171, NSW Bureau of Crime Statistics and Research, October 2024) 5.

⁴³ Community Restorative Centre, *Submission 3* (27 June 2025); Intellectual Disability Rights Service, *Submission 14* (30 June 2025).

⁴⁴ Legal Aid NSW, *Submission 2* (27 June 2025); NSW Bar Association, *Submission 15* (30 June 2025); NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

⁴⁵ Legal Aid NSW, *Submission 2* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

⁴⁶ Legal Aid NSW, *Submission 2* (27 June 2025); Just Reinvest, *Submission 4* (27 June 2025); Law Council of Australia, *Submission 17* (1 July 2025); Australian Lawyers for Human Rights, *Submission 11* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); AbSec, *Submission 25* (4 July 2025).

1.5.3 Reforms to other service systems

During our Review, stakeholders raised deficiencies in current responses by the education, child protection and out-of-home care (OOHC) systems to younger children who are in contact, or who are at risk of contact, with the criminal justice system. Suggestions for further improvement which were made in some of the submissions included:

- Alternative schooling options or individualised learning for children who are disengaged (or at risk of disengagement) from mainstream education.⁴⁷
- Training and support for carers and educators.⁴⁸
- Investing in early intervention to prevent contact with the OOHC system.⁴⁹
- Creating OOHC-specific diversion pathways that involve carers, education, and therapeutic supports.⁵⁰

The interaction between the criminal justice system and other services is an important contextual consideration for this Review. We heard in a number of our consultations that many children in contact with the criminal justice system have also had contact with other systems — particularly OOHC.

While reforms to the education, child protection, and OOHC systems are beyond scope of our Terms of Reference, we are aware that the NSW Government has made a substantial commitment to improvements in these areas. For example:

- In February 2025, the Reform Plan for transforming the OOHC care system was released, which sets out the NSW Government's vision for transformation, and the direction of a more detailed OOHC strategy that will be developed by the end of 2025.⁵¹
- The 2025–26 NSW Budget includes a \$1.2 billion child protection package to increase support and protection for children and young people in OOHC. This includes a \$797.6 million boost to OOHC funding and implementation of ongoing reforms, and \$191.5 million to support the recruitment of more than 200 new, and retention of 2,126, case workers with higher pay and more specialised training.⁵²
- In March 2025, NSW signed a 10-year agreement with the Australian Government to fully fund NSW Government schools. This will see \$10.4 billion in additional funding to NSW public schools over the 10-year period, \$4.8 billion from the Australian Government and \$5.6 billion from the NSW Government. The funding is tied to reforms that lift education standards, including more individualised support for students.⁵³

In implementing these commitments, it is open to the NSW Government to have regard to the issues and suggestions raised by stakeholders in this Review. In our view, all of those matters are inextricably linked.

⁴⁷ Legal Aid NSW, *Submission 2* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025).

⁴⁸ Office of the Senior Practitioner, Child Protection and Permanency, Department of Communities and Justice, *Submission 19* (2 July 2025).

⁴⁹ Aboriginal Women's Advisory Network, *Submission 26* (4 July 2025).

⁵⁰ Office of the Senior Practitioner, Child Protection and Permanency, Department of Communities and Justice, *Submission 19* (2 July 2025).

⁵¹ NSW Government, Department of Communities and Justice, *Reform Plan: Transforming the Out-of-Home Care System in NSW* (February 2025).

⁵² NSW Government, *NSW Budget 2025-26: Budget Paper No.02 – Performance and Wellbeing* (2025) 6-4.

⁵³ *Ibid*, 3-1.

1.6 Review approach and stakeholder engagement

A fundamental component of our Review was undertaking targeted consultation with identified stakeholders. We were significantly supported in this work, as well as in the conduct of the Review generally, by staff within the Department of Communities and Justice, acting as the Review Secretariat, and we convey our sincere appreciation to each of them for their expertise, diligence and commitment, both in the conduct of the Review and in the preparation of this report.

Our stakeholder engagement process was designed to elicit views from a range of stakeholders within a limited timeframe. To ensure efficiency and impact, we adopted a multi-faceted approach to consultation.

1.6.1 Regional visits

On 18 and 19 June 2025, we visited Tamworth and Moree. In doing so, we engaged with 13 stakeholders (both groups and individuals) and discussed events occurring, as it were, ‘on the ground’, as well as the effect of those events upon children, victims of crime, and the wider local community.

The stakeholders we met with during these visits are listed at **Appendix A**. References to our discussions with them appear at various points within this report.

1.6.2 Written submissions

To assist our Review, feedback was requested from over 40 stakeholders, by reference to a number of focus questions which appear at **Appendix B**. Written submissions were open for a three-week period and we received a total of 28 submissions (see **Appendix C**). All of those submissions have been considered in the formulation of our recommendations.

1.6.3 Individual meetings and group roundtables

We conducted two group roundtables, and a series of individual meetings, with targeted stakeholders, such as:

- NSW Government agencies, including the NSW Police Force, the ODPP, Youth Justice NSW, NSW Health and the Department of Education
- the Chief Magistrate of the Local Court, the President of the Children’s Court, and various Children’s Court Magistrates, and
- legal organisations, including Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT).

We met with more than 20 organisations and agencies, who are listed at **Appendix D**. Again, the content of all of those discussions have been taken into account in formulating our recommendations.

1.6.4 Limitations of a targeted consultation method

As we have indicated, and in circumstances where we were working within a limited timeframe, we engaged directly with stakeholders who were identified as having views and information relevant to the issues under review. That process limited our capacity to capture perspectives from individuals who were not included in the targeted submissions and meeting process.

However, additional groups and individuals who were not included in the targeted consultation process, but who had an interest in the issues raised by our Review, proactively reached out to the Secretariat and were added to the call for submissions. In addition, and as previously indicated, we also had regard to work undertaken prior to this Review.

2 Balancing the interests of children and community safety

At a glance

Doli incapax is a longstanding legal safeguard that recognises the limited development of young children. It is supported by modern neuroscience. The law recognises that children are still developing, and may have varying levels of understanding of moral wrongness.

A core challenge of our Review is finding the right balance between upholding the legal rights, and protecting the needs, of children aged 10–13 years involved in the criminal justice system on the one hand, and protecting community safety on the other. Statistical data demonstrates that 10–13 year olds involved in the criminal justice system often present with complex backgrounds and developmental challenges. Such data also highlights a disparity between crime rates in regional versus metropolitan areas, which underscores regional community safety concerns.

Stakeholder feedback indicates that current criminal justice processes are not delivering effective outcomes for children, victims or the community. Exposure to such processes can result in children becoming entrenched in the criminal justice system, leading to a cycle of reoffending that undermines community safety and creates frustration for victims. This highlights the need to explore alternative approaches — particularly greater access to diversion and new therapeutic interventions — which may better address the root causes of offending, reduce future criminal justice system contact, and ultimately enhance community safety.

2.1 Introduction

Our Terms of Reference include consideration of matters of community safety and the interests of children. In exploring the intersection between these issues, we outline the underlying rationale for the presumption of *doli incapax*, and recent data on 10–13 year olds involved in the NSW criminal justice system, as well as crime rates in regional and rural areas.

We also outline stakeholder perspectives on the tension between safeguarding the interests of children, and protecting community safety. That tension is particularly evident in cases where children engage in repeated or serious offending, and in regional areas where service gaps, systemic disadvantage, and community frustration appear particularly acute. Finally, we highlight two case studies that illustrate this core tension and other issues central to this Review.

2.2 The rationale for the presumption of *doli incapax*

2.2.1 *Doli incapax* reflects developmental limitations of young children

In NSW, all 10–13 year olds are presumed *doli incapax*. The rationale for the presumption is that a child aged under 14 years is not sufficiently developed, intellectually and morally, to appreciate the difference between right and wrong and thus lacks the capacity for *mens rea*.⁵⁴ In other words, *doli incapax* is an acknowledgement of the developmental limitations of 10–13 year olds by virtue of their young age.

⁵⁴ *RP v The Queen* (2016) 259 CLR 641, [8].

In written submissions, stakeholders highlighted that the presumption of *doli incapax*:

- is an important legal safeguard for children⁵⁵
- is a recognition, by the legal system, that children are not adults, and should not be held responsible for their actions as if they were adults with full moral culpability (unless they can be proven to have sufficient moral understanding),⁵⁶ and
- incorporates a rationale which is supported by modern neuroscience.⁵⁷

Consistent with such observations, the United Nations Committee on the Rights of the Child has recognised that scientific evidence from child development and neuroscience shows that children under 14 years are still developing key cognitive functions, particularly in the frontal cortex, which affects reasoning, impulse control, and understanding of consequences.⁵⁸ Accordingly, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings.⁵⁹

As noted in **Chapter 1**, there has been a decline in convictions of 10–13 year olds since the High Court case of *RP v The Queen* (2016) 259 CLR 641 (*RA*), which clarified the principles of the *doli incapax* presumption. Some submissions considered that this reflects the proper operation of the presumption, given the developmental limitations of young children,⁶⁰ and that the utility of *doli incapax* should not be measured by the number of children found guilty of offences.⁶¹

2.2.2 Trauma and other vulnerabilities impact child development

Many stakeholders who engaged with our Review highlighted the disadvantages and vulnerabilities faced by 10–13 year olds in contact with the criminal justice system and the impact of such disadvantages and vulnerabilities on their development and understanding.⁶² In this regard, the views expressed in submissions included that:

- children aged 10–13 years involved in the criminal justice system are some of the most vulnerable and disadvantaged young people in the community⁶³

⁵⁵ Legal Aid NSW, *Submission 2* (27 June 2025); NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); Australian Lawyers for Human Rights, *Submission 11* (27 June 2025); Intellectual Disability Rights Service, *Submission 14* (30 June 2025); NSW Bar Association, *Submission 15* (30 June 2025).

⁵⁶ The Public Defenders, *Submission 8* (27 June 2025).

⁵⁷ Intellectual Disability Rights Service, *Submission 14* (30 June 2025); NSW Bar Association, *Submission 15* (30 June 2025); Aboriginal Legal Service (NSW/ACT), *Submission 22* (30 June 2025); NSW Health, *Submission 27* (7 July 2025).

⁵⁸ Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) [22].

⁵⁹ *Ibid.*

⁶⁰ The Public Defenders, *Submission 8* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); Aboriginal Affairs NSW, Premier's Department, *Submission 18* (1 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (30 June 2025).

⁶¹ Intellectual Disability Rights Service, *Submission 14* (30 June 2025).

⁶² Legal Aid NSW, *Submission 2* (June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); Youth Justice NSW, *Submission 12* (25 June 2025); NSW Council of Civil Liberties, *Submission 13* (June 2025); Intellectual Disability Rights Service, *Submission 14* (June 2025); SNAICC, *Submission 16* (June 2025); Office of the Senior Practitioner, Child Protection and Permanency, Department of Communities and Justice, *Submission 19* (26 June 2025); Aboriginal Culture in Practice, Child Protection and Permanency, Department of Communities and Justice, *Submission 20* (2 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (30 June 2025); NSW Children's Court, *Submission 24* (2 July 2025) 8; AbSec, *Submission 25* (4 July 2025); NSW Health, *Submission 27* (7 July 2025).

⁶³ The Law Society of NSW, *Submission 9* (27 June 2025); Youth Justice NSW, *Submission 12* (25 June 2025).

- a high proportion of children in this age group live with neurodevelopmental disabilities, mental health conditions or cognitive impairments⁶⁴
- 10–13 year olds in contact with the criminal justice system have frequently experienced poverty, homelessness, educational disengagement and involvement in out-of-home care (OOHC)⁶⁵
- trauma, neglect and adverse childhood experiences significantly impair development,⁶⁶ and
- offending behaviour by young children can be a response to trauma.⁶⁷

The views expressed by a number of stakeholders regarding the vulnerabilities of 10–13 year olds involved in the criminal justice system align with observations in the August 2024 Australian Human Rights Commission report, *'Help way earlier!' How Australia can transform child justice to improve safety and wellbeing*:

Many children at risk of or in contact with the justice system are dealing with multiple and complex issues in their lives which often contribute significantly to their chances of offending and reoffending. Their lack of basic rights often manifest as the drivers of their contact with the justice system in the first place, including poverty, intergenerational trauma, violence and abuse, racism, homelessness, and inadequate healthcare. These social determinants of justice show that children's rights to health, safety, culture, participation, non-discrimination, adequate standards of living, and education are not being realised.⁶⁸

In NSW, this entrenched disadvantage is reflected in NSW Bureau of Crime Statistics and Research (BOCSAR) research, which shows that young people aged 10–13 years who appear in the criminal courts 'overwhelmingly come from disadvantaged backgrounds and have a range of complex needs'.⁶⁹ This data is outlined in further detail below.

There is also evidence that childhood trauma can impede development. For example, research indicates that children exposed to numerous adverse childhood experiences are more likely to have a developmental age lower than their chronological age, and to engage in serious and chronic offending.⁷⁰

⁶⁴ Legal Aid NSW, *Submission 2* (27 June 2025); Aboriginal Affairs NSW, Premier's Department, *Submission 18* (2 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (30 June 2025); NSW Health, *Submission 27* (7 July 2025); AbSec, *Submission 25* (4 July 2025).

⁶⁵ Legal Aid NSW, *Submission 2* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); SNAICC, *Submission 16* (June 2025); Aboriginal Affairs NSW, Premier's Department, *Submission 18* (1 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (30 June 2025); AWAN, *Submission 26* (4 July 2025).

⁶⁶ Legal Aid NSW, *Submission 2* (27 June 2025).

⁶⁷ Community Restorative Centre, *Submission 3* (27 June 2025); Office of the Senior Practitioner, Child Protection and Permanency, Department of Communities and Justice, *Submission 19* (26 June 2025); Aboriginal Culture in Practice, Child Protection and Permanency, Department of Communities and Justice, *Submission 20* (2 July 2025).

⁶⁸ Australian Human Rights Commission, *'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing* (August 2024) 8.

⁶⁹ Karen Freeman and Neil Donnelly, *The involvement of young people aged 10 to 13 years in the NSW criminal justice system* (Bureau Brief No 171, NSW Bureau of Crime Statistics and Research, October 2024) 19.

⁷⁰ Justin Barker, *Therapeutic Support Panel for Children and Young People: 2024 Report* (December 2024) 17.

2.3 Recent data on youth crime in NSW

2.3.1 Legal proceedings against children generally

BOCSAR research in relation to legal proceedings against children in NSW shows that:

- From 2010 to 2014 rates of legal proceedings against 14–17 year olds declined and then were relatively stable from 2015 to 2023, falling to their lowest rate in 2022.⁷¹
- In 2023, police commenced a total of 23,768 proceedings against young people aged under 18 years at the time of the offence. The vast majority of these proceedings involved people aged 14–17 years (19,106 or 80.4%), with only 4,662 (19.6%) involving a person aged 10–13 years.⁷²
- The rate of proceedings against 10–13 year olds in 2023 (1,126.8 per 100,000) was much lower than the rate for 14–17 year olds (4,738.0 per 100,000 population).⁷³

2.3.2 Legal proceedings against 10–13 year olds

BOCSAR research reflects a number of findings in relation to legal proceedings against 10–13 year olds which are relevant to our Review.

2.3.2.1 Interactions with police

In 2023, police initiated 4,662 legal proceedings against 2,144 distinct 10–13 year olds, of which nearly 90% were 12 or 13 years old.⁷⁴

The majority of legal proceedings against 10–13 year olds (70.1%) were for non-violent offences, most commonly for property offences (36.3%), disorderly conduct (mostly trespass but also offensive conduct, criminal intent and offensive language) (12.0%) and offences against justice procedures (10.1%).⁷⁵ Offences against the person comprised the remainder (29.9%) of proceedings.⁷⁶

The majority (63.4%) of police-initiated legal proceedings against 10–13 year olds resulted in formal court diversions under the *Young Offenders Act 1997 (YOA)*: 36.3% were cautions; 20.9% were warnings; and 6.2% were Youth Justice Conferences (YJCs).⁷⁷ The YOA is discussed further in Chapter 5.

2.3.2.2 Court appearances and outcomes

In 2023, there were 719 court appearances finalised in the NSW Children's Court involving children aged under 14 years at the time of the offence. Of these finalised court appearances around 22.4% involved 12 year olds and 69.4% involved 13 year olds.⁷⁸

Of the 718 finalised court appearances with known outcomes:

⁷¹ Karen Freeman and Neil Donnelly, *The involvement of young people aged 10 to 13 years in the NSW criminal justice system* (Bureau Brief No 171, NSW Bureau of Crime Statistics and Research, October 2024) 5.

⁷² *Ibid*, 5.

⁷³ *Ibid* 5–6.

⁷⁴ 64 (3.0%) were 10 years old, 173 (8.1%) were 11 years old, 597 (27.8%) were 12 years old and 1,310 or (61.1%) were 13 years old: *ibid*, 1.

⁷⁵ *Ibid*, 1, 8.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*, 1, 7.

⁷⁸ 9 (around 1.2%) involved 10 year olds, 50 (around 6.9%) involved 11 year olds, 160 (around 22.4%) involved 12 year olds and 499 (around 69.4%) involved 13 year olds (718 with known outcomes, with data missing for one finalisation): *ibid*, 13.

- 3.2% resulted in orders under sections 14 and 19 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*
- 19.6% had at least one proven offence
- 24.7% were found not guilty of any offences, and
- 52.5% had all charges withdrawn.⁷⁹

There were no proven offences for 10 year olds.⁸⁰

The most common penalty imposed for a proven court appearance was a 'Court Dismissal' (49.6%), which includes court-ordered cautions or YJCs. Ten finalisations (7.1%) involved a custodial sentence.⁸¹ Of these:

- three custodial sentences were imposed for 12 year olds, and seven were imposed for 13 year olds
- five custodial sentences were for three months or less, three were between three and six months, and two were over six months but less than one year.⁸²

2.3.2.3 Experiences in custody

There were 526 entries into youth detention in 2023 involving 171 distinct 10–13 year olds. All of these children were received into detention on remand. Of this cohort:

- two were 10 years old
- eight were 11 years old
- 35 were 12 years old, and
- 126 were 13 years old.⁸³

Most (73.5%) episodes of detention were for 24 hours or less; 4.2% were longer than 30 days.⁸⁴

2.3.2.4 Demographic characteristics

Of the 2,144 individual 10–13 year olds that were legally proceeded against in 2023, there were 2,068 who had their Aboriginality and gender recorded.⁸⁵ Of that cohort:

- 854 (41.3%) were Aboriginal, which is six times higher than the proportion of Aboriginal 10–13 year olds in the general population (6.2%).⁸⁶ The over-representation of Aboriginal young people is most pronounced for the youngest age group: 54.1% of 10 year olds were Aboriginal, while 39.0% of 13 year olds were Aboriginal.⁸⁷
- More boys were proceeded against than girls (for each age), but the proportion of girls increased with age.⁸⁸
- The majority (64.9%) of non-Aboriginal 10–13 year olds lived in a major city, and the majority (63.8%) of Aboriginal 10–13 year olds lived in a regional or remote location with 20.4% living in an

⁷⁹ Ibid, 2.

⁸⁰ Ibid, 13.

⁸¹ Ibid, 2.

⁸² Ibid, 15.

⁸³ Ibid, 2, 16.

⁸⁴ Ibid, 2, 17.

⁸⁵ Ibid, 10.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

outer regional/remote/very remote location.⁸⁹ The comparatively high proportion of Aboriginal young people proceeded against by police in regional/remote/very remote locations is in part a reflection of the comparatively high proportion of the population of Aboriginal young people aged 10–13 years living in these regions compared with non-Aboriginal young people (14.6% vs 4.3%).⁹⁰

There were 495 court finalisations involving Aboriginal 10–13 year olds, accounting for around 69.7% of finalisations (of the 710 finalisations where the Aboriginality of the defendant was known).⁹¹

Of the cohort subject to youth detention, 59.6% were Aboriginal and 71.3% were male.⁹²

2.3.2.5 Geographical differences

Of the 2,144 distinct 10–13 year olds who were legally proceeded against in 2023, there were 2,109 who had information about their residential location recorded:

- 52.8% lived in a major city
- 35.3% lived in inner regional areas, and
- 11.9% lived in outer regional/remote/very remote locations.⁹³

While a relatively low proportion of the cohort live in outer regional/remote/very remote locations, it is clear that this category is vastly over-represented, when population is taken into account.⁹⁴

The rate of legal proceedings against 10–13 year olds was more than three times higher in regional, remote or very remote areas (1,171.6 per 100,000 population) than major cities (371.2 per 100,000 population).⁹⁵

The New England and North West region had the highest rate followed by the Far West and Orana region. In both regions the rate of young people being proceeded against was more than three times the rate of NSW overall.⁹⁶ The rate for the Mid North Coast was also high; more than twice the NSW rate.⁹⁷

2.3.2.6 Complex needs

BOCSAR considered 500 individual 10–13 years olds who had a finalised court appearance in 2023 and identified overlapping needs and vulnerabilities, including:⁹⁸

- **Prior personal contact, and intergenerational contact, with the criminal justice system:**
 - 58.0% had contact with police in the 12 months prior to the index court appearance, and had received either a caution, YJC or court attendance notice
 - 23.0% had previously spent time in youth detention
 - 74.8% had a parent who had ever appeared in court, and
 - 40.6% had a parent who had ever been in custody.

⁸⁹ Ibid, 11.

⁹⁰ Ibid, 11.

⁹¹ Ibid, 14.

⁹² Ibid, 2, 16.

⁹³ Ibid, 11.

⁹⁴ Ibid.

⁹⁵ Ibid, 1.

⁹⁶ Ibid, 12.

⁹⁷ Ibid.

⁹⁸ Ibid, 18.

- **Contact with the human services system:**
 - 90.8% had been identified in a child protection report as at risk of significant harm (ROSH)
 - 68.0% had been the subject of 10 or more ROSH reports
 - 26.8% had been in OOHC, and
 - 40.2% had accessed a specialist homelessness service.
- **Being a victim of (mostly violent) crimes:**
 - 72.2% had been recorded by police as a victim in a prior criminal incident
 - 59.8% had been a victim of violence
 - 23.8% had been recorded as a victim of a family violence, and
 - 8.4% had been recorded as a victim of property crime.

2.4 Recent data on crime in regional and rural NSW

A March 2024 report by BOCSAR indicates the following crime trends and patterns in regional NSW:

- From 2004 to 2023:
 - property crime decreased by 48% in regional NSW (compared to a 67% decrease in Greater Sydney), and
 - violent crime was stable in regional NSW (compared to a 20% decrease in Greater Sydney).⁹⁹
- The higher rates of decline in Greater Sydney increased the rate disparity between the two areas, such that, in 2023:
 - the property crime rate was 59% higher in regional NSW compared to Greater Sydney, and
 - the violent crime rate was 57% higher compared to Greater Sydney.¹⁰⁰
- In 2023, most major crimes were lower than or equivalent to 2019 (prior to the COVID-19 pandemic, during which crime fell across most offence categories), although over that period four major offences significantly increased in regional NSW:
 - motor vehicle theft (up 20%)¹⁰¹ — a 188% increase in legal actions against young people accounts for 82% of the total increase¹⁰²
 - non-domestic assault (up 14%)¹⁰³ — an increase in legal actions against young people accounts for 62% of the total increase¹⁰⁴
 - domestic violence related assault (up 24%)¹⁰⁵ — the largest increase in legal proceedings was against young females (up 94%),¹⁰⁶ and

⁹⁹ Alana Cook and Jackie Fitzgerald, *Crime in Regional and Rural NSW in 2023: Trends and Patterns* (Bureau Brief No. 169, NSW Bureau of Crime Statistics and Research, March 2024) 1.

¹⁰⁰ Ibid 1, 18.

¹⁰¹ Ibid, 1–2.

¹⁰² Ibid, 2, 12.

¹⁰³ Ibid, 1.

¹⁰⁴ Ibid, 2.

¹⁰⁵ Ibid, 1.

¹⁰⁶ Ibid, 17.

- sexual assault (up 47%, largely due to increases in adult victims, historic child sexual assault, and contemporary child sexual assault).¹⁰⁷

The March 2024 BOCSAR report noted that certain factors may account for the longstanding disparity between crime rates in the regions versus the capital city, including:

- socio-economic disadvantage and poverty
- unemployment
- drug and alcohol use, and
- the availability of recreational and educational opportunities for young people.¹⁰⁸

2.5 Stakeholder perspectives

The BOCSAR research, outlined above, highlights the following key issues:

- **The complex needs of children**, noting 10–13 year olds involved in the criminal justice system often present with complex backgrounds, including trauma, disadvantage, and developmental challenges.
- **Regional community safety**, noting the differences between regional crime rates and urban crime rates, and the complex issues faced by particular regional areas (such as socio-economic disadvantage and limited opportunities for young people).

Many stakeholders in this Review acknowledged the inherent tension between safeguarding the rights and needs of children aged 10–13 years and protecting the community. In consultations, we heard that:

- Community safety is a significant concern, with fear and frustration growing in response to serious youth offending. Perspectives varied, with some considering that the children clearly understand their actions are wrong — referring to behaviours like concealing their identity or planning violent acts — and others acknowledging the children may recognise wrongdoing but lack the maturity to grasp the full significance of their actions.
- Concerns primarily relate to a small cohort of children within communities who repeatedly offend or engage in serious conduct. These children often face multiple, overlapping vulnerabilities — such as disadvantage, unstable family environments, developmental delays, mental health challenges, or disabilities.
- There appears to have been a shift in the nature of youth offending, with some behaviours suggesting a lack of empathy — potentially consistent with Foetal Alcohol Spectrum Disorder — or influence from social media.
- Police may arrest a child and refuse bail as a ‘circuit breaker’ (to interrupt offending behaviour and protect the community) or due to a lack of alternative options (such as available community services). However, when *doli incapax* cannot be rebutted and the child is released, the cycle often repeats. This approach may offer short-term relief for the community but fails to address a series of broader issues (including the child’s underlying issues), and increases the child’s exposure to the criminal justice system.

Views in written submissions included:

- The current system — shaped significantly by the operation of *doli incapax* — is failing to adequately protect young people, victims or the community.¹⁰⁹

¹⁰⁷ Ibid, 1–2.

¹⁰⁸ Ibid, 18.

¹⁰⁹ NSW Police Force, *Submission 5* (27 June 2025).

- The presumption limits young people's access to timely intervention and accountability, contributes to growing community resentment and diminished perceptions of safety (particularly in regional areas) and results in victims feeling that they have been denied justice.¹¹⁰
- Children who repeatedly 'cycle' through the criminal justice system become identifiable targets of community frustration and anger, further complicating efforts to support behavioural change and rehabilitation.¹¹¹
- Communities in regional NSW face significant service gaps that undermine both community safety and the wellbeing of children, including limited access to therapeutic services, inadequate access to housing or transport, and (in some areas) what are perceived to be poor police-community relationships.¹¹²

The broad consensus from stakeholders, and indeed a consistent theme expressed in the course of our Review, was that improvements, for both the community and for young people, may be able to be achieved, and underlying causes of offending better addressed, if there was increased diversion away from the criminal system for children, and improved access to therapeutic interventions. We return to these matters in **Chapters 5 and 6**.

2.6 Case studies

Cases brought to our attention illustrate the complex challenge of balancing the intersection of a number of issues. Those issues include:

- balancing the rights and interests of children with those of the broader community
- the current operation of the presumption of *doli incapax*, including the nature and extent of the evidentiary burden on the prosecution and the evidence available to the court to consider whether the presumption has been rebutted
- the interaction between the operation of the presumption of *doli incapax* and diversion schemes, and
- the impact of the presumption on the ability to respond to underlying causes of behaviour by children aged under 14 years.

2.6.1 R v Harry

The first is the case of *R v Harry*,¹¹³ in which the young person, Harry, who was aged 13, was charged with offences of:

- aggravated break and enter and committing a serious indictable offence (the offence being the alleged theft of keys to a motor vehicle)
- stealing a motor vehicle
- being carried in a conveyance without consent
- hindering police, and
- disseminating material advertising involvement in the commission of an offence.

Harry was refused bail, in circumstances where there was evidence of his having had more than 100 interactions with police.

¹¹⁰ NSW Police Force, *Submission 5* (27 June 2025).

¹¹¹ Youth Justice NSW, *Submission 12* (29 June 2025).

¹¹² The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

¹¹³ *R v Harry* [2025] NSWChC 3.

At the hearing, police relied (among other things) on evidence of Harry's schooling to rebut the presumption, including evidence that he had signed a suspension resolution in which he agreed to attend classes on time and follow his teacher's instructions.

In concluding that the prosecution had failed to rebut the presumption of *doli incapax*, the Magistrate observed that the evidence on which the prosecution relied did not include any evidence going to the issue of Harry's understanding of why his behaviour was 'bad', or any perception of wrongfulness on his part.¹¹⁴ His Honour concluded that much of the evidence relied upon by the prosecution to rebut the presumption did little more than reinforce what was described as his 'lack of development'.¹¹⁵

Finally, his Honour concluded that the evidence of Harry's limited engagement with schooling rendered it more likely that he was not sufficiently developed, intellectually or morally, to appreciate the difference between right and wrong.¹¹⁶ The presumption not having been rebutted, the charges were dismissed.

2.6.2 A's case

The second case study is an amalgam of a number of accounts we heard and typifies what is being experienced. A 13 year old, 'A', is charged with a number of offences, including aggravated break and enter, taking and driving a conveyance without consent or stealing motor vehicle, and engaging in a police pursuit.

A is refused bail, and the charges are listed for hearing. However, the charges are withdrawn prior to hearing, because the prosecution concludes it is not in a position to adduce evidence to rebut the presumption of *doli incapax*. The charges are, as a consequence, dismissed.

A has a bail history that runs over many pages and has been in custody for a period of months by the time the charges are withdrawn. A is then released. Within weeks of release, A is arrested and charged with being the driver of a stolen motor vehicle, which was involved in a police pursuit and which resulted in damage to property and injury to others on the road.

A's case demonstrates a number of issues. They include the difficulties experienced in rebutting the presumption, and the undesirable consequences which can follow. Further, as discussed below, A's case demonstrates that little was achieved in terms of rehabilitation and meaningful intervention.

2.6.3 Comments

These case studies highlight concerns raised by a number of stakeholders regarding the operation of the *doli incapax* presumption. In some cases (such as *Harry*), the evidence relied upon to rebut the presumption is put before the Court but is found to be simply insufficient. In other cases (such as A's case), the police concede that the presumption could not be rebutted, and withdraw the charges prior to any hearing. In both cases, there is a complete absence of meaningful intervention, supervision, assistance, or treatment. The shortcomings of such an outcome were the subject of specific comment by the Magistrate in *Harry* who said the following:

The greater the need for intervention – the less likely there will be intervention ... *Doli incapax* means the greater the background of disadvantage, the less likely a child will be held criminally responsible – or then be rehabilitated through Court intervention – or subject to the other purposes of sentence – or be diverted from the criminal system (for example, under the *Young Offenders Act 1997* (NSW), that requires an admission) – or have any offence proven. Because no matters are proven, the child cannot be subject to Youth Justice supervision, who ordinarily do an extraordinary job.¹¹⁷

¹¹⁴ Ibid, [59], [64].

¹¹⁵ Ibid, [61].

¹¹⁶ Ibid, [68].

¹¹⁷ Ibid, [83], [93]–[94].

The case studies give rise to the question of whether different outcomes could have been achieved if alternative pathways had been available. In our view, what needs to be considered is whether, instead of exposing children to the criminal justice process (which can have harmful and criminogenic effects which are long-standing), engaging them in therapeutic interventions could provide a more constructive approach. In particular, we have considered whether such interventions may better address the underlying drivers of their behaviour, reduce the likelihood of future contact with the justice system, and therefore make the community safer.

All of these matters necessitate a consideration of:

1. how the presumption of *doli incapax* is currently operating in NSW in a legal sense, and the issues associated with that operation (which we explore in **Chapter 3**)
2. what options may be available to legislate the presumption (which we address in **Chapter 4**)
3. the interaction between the presumption of *doli incapax* and statutory diversion schemes, and ways to improve access to diversion where appropriate (which we discuss in **Chapter 5**), and
4. the impact of the operation of *doli incapax* on available responses to address underlying causes of behaviour by children aged under 14 years, and alternative options for intervention (which we consider in **Chapter 6**).

3 The operation of *doli incapax*

At a glance

While the High Court's decision in *RP v The Queen* (2016) 259 CLR 641 (*RP*) clarified the key principles for rebutting the presumption of *doli incapax*, and accordingly the nature of the evidence required to support this inference beyond a reasonable doubt, stakeholder feedback and statistical data suggest that understanding and application of the decision by criminal justice system participants remains inconsistent. Stakeholders also raised other evidentiary and operational issues, including concerns about the nature and quality of evidence relied upon to rebut the presumption, and what was said by some to be a practice of deferring consideration of *doli incapax* until later stages of the criminal justice process.

We have made a number of recommendations to address these issues, including the introduction of legislation which is outlined in the next Chapter.

3.1 Introduction

Our Terms of Reference require that we consider, amongst other things:

1. how the *doli incapax* presumption is currently operating in NSW
2. the nature and extent of the evidentiary burden on the prosecution
3. the evidence available to the court, and
4. possible improvements which could be made to the process by which the presumption is dealt with in criminal proceedings.

In this Chapter, we canvass the legal principle of *doli incapax* in NSW, as articulated in *RP*,¹¹⁸ and views expressed by stakeholders.

3.2 The legal principle of *doli incapax*

As we have previously noted,¹¹⁹ in NSW the age at which a child is capable of being criminally responsible is governed by the *Children (Criminal Proceedings) Act 1987 (CCPA)*, which makes provision for a conclusive presumption that no child under the age of 10 years can be guilty of a criminal offence.¹²⁰ However, that Act does not otherwise affect the operation of the common law presumption of *doli incapax*, which presumes that a child aged above 10 and under 14 years lacks the capacity to be criminally responsible for their acts. The presumption may be rebutted by the prosecution adducing evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element(s) of the offending.

The rationale behind this long-standing presumption is that children should not be subject to criminal conviction unless it is established, beyond reasonable doubt, that they committed the conduct with the necessary mental capacity, meaning they did the charged act knowing it to be seriously wrong.¹²¹ The presumption recognises that a child aged under 14 years is not sufficiently

¹¹⁸ *RP v The Queen* (2016) 259 CLR 641.

¹¹⁹ See **Chapter 1**.

¹²⁰ *Children (Criminal Proceedings) Act 1987* (NSW) s 5.

¹²¹ David Hamer and Thomas Crofts, 'The Logic and Value of the Presumption of *Doli Incapax* (Failing That, an Incapacity Defence)' (2023) 43(3) *Oxford Journal of Legal Studies* 546, 548.

intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for *mens rea*.¹²²

3.3 *RP v The Queen*

In order to provide appropriate context for our Review, it is necessary to consider the presumption of *doli incapax* by reference to the decision of the High Court in *RP*.

RP was an appeal from the decision of the NSW Court of Criminal Appeal¹²³ upholding the conviction (following a trial before a Judge alone) of the appellant, who was between 11 and a half years and 12 years and 3 months, for 4 counts of sexual offending against his younger brother. At trial, the sole issue for determination was whether the Crown had rebutted the presumption that the appellant was *doli incapax*.

The appellant was acquitted of the offending in count 1. The Trial Judge was satisfied that the circumstances surrounding the offending in count 2 proved beyond reasonable doubt that the appellant knew that his conduct was seriously wrong, and therefore that the presumption was rebutted in relation to that offending. Acting on a concession from trial counsel, the Trial Judge found that it followed that the presumption was also rebutted in relation to the offending in counts 3 and 4.

The NSW Court of Criminal Appeal was unanimous in concluding that the presumption that the appellant was *doli incapax* had been rebutted in relation to the offending alleged in count 2 but that it was not rebutted in relation to the offending in count 4. A verdict of acquittal was entered in respect of the latter count. By majority, the Court of Criminal Appeal held that the Trial Judge did not err in finding that the presumption that the appellant was *doli incapax* had been rebutted in relation to the offending alleged in count 3.

The High Court granted special leave to appeal on two grounds, namely that:

1. the verdicts on counts 2 and 3 were unreasonable because the evidence did not establish, to the criminal standard, that the presumption that the appellant was *doli incapax* had been rebutted, and
2. the Court of Criminal Appeal erred in failing to quash the appellant's conviction for the offending in count 3 on the ground that he had been denied a fair trial.

The Court upheld the first ground of appeal, rendering it unnecessary to address the second. The decision went on to clarify the key principles of rebutting the presumption of *doli incapax* and, accordingly, the nature of the evidence required to support this inference beyond a reasonable doubt.

3.3.1 Principles which emerge from *RP*

It is not necessary for the purposes of our Review, to consider the facts of the alleged offending in *RP*. What is necessary is to consider:

1. the analysis of the High Court of the rationale behind the presumption
2. the principles the Court formulated as to its application, and
3. the Court's observations regarding the nature and extent of the evidence which was relied upon to prove the appellant knowledge of the wrongfulness of his conduct.

¹²² *RP v The Queen* (2016) 259 CLR 641, [8] citing Hale, *The History of the Pleas of the Crown* (vol. 1, 1736) 25–28; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1; *R v ALH* (2003) 6 VR 276; *BP v The Queen* [2006] NSWCCA 172.

¹²³ *RP v R* [2015] NSWCCA 215 (Johnson, Davies and Hamill JJ).

As to the first matter, the Court's analysis included the following propositions:

- The rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong, and thus lacks any capacity for *mens rea*.¹²⁴
- The presumption is irrebuttable in the case of a child under the age of 7 years, but from the age of 7 years until attaining the age of 14 years, it is rebuttable.¹²⁵
- The age at which a child is capable of bearing criminal responsibility for their acts has been raised by statute in NSW, with section 5 of the CCPA making provision for a conclusive presumption that no child under the age of 10 years can be guilty of an offence, but otherwise not affecting the operation of the presumption of *doli incapax*.¹²⁶
- From the age of 10 years until attaining the age of 14 years, the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element(s) of the offence, as distinct from simply being aware that their conduct is merely naughty or mischievous.¹²⁷
- Such distinction may be captured by stating the requirement in terms of proof that the child knew that the conduct was 'seriously wrong' or 'gravely wrong'.¹²⁸
- Irrespective of how obviously wrong the act(s) constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of such act(s), and the prosecution must point to evidence from which an inference can be drawn, beyond reasonable doubt, that the child's development is such that they knew that it was morally wrong to engage in the conduct. Those considerations direct attention to the child's education, and the environment in which they have been raised.¹²⁹

As to the second matter, the principles articulated in *RP* included the following:

- What may suffice to rebut the presumption will vary according to the nature of the allegation, and the child.¹³⁰
- The only presumption the law makes in the case of child defendants is that those aged under 14 years are *doli incapax*, and rebutting that presumption directs attention to the intellectual and moral development of the particular child, recognising that some 10 year old children will have the capacity to understand the serious wrongfulness of their acts, whilst other children aged very nearly 14 years old will not.¹³¹
- The onus is on the prosecution to rebut the presumption beyond reasonable doubt.¹³²

As to the third matter, and acknowledging that the facts of cases differ, the observations made by the plurality in *RP* regarding the evidence which was relied upon in that case to prove the appellant's understanding of the wrongfulness of his conduct are nevertheless instructive. Those observations included the following:

- In circumstances where the Trial Judge had found that the appellant was of very low intelligence, and possessed a lesser appreciation of the seriousness of his conduct as a result, the prosecution had not adduced any evidence, apart from the circumstances of the alleged

¹²⁴ *RP v The Queen* (2016) 259 CLR 641, [8].

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, [9].

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, [8]

¹³⁰ *Ibid.*, [12].

¹³¹ *Ibid.*

¹³² *Ibid.*, [32].

offending, to establish that the appellant's development was such that he understood the moral wrongfulness of his acts.¹³³

- Despite evidence which was indicative of unsatisfactory aspects of the appellant's upbringing, including comments from the appellant's father which raised the possibility that the appellant had been the victim of sexual molestation (something which was pertinent to the only issue at trial), the prosecution did not call any person responsible for the appellant's care to give an account of the environment in which he was raised.¹³⁴
- There was no evidence about:
 - the environment in which the appellant had been raised
 - his moral development, or
 - his performance at school as an 11 year old,

in the absence of which it was not open to conclude that the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood that his conduct was seriously wrong in a moral sense.¹³⁵

3.3.1.1 The requirement for proof of knowledge that the act is seriously wrong

One of the matters highlighted by the plurality in *RP* was the distinction to be drawn between the child's knowledge of the moral wrongfulness of their act or omission, and the child's awareness that the conduct in question is merely naughty or mischievous.¹³⁶ That distinction may be captured by stating the requirement in terms of proof that the child knew the conduct was 'seriously wrong' or 'gravely wrong'.¹³⁷ No matter how obviously and objectively 'wrong' the act(s) constituting the offence may be, the plurality in *RP* made it clear that the presumption that a child is *doli incapax* cannot be rebutted merely by inferences drawn from the doing of such act(s).¹³⁸ The prosecution must point to evidence from which an inference can be drawn, beyond reasonable doubt, that the child's development is such that they knew that it was morally wrong to engage in the conduct.¹³⁹ This directs attention to the child's education and the environment in which the child has been raised,¹⁴⁰ as well as evidence of the development or disposition of the child.¹⁴¹

However, it is important to emphasise the plurality in *RP* concluded that the presumption could not be rebutted *merely* by an inference drawn from the doing of the relevant act(s).¹⁴² Without parsing the judgment, the use of the word 'merely' appears to us to be significant. The plurality did not suggest that inferences in support of the rebuttal of the presumption were not available to be drawn from the circumstances of the offending *at all*, but rather that the evidence relied upon could not be so limited, and that evidence over and above such inference(s) would be required.

¹³³ Ibid.

¹³⁴ Ibid, [34].

¹³⁵ Ibid, [32], [36].

¹³⁶ Ibid, [9], citing *C (A Minor) v Director of Public Prosecutions* [1986] AC 1, 38; *BP v The Queen* [2006] NSWCCA 172, [27]–[28].

¹³⁷ Ibid, [9], citing *R v Gorrie* (1918) 83 JP 136; *C (A Minor) v Director of Public Prosecutions* [1986] AC 1; John Frederick Archbold, *Archbold Criminal Pleading, Evidence and Practice* (vol 1, 1993) 52 [1–96].

¹³⁸ Ibid, [38] (Gageler J).

¹³⁹ Ibid, [9], citing *R v Smith (Sidney)* (1845) 1 Cox CC 260 (Erie J); *C (A Minor) v Director of Public Prosecutions* [1986] AC 1, 38; *BP v The Queen* [2006] NSWCCA 172, [29]; *R v T* [2009] AC 1310, [16] (Lord Phillips); disapproving *R v ALH* (2003) 6 VR 276, [19], [24], [86].

¹⁴⁰ Ibid, [9], citing *B v R* (1958) 44 Cr App R 1, 3–4 (Lord Parker CJ); *C (A Minor) v Director of Public Prosecutions* [1995] UKHL 15, 8, citing *F v Padwick* [1959] Crim L R 439 (Lord Parker CJ).

¹⁴¹ Ibid, [38] (Gageler J).

¹⁴² Ibid, [9].

Our discussions with stakeholders tend to suggest that from an evidentiary point of view, this issue is sometimes overlooked. There is at least some anecdotal evidence that this particular aspect of the decision in *RP* may have been interpreted by some as authority for the proposition that no inference can be drawn from the circumstances of the offending *at all*. For the reasons we have outlined, that does not represent the current state of the law. To the extent that there might be any doubt about it, it can be removed by addressing the issue legislatively (see **Chapter 4**).

The plurality in *RP* clarified that the child must know the act is seriously wrong as ‘a matter of morality and not law’.¹⁴³ Justice Gageler, in his concurring judgment, described the requirement as the child understanding that their conduct was seriously wrong, in a moral sense, by normal adult standards,¹⁴⁴ as distinct from the child’s own idiosyncratic ethical standards.¹⁴⁵

The subsequent High Court judgment in *BDO v The Queen* [2023] HCA 16 further clarified that ‘an act is wrong according to the standards or principles of reasonable people. The standard, obviously enough, is that of an adult person’.¹⁴⁶

‘Seriously wrong’ has been described in some decisions as involving:

more than a childlike knowledge of right and wrong, or a simple contradiction. It involves more complex definitions of moral thought involving the capacity to understand the event, the ability to judge whether their actions were right or wrong (moral sophistication), and an ability to act on that moral knowledge.¹⁴⁷

3.3.1.2 The nature of evidence to rebut the presumption

The High Court observed in *RP* that what might suffice to rebut the presumption will vary according to the nature of the allegation, and the child.¹⁴⁸ That is a reflection of the fact that no two cases are ever factually the same. Answers given in the course of a police interview may go to prove the child possessed the requisite knowledge.¹⁴⁹ In other cases, evidence of the child’s progress at school, and of the child’s home life, may do so.¹⁵⁰

It has been observed that the closer the child is to the age of 10 years, the stronger the evidence which will be required to rebut the presumption.¹⁵¹ However, as was pointed out by the plurality in *RP*, the difficulty with propositions of that kind is that they are apt to suggest that children mature at a uniform rate.¹⁵² The only presumption which the law makes in the case of child defendants is that those aged under 14 years are *doli incapax*.¹⁵³ Rebutting the presumption directs attention to the intellectual and moral development of the particular child.¹⁵⁴ Some 10 year old children will possess the capacity to understand the serious wrongness of their acts, whilst other children aged very nearly 14 years old will not.¹⁵⁵

¹⁴³ Ibid, [11].

¹⁴⁴ Ibid, [38] (Gageler J).

¹⁴⁵ *R v M* (1977) 16 SASR 589, 590–591.

¹⁴⁶ *BDO v The Queen* (2023) 277 CLR 518, [13].

¹⁴⁷ *EL v R* [2021] NSWDC 585, [171]; *Director of Public Prosecutions v PM* [2023] VSC 560, [94]; *R v Greg* [2023] NSWChC 13, [10], each quoting Nicholas J Lennings and Chris J Lennings, ‘Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study’ (2014) 21(5) *Psychiatry, Psychology and Law* 791, 792.

¹⁴⁸ *RP v The Queen* (2016) 259 CLR 641, [12].

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid [12], citing *R (A Child) v Whitty* (1993) 66 A Crim R 462, 465; *DK v Rooney* (Supreme Court of NSW, McInerney J, 3 July 1996).

¹⁵² Ibid, [12].

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

3.3.2 The outcome in RP

In allowing the appeal in *RP*, the plurality noted (amongst other things) that:

- the prosecution did not adduce any evidence, apart from the circumstances of the offending, to establish that the appellant's development was such that he understood the moral wrongness of his acts
- despite expert evidence which was indicative of unsatisfactory aspects of the appellant's upbringing, the prosecution called no evidence of the environment in which the appellant was raised
- the evidence of the appellant's intellectual limitations, whilst not precluding a finding that the presumption had been rebutted, pointed to the need for clear evidence that despite such limitations, the appellant possessed the requisite understanding
- there was no evidence about the environment in which the appellant had been raised, nor was there evidence from which any conclusion could be drawn as to his moral development, and
- no evidence of the appellant's performance at school was adduced.¹⁵⁶

The plurality concluded that in the absence of evidence on these (and other) subjects it was not open to conclude that the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood that his conduct was seriously wrong in a moral sense.¹⁵⁷ Justice Gageler agreed that the evidence was not sufficient to discharge the onus of proof.¹⁵⁸

Accepting that each case must depend on its own facts, the considerations set out above provide a general indication of the kind of factors which are likely to be relevant in determining whether the presumption has been rebutted.

3.3.3 The presumption following RP

Since the decision in *RP*, and consistent with the observations of the plurality, courts have provided some further guidance on the nature of evidence that may be relevant in determining whether the presumption of *doli incapax* has been rebutted. For example, evidence capable of showing a child's knowledge of the serious wrongfulness of the act may include evidence of their moral, social and intellectual development, such as:

- Evidence of the child's level of intelligence and educational attainment, for example, from teachers and witnesses in educational settings.¹⁵⁹
- Evidence of the environment the child was raised in, 'from which a sense of morality and rightness and wrongfulness may be derived'.¹⁶⁰
- Evidence of mental illness or disorder, provided the disorder, of itself, prevents the child from reaching a state of moral and intellectual development where they can understand the serious moral wrongfulness of the conduct.¹⁶¹

Evidence that may, *by itself*, be insufficient to rebut the presumption of *doli incapax* includes:

¹⁵⁶ Ibid, [32]–[36].

¹⁵⁷ Ibid, [36].

¹⁵⁸ Ibid, [40] (Gageler J).

¹⁵⁹ *R v IP* [2023] NSWCCA 314, [25].

¹⁶⁰ Ibid

¹⁶¹ Ibid.

- **Evidence of deception, lying or flight:** Whilst this *could* indicate the child's knowledge that their actions are seriously wrong, it may alternatively reflect little more than a belief that their behaviour is mischievous or naughty.¹⁶²
- **Evidence of knowing right from wrong as a child:** This may not necessarily equate to knowledge, at the time of the offence, that what they were doing was seriously or gravely wrong.¹⁶³
- **A child's acknowledgement that they understood that an act was seriously wrong:** This may reflect an understanding that they are likely to be in trouble if caught, rather than an appreciation of moral wrongness.¹⁶⁴
- **The child's age:** This alone may be of little weight in determining the child's understanding of the extent to which their conduct departed from ordinary standards of morality,¹⁶⁵ particularly given that, as previously noted, children do not mature at a uniform rate.¹⁶⁶
- **Proof that the child did the act charged:** This is insufficient, *in and of itself*, to rebut *doli incapax*,¹⁶⁷ however horrifying or obviously wrong the act may be.¹⁶⁸ However, evidence of the surrounding circumstances of the offence, or the manner of the child's conduct, may still be relevant in determining whether the presumption of *doli incapax* has been rebutted.¹⁶⁹

It follows that there is no specific formula for determining whether the evidence is sufficient to rebut the presumption of *doli incapax*, nor is it possible to be prescriptive as to the nature and extent of the evidence which will be required. What is sufficient in terms of evidence to rebut the presumption will depend upon the circumstances of the individual case, and will require consideration of the child as a unique individual, and an assessment of a wide variety of matters.¹⁷⁰

3.3.4 Types of evidence relied on

Submissions,¹⁷¹ along with discussions with stakeholders, identified a range of evidence commonly relied on to address *doli incapax*, such as:

- admissions by the child
- police interviews
- statements by parents, carers, teachers or youth workers
- school reports or educational records
- psychologist and psychiatrist reports, and
- antecedents or prior history (noting the limitations in the *Young Offenders Act 1997 (YOA)* about the admissibility of prior diversions).

¹⁶² *R v Greg* [2023] NSWChC 13, [114]. See also *C (A Minor) v Director of Public Prosecutions* [1986] AC 1.

¹⁶³ *EL v R* [2021] NSWDC 585, [175].

¹⁶⁴ *Director of Public Prosecutions v PM* [2023] VSC 560, [69].

¹⁶⁵ *BC v R* [2019] NSWCCA 111, [51].

¹⁶⁶ *RP v The Queen* (2016) 259 CLR 641, [12].

¹⁶⁷ *BC v R* [2019] NSWCCA 111, [43], citing *RP v The Queen* (2016) 259 CLR 641, [9].

¹⁶⁸ *RP v The Queen* (2016) 259 CLR 641, [9].

¹⁶⁹ *BC v R* [2019] NSWCCA 111, [53]; *AL v The Queen* [2017] NSWCCA 34, [132], [135]–[139].

¹⁷⁰ *Director of Public Prosecutions v PM* [2023] VSC 560, [93].

¹⁷¹ Legal Aid NSW, *Submission 2*, (27 June 2025); NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); The Public Defenders, *Submission 8* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); Children's Court of NSW, *Submission 24* (2 July 2025).

For the reasons already stated, the probative value of these various types of evidence will differ from case to case.

3.4 Process for dealing with *doli incapax* in criminal proceedings

3.4.1 Consideration at the charge stage

The *doli incapax* presumption is a relevant consideration at multiple stages of the criminal process, including in interactions between police and children aged 10–13 years. For example, upon apprehending a child, police may exercise discretion as to whether to take formal legal action. Where formal action is taken, police may either divert the child under the YOA or proceed to charge. Diversion under the YOA is only available for eligible offences and must be considered in light of several factors outlined in the legislation (discussed further in **Chapter 5**).

The NSW Bureau of Crime Statistics and Research (BOCSAR) research on the impact of the *RP* decision indicates that it has had little impact on decisions of police officers to charge children aged 10–13 years with a criminal offence. The volume of court proceedings involving defendants and 10–13 years remained mostly stable between 2017 and 2023.¹⁷²

3.4.2 Consideration by the prosecution

Depending on the type of charge, either the police or the Office of the Director of Public Prosecutions (ODPP) will have carriage of a prosecution against a child aged 10–13 years.¹⁷³

As noted in **Chapter 1**, BOCSAR research shows that, following *RP*, there was an increase in prosecutors withdrawing all charges against 10–13 year olds (growing from 12% in 2015–16 to 53% in 2022–23). The BOCSAR research ‘clearly shows that *RP* has influenced police prosecutors’ decisions and that ‘after *RP* the prosecution anticipated a higher risk of failure’ in rebutting *doli incapax*.¹⁷⁴

3.4.3 Consideration at the court stage

3.4.3.1 Bail determinations

Criminal proceedings against children are commenced by way of a court attendance notice except in certain circumstances (for example, where police consider the child is unlikely to comply with a court attendance notice, or they are likely to commit further offences).¹⁷⁵ If, when a young person is charged, police refuse bail, the child must be brought before the Children’s Court as soon as practicable.¹⁷⁶

¹⁷² Jonathan Gu, *Did a High Court decision on doli incapax shift court outcomes for 10-13 year olds?* (Crime and Justice Bulletin No 268, NSW Bureau of Crime Statistics and Research, May 2025) 20.

¹⁷³ Summary offences (which comprise the majority of offences allegedly committed by 10–13 year olds) are typically prosecuted by the NSW Police Force in the Children’s Court or Local Court, whereas the ODPP is responsible for prosecuting indictable offences in the higher courts.

¹⁷⁴ Jonathan Gu, *Did a High Court decision on doli incapax shift court outcomes for 10-13 year olds?* (Crime and Justice Bulletin No 268, NSW Bureau of Crime Statistics and Research, May 2025) 10, 20.

¹⁷⁵ *Children (Criminal Proceedings) Act 1987* (NSW) s 8.

¹⁷⁶ *Children (Criminal Proceedings) Act 1987* (NSW) s 9.

The Court must determine whether to grant or refuse bail based on the same criteria as those applied by the police in making bail decisions — that is, the requirements in the *Bail Act 2013*. The relevant matters to be considered include the strength of the prosecution case.¹⁷⁷

In 2023, there were 1,136 first court appearances for young people aged 10–13 years at the time of the offence. Of these, 458 (40.3%) followed bail being refused by police. A much smaller proportion of young people were bail refused at their first court appearance (11.4% or 130 young people). As such, the vast majority of young people initially bail refused by police were subsequently granted bail or dispensed with at their first court appearance.¹⁷⁸ Judicial decisions about bail may be influenced by awareness that charges are unlikely to be proven.¹⁷⁹

Once the issue of bail is determined, the matter will take its course (usually through the Children's Court). If a plea of guilty is entered, the matter will proceed to sentence. If a plea of not guilty is entered, it will proceed to a preliminary hearing for the purposes of determining the discrete issue of whether the presumption has been rebutted. If it is not, the charge(s) will be dismissed. If it is, the proceedings will be adjourned for a further substantive hearing as to the commission of the alleged offences.

BOCSAR research shows that, after *RP*, guilty pleas among 10–13 year olds dropped significantly. The decline in guilty pleas was met with a surge in the proportion of finalised court appearances where 10–13 year olds pleaded not guilty (to the principal offences), growing from 29% of finalised court appearances in 2016 to 64% in 2023.¹⁸⁰

3.4.3.2 Preliminary hearings

The preliminary hearing at which the presumption is considered, and its rebuttal or otherwise determined, is likely to proceed in the following way (consistent with *R v Greg* [2023] NSWChC 13):¹⁸¹

- The prosecution case may be presented, by way of written statements, oral evidence, or other evidence such as CCTV, or a combination of each, subject to the usual rules of admissibility. The child may also present evidence.
- The court will determine, having regard to the entirety of the evidence, whether the prosecution has proved beyond reasonable doubt that the child was not *doli incapax* at the time of each relevant offence.
- If the prosecution fails to rebut the presumption of *doli incapax* beyond reasonable doubt, the prosecution has failed to establish an element of the offence and the child will be found not guilty of that offence.
- If the court is satisfied beyond reasonable doubt that the prosecution has rebutted the presumption of *doli incapax*, then:
 - the element of *doli incapax* is taken to have been established in relation to that offence, and
 - all written material tendered in relation to the question of *doli incapax* is to be returned to the prosecutor, and does not remain part of the prosecution case for the remainder of the hearing for that offence; unless the court later finds that a fact that the court relied upon in determining the issue of *doli incapax* was incorrect, in which case the issue of *doli incapax* may be revisited for that offence.

¹⁷⁷ *Bail Act 2013* (NSW) s 18(1)(c).

¹⁷⁸ Karen Freeman and Neil Donnelly, *The involvement of young people aged 10 to 13 years in the NSW criminal justice system* (Bureau Brief No 171, NSW Bureau of Crime Statistics and Research, October 2024) 18.

¹⁷⁹ Children's Court of NSW, *Submission 24* (2 July 2025).

¹⁸⁰ Jonathan Gu, *Did a High Court decision on doli incapax shift court outcomes for 10-13 year olds?* (Crime and Justice Bulletin No 268, NSW Bureau of Crime Statistics and Research, May 2025) 9.

¹⁸¹ *R v Greg* [2023] NSWChC 13, [10]–[15].

- The matter is then listed for further hearing on the other elements of the offences; and the Magistrate who heard the issue of *doli incapax* is taken to be part-heard.

If *doli incapax* is not rebutted or if other elements of the offence are not proven, the child is acquitted. No further action is taken.

BOCSAR research shows that the proportion of court appearances where a child aged 10–13 years was found not guilty of all charges grew from 5% to 24% between 2010 and 2023. Within defended hearings for defendants aged 10–13 years, the proportion of court appearances where the child was found not guilty of all charges grew from 24% to 88% between 2010 and 2023.¹⁸²

3.5 Stakeholder perspectives on the operation of *doli incapax*

Stakeholder feedback revealed a range of different perspectives on the operation of the *doli incapax* presumption.

3.5.1 The nature and extent of the burden on the prosecution

Some submissions considered that the current burden is excessively high and difficult to meet in practice.¹⁸³ The NSW Police Force highlighted issues including:¹⁸⁴

- The difficulty of proving what the child was actually thinking at a specific point in time.
- A perceived lack of guidance in case law about what evidence is capable of rebutting the presumption, bearing in mind the anecdotal examples of evidence deemed insufficient to do so.
- The high rate of charge withdrawals by police prosecutors, due to the low prospects of conviction.

Two particular observations might be made about those issues.

First, the difficulty of proving the mental element of an offence is not restricted to prosecutions against children. The nature of that element means that, absent an admission, the likelihood is that it can only be established by circumstantial evidence. That is not uncommon in practice.

Secondly, we acknowledge that there appears to be some uncertainty about the nature of the evidence which can be relied upon. That, in our view, is appropriately addressed, at least in part, by further training and education for police and police prosecutors (see further below), and by legislative provisions which may make the position clearer (see **Chapter 4**).

Several stakeholders considered that the current operation of the presumption, and the onus and standard of proof which applies to it, is appropriate.¹⁸⁵ Views expressed in submissions included:

- The high threshold is justified, as it ensures that only children who demonstrably understand the serious wrongfulness of their actions are subject to criminal sanction.¹⁸⁶

¹⁸² Jonathan Gu, *Did a High Court decision on doli incapax shift court outcomes for 10-13 year olds?* (Crime and Justice Bulletin No 268, NSW Bureau of Crime Statistics and Research, May 2025) 9.

¹⁸³ Police Association of NSW, *Submission 1* (27 June 2025); NSW Police Force, *Submission 5* (27 June 2025); Office of the Director of Public Prosecutions, *Submission 28* (11 July 2025).

¹⁸⁴ NSW Police Force, *Submission 5* (27 June 2025).

¹⁸⁵ Legal Aid NSW, *Submission 2* (27 June 2025); The Public Defenders, *Submission 8* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); Law Council of Australia, *Submission 17* (1 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); AbSec, *Submission 25* (4 July 2025); NSW Health, *Submission 27* (7 July 2025).

¹⁸⁶ Legal Aid NSW, *Submission 2* (27 June 2025).

- Given the vulnerability of 10–13 year olds in contact with the criminal justice system, and the serious consequences of conviction, the burden of proof must remain high, and in accordance with the criminal standard.¹⁸⁷
- The presumption is capable of being rebutted, and evidence to rebut it is capable of being adduced. The fact that evidence to rebut the presumption is not always adduced indicates that the majority of children aged 10–13 years are, in fact, *doli incapax*.¹⁸⁸
- Most 10–13 year olds who face criminal charges have not yet reached the developmental stage necessary to form intent — particularly those affected by disability, complex trauma, or both.¹⁸⁹
- The decline in proven outcomes post-*RP* does not reflect a problem in the law, but rather the correct application of the presumption.¹⁹⁰
- Prosecutions may be unsuccessful due to evidentiary issues unrelated to *doli incapax*, such as a failure to prove identification or complicity in cases involving multiple alleged offenders.¹⁹¹

Whilst there is merit in some of these propositions, we have difficulty accepting that the multiplicity of failures in rebutting the principle is, of itself, an indication that the majority of children who are prosecuted are, in fact, *doli incapax*. We were made aware, in the course of our consultations, of numerous instances in which no evidence has been offered by the prosecution. For obvious reasons, there is a difficulty in concluding that the majority of children to whom the presumption applies are, in fact, *doli incapax* if no evidence is adduced in relation to the issue at all.

3.5.1.1 Evidence in *doli incapax* matters is often limited and non-specific

Several stakeholders highlighted that evidence in *doli incapax* matters is often limited. Issues raised in consultations included:

- The source(s) of relevant evidence can be difficult and resource-intensive to identify — for example, it may require canvassing schools, carers, and agencies, subpoenaing documents and witnesses, and reviewing records from multiple NSW Government departments.¹⁹²
- Short timeframes can hinder the ability to gather evidence and successfully rebut *doli incapax*. *Doli incapax* hearings are often listed quickly, but police require time to investigate serious offences and present a complete brief.¹⁹³
- The child may be unwilling to participate in a police interview, or their family may be reluctant to provide statements that could be used against the child.¹⁹⁴
- Evidence from schools or health services can be limited where the child has limited engagement or has moved schools frequently.¹⁹⁵
- Expert reports are rarely available, often because the defence will rarely seek them, the child will object to participating in an assessment sought by the prosecution, or the report's admissibility may be successfully challenged on the basis of privilege.¹⁹⁶

¹⁸⁷ Legal Aid NSW, *Submission 2* (27 June 2025).

¹⁸⁸ The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

¹⁸⁹ AbSec, *Submission 25* (4 July 2025).

¹⁹⁰ The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); The Public Defenders, *Submission 8* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025).

¹⁹¹ Children's Court of NSW, *Submission 24* (2 July 2025).

¹⁹² NSW Police Force, *Submission 5* (27 June 2025).

¹⁹³ NSW Police Force, *Submission 5* (27 June 2025).

¹⁹⁴ Office of the Director of Public Prosecutions, *Submission 28* (11 July 2025).

¹⁹⁵ NSW Police Force, *Submission 5* (27 June 2025); Office of the Director of Public Prosecutions, *Submission 28* (11 July 2025).

¹⁹⁶ Office of the Director of Public Prosecutions, *Submission 28* (11 July 2025).

We were also informed in consultations that in many cases the prosecution ultimately concedes that it does not have the necessary evidence to rebut the presumption, and adduces no evidence at all. In other cases, the available evidence can be ambiguous, or otherwise of limited probative value. Views which were expressed in submissions included:

- Available evidence such as school records may not clearly reflect the child's development or moral understanding and may not be in a sufficiently detailed form to allow any probative inference(s) to be drawn.¹⁹⁷
- Available reports prepared for different purposes, such as counselling or therapy, may be of limited relevance as they are not closely connected in time or context to the alleged offending.¹⁹⁸
- The evidence adduced in proceedings often describes a child's experiences rather than their understanding of moral wrongness.¹⁹⁹
- Evidence relied upon to rebut the presumption may instead support the conclusion that the child lacked understanding of the moral wrongness of their actions.²⁰⁰

We would simply observe that most, if not all, of these perceived difficulties can in any prosecution, of any person, for any offence. They are not specific to proceedings in which the issues of the presumption, and its rebuttal, arise.

3.5.1.2 Evidence to rebut doli incapax may be sought from support figures

Several stakeholders highlighted that the prosecution may seek to rely on evidence from adults who are trusted by, or closely connected to, the child, including parents, carers, teachers, caseworkers, police-youth liaison officers, psychologists and health providers. Submissions argued that such evidence often fails to rebut the presumption but causes lasting harm to the child because:

- it can erode trust, damage key relationships, and discourage future engagement with education, mental health and support services,²⁰¹ and
- the resulting isolation and disengagement can undermine effects towards rehabilitation, heighten a child's risk for future police contact and further entrench the child in the criminal justice system.²⁰²

Some submissions supported restrictions on access to or use of sensitive records (such as medical or psychological reports) or introducing confidentiality protections similar to the Sexual Assault Communications Privilege.²⁰³ Another suggestion was for clear procedural guidance to ensure evidence is probative and does not compromise the child's access to education, health, or support services.²⁰⁴

¹⁹⁷ NSW Police Force, *Submission 5* (27 June 2025); NSW Advocate for Children and Young People, *Submission 7* (27 June 2025).

¹⁹⁸ Office of the Director of Public Prosecutions, *Submission 28* (11 July 2025).

¹⁹⁹ Children's Court of NSW, *Submission 24* (2 July 2025).

²⁰⁰ Legal Aid NSW, *Submission 2* (27 June 2025).

²⁰¹ Legal Aid NSW, *Submission 2* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); NSW Bar Association, *Submission 15* (30 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

²⁰² Legal Aid NSW, *Submission 2* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); NSW Bar Association, *Submission 15* (30 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

²⁰³ Legal Aid NSW, *Submission 2* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025).

²⁰⁴ Legal Aid NSW, *Submission 2* (27 June 2025).

3.5.2 Consideration of *doli incapax* by those engaged in the criminal Justice system

3.5.2.1 *Doli incapax* is often considered at a late stage

Several stakeholders raised concerns about delayed consideration or application of *doli incapax* by criminal justice system participants, as this can unnecessarily expose children to harmful criminal justice system contact.²⁰⁵ Views in submissions included:

- *Doli incapax* may not be considered at the point of charge and is often not considered until closer to the hearing.²⁰⁶ The impact of these circumstances is often most acute when a decision is made, at a relatively late stage, to adduce no evidence at all, leading to the inevitable dismissal of the charge(s). In those cases, children may spend months on bail or in custody before the issue is addressed, particularly in regional areas with delayed hearing dates.²⁰⁷
- Police may use charging, remand or bail conditions as behaviour management tools, prioritising community safety over consideration of *doli incapax*.²⁰⁸
- Lengthy periods on bail increase the likelihood of breaching bail conditions and accruing further charges.²⁰⁹ Bail conditions are often imposed on children without the support to achieve compliance, as Youth Justice NSW support is usually unavailable for 10–13 year olds.²¹⁰
- Matters are often withdrawn either at or shortly before the hearing due to insufficient evidence to rebut *doli incapax*.²¹¹

An alternative view was that while it may be argued that police should collect all necessary evidence prior to charging:

- some behaviour is so serious that immediate intervention is needed, and
- investigators require significant time to explore and gather evidence to rebut *doli incapax*.²¹²

We were also informed in consultations that police already consider *doli incapax* when deciding whether to charge a child, using their judgment based on the circumstances. If the evidence points to a child clearly lacking the necessary knowledge of the wrongfulness of their actions, no charge is brought.

²⁰⁵ Legal Aid NSW, *Submission 2* (27 June 2025); Just Reinvest NSW, *Submission 4* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); The Public Defenders, *Submission 8* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

²⁰⁶ The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

²⁰⁷ The Law Society of NSW, *Submission 9* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

²⁰⁸ The Law Society of NSW, *Submission 9* (27 June 2025).

²⁰⁹ Legal Aid NSW, *Submission 2* (27 June 2025).

²¹⁰ The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025).

²¹¹ Legal Aid NSW, *Submission 2* (27 June 2025); NSW Police Force, *Submission 5* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

²¹² NSW Police Force, *Submission 5* (27 June 2025).

3.5.2.2 Understanding and application of *doli incapax* is inconsistent

A number of stakeholders raised concerns about inconsistent understanding or application of *doli incapax* by criminal justice system decision-makers.²¹³ Views in submissions included:

- There is inconsistent understanding among police of the *doli incapax* presumption, and the evidence required to rebut it.²¹⁴
- While some police briefs are thorough and include a range of evidence aimed at rebutting *doli incapax*, others do not.²¹⁵
- Some investigating officers may not seek evidence to rebut *doli incapax*,²¹⁶ or may only seek relevant evidence once directed by police prosecutors.²¹⁷
- The presumption is applied inconsistently by courts.²¹⁸

We consider that at least some of these issues can be addressed by our recommendations. We are not in a position to make any assessment of whether the presumption is applied inconsistently by the courts. That is for the simple reason that the issue arises principally in the Children's Court and there is sparse publication of the Court's judgments. We should say, however, that our considerations of those judgments which are available, and our discussions with judicial officers in the Children's Court, are not supportive of the conclusions that application of the principle is inconsistent. Further, BOCSAR research found that:

- the small differences in court outcomes between specialist Children's Court magistrates and generalist magistrates largely disappeared after the *RP* decision, and
- the similarity in court outcome trends across NSW also implies a lack of regional differences in how the Children's Court applies *doli incapax*.²¹⁹

3.5.3 Training and guidance for criminal justice system participants

A number of stakeholders considered that improved training and guidance about the operation of the presumption of *doli incapax* would:

- result in the wider availability of evidence relied upon to rebut the presumption
- enhance the probative value of such evidence
- promote consistency in decision-making, and
- assist in ensuring that appropriate cases proceed to hearing.²²⁰

Submissions suggested improved training and guidance on matters such as:

²¹³ NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); SNAICC, *Submission 16* (1 July 2025); Aboriginal Culture in Practice, Child Protection and Permanency, Department of Communities and Justice, *Submission 20* (2 July 2025).

²¹⁴ Legal Aid NSW, *Submission 2* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); Youth Justice NSW, Department of Communities and Justice, *Submission 12* (29 June 2025).

²¹⁵ The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025).

²¹⁶ The Law Society of NSW, *Submission 9* (27 June 2025).

²¹⁷ Legal Aid NSW, *Submission 2* (27 June 2025).

²¹⁸ NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); SNAICC, *Submission 16* (1 July 2025); Office of the Senior Practitioner, Child Protection and Permanency, *Submission 19* (2 July 2025).

²¹⁹ Jonathan Gu, *Did a High Court decision on doli incapax shift court outcomes for 10-13 year olds?* (Crime and Justice Bulletin No 268, NSW Bureau of Crime Statistics and Research, May 2025) 20.

²²⁰ Legal Aid NSW, *Submission 2* (27 June 2025); NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); Youth Justice NSW, Department of Communities and Justice, *Submission 12* (29 June 2025).

- the nature of the presumption and the evidence required to rebut it,²²¹ including the principles in *RP*²²²
- alternative ways to proceed where there is insufficient evidence to address the presumption²²³
- relevant rules governing the admissibility of evidence,²²⁴ and
- the cognitive development of children and trauma-informed practice.²²⁵

Conversely, the NSW Police Force considered that while training may clarify the complexities of the *doli incapax* doctrine, it cannot overcome issues posed by the high evidentiary threshold confirmed in *RP*.²²⁶

In our view, to speak of a ‘high evidentiary threshold’ may be apt to confuse. The requirement is that the prosecution rebut the presumption beyond reasonable doubt. That standard of proof is, of course, no greater or no less than that which applies in criminal proceedings generally.

3.6 Our recommended approach

Stakeholder feedback highlighted a number of issues with the current operation of *doli incapax* in NSW, including consideration of the presumption at late stages of the justice process and inconsistent understanding or application among criminal justice system participants. As indicated by stakeholders, the consequences can include:

- unnecessary exposure of children to criminal justice system processes, which can have significant detrimental effects
- reliance on evidence to rebut *doli incapax* that is indirect, ambiguous or damaging to the child’s relationships with support figures.

Further, one submission raised, in the context of the BOCSAR analysis (discussed above), that the decrease in convictions and the increase in withdrawn charges following *RP* reflects a disconnection between decision-making by investigating officers and the evidentiary requirements needed to rebut *doli incapax*.²²⁷ By contrast, decision-making by prosecutors and the courts suggests closer alignment with the standards articulated in *RP*.

We consider that enhanced training and guidance for police, including for police prosecutors, are essential to addressing issues with the operation of *doli incapax*. Training for police should be prioritised, given their role as the first point of contact in the criminal justice system and the significant influence their decisions have on outcomes for children.

That training could focus upon updating standard operating procedures or other police training materials. For example, the Queensland Police Service Operating Procedures Manual covers the

²²¹ Legal Aid NSW, *Submission 2* (27 June 2025); Youth Justice NSW, Department of Communities and Justice, *Submission 12* (29 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

²²² The Public Defenders, *Submission 8* (27 June 2025).

²²³ Legal Aid NSW, *Submission 2* (27 June 2025).

²²⁴ The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

²²⁵ Legal Aid NSW, *Submission 2* (27 June 2025); NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); Office of the Senior Practitioner, Child Protection and Permanency, Department of Communities’ and Justice, *Submission 19* (2 July 2025); Aboriginal Culture in Practice, Child Protection and Permanency, Department of Communities’ and Justice, *Submission 20* (2 July 2025); Children’s Court of NSW, *Submission 24* (2 July 2025).

²²⁶ NSW Police Force, *Submission 5* (27 June 2025).

²²⁷ NSW Bar Association, *Submission 15* (30 June 2025).

presumption of *doli incapax* and the need to investigate and gather evidence on this issue, regardless of whether an admission is made.²²⁸

Training could also cover matters such as the legal meaning and purpose of *doli incapax*, the onus and standard of proof, and the types of evidence required to rebut the presumption. This additional guidance may improve consistency of understanding and application of the presumption among police, and could be provided by an experienced legal professional.

Recommendation 1 is for additional training and operational guidance for police to address several key matters concerning the operation of the *doli incapax* presumption, including:

- **The nature of the presumption and the evidentiary requirements for rebutting it (Recommendation 1(a)):** This is to complement our recommendations for legislative provisions to make the common law position clearer (see **Chapter 4**).
- **The need to consider the presumption at the point of charge and in the preparation of the brief of evidence (Recommendation 1(b)):** Targeted training on this issue may help to ensure that children are not unnecessarily exposed to the criminal justice system in circumstances where they are unlikely to be found criminally responsible (see further below). It may also assist to prompt police to explore alternative responses in cases where the evidence is insufficient to rebut the presumption of *doli incapax* (for example, referral to programs that are not dependent on criminal responsibility, such as Youth on Track,²²⁹ or referral to the alternative intervention pathway recommended in **Chapter 6**).
- **Potential evidentiary issues (Recommendation 1(c))**, including the admissibility requirements and probative value of commonly relied-upon evidence (such as school and health records) and the risks of harm to the child from seeking evidence from their support figures. This may help to ensure evidence gathering processes are both legally sound and trauma-informed.

In making **Recommendation 1(b)**, we consider there is strong justification for police to receive additional training about the need to consider the issue of *doli incapax* at the charging stage. We note that although, on one view, BOCSAR research indicates that while the decision in *RP* may have made it harder to prosecute 10–13 year olds, this has not translated into fewer proceedings being commenced against persons in that age group, notwithstanding the likelihood that many of those charged may have their charges withdrawn by police prosecutors.²³⁰

We note that police have specifically adopted, and comply with, the ODPP Prosecution Guidelines. Those Guidelines include a requirement that in deciding whether to prosecute a person for an offence, police must determine whether the admissible evidence available is capable of establishing each element of the offence (the *prima facie* case test), whether there are reasonable prospects of conviction, and whether discretionary factors nevertheless dictate that the matter should not proceed in the public interest.²³¹

It is not the intended (or in our view, the likely) outcome that early consideration of the issue of *doli incapax* would result in the criminal process being delayed, or require legal advice to be sought and obtained in each and every case in which a charge is being considered. In our view, considering *doli incapax* at the point of charge is a logical extension of the police's existing obligation — under the ODPP Prosecution Guidelines — to consider whether there is admissible evidence capable of establishing each element of the offence.

²²⁸ Queensland Police Service, *Operational Procedures Manual* (OPM Issue 105.2, Public Edition, 16 June 2025) [5.2.4].

²²⁹ Outlined in **Chapter 5**.

²³⁰ Jonathan Gu, *Did a High Court decision on doli incapax shift court outcomes for 10-13 year olds?* (Crime and Justice Bulletin No 268, NSW Bureau of Crime Statistics and Research, May 2025) 21.

²³¹ NSW Police Force, *Prosecution Policy* (2021) [3.1].

We also acknowledge that police require sufficient time to investigate serious offences and present a complete brief.²³² **Recommendation 1(b)** is not intended to, and in practice will not, prevent police from obtaining further evidence about a child's criminal responsibility once proceedings have commenced. Rather, it aims to ensure consideration of *doli incapax* is a central consideration from the very beginning of criminal proceedings and thereafter.

Recommendation 1(b) also responds to stakeholder feedback that, notwithstanding the application of the *doli incapax* presumption, the charging process may at times be used as a temporary circuit breaker or de-escalation tool where there are community safety concerns or alternative options are limited. While we understand why police may take this approach, we consider it both inappropriate and lacking utility. Any relief it may provide is likely to be short-term, and outweighed by the significant, harmful and long-term consequences of exposing children aged 10–13 years to justice system responses, particularly in cases where they are unlikely to be found criminally responsible. Moreover, such an approach may increase the likelihood of the child becoming entrenched in the justice system, thereby heightening the risk of future offending and undermining community safety.

We recognise that additional training for police about the need to consider *doli incapax* at the point of charge may lead to fewer charges being laid against 10–13 year olds. The community must have confidence that that alternative and effective responses are available to police. Our recommendations to improve access by 10–13 year olds to diversion under the YOA (see **Chapter 5**) and to introduce new therapeutic intervention measures for this cohort (see **Chapter 6**) are intended to support this.

That said, we also acknowledge that even if, ultimately, alternatives are available, there will still be cases in which they are not suitable or appropriate. In such cases, the *doli incapax* presumption and the test for rebutting it must be properly addressed. The implementation of additional police training is also intended to assist in such circumstances.

Recommendation 1: Additional police training and guidance on *doli incapax*

There should be additional training and operational guidance for police in respect of the operation of the presumption of *doli incapax*, including in relation to:

- (a) the nature of the presumption and the evidentiary requirements for rebutting the presumption
- (b) the need to consider the presumption, both at the point of charge and in the course of the preparation of the brief of evidence, and
- (c) potential evidentiary issues that may be encountered both before and at the time of any hearing.

²³² NSW Police Force, *Submission 5* (27 June 2025).

4 Legislating the presumption of *doli incapax*

At a glance

While there was some divergence among stakeholders about how to legislate *doli incapax* in NSW, the overwhelming majority supported retaining the current common law standard, as articulated in *RP v The Queen* (2016) 259 CLR 641 (*RP*). Our recommendation is consistent with that support.

We accept that the common law sets a high threshold. However, it reflects an approach which provides safeguards against inappropriate findings of criminal responsibility where a child lacks the requisite knowledge, which aligns with criminal law principles regarding *mens rea*, and which recognises the vulnerability of children aged 10–13 years and the serious impact of criminal convictions on this cohort.

In addition, we support including statutory guidance in respect of those factors which can be taken into account in determining whether the presumption has been rebutted. This is intended to assist courts, police and legal practitioners in applying the test, and at least limit the lack of understanding which presently exists.

4.1 Introduction

Our Terms of Reference centre on the task of reviewing and reporting on the operation of, and legislative options for, the presumption of *doli incapax* in NSW. We are specifically required to recommend a framework to enable the legislative enactment of the presumption.

In this Chapter, we consider the form that such legislation could take, noting different approaches across Australian jurisdictions, and stakeholder views about the preferred approach. We also consider legislative proposals relating to early consideration of *doli incapax*, noting that the Terms of Reference require consideration of any improvements in relation to the process by which the presumption is dealt with in criminal proceedings (for example, if it should be considered earlier in proceedings or dealt with in a separate hearing).

4.2 Different approaches to legislating *doli incapax*

Across all Australian jurisdictions, the presumption of *doli incapax* applies to children over the minimum age of criminal responsibility²³³ and under 14 years.

The Commonwealth and most states and territories²³⁴ have legislated the presumption. In NSW and South Australia (SA), the presumption applies in accordance with the common law.

²³³ The minimum age of criminal responsibility is 10 years in all Australian jurisdictions, except Victoria, which will raise the age to 12 years via legislation to commence later this year, and the ACT, which raised the general age to 14 years from 1 July 2025 (with the exception that some serious offences still apply to 12–13 year olds): see **Chapter 1**.

²³⁴ Queensland, Tasmania, Western Australia, the Australian Capital Territory, the Northern Territory and Victoria. Note the *Youth Justice Act 2024* (Vic) pt 1.2 ch 1 is to commence on a start date fixed by proclamation or, if a date is not so fixed, on 30 September 2025: at s 2.

4.2.1 Elements of the test across Australia jurisdictions

Some literature points to four distinct approaches to the test to rebut *doli incapax* across Australian jurisdictions:²³⁵

- **actual knowledge** that the offending conduct was **seriously wrong** (applying in NSW, SA and Victoria)²³⁶
- **actual knowledge** that the offending conduct was **wrong** (applying in the Australian Capital Territory, Northern Territory, and Commonwealth)²³⁷
- **capacity to know** that the offending conduct **should not occur** (applying in Queensland and Tasmania)²³⁸
- **capacity to know** that the offending conduct was **seriously wrong** (applying in Western Australia (WA)).²³⁹

However, many aspects of the test for rebutting *doli incapax*, outlined in *RP*,²⁴⁰ are consistently applied across a number of jurisdictions. For example, despite the language variants of ‘wrong’,²⁴¹ ‘seriously wrong’²⁴² or ‘ought not to [be done]’,²⁴³ in effect they mean the same thing, namely that the child understood the act as seriously wrong in a moral sense,²⁴⁴ as articulated in *RP*.

Other principles from *RP* that apply across jurisdictions include:

- The prosecution is required to rebut the presumption (the onus of proof) beyond reasonable doubt (the standard of proof).²⁴⁵
- Evidence of the offending conduct is not, by itself, sufficient to rebut the presumption.²⁴⁶

The key point of difference between jurisdictions is the knowledge requirement: certain jurisdictions require that the child has a ‘capacity to know’ that the act was wrong, rather than ‘actual knowledge’ of this.

²³⁵ See generally Dominique Moritz and Mac Tuomi, ‘Four thresholds of *doli incapax* in Australia: Inconsistency or uniformity for children’s criminal responsibility?’ (2022) 48(1) *Alternative Law Journal* 25.

²³⁶ Note that Victoria has legislated the common law presumption via *Youth Justice Act 2024* (Vic) s 11 (uncommenced).

²³⁷ *Criminal Code 2002* (ACT) s 25; *Criminal Code Act 1983* (NT) ss 38A, 43AQ; *Criminal Code* (Cth) s 7.2.

²³⁸ *Criminal Code* (Qld) s 29; *Criminal Code* (Tas) s 18.

²³⁹ *The Criminal Code* (WA) s 29, as interpreted by the WA Court of Appeal in *Rye v The State of Western Australia* [2021] WASCA 43.

²⁴⁰ *RP v The Queen* (2016) 259 CLR 641, [8]–[9].

²⁴¹ *Criminal Code 2002* (ACT) s 25; *Criminal Code Act 1983* (NT) ss 38A, 43AQ; *Criminal Code* (Cth) s 7.2.

²⁴² *The Criminal Code* (WA) s 29, as interpreted by the WA Court of Appeal in *Rye v The State of Western Australia* [2021] WASCA 43.

²⁴³ *Criminal Code* (Tas) s 18.

²⁴⁴ *LT v Police* [2024] SASC 105, [15]; *DPP v PM* [2023] VSC 560, [10], [68], [80]–[82]; *UD v Bishop* [2021] ACTSCFC 1, [14]; *KG v Firth* (2019) 278 A Crim R 249, [26]–[27]; *BDO v The Queen* (2023) 277 CLR 518, [13], [16], [23]; *Rye v The State of Western Australia* [2021] WASCA 43, [50]–[51]; *NR v Director of Public Prosecutions* (WA) [2022] WASC 456, [30].

²⁴⁵ *LT v Police* [2024] SASC 105, [16]; *DPP v PM* [2023] VSC 560, [67]; *UD v Bishop* [2021] ACTSCFC 1, [90]; *KG v Firth* (2019) 278 A Crim R 249, [24], [27]; *BDO v The Queen* (2023) 277 CLR 518, [52]; *Rye v The State of Western Australia* [2021] WASCA 43, [44]; *NR v Director of Public Prosecutions* (WA) [2022] WASC 456, [23], [53].

²⁴⁶ *LT v Police* [2024] SASC 105, [15]; *DPP v PM* [2023] VSC 560, [68]; *UD v Bishop* [2021] ACTSCFC 1, [16], [27]; *KG v Firth* (2019) 278 A Crim R 249, [27]; *BDO v The Queen* (2023) 277 CLR 518, [14]; *Rye v The State of Western Australia* [2021] WASCA 43, [34].

4.2.2 ‘Capacity to know’ requirement and *BDO v The Queen*

In *BDO v The Queen* [2023] HCA 16 (*BDO*), the High Court considered the question of whether the Queensland test to rebut *doli incapax* could be equated with what was required at common law. The High Court clarified that:

There is clearly a difference between what is meant by a person’s capacity to know and their knowledge. The former has regard to their ability to understand moral wrongness, the latter to what in fact they know or understand.²⁴⁷

A ‘capacity to know’ test appears to be a slightly lower threshold than that formulated in *RP*. Proof of actual knowledge would satisfy a ‘capacity to know’ standard, however, the reverse cannot necessarily be said to be true.²⁴⁸ The High Court acknowledged that, while the practical difference between the two standards may be minimal in some cases, the legal distinction remains.²⁴⁹

The High Court also considered that the observations in *RP* regarding evidentiary requirements may be relevant to the ‘capacity to know’ test. That is, the capacity of a child to know that conduct is morally wrong will usually depend on an inference to be drawn from evidence about their intellectual and moral development.²⁵⁰

This suggests that similar evidence will be required to satisfy either a ‘capacity to know’ or an ‘actual knowledge’ test.

4.2.3 Differences in data trends

As noted in **Chapter 1**, NSW Bureau of Crime Statistics and Research (BOCSAR) analysis shows that following the High Court’s decision in *RP*, NSW, Victoria and SA saw significant changes in the proportion of 10–13 year olds with proven outcomes, whereas Queensland and WA experienced less pronounced changes.

Despite both jurisdictions having a ‘capacity to know’ test, outcomes for 10–13 year olds in WA and Queensland appear to vary. BOCSAR analysis shows that:

- in 2022–23, Queensland recorded an 82% conviction rate for children aged 10–13 years, whereas WA had a 43% conviction rate, and
- in the wake of *RP*, from 2016–17 to 2022–23, Queensland experienced a modest decline of about 5% in the proportion of 10–13 year olds convicted of an offence, while WA saw a larger decrease of about 13%.²⁵¹

4.2.4 The Victorian approach to legislating *doli incapax*

Among Australian jurisdictions, Victoria appears to have taken the most comprehensive approach to legislating the presumption of *doli incapax*. It also appears to be the only Australian jurisdiction where legislation expressly requires consideration of *doli incapax* from the point of charge. The stated purpose of its approach was to:

- clarify the principle
- encourage its consistent application, and

²⁴⁷ *BDO v The Queen* (2023) 277 CLR 518, [15].

²⁴⁸ *Ibid*, [21].

²⁴⁹ *Ibid*, [24].

²⁵⁰ *Ibid*, [23].

²⁵¹ Jonathan Gu, *Did a High Court decision on doli incapax shift court outcomes for 10-13 year olds?* (Crime and Justice Bulletin No 268, NSW Bureau of Crime Statistics and Research, May 2025) 30.

- require consideration of *doli incapax* at all stages of the criminal justice process, particularly when deciding to charge a child with an offence.²⁵²

Section 11 of the *Youth Justice Act 2024* (Vic) (which is to commence no later than 30 September 2025) sets out the key principles from the ‘longstanding and foundational common law presumption of *doli incapax* in line with the High Court decision of *RP v The Queen* [2016] HCA 53’.²⁵³ On commencement, section 11 will outline:

- **The presumption of *doli incapax*:** That it is presumed that a child who is 12 or 13 years old cannot commit an offence.
- **The test for rebutting the presumption:**
 - That the child knew at the time of the alleged commission of the offence that their conduct was seriously wrong.
 - This refers to the child’s knowledge that it was seriously wrong in a moral sense to engage in the conduct that constitutes the physical elements of the offence.
- **The burden of proof:** That to rebut the presumption the prosecution must prove the above beyond a reasonable doubt.
- **The nature of evidence capable of rebutting the presumption:** That whether the child knew their conduct was seriously wrong is a question of fact, and cannot merely be inferred from the nature of the act itself.
- **The continuity of the common law:** That common law principles regarding the criminal responsibility of children will continue to apply, although the legislation prevails to the extent of any inconsistency.

The new legislation in Victoria includes procedural requirements for police officers when deciding whether to charge a child to whom the new statutory formulation of the *doli incapax* presumption applies (12–13 year olds). The intention is ‘to ensure consideration of the presumption is at the forefront of any potential criminal proceedings and to aid strategic assessments about the likelihood of rebutting the presumption’.²⁵⁴

Section 12 of the *Youth Justice Act 2024* (Vic) (uncommenced) provides that:

- Before deciding to commence proceedings for an offence, police must have regard to whether it appears there is admissible evidence available to rebut the presumption beyond reasonable doubt, by demonstrating that the child knew, at the time of the alleged offence, that their conduct was seriously wrong.²⁵⁵
- Police must consider particular matters, including any available information about the child’s age, maturity and stage of development, or whether the child has a disability or mental illness, and any previous decision (by a court or any person) about whether the child could be held criminally responsible for any other conduct.²⁵⁶
- Police must also record the reasons why it appears there is admissible evidence to rebut the new statutory *doli incapax* presumption beyond reasonable doubt, and any information, evidence or other matter that was considered.²⁵⁷

²⁵² Victoria, *Parliamentary Debates*, Legislative Assembly, 19 June 2024, 2307 (Anthony Carbines, Minister for Police, Minister for Crime Prevention, Minister for Racing); Explanatory Memorandum, Youth Justice Bill 2024 (Vic), 35.

²⁵³ Explanatory Memorandum, Youth Justice Bill 2024 (Vic), 35.

²⁵⁴ *Ibid*, 37.

²⁵⁵ *Youth Justice Act 2024* (Vic) s 12(1) (uncommenced).

²⁵⁶ *Youth Justice Act 2024* (Vic) s 12(2) (uncommenced).

²⁵⁷ *Youth Justice Act 2024* (Vic) s 12(3) (uncommenced).

The new Victorian legislation also contains a prosecutorial review requirement for certain charges where the offence was allegedly committed by a child to whom the new statutory *doli incapax* presumption applies. It is intended to ensure that only matters that have reasonable prospects of conviction progress to a hearing, and matters that do not are removed from the criminal justice system at an early opportunity.²⁵⁸

Section 13(1) (uncommenced) provides that, where the child allegedly committed an indictable offence, and it is being heard summarily in the Children's Court, a prosecutor must review the charge. Among other things, the prosecutor must consider whether it appears, at the time of the review, that there is sufficient admissible evidence to rebut the *doli incapax* presumption beyond reasonable doubt.²⁵⁹

This review requirement does not apply to a charge being prosecuted by the Director of Public Prosecutions,²⁶⁰ meaning that only police prosecutors will be required to fulfil the review requirement.²⁶¹

4.3 Stakeholder perspectives on legislating *doli incapax*

Stakeholders held differing views about the preferred model for legislating *doli incapax* in NSW. There were a number of models suggested, some of which are outlined below.

4.3.1 Legislating the current common law position

Many stakeholders supported retaining the current common law position in NSW, as articulated by the High Court in *RP*.²⁶² It was noted that the common law position appropriately reflects children's psychological and cognitive development.²⁶³ The current common law position was also viewed as consistent with international legal standards.²⁶⁴

Several stakeholders considered legislation to be unnecessary and preferred that the principle remain in the common law.²⁶⁵ Some who advocated that position submitted that the common law, particularly as stated in *RP*, is clear, well-established and already provides sufficient and appropriate guidance.²⁶⁶

²⁵⁸ Explanatory Memorandum, Youth Justice Bill 2024 (Vic), 38–39.

²⁵⁹ *Youth Justice Act 2024* (Vic) s 13(3) (uncommenced).

²⁶⁰ *Youth Justice Act 2024* (Vic) s 13(2) (uncommenced).

²⁶¹ Explanatory Memorandum, Youth Justice Bill 2024 (Vic), 39.

²⁶² Legal Aid NSW, *Submission 2* (27 June 2025); NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); The Public Defenders, *Submission 8* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); Australian Lawyers for Human Rights, *Submission 11* (27 June 2025); NSW Bar Association, *Submission 15* (30 June 2025); Aboriginal Affairs NSW, Premier's Department, *Submission 18* (2 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

²⁶³ Legal Aid NSW, *Submission 2* (27 June 2025).

²⁶⁴ Law Council of Australia, *Submission 17* (1 July 2025); NSW Health, *Submission 27* (7 July 2025).

²⁶⁵ Legal Aid NSW, *Submission 2* (27 June 2025); Just Reinvest NSW, *Submission 4* (27 June 2025); The Public Defenders, *Submission 8* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); NSW Council for Civil Liberties, *Submission 13* (30 June 2025); Intellectual Disability Rights Service, *Submission 14* (30 June 2025); NSW Bar Association, *Submission 15* (30 June 2025).

²⁶⁶ Legal Aid NSW, *Submission 2* (27 June 2025); The Public Defenders, *Submission 8* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025).

In the event that the enactment of legislation was pursued, there was broad stakeholder support for the adoption of an approach which aligned, and was consistent, with the common law approach,²⁶⁷ or which adopted the Victorian model.²⁶⁸ The Victorian model was viewed as providing greater clarity, while maintaining the protective intent of the common law.²⁶⁹

4.3.2 Adopting a ‘capacity to know’ test

The NSW Police Force and the Police Association of NSW strongly supported departing from the current common law position and adopting the Queensland ‘capacity to know’ test, as discussed in *BDO*.²⁷⁰ The NSW Police Force considered that:

- A ‘capacity to know’ test would lower the threshold for criminal responsibility, clearly differentiate from the approach in *RP*, and result in more appropriate findings of guilt.
- This would ease the current evidentiary burden imposed by *RP*, by not requiring proof of what the child was thinking at a specific point in time.
- By increasing the likelihood of conviction, this approach could incentivise diversion under the *Young Offenders Act 1997 (YOA)* or enable better access to court-ordered supports. This would, in turn, reduce recidivism and protect the community.²⁷¹

However, many other stakeholders opposed adopting a ‘capacity to know’ standard, both in submissions²⁷² and during our consultations. Specific views in submissions included:

- Adopting the test which is operative in Queensland would be a significant or radical departure from the common law doctrine of *doli incapax*.²⁷³
- Such a test does not provide for an individualised assessment of the specific child’s understanding at the time of the alleged offence.²⁷⁴
- Criminal responsibility should not attach to children who ‘should have known better’, but in fact did not understand the moral wrongfulness of their actions.²⁷⁵
- A ‘capacity to know’ standard provides insufficient protection for children.²⁷⁶

²⁶⁷ NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); Australian Lawyers for Human Rights, *Submission 11* (27 June 2025); NSW Bar Association, *Submission 15* (30 June 2025); SNAICC, *Submission 16* (1 July 2025); Office of the Deputy Secretary, Child Protection and Permanency, Department of Communities and Justice, *Submission 19* (2 July 2025); AbSec, *Submission 25* (4 July 2025).

²⁶⁸ Legal Aid NSW, *Submission 2* (27 June 2025); Law Council of Australia, *Submission 17* (1 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

²⁶⁹ Legal Aid NSW, *Submission 2* (27 June 2025); Law Council of Australia, *Submission 17* (1 July 2025).

²⁷⁰ NSW Police Force, *Submission 5* (27 June 2025); Police Association of NSW, *Submission 1* (27 June 2025).

²⁷¹ NSW Police Force, *Submission 5* (27 June 2025).

²⁷² The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); Law Council of Australia, *Submission 17* (1 July 2025); NSW Bar Association, *Submission 15* (30 June 2025); SNAICC, *Submission 16* (1 July 2025).

²⁷³ The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); The Public Defenders, *Submission 8* (27 June 2025).

²⁷⁴ The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

²⁷⁵ The Public Defenders, *Submission 8* (27 June 2025).

²⁷⁶ NSW Bar Association, *Submission 15* (30 June 2025); Law Council of Australia, *Submission 17* (1 July 2025).

- Departing from the common law may have undue impacts on Aboriginal and Torres Strait Islander children and vulnerable children, including those with developmental delays, cognitive impairment or complex needs.²⁷⁷

4.3.3 Clarifying the relevant considerations for rebutting *doli incapax*

The Office of the Director of Public Prosecutions (ODPP) submitted that any legislation should address current prosecutorial challenges and clarify the principles for which *RP* stands as authority. Concerns were raised that, on occasions, courts and defence practitioners may rely on *RP* to exclude the circumstances of the offending as a relevant consideration for rebutting the presumption. The ODPP considers this approach to be incorrect.²⁷⁸

As we have previously noted, the plurality in *RP* concluded that the presumption cannot be rebutted *merely* as an inference from the doing of the act(s) no matter how obviously wrong the act(s) may be.²⁷⁹ The ODPP contends that this does not mean the circumstances of the offending are irrelevant, but rather that the basic facts alone are insufficient to rebut the presumption.²⁸⁰ That interpretation accords with our view, for the reasons we have already expressed in **Chapter 3**.

4.3.4 Legislative requirements to consider *doli incapax* at early stages

As noted in **Chapter 3**, a strong concern among stakeholders in our Review was what was considered to be the delayed consideration of *doli incapax* in the criminal justice process. Early consideration of *doli incapax* was viewed as a key safeguard to prevent unnecessary criminalisation, and to protect vulnerable children from the harms of prolonged contact with the criminal justice system.

Many submissions supported legislative requirements for consideration of *doli incapax* at early or multiple stages of the criminal justice process, similar to the new Victorian legislation.²⁸¹ Submissions considered that such requirements would help to avoid:

- extended bail and remand periods²⁸²
- charges being withdrawn or dismissed late in proceedings, which wastes resources,²⁸³ and
- children being unnecessarily drawn into the criminal justice system when diversion or support would be more appropriate.²⁸⁴

The NSW Police Force opposed legislation requiring consideration of the *doli incapax* presumption *before* commencing or continuing with a prosecution. They consider it would require police to seek legal advice about the sufficiency of evidence before laying any charges, and place a considerable burden on prosecutors to make early assessments, without sufficient information to do so (for

²⁷⁷ Law Council of Australia, *Submission 17* (1 July 2025); Aboriginal Affairs NSW, Premier's Department, *Submission 18* (2 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

²⁷⁸ Office of the Director of Public Prosecutions, *Submission 28* (11 July 2025).

²⁷⁹ *RP v The Queen* (2016) 259 CLR 641, [9].

²⁸⁰ Office of the Director of Public Prosecutions, *Submission 28* (11 July 2025).

²⁸¹ Legal Aid NSW, *Submission 2* (27 June 2025); NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); The Public Defenders, *Submission 8* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); Australian Lawyers for Human Rights, *Submission 11* (27 June 2025); NSW Bar Association, *Submission 15* (30 June 2025); Law Council of Australia, *Submission 17* (1 July 2025); Office of the Senior Practitioner, Child Protection and Permanency, Department of Communities and Justice, *Submission 19* (2 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); AbSec, *Submission 25* (4 July 2025).

²⁸² Legal Aid NSW, *Submission 2* (27 June 2025).

²⁸³ The Public Defenders, *Submission 8* (27 June 2025).

²⁸⁴ Office of the Senior Practitioner, Child Protection and Permanency, Department of Communities and Justice, *Submission 19* (2 July 2025).

example, where a brief of evidence is not yet available). This may increase the already high rate of matters being withdrawn.²⁸⁵

The ODPP does not support introducing legislation mandating consideration of the *doli incapax* presumption at particular stages of the prosecution process, noting this is already addressed in its Prosecution Guidelines.²⁸⁶ Prosecutors are required to assess the decision to prosecute throughout proceedings,²⁸⁷ including consideration of *doli incapax* where relevant.

Particular attention is given to issue of *doli incapax* at the early stages of charge certification (in committal proceedings) and service of the brief (in summary prosecutions). Any change in circumstances bearing on the issue (including receipt of further evidence) will require the prosecution to review whether to continue the prosecution.²⁸⁸

4.3.5 Legislative arrangements for preliminary *doli incapax* and/or capacity hearings

The Children's Court proposed a legislative model that includes the following features:

- The Court receives evidence about the child's capacity prior to the substantive offence proceedings and determines — on the balance of probabilities — whether the child meets fitness-to-be-tried standards and whether they are *doli incapax*.²⁸⁹ Under the fitness test, a person is considered unfit to be tried if, because of their mental health or cognitive impairment, they are unable to do things such as understand the offence, exercise their right to challenge jurors, or follow and understand the court process.²⁹⁰
- If the *doli incapax* presumption is rebutted, the Court proceeds to consider whether the elements of the charged offence are proven.²⁹¹
- If the Court determines the *doli incapax* presumption is not rebutted, but the child poses a significant risk to themselves or others, the Court has the power to refer the child to therapeutic, educational, child protection, or cultural services.²⁹²

The Children's Court also suggested that legislation could also provide guidance for when a court may presume a child has sufficient understanding that certain conduct is seriously wrong, based on a prior finding of such understanding in a similar matter — unless there has been a significant change in circumstances that could affect that assessment.²⁹³

The Public Defenders supported introducing a legislative basis for optional preliminary hearings focused solely on the question of *doli incapax*, applicable in both summary and indictable matters.²⁹⁴ Preliminary *doli incapax* hearings are currently conducted on an informal basis in the Children's Court (see further **Chapter 3**). The Public Defenders considered that the benefits of their proposal include:

- earlier and quicker resolution of the *doli incapax* issue, potentially avoiding the need for witnesses having to give evidence at trial, and

²⁸⁵ NSW Police Force, *Submission 5* (27 June 2025).

²⁸⁶ Office of the Director of Public Prosecutions, *Submission 28* (11 July 2025).

²⁸⁷ Office of the Director of Public Prosecutions, *Prosecution Guidelines* (March 2021) [1.7].

²⁸⁸ Office of the Director of Public Prosecutions, *Submission 28* (11 July 2025).

²⁸⁹ Children's Court of NSW, *Submission 24* (7 July 2025).

²⁹⁰ *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 36. Procedures for fitness to be tried apply only in proceedings before the Supreme Court and District Court: at s 27.

²⁹¹ Children's Court of NSW, *Submission 24* (7 July 2025).

²⁹² Children's Court of NSW, *Submission 24* (7 July 2025).

²⁹³ Children's Court of NSW, *Submission 24* (7 July 2025).

²⁹⁴ The Public Defenders, *Submission 8* (27 June 2025).

- allowing hearings based on agreed facts solely for the purpose of assessing *doli incapax*, even if other aspects of the case are in dispute.²⁹⁵

4.3.6 Mandatory requirements for expert assessments

A number of stakeholders highlighted the need to improve the quality and availability of expert reports in *doli incapax* matters.²⁹⁶ Some stakeholders specifically supported the availability of court-ordered expert assessments.²⁹⁷ Suggestions from stakeholders included:

- Tasking a public health service to provide psychiatric assessment reports — with the dual purposes of improving the evidence available to the court and facilitating referrals to appropriate health services.²⁹⁸
- Granting courts the power to order expert assessments on *doli incapax*, similar to existing powers under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (MHCIFP Act)* to order fitness assessments in indictable proceedings.²⁹⁹

Other stakeholders opposed court-mandated expert assessments due to concerns about:

- abrogating the child's right to silence,³⁰⁰ and
- the risk of causing further harm to the child, as obtaining a report in these circumstances lacks a therapeutic purpose and does not align with trauma-informed practice.³⁰¹

4.3.7 Mandatory requirements to consider cultural factors

Stakeholders highlighted that consideration of *doli incapax* often overlooks cultural context, particularly for Aboriginal children.³⁰² Some submissions recommended:

- requirements to include Aboriginal elders and other cultural authority figures in decisions about *doli incapax*,³⁰³ and
- mandated cultural assessments for Aboriginal and Torres Strait Islander children.³⁰⁴

4.4 Our recommended approach

As noted above, our Review is required to recommend a framework for enacting the presumption of *doli incapax* in NSW legislation. We support legislating the *doli incapax* presumption and the test for rebutting it (**Recommendation 2**). This may improve consistency of application, provide greater legal

²⁹⁵ The Public Defenders, *Submission 8* (27 June 2025).

²⁹⁶ Advocate for Children and Young People, *Submission 7* (27 June 2025); Youth Justice NSW, *Submission 12* (29 June 2025); Office of the Senior Practitioner, Child Protection and Permanency, Department of Communities and Justice, *Submission 19* (2 July 2025); NSW Bar Association, *Submission 15* (30 June 2025).

²⁹⁷ Children's Court of NSW, *Submission 24* (2 July 2025); NSW Health, *Submission 27* (7 July 2025); Office of the Director of Public Prosecutions, *Submission 28* (11 July 2025).

²⁹⁸ NSW Health, *Submission 27* (7 July 2025).

²⁹⁹ Office of the Director of Public Prosecutions, *Submission 28* (11 July 2025).

³⁰⁰ The Law Society of NSW, *Submission 9* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025).

³⁰¹ The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

³⁰² Aboriginal Affairs NSW, Premier's Department, *Submission 18* (2 July 2025); SNAICC, *Submission 16* (1 July 2025); Aboriginal Culture in Practice, Child Protection and Permanency, Department of Communities' and Justice, *Submission 20* (2 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

³⁰³ SNAICC, *Submission 16* (1 July 2025).

³⁰⁴ Australian Lawyers for Human Rights, *Submission 11* (27 June 2025).

certainty, and better fulfil the presumption's protective purpose, provided legislative reform is supported by appropriate training and guidance, as recommended in **Chapter 3**.

In this section, we outline the elements that, in our view, such legislation should and should not include.

4.4.1 Legislation should reflect the current common law position and specify relevant considerations for rebutting *doli incapax*

Having taken into account stakeholder feedback, we recommend that NSW legislation should reflect, and be consistent with, the current common law position as expressed in *RP* (**Recommendation 2(1)–(2)**).

We acknowledge the differing views of stakeholders regarding the requirement, within the terms of any test, of the element of knowledge. Generally speaking, those views fall into one of two categories, namely:

- that the requirement expressed in *RP*, which requires actual knowledge, should be retained, or
- that the requirement adopted in Queensland and Western Australia, which requires proof of a 'capacity to know', is more appropriate.

We recommend that in terms of any mental element bearing upon the presumption, any NSW legislation should adopt the common law position (as expressed in *RP*) requiring proof of actual knowledge, at the time of the act, that the child knew it was seriously, morally wrong (**Recommendation 2(2)**). We accept that this is a high threshold. However, in our view, it is appropriate for a number of reasons.

Amongst other things, it provides a safeguard against the possibility of what are arguably inappropriate findings of criminal responsibility when a child lacks the ability to form criminal intent. It is also entirely consistent with the common law regarding the *mens rea* element of any criminal offence. Finally, it recognises the considerable vulnerability of children aged 10–13 years, and the significant impact upon such children of a criminal conviction. For all of these reasons, we do not consider that any departure from the common law test is justified or necessary.

In reaching that conclusion, we acknowledge the views of some stakeholders that a 'capacity to know' test would alleviate the burden on the prosecution as it would not require proof of what the child was actually thinking at the time of the act.³⁰⁵ However, in our view, that does not justify a departure from the common law. As we pointed out in **Chapter 3**, the very nature of the mental element of any alleged criminal offence is such that proving it is likely to be challenging.

The fact that this is so does not, in our view, justify a change in the law which applies a 'capacity to know' test specifically applicable to children in cases where the presumption is engaged. On the contrary, if such a change were implemented, it would bring about a circumstance which might be regarded as being somewhat inconsistent with the criminal law generally, and which would have the effect of creating a separate category of proof. Whilst we acknowledge the challenges faced, particularly by police prosecutors, in rebutting the presumption, we consider that those challenges are better addressed by improved training (**Recommendation 1**, discussed in **Chapter 3**), and statutory clarification regarding the matters which might be taken into account by a court in determining whether the presumption has been rebutted (**Recommendation 2(3)**), discussed further below).

Quite apart from these considerations, we have some doubt as to whether a 'capacity to know' test of the kind which applies Queensland would in fact be easier to satisfy. In that regard, we simply note that the High Court in *BDO* recognised that:

³⁰⁵ NSW Police Force, *Submission 5* (27 June 2025).

- The evidence must establish the accused’s capacity to understand what they were doing at the time of the relevant act.³⁰⁶
- What will be sufficient to rebut *doli incapax* beyond reasonable doubt will vary from case to case, and it will depend on the nature of the allegations and the individual child.³⁰⁷

We acknowledge the position that the ‘capacity to know’ test may account for the higher rate of proven offences for 10–13 year olds in Queensland.³⁰⁸ However, as reflected in BOCSAR analysis (outlined above), WA has a conviction rate for 10–13 year olds that is half that of Queensland, despite also applying a ‘capacity to know’ test for rebutting *doli incapax*. This may suggest that the legal test alone may not account for the higher conviction rate in Queensland.

We also acknowledge the view that a ‘capacity to know’ test would increase the likelihood of convictions, thereby encouraging engagement by 10–13 year olds in diversionary options or facilitating access to court-ordered interventions.³⁰⁹ Such an outcome is, in our view, speculative to a degree.

We generally embrace the importance of diversionary options and interventions and consider there is a greater likelihood of a positive change resulting from such outcomes. For this reason, we consider reforms to expand the availability of diversion and intervention measures³¹⁰ are preferable to lowering the standard required to rebut *doli incapax*.

Recommendation 2(3) is for NSW legislation to provide guidance to the courts in respect of those factors which can be taken into account in determining whether the presumption of *doli incapax* has been rebutted. The need for such reform stems, at least in part, from:

- what appear to be misunderstandings as to the nature of the necessary evidentiary focus
- a perceived lack of guidance in the authorities about what matters are relevant to rebutting the presumption,³¹¹ and
- a suggested tendency of evidence adduced in cases in which the presumption applies to indicate the child’s experiences, rather than focus upon their understanding of moral wrongness.³¹²

The NSW Police Force specifically suggested that any legislation include a list of factors to which the court must have regard to when considering whether the presumption of *doli incapax* is rebutted.³¹³ That approach, in our view, is an appropriate one. We would, however, emphasise three matters.

First, it is important that whilst the court’s consideration of any prescribed factors (to the extent that they are applicable) should be mandatory, any such factors should be inclusive, and not exhaustive, of those which can be taken into account. That is simply a recognition of the fact that the facts and circumstances of cases will differ. What weight might be attached to any one factor will, of course, be a matter for the court and no single factor will be determinative.

Secondly, and for the reasons we have previously expressed, such factors should include that nature and circumstances of the alleged offending (**Recommendation 2(3)(b)**). This addresses what

³⁰⁶ *BDO v The Queen* (2023) 277 CLR 518, [45].

³⁰⁷ *BDO v The Queen* (2023) 277 CLR 518, [23].

³⁰⁸ NSW Police Force, *Submission 5* (27 June 2025).

³⁰⁹ NSW Police Force, *Submission 5* (27 June 2025).

³¹⁰ Outlined in **Chapters 5 and 6**.

³¹¹ NSW Police Force, *Submission 5* (27 June 2025).

³¹² Children’s Court of NSW, *Submission 24* (2 July 2025).

³¹³ NSW Police Force, *Submission 5* (27 June 2025).

appears to be some misunderstanding of one aspect of the decision in *RP* and is consistent with other authorities.³¹⁴

Thirdly, in drafting such legislation, some guidance could obviously be gained from the observations of the plurality in *RP* which we discussed in **Chapter 3**, and which include the following:

- the prosecution must prove the child knew, at the time of the conduct, that their conduct was seriously wrong in a moral sense
- the presumption cannot be rebutted based solely on the nature of the conduct
- the prosecution must present specific evidence from which it can be inferred, beyond reasonable doubt, that the child's development is such that they understood the moral wrongness of the conduct
- rebutting the presumption directs attention to the intellectual and moral development of the particular child, and
- what suffices to rebut the presumption depends on the nature of the alleged offence and the child.³¹⁵

Recommendation 2: Legislating the common law test for rebutting *doli incapax*

There should be a new legislative framework for enacting the presumption of *doli incapax* in NSW which should:

- (1) Confirm the presumption that, unless rebutted, a child over the age of 10 and under the age of 14 years old cannot commit an offence.
- (2) Confirm, as articulated in *RP v The Queen* (2016) 259 CLR 641, that the prosecution must rebut the presumption and prove, beyond reasonable doubt, that the child knew at the time of the relevant act that their conduct was seriously wrong in a moral sense.
- (3) Provide guidance for determining whether the presumption has been rebutted, by:
 - (a) Providing a non-exhaustive list of statutory considerations for determining whether the presumption has been rebutted.
 - (b) Expressly including that the circumstances surrounding the commission of the offence with which the child is charged shall be a relevant consideration.

4.4.2 Legislation should include a statutory review mechanism

Some submissions recommended that legislative reforms relating to *doli incapax* should include a mechanism for review.³¹⁶ We agree, and recommend that such a review be conducted within three to five years after commencement of the legislation (**Recommendation 3**). This should allow sufficient time to assess the legislation's operation.

While some stakeholders proposed requirements to consider cultural factors in assessing *doli incapax*, we did not have sufficient information to support formal recommendations in this area. Nonetheless, we acknowledge these proposals and note them for the NSW Government to consider in any future statutory review.

³¹⁴ See, eg, *BC v R* [2019] NSWCCA 111, [53]; *RP v The Queen* (2016) 259 CLR 641, [38] (Gageler J); *AL v The Queen* [2017] NSWCCA 34, [132], [135]–[139]; *BDO v The Queen* (2023) 277 CLR 518, [52].

³¹⁵ *RP v The Queen* (2016) 259 CLR 641, [9], [12].

³¹⁶ Legal Aid NSW, *Submission 2* (27 June 2025); Office of the Deputy Secretary, Child Protection and Permanency, Department of Communities and Justice, *Submission 21* (2 July 2025).

Recommendation 3: Statutory review mechanism

The new legislative framework for enacting *doli incapax* in NSW should include a requirement to review the operation of the legislation within 3–5 years of commencement.

4.4.3 Legislation should not mandate early consideration of *doli incapax*

There was force in the many submissions highlighting the critical importance of early consideration of *doli incapax*, some of which specifically endorsed the Victorian model.³¹⁷

However, we do not recommend introducing express legislative requirements to consider whether there is admissible evidence to rebut *doli incapax* at the point of charge due to potential inflexibility. This reflects concerns raised by the NSW Police Force regarding the possibility of a resultant need to seek legal advice whenever police are considering the presumption of *doli incapax* at the time of charge.³¹⁸ We accept that police are often required to make tactical and operational determinations without having the benefit of being able to reflect on the issues over time, and if necessary obtain advice.

We also do not recommend express legislative requirements for police to record the reasons why it appears there is admissible evidence to rebut the *doli incapax* presumption beyond reasonable doubt and the information or evidence that was considered. We are concerned this may result in defence practitioners routinely seeking to compel production of that information and, in cases where police sought legal advice pre-charge, questions of privilege may arise. This may result in increased workload and costs associated with contesting subpoenas.

Although we have not included it as a legislative recommendation, we recommend training for police on the need to consider *doli incapax* at the point of charge and in preparation of the brief of evidence (**Recommendation 1(b)**, in **Chapter 3**). We consider this approach strikes an appropriate balance — thereby reducing the risk of children being unnecessarily drawn into the criminal justice system in circumstances where *doli incapax* may be unlikely to be rebutted — and avoiding the imposition of unworkable or impractical requirements on police.

However, it remains our view that earlier consideration of *doli incapax*, combined with the availability of alternative therapeutic responses, can enable meaningful interventions to be implemented for the child that address the underlying causes of their behaviour. This approach can help to prevent the current and common situation where children are subject to bail conditions or custodial remand prior to their matter being later withdrawn and no further action taken or support provided — which ultimately undermines community safety. These are all key considerations that have informed our recommendations to address current barriers to diversion under the YOA (see **Chapter 5**) and to introduce a new alternative intervention pathway, which is intended for 10–13 year olds requiring a more intensive response (see **Chapter 6**).

Further, we do not consider there is a need for express legislative requirements to consider *doli incapax* at later stages of the prosecution process, like in Victoria. BOCSAR data shows that, in 2023, over 50% of court appearances involving 10–13 year olds were finalised by a police prosecutor who withdrew all charges.³¹⁹ This suggests that, in practice, *doli incapax* is already a significant factor in later decisions by police prosecutors.

³¹⁷ *Youth Justice Act 2024* (Vic) s 12 (uncommenced).

³¹⁸ NSW Police Force, *Submission 5* (27 June 2025).

³¹⁹ Jonathan Gu, *Did a High Court decision on doli incapax shift court outcomes for 10-13 year olds?* (Crime and Justice Bulletin No 268, NSW Bureau of Crime Statistics and Research, May 2025) 20.

4.4.4 Legislation should not mandate expert assessments

Whilst there was support from some stakeholders for the introduction of mandatory expert assessments, we do not support that approach. We acknowledge that there may be a desire for more evidence to be available to the court in *doli incapax* — particularly in cases where a young person is disengaged from services and police have limited sources of evidence — but we are concerned that the potential benefits of mandatory expert assessments may be outweighed by the drawbacks.

Our concerns include:

- It may be both challenging and arguably inappropriate for a clinician to determine *doli incapax*, as it is a legal concept rather than a clinical one.³²⁰ Expert assessments should not — and cannot — replace the court’s own determination of this issue.
- While courts have powers to order fitness assessments under the MHCIFP Act, fitness concerns the accused person’s capacity to participate meaningfully in the court process, whereas *doli incapax* is a substantive matter that must be rebutted by the prosecution beyond reasonable doubt. A fitness assessment can be conducted without reference to the specific details of the alleged offending. We share stakeholder concerns about the potential impact of court-mandated expert assessments of *doli incapax* on a child’s right to silence.
- In consultations, we heard that expert assessments can involve significant expense and yield variable results. Expert reports obtained some time after the alleged offence may have limited bearing on the child’s understanding at the relevant time.³²¹

In situations where evidence is unavailable or insufficient to rebut *doli incapax*, but there remains a significant risk to the child or community, we recognise the importance of having alternative options available. This is one of the key purposes behind our recommendations about introducing new therapeutic intervention measures for 10–13 year olds, which are not contingent on criminal responsibility (see **Chapter 6**).

4.4.5 Legislation should not mandate capacity hearings

We do not recommend including legislative requirements for preliminary hearings to assess a child’s capacity alongside *doli incapax*. We consider it is important to maintain a distinction between cognitive capacity generally and the presumption of *doli incapax*, for the following reasons:

- *Doli incapax* specifically focuses on the child’s understanding at the time of the alleged offence, whereas cognitive capacity is a broader concept. Most children can develop moral understanding as they mature, whereas those with cognitive impairments may experience enduring limitations in capacity.
- We are concerned that mandatory capacity hearings may risk conflating the age-based legal presumption of *doli incapax* with general cognitive capacity, overcomplicating the proceedings and obscuring the central issues in contention.

We also note that the fitness provisions under the MHCIFP Act do not currently apply to proceedings in the Children’s Court. Accordingly, the Children’s Court’s proposal represents a

³²⁰ Susan Baidawi et al, ‘Children aged 10 to 13 in the justice system: Characteristics, alleged offending and legal outcomes’, *Report to the Criminology Research Advisory Council Grant: CRG 41/20–21* (Australian Institute of Criminology, January 2024) 60.

³²¹ David Hamer and Thomas Crofts, ‘The Logic and Value of the Presumption of *Doli Incapax* (Failing That, an Incapacity Defence)’ (2023) 43(3) *Oxford Journal of Legal Studies* 546, 547. See also Susan Baidawi et al, ‘Children aged 10 to 13 in the justice system: Characteristics, alleged offending and legal outcomes’, *Report to the Criminology Research Advisory Council Grant: CRG 41/20–21* (Australian Institute of Criminology, January 2024) 60.

significant departure from current arrangements, and such a reform is beyond the remit of this Review.

While there was some stakeholder support for enshrining the current informal arrangements for preliminary *doli incapax* hearings in legislation,³²² we did not have sufficient information to support formal recommendations in this area. Nonetheless, we acknowledge this suggestion and note it for the NSW Government to consider in any future statutory review (see **Recommendation 3**).

³²² The Public Defenders, *Submission 8* (27 June 2025).

5 Interaction between *doli incapax* and statutory diversion schemes

At a glance

While stakeholders held different views about the compatibility of *doli incapax* with diversion, there was consistently strong support across a range of stakeholders for the need to improve access to statutory diversion processes.

For less serious offending by 10–13 year olds, diversion under the *Young Offenders Act 1997 (YOA)* is likely to be the most suitable response and, appropriately, this cohort are frequently diverted under the YOA. We recommend reforms to address current constraints in the YOA to further improve access to YOA diversions by children aged 10–13 years.

For 10–13 year olds with mental health needs, diversion under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (MHCIFP Act)* may be an appropriate and effective response. However, mental health diversions are rare for this age group. We consider that access to mental health diversions should be improved where possible.

5.1 Introduction

Our Terms of Reference require consideration of the interaction between *doli incapax*, the YOA, and the MHCIFP Act.

In NSW, there are various diversionary and intervention programs available for children and young people that aim to prevent contact with, or divert them from, the criminal justice system. This Chapter focuses on statutory diversion schemes under the YOA and MHCIFP Act.

5.2 Importance of diversion

The importance and effectiveness of diversion was a commonly expressed view amongst stakeholders. Specific submissions included:

- Diversion is a necessary and appropriate response to most offending by children.³²³
- Diversion should be the preferred response to offending behaviour by children, over criminal prosecution.³²⁴
- Incarceration creates more harm, and is more expensive, than early intervention or diversion.³²⁵
- Improved diversion and intervention is more likely to decrease the likelihood of children coming into contact with the criminal justice system³²⁶ and produce better outcomes for young people, the community and victims of crime.³²⁷

Stakeholder views regarding the importance of diversion are supported by research indicating that:

³²³ Legal Aid NSW, *Submission 2* (27 June 2025).

³²⁴ Just Reinvest NSW, *Submission 4* (27 June 2025); NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); NSW Council for Civil Liberties, *Submission 13* (30 June 2025).

³²⁵ Community Restorative Centre, *Submission 3* (27 June 2025).

³²⁶ NSW Advocate for Children and Young People, *Submission 7* (27 June 2025).

³²⁷ NSW Police Force, *Submission 5* (27 June 2025).

- Most offending by 10–13 year olds is non-violent³²⁸ and only a small proportion engage in more serious and persistent offending.³²⁹
- Diversion can provide an efficient response to those children who commit less serious offences and are likely to desist from offending without requiring further intervention. It can also ‘reduce the criminogenic effects of formal justice system contact as a result of negative labelling and stigmatisation’.³³⁰
- Children who are diverted away from the criminal justice system, and are provided with appropriate supports, are less likely to reoffend than those who come into contact with the system.³³¹

5.3 Current diversion schemes

5.3.1 Diversion under the Young Offenders Act 1997

In NSW, the YOA is the primary legislation that deals with diversion for young offenders. It applies to children:

- aged 10–17 years when an offence covered by the YOA is committed, or is alleged to have been committed, and
- who are aged under 21 years when being dealt with under the YOA.³³²

The YOA is underpinned by various principles to guide its operation, including that:

- the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence, having regard to the matters that must be considered under the YOA, and
- criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.³³³

In addition, the objectives of the YOA include:

- establishing a scheme that provides an alternative process to court proceedings, and an efficient and direct response to the commission of certain offences by children,
- establishing a scheme of youth justice conferences (YJCs) to deal with offenders in a way that meets the needs of victims and offenders,
- addressing the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of diversionary options including YJCs, cautions and warnings.³³⁴

³²⁸ Karen Freeman and Neil Donnelly, *The involvement of young people aged 10 to 13 years in the NSW criminal justice system* (NSW Bureau of Crime Statistics and Research, 2024) 1.

³²⁹ Susan Baidawi et al, ‘Children aged 10 to 13 in the justice system: Characteristics, alleged offending and legal outcomes’, *Report to the Criminology Research Advisory Council Grant: CRG 41/20–21* (Australian Institute of Criminology, January 2024) x, xii.

³³⁰ Troy Allard et al, ‘Police diversion of young offenders and Indigenous over-representation’, *Trends & issues in crime and criminal justice*, No. 390 (Australian Institute of Criminology, 2010) 9.

³³¹ Garner Clancey, Cindy Wang and Brenda Lin, ‘Youth justice in Australia: Themes from recent enquiries’, *Trends & Issues in Crime and Criminal Justice* (No 605, Australian Institute of Criminology, October 2020) 9.

³³² *Young Offenders Act 1997* (NSW) ss 4 (definition of ‘child’), 7A(1).

³³³ *Young Offenders Act 1997* (NSW) ss 7(a), (c).

³³⁴ *Young Offenders Act 1997* (NSW) ss 3.

The YOA applies to summary offences, and indictable offences that may be dealt with summarily under Chapter 5 of the *Criminal Procedure Act 1986* or another prescribed law.³³⁵ Offences excluded from the YOA include:

- strictly indictable offences
- offences under the *Crimes (Domestic and Personal Violence) Act 2007*
- sexual offences
- certain traffic offences
- certain drug offences, and
- any offence that results in the death of a person.³³⁶

Following an incident, police consider whether a young person is eligible for diversion under the YOA or whether the matter should proceed to court.³³⁷ The YOA contains a hierarchy of responses: warnings, cautions and YJCs.³³⁸

5.3.1.1 Warnings

A warning is given to the child by a police officer and may be given at any place, including any place where the child is found.³³⁹ There are no conditions or additional sanctions imposed.³⁴⁰ A warning is intended to be a direct and immediate response to low-level offending by children,³⁴¹ and does not require the child to admit the offence.

Police can only issue warnings for summary offences covered by the YOA (other than a graffiti offence or any other offence prescribed by the Young Offenders Regulation 2016 (none are currently prescribed)).³⁴² Warnings cannot be given for violent offences or where the police officer considers it is not in the interests of justice for the matter to be dealt with by warning.³⁴³

5.3.1.2 Cautions

For eligible matters that are too serious for a warning, police can give a caution.³⁴⁴ This option is available to police for any offence covered by the YOA (other than a graffiti offence or any other offence prescribed by the Young Offenders Regulation 2016 (none are currently prescribed)).³⁴⁵

Cautions are usually given by a police officer at a police station.³⁴⁶ A caution must be given 10–21 days after the decision to give a caution has been made, and the child has been given notice of the caution.³⁴⁷ Cautions may also be given by a court, for any offence (including graffiti offences).³⁴⁸

³³⁵ *Young Offenders Act 1997* (NSW) s 8(1).

³³⁶ *Young Offenders Act 1997* (NSW) ss 8(2)–(3).

³³⁷ Legislative Assembly Law and Safety Committee, Parliament of NSW, *The Adequacy of Youth Diversionary Programs in New South Wales* (Report No 2/56, September 2018) [1.12].

³³⁸ *Young Offenders Act 1997* (NSW) s 9(1).

³³⁹ *Young Offenders Act 1997* (NSW) s 15(1).

³⁴⁰ *Young Offenders Act 1997* (NSW) s 15(2).

³⁴¹ NSW, *Parliamentary Debates*, Legislative Council, 21 May 1997, 8959 (Jeff Shaw, Attorney General).

³⁴² *Young Offenders Act 1997* (NSW) s 13.

³⁴³ *Young Offenders Act 1997* (NSW) s 14(2).

³⁴⁴ *Young Offenders Act 1997* (NSW) ss 20(1), (3).

³⁴⁵ *Young Offenders Act 1997* (NSW) s 18.

³⁴⁶ *Young Offenders Act 1997* (NSW) ss 26(2)–(3).

³⁴⁷ *Young Offenders Act 1997* (NSW) s 26(1).

³⁴⁸ *Young Offenders Act 1997* (NSW) s 31(1)(a).

To receive a caution, a child must consent to the caution and admit the offence.³⁴⁹ A child may only be cautioned under the YOA on a maximum of three occasions.³⁵⁰

We note that cautions can also be given by the court under the *Children (Criminal Proceedings) Act 1987* in certain circumstances; where an offence is proven, the court may direct that the charge be dismissed and may issue a caution.³⁵¹

5.3.1.3 Youth Justice Conferences

For offences covered by the YOA that are too serious for a warning or caution, or where the child has already been cautioned on three previous occasions, police and courts can refer a person to a YJC. The child must admit the offence and, in the case of a police referral, consent to the YJC.³⁵²

YJCs are administrated by Youth Justice NSW and involve bringing together the child and their family or an adult of their choosing, the child's legal practitioner, the investigating official, a specialist youth officer, and the victims and their support persons.³⁵³ YJCs result in an outcome plan being developed for the child,³⁵⁴ which may provide for participation by the child in an appropriate program (such as counselling and educational programs).³⁵⁵

5.3.2 Diversion under mental health legislation

The MHCIFP Act sets out the framework for criminal proceedings involving people, including children, with mental health or cognitive impairment. Under section 14 of the MHCIFP Act, a magistrate may dismiss a charge against a defendant with a mental health impairment or cognitive impairment and:

- discharge them into the care of a responsible person
- discharge them on the condition that they attend on a person or at a place for assessment, treatment or support, or
- discharge them unconditionally.

In determining whether to make a section 14 order, the magistrate must consider matters outlined in section 15, including: the nature, seriousness and circumstances of the alleged offence, the defendant's criminal history, and whether the defendant has previously received a mental health diversion.³⁵⁶

Section 14 orders operate for 12 months, with the court exercising oversight during this period:

- If a magistrate suspects that a defendant has not complied with a condition of the order, the magistrate may, within 12 months of the order being made, order the defendant to appear before the court.³⁵⁷
- If the defendant was conditionally discharged and fails to comply with the condition within 12 months of the order, the magistrate may then deal with the original charge.³⁵⁸

³⁴⁹ *Young Offenders Act 1997* (NSW) ss 19(b)–(c), 31(1)(b).

³⁵⁰ *Young Offenders Act 1997* (NSW) ss 20(7), 31(5).

³⁵¹ *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(a)(i).

³⁵² *Young Offenders Act 1997* (NSW) ss 36(b)–(c), 40(1A)(b).

³⁵³ *Young Offenders Act 1997* (NSW) s 47(1).

³⁵⁴ *Young Offenders Act 1997* (NSW) s 52(1).

³⁵⁵ *Young Offenders Act 1997* (NSW) ss 52(5)(c), (5A).

³⁵⁶ *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) ss 15(b), (e), (f).

³⁵⁷ *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 16(1).

³⁵⁸ *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 16(4).

The NSW Adolescent Court and Community Teams, administered by Justice Health NSW, operate at some Children's Court locations and assess young people who have been referred to the service to determine if they are eligible for diversion under the MHCIFP Act.

5.4 Stakeholder perspectives on the diversion schemes

5.4.1 Interaction between *doli incapax* and diversion schemes

We heard a range of views from stakeholders about the interaction between the *doli incapax* presumption and diversion under the YOA and the MHCIFP Act.

Some stakeholders considered that *doli incapax* poses barriers to 10–13 year olds engaging in diversion. Views in submissions included:

- Following legal advice, children may choose to contest charges rather than engaging in YOA diversions on the basis that *doli incapax* is unlikely to be rebutted.³⁵⁹
- There is uncertainty about how *doli incapax* applies in relation to YJCs, particularly regarding whether the presumption must be rebutted beforehand, who is responsible for confirming this — police at referral or Youth Justice NSW managers during eligibility assessment — and how to respond when a child shows limited understanding of their actions during a YJC.³⁶⁰ YJCs require the child to take accountability, which conflicts with the (unrebutted) *doli incapax* presumption that the child lacks capacity to understand their behaviour.³⁶¹
- Orders under section 14 of the MHCIFP Act are generally made on application by the defence. The defence may be more likely to enter a 'not guilty' plea and seek withdrawal or dismissal of the matter on the basis of *doli incapax*.³⁶²
- Section 14 orders can involve onerous treatment plans. These may be inappropriate if the child could otherwise be found not criminally responsible due to *doli incapax*.³⁶³

Other views expressed in submissions included:

- *Doli incapax* can operate harmoniously with diversion.³⁶⁴
- Children aged 10–13 years typically choose diversion,³⁶⁵ even when they receive legal advice that the prosecution may be unable to rebut *doli incapax*.³⁶⁶ Diversion ensures faster resolution of proceedings.³⁶⁷
- Cases that proceed to court often involve offences excluded from the YOA, police exercising discretion to charge rather than divert, or the child contesting the charge (on the basis of *doli incapax* or on other bases).³⁶⁸

³⁵⁹ Police Association of NSW, *Submission 1* (27 June 2025); NSW Police Force, *Submission 5* (27 June 2025); Youth Justice NSW, *Submission 12* (29 June 2025).

³⁶⁰ Youth Justice NSW, *Submission 12* (29 June 2025).

³⁶¹ Youth Justice NSW, *Submission 12* (29 June 2025).

³⁶² NSW Police Force, *Submission 5* (27 June 2025).

³⁶³ The Law Society of NSW, *Submission 9* (27 June 2025).

³⁶⁴ Legal Aid NSW, *Submission 2* (27 June 2025); The Public Defenders, *Submission 8* (27 June 2025); AbSec, *Submission 25* (4 July 2025).

³⁶⁵ The Law Society of NSW, *Submission 9* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025).

³⁶⁶ Legal Aid NSW, *Submission 2* (27 June 2025).

³⁶⁷ Legal Aid NSW, *Submission 2* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025).

³⁶⁸ The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025).

- Children may attend court for various reasons, including to receive comprehensive, in-person legal advice (following initial advice received via the Legal Aid NSW or Aboriginal Legal Service (NSW/ACT) hotline), and because they can access the same YOA diversions as they could access from police.³⁶⁹

5.4.2 Barriers to diversions under the YOA

While stakeholders held different views about the compatibility of *doli incapax* with diversion, there was strong support across a range of stakeholders for the need to improve access to diversion under the YOA. As noted by the Children’s Court, the benefit of cautions and YJCs include holding the child accountable for their behaviour and inviting them to acknowledge and repair the harm.³⁷⁰

The Aboriginal Legal Service (NSW/ACT) noted that YOA diversions, in particular YJCs, are under-utilised.³⁷¹ This feedback was also provided by other stakeholders during our consultations.

Stakeholders highlighted particular constraints on diversion under the YOA, which are outlined below.

5.4.2.1 The admission requirement

A child is required to admit the offence to be eligible for a caution or YJC. Submissions from many stakeholders identified the admission requirement as a key barrier to diversion.³⁷²

The Public Defenders observed that, while the law distinguishes criminal responsibility by age, the YOA applies the same rules to children aged 10–13 years as it does to young people aged over 14 years.³⁷³ This may justify adopting a more flexible or lower threshold for diversion for the younger age group.

In submissions³⁷⁴ and in consultations, some stakeholders supported a requirement to ‘not deny’ the offence, rather than make a formal admission.

5.4.2.2 Three caution limit

A maximum of three cautions are available under the YOA. Submissions from several stakeholders supported removing or increasing the limit on cautions.³⁷⁵ Similar views were expressed in roundtables and individual consultations.

The Children’s Court supported removing the limit, because lawyers will advise children to attend court if diversionary options are finite and the alternative is likely an acquittal.³⁷⁶ Conversely, the Police Association of NSW expressed concerns that unlimited cautions may undermine accountability.³⁷⁷

³⁶⁹ Children’s Court of NSW, *Submission 24* (2 July 2025).

³⁷⁰ Children’s Court of NSW, *Submission 24* (2 July 2025).

³⁷¹ The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

³⁷² NSW Police Force, *Submission 5* (27 June 2025); The Public Defenders, *Submission 8* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); Youth Justice NSW, *Submission 12* (29 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

³⁷³ The Public Defenders, *Submission 8* (27 June 2025).

³⁷⁴ Legal Aid NSW, *Submission 2* (27 June 2025); NSW Police Force, *Submission 5* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025).

³⁷⁵ Legal Aid NSW, *Submission 2* (27 June 2025); The Public Defenders, *Submission 8* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); Children’s Court of NSW, *Submission 24* (2 July 2025); AbSec, *Submission 25* (4 July 2025).

³⁷⁶ Children’s Court of NSW, *Submission 24* (2 July 2025).

³⁷⁷ Police Association of NSW, *Submission 1* (27 June 2025).

The NSW Police Force supported retaining the current cap of three cautions but introducing a three-year expiry period. This approach was seen as enhancing diversion opportunities without weakening the deterrent effect of a cap, and signalling when more intensive interventions are needed to address offending behaviour.³⁷⁸

5.4.2.3 Offence exclusions

Several submissions highlighted the exclusion of certain offences from the YOA as a key barrier to diversion.³⁷⁹

Some submissions considered that the list of excluded offences is arbitrary and unjustified.³⁸⁰ It was noted that there are other checks and balances within the YOA, including the factors for police and courts to consider when exercising discretion to divert the child.³⁸¹ Similar views were expressed during consultations.

5.4.2.4 Uncertainty about the admissibility of diversion-related evidence

Section 67 of the YOA provides that ‘any statement, confession, admission or information made or given by a child during the giving of a caution or a conference under this Act is not to be admitted in evidence in any subsequent criminal or civil proceedings’.

Some submissions noted that police and prosecutors may seek to use diversion-related evidence (for example, warnings issued by police or statements made during YJCs) to rebut *doli incapax*.³⁸² Concerns about use of diversion-related evidence in future legal matters may deter children from engaging in diversions.³⁸³

Several submissions supported clarifying or strengthening protections for disclosures made during diversion or therapeutic processes.³⁸⁴ Conversely, some submissions supported permitting diversion-related evidence to be admissible to rebut *doli incapax* where the child disengages or fails to comply with diversion.³⁸⁵

5.4.2.5 Inconsistent awareness or use of diversion by police

Some stakeholders raised concerns about inconsistent awareness or use of the YOA diversionary options by police. Views in submissions included:

- Some police are unaware of, or otherwise do not use, these diversionary options and will persist in charging a child aged 10–13 years with a criminal offence.³⁸⁶

³⁷⁸ NSW Police Force, *Submission 5* (27 June 2025).

³⁷⁹ Legal Aid NSW, *Submission 2* (27 June 2025); The Public Defenders, *Submission 8* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

³⁸⁰ The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

³⁸¹ The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025).

³⁸² Youth Justice NSW, *Submission 12* (29 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

³⁸³ NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

³⁸⁴ Legal Aid NSW, *Submission 2* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); Children’s Court of NSW, *Submission 24* (2 July 2025).

³⁸⁵ Police Association of NSW, *Submission 1* (27 June 2025); NSW Police Force, *Submission 5* (27 June 2025).

³⁸⁶ The Law Society of NSW, *Submission 9* (27 June 2025).

- There may be different attitudes towards diversion among police officers in different regions of NSW.³⁸⁷
- In some areas, there may be community expectations or pressure to pursue a criminal justice response rather than using diversion.³⁸⁸
- YOA diversions are used less often for First Nations children.³⁸⁹
- There should be additional training for police to promote awareness and use of diversionary options in appropriate matters.³⁹⁰

An alternative view raised during consultations was that police are willing to use diversionary processes where they are available.

5.4.3 Barriers to mental health diversions

The Children's Court advised that diversions under the MHCIFP Act are rare for 10–13 year olds.³⁹¹ This is also reflected in data from the NSW Bureau of Crime Statistics and Research (BOCSAR).

In 2023, there were 719 finalised Children's Court appearances involving defendants who were under 14 years of age at the time of the offence.³⁹² Of the 718 court appearances with a known outcome, 3.2% were diversions under the MHCIFP Act.³⁹³

Stakeholders identified a range of barriers to, or limitations of, orders under section 14 of the MHCIFP Act for 10–13 year olds. Views in submissions included:

- There may be insufficient evidence of a diagnosis to support applications for a section 14 order. This may be due to limited availability of assessments,³⁹⁴ particularly in regional areas and for First Nations children.³⁹⁵
- Some children may be unsuitable for, or unable to engage in, a 12-month court-mandated treatment plan.³⁹⁶
- Previous diversion under section 14 may prejudice a child in future section 14 applications, given section 15(f) allows a magistrate to consider whether a defendant has previously been diverted in this way.³⁹⁷
- In practice, there can be a lack of follow-up or oversight of a child's compliance with a section 14 order.³⁹⁸

³⁸⁷ Legal Aid NSW, *Submission 2* (27 June 2025).

³⁸⁸ The Public Defenders, *Submission 8* (27 June 2025).

³⁸⁹ The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); NSW Council for Civil Liberties, *Submission 13* (30 June 2025).

³⁹⁰ The Law Society of NSW, *Submission 9* (27 June 2025).

³⁹¹ Children's Court of NSW, *Submission 24* (2 July 2025).

³⁹² Karen Freeman and Neil Donnelly, *The involvement of young people aged 10 to 13 years in the NSW criminal justice system* (Bureau Brief No 171, NSW Bureau of Crime Statistics and Research, October 2024) 2.

³⁹³ *Ibid*, 13.

³⁹⁴ Legal Aid NSW, *Submission 2* (27 June 2025); Youth Justice NSW, *Submission 12* (29 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

³⁹⁵ The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

³⁹⁶ The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

³⁹⁷ The Law Society of NSW, *Submission 9* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); Children's Court of NSW, *Submission 24* (2 July 2025).

³⁹⁸ Youth Justice NSW, *Submission 12* (29 June 2025); Children's Court of NSW, *Submission 24* (2 July 2025).

- There may be limited availability of community-based mental health services to support compliance with section 14 orders — especially in regional areas, or where the child has complex diagnoses.³⁹⁹

5.5 Our recommended approach

5.5.1 Improving access to YOA diversions by 10–13 year olds

For less serious offending by 10–13 year olds, diversion under the YOA is likely to be the most suitable response and, appropriately, this cohort are frequently diverted under the YOA.

A 2024 report by BOCSAR found that the majority (63.4%) of police-initiated legal proceedings against 10–13 year olds in 2023 were formal court diversions under the YOA.⁴⁰⁰ The most common method of diversion was a caution (36.3%), followed by a warning (20.9%) and then a YJC (6.2%).⁴⁰¹

The BOCSAR research also indicates that the likelihood of diversion under the YOA decreases as children get older. For instance, court diversions were the outcome in:

- 74.8% of legal proceedings against 10 year olds
- 65.2% of legal proceedings against 12 year olds
- 51.4% of legal proceedings against 14 year olds, and
- 31.8% of legal proceedings against 17 year olds.⁴⁰²

This may suggest that factors other than the presumption of *doli incapax* may influence the level of engagement in YOA diversions by 10–13 year olds.

Notwithstanding that YOA diversions are frequently used for the 10–13 year old cohort, we agree with stakeholders in our Review that access to YOA diversions should be improved where possible.

As noted in **Chapter 1**, we understand that a review of the YOA remains under consideration by the NSW Government.⁴⁰³ In light of strong stakeholder feedback, we recommend that the NSW Government facilitates greater access to diversion by 10–13 year olds through amendments to the YOA directed at this cohort. We consider that addressing these constraints may better meet the objectives of the YOA, including addressing the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of YJCs, cautions and warnings.⁴⁰⁴

First, we recommend that the admission requirement be revised for 10–13 year olds (**Recommendation 4(1)**). While this current requirement may hinder diversion opportunities for young people generally, it may present particular challenges for 10–13 year olds, given their developmental stage and level of understanding. Lowering the threshold so that a 10–13 year old can be diverted where they do not deny the offence may be a more balanced approach: the child may acknowledge involvement without having to agree to every aspect of the alleged conduct.

Second, we recommend that the YOA include three-year expiration date for cautions received by 10–13 year olds (**Recommendation 4(2)**), as suggested by the NSW Police Force.⁴⁰⁵ While many

³⁹⁹ Legal Aid NSW, *Submission 2* (27 June 2025); Intellectual Disability Rights Service, *Submission 14* (30 June 2025); Children’s Court of NSW, *Submission 24* (2 July 2025).

⁴⁰⁰ Karen Freeman and Neil Donnelly, *The involvement of young people aged 10 to 13 years in the NSW criminal justice system* (Bureau Brief No 171, NSW Bureau of Crime Statistics and Research, October 2024) 1.

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*, 7.

⁴⁰³ Evidence to Portfolio Committee No 5 — Justice and Communities, Legislative Council, Parliament of NSW, Sydney, 6 March 2024, 71 (Paul McKnight).

⁴⁰⁴ *Young Offenders Act 1997* (NSW) s 3(d).

⁴⁰⁵ NSW Police Force, *Submission 5* (27 June 2025).

stakeholders supported removing the current cap on cautions, unlimited cautions may not effectively address underlying causes of the child's behaviour. Repeated offending may indicate that a more intensive response, such as a YJC, is required. Cautions do not include any conditions, whereas outcome plans from a YJC can facilitate engagement by the child in appropriate programs and services.

We therefore support keeping the three-caution limit, but allowing cautions to expire after a period of three years. This approach may reduce the likelihood of 10–13 year olds choosing to go to court simply to preserve their remaining cautions, as they would regain access to cautions after a period without reoffending.

Third, we recommend expanding the offences for which 10–13 year olds can be diverted under the YOA (**Recommendation 4(3)**) to include less serious breaches of Apprehended Violence Orders and stalking or intimidation offences. This reflects stakeholder feedback.⁴⁰⁶

We heard in consultations that domestic violence offending by young children is often less serious or involves complexities better addressed through alternatives to the criminal justice process. We agree that existing safeguards — such as the factors for police and courts to consider in determining whether to divert the child by way of caution or YJC, including the seriousness of the offence and the harm caused to any victim⁴⁰⁷ — would provide an appropriate fetter on the use of cautions or YJCs for unsuitable matters.

The NSW Government may also consider stakeholder suggestions to broaden the scope of the YOA to include less serious sexual offences,⁴⁰⁸ traffic offences,⁴⁰⁹ graffiti offences,⁴¹⁰ and additional drug offences.⁴¹¹

Finally, we recommend strengthening protections for diversion-related evidence (**Recommendation 4(4)**). This may go some way to addressing concerns about children preferring to contest charges on the basis of *doli incapax* rather than engaging in YOA diversions. A clear, legislative prohibition on diversion-related evidence being relied on to rebut *doli incapax* may provide an additional incentive for 10–13 year olds to engage in diversionary processes. We also note that the new legislation in Victoria includes comprehensive admissibility protections.⁴¹²

The reforms outlined in **Recommendation 4** — particularly the departure from the admission requirement — constitute a significant shift in the approach to diversion under the YOA. Successful implementation will depend on active engagement and consistent application by all criminal justice system participants. Further efforts will be needed by criminal justice agencies and practitioners — including these who provide legal representation to children — to foster a shared commitment to the new approach, and to develop a sound understanding of how it operates.

⁴⁰⁶ NSW Police Force, *Submission 5* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); Children's Court of NSW, *Submission 24* (2 July 2025).

⁴⁰⁷ *Young Offenders Act 1997* (NSW) ss 20(3), 37(3).

⁴⁰⁸ Children's Court of NSW, *Submission 24* (2 July 2025).

⁴⁰⁹ Legal Aid NSW, *Submission 2* (27 June 2025); Children's Court of NSW, *Submission 24* (2 July 2025).

⁴¹⁰ Legal Aid NSW, *Submission 2* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

⁴¹¹ Legal Aid NSW, *Submission 2* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); Children's Court of NSW, *Submission 24* (2 July 2025).

⁴¹² *Youth Justice Act 2024* (Vic) ss 142–144.

Recommendation 4: Addressing constraints on diversion under the *Young Offenders Act 1997*

The *Young Offenders Act 1997* should be amended to:

- (1) Change the threshold requirement for 10–13 year olds to be eligible for a caution or Youth Justice Conference, such that the child need not ‘admit’ the offence, but instead may ‘not deny’ the offence.
- (2) Introduce a three-year expiry period for cautions received by 10–13 year olds.
- (3) Expand the offences for which 10–13 year olds can access diversion under the Act.
- (4) Clarify that evidence relating to diversion, including any non-denial, cannot be used to rebut the presumption of *doli incapax*.

5.5.1.1 Illustrative case study: Application of Recommendation 4

This case study indicates how **Recommendation 4** could work in practice. It is an example of a less serious matter involving a child who does not have especially complex needs and where diversion under the YOA may be appropriate.

The child is aged 11 and shoplifts from a local shop. They are a frequent cannabis user and steal to fund cannabis use.

At present, the outcome may be as follows:

- Police determine that a YJC may be suitable, but the child declines to participate following legal advice that:
 - evidence of their participation in the YJC may be used against them in subsequent proceedings, given the current admission requirement and the uncertainty around the admissibility of diversion-related evidence, and
 - if the matter proceeds to court, the child is likely to be acquitted due to *doli incapax*.
- The child proceeds to court and is found *doli incapax*. The matter is dismissed with no further intervention or support.
- The child reoffends as underlying causes of their behaviour are not addressed.

In line with **Recommendation 4**, the outcomes could be as follows:

- The child agrees to participate in the YJC, as they are not required to formally admit the offence and their participation cannot be used against them in subsequent proceedings.
- The child participates in the YJC, which involves meeting face-to-face with the shop owner and respected community members. This prompts reflection, and the young person provides an apology.
- The outcome plan from the YJC includes a referral to alcohol and other drug counselling, which supports the child in ceasing cannabis use. By addressing the underlying cause of the offending, the child does not reoffend.

5.5.2 Improving access to mental health diversions by 10–13 year olds

For many 10–13 year olds with mental health needs, diversion under the MHCIFP Act may be an appropriate and effective response. This provides an avenue for children to access individualised mental health support, which may reduce their risk of further contact with the criminal justice system.⁴¹³

⁴¹³ Claire Gaskin et al, ‘Youth Mental Health Diversion at Court: Barriers to Diversion and Impact on Reoffending’ (2022) 70(6–7) *Crime & Delinquency* 1726, 1729.

We consider that access to mental health diversions under section 14 of the MHCIFP Act should be improved where possible. A 2022 study found that young people who were granted a diversion under the MHCIFP Act were significantly less likely to reoffend within 12 months (56% reoffending rate), compared to those who were eligible but not granted diversion (65% reoffending rate).⁴¹⁴

We recommend that the NSW Government consider ways to ensure that any previous order made under section 14 of the MHCIFP Act before a person turns 14 years of age does not limit the availability of section 14 orders once a child is over 14 years of age (**Recommendation 5**). This is to encourage greater engagement in mental health diversions by 10–13 year olds by alleviating concerns that such engagement could affect future diversion opportunities.

Further consideration could be given to the suggestion, made in submissions, that section 15 of the MHCIFP Act be amended to ensure that, when considering whether to make a section 14 order, the court cannot consider any previous orders made before a person turned 14 years old.⁴¹⁵ We note this restriction may impact on the court's ability to undertake the required balancing exercise in section 15. For example, section 15(e) requires consideration of the person's criminal history, which includes any prior diversion under section 14, and section 15(h) requires consideration of community and victim safety, which may be informed by the defendant's conduct when subject to a previous section 14 order. An alternative option that could be considered is for section 15 to specify that a section 14 order made before the person turned 14 is not determinative when deciding whether to make a new order.

There was also support in submissions for increased funding for diagnostic and support services for children with disabilities and mental health issues.⁴¹⁶ In consultations, we heard the Justice Health NSW Safeguards Service, which provides mental health assessment and treatment for young people at risk of entering the criminal justice system, is seeing promising results. We understand the NSW Government is investing almost \$110 million over four years to expand the Safeguards program to regional NSW.⁴¹⁷

To better support applications for section 14 orders for 10–13 year olds, and facilitate effective compliance with those orders, the NSW Government could consider enhancing the availability and accessibility of mental health services for this age group specifically.

Recommendation 5: Limiting impact of previous orders under section 14 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*

The NSW Government should consider ways to ensure that any previous order made under section 14 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* before a person turns 14 years of age does not limit the availability of section 14 orders once the person is over 14 years of age.

5.6 Other diversionary programs

This Review focuses on how *doli incapax* interacts with diversion schemes under the YOA and the MHCIFP Act, consistent with our Terms of Reference.

⁴¹⁴ Ibid, 1749, 1751.

⁴¹⁵ The Law Society of NSW, *Submission 9* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

⁴¹⁶ Legal Aid NSW, *Submission 2* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025).

⁴¹⁷ Justice Health NSW, 'Justice Health Safeguards program expands to regional NSW' *NSW Government* (Web Page, 18 December 2024) <<https://www.nsw.gov.au/health/justicehealth/news-events/justice-health-safeguards-program-expands-to-regional-nsw>>.

We note that in NSW there are various diversionary and intervention programs available for children and young people that aim to prevent contact with, or divert them from, the criminal justice system. As recently summarised by the Legislative Assembly Committee on Law and Safety, these include:

- primary prevention programs, which aim to address factors impacting children and young people before they start engaging in offending behaviour
- early intervention programs, which aim to address offending behaviour at early stages or before serious offences are committed, and
- diversionary programs that focus on diverting children and young people away from criminal justice responses after an offence has been committed.⁴¹⁸

Some of the available programs and services are outlined below.

5.6.1 Existing programs and services

5.6.1.1 Youth on Track

The Youth on Track program is an early intervention service, delivered by community organisations in partnership with Youth Justice NSW, that provides a range of flexible and culturally appropriate supports to 10–17 year olds who are involved, or who are at risk of involvement, with the criminal justice system. The NSW Government has focused on partnering with Aboriginal Community-Controlled Organisations (**ACCOS**) to deliver the program.⁴¹⁹ Youth on Track is delivered in nine locations: Dubbo, Orange, Blacktown, Hunter, Coffs Harbour, Mid North Coast, Taree, New England and Riverina.⁴²⁰

Some stakeholders expressed support for the Youth on Track program in written submissions.⁴²¹ We also heard strong support for Youth on Track during our consultations. We understand that it is primarily targeted at older children.

5.6.1.2 NSW Police Force initiatives

The NSW Police Force delivers various programs aimed at identifying and supporting at-risk children and young people and encouraging their engagement with diversionary approaches:⁴²²

- Youth Action Meetings (**YAMs**) are led by NSW Police and provide a coordinated approach across several services for identified vulnerable young people.
- The NSW Police Force partners with Police Citizens Youth Clubs NSW to work with at-risk young people and young offenders to break the cycle of disadvantage through crime prevention, occupational education, youth capacity building and social responsibility programs.
- The *Joint Protocol to Reduce the Criminalisation of Children and Young People in Out-of-Home Care (Joint Protocol)* is a multi-agency agreement, co-led by the NSW Police Force and the Department of Communities and Justice, which covers all young people who are residing in out-of-home care (**OOHC**) facilities in NSW. The agreement provides police with the discretionary power to proceed in matters without undertaking legal action, with the aim of decreasing the over-representation of OOHC youth in the criminal justice system.

⁴¹⁸ Legislative Assembly Committee on Law and Safety, Parliament of NSW, *Community safety in regional and rural communities – Interim Report: Addressing the drivers of youth crime through early intervention* (Report No 2/58, May 2025) [3.9].

⁴¹⁹ NSW Government, Submission No 195 to Legislative Assembly Committee on Law and Safety, Parliament of NSW, *Community safety in regional and rural communities* (2 July 2024) 9.

⁴²⁰ Ibid.

⁴²¹ The Law Society of NSW, *Submission 9* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); Youth Justice NSW, *Submission 12* (29 June 2025).

⁴²² See NSW Police Force, *Youth Strategy 2023-2025* (2023) 11.

5.6.1.3 New Street Services

New Street Services is an early intervention and prevention program that offers therapeutic support to children and young people aged 10–17 years who have engaged in harmful sexual behaviour towards others, their families and caregivers. The program works with the child to understand, acknowledge and take responsibility for their behaviour.⁴²³

The service model includes:

- a whole-of-family and interagency approach to sustain support and intervention, and
- a strong emphasis on safety for both the child victim and the young person who engaged in the behaviour, recognising that they may also be victims of abuse or neglect.⁴²⁴

We received support for New Street Services in some submissions⁴²⁵ and during our consultations.

5.6.1.4 BackTrack

BackTrack was founded in 2006 in Armidale to support vulnerable young people whose complex needs could not be met by mainstream services. It aims to break cycles of disadvantage and incarceration through holistic, long-term support.⁴²⁶

BackTrack helps vulnerable young people to develop work and life skills, participate in learning and training, prepare for employment and connect with wider community. The program is nationally recognised and supports similar initiatives through the BackTrack Network.⁴²⁷

We heard strong support for BackTrack during consultations. It is primarily targeted at older children.

5.6.1.5 Yilaan.gaal Dhina (Fresh Footprints)

Yilaan.gaal Dhina (meaning ‘Fresh Footprints’ in the Gamilaraay language) is a youth diversion program developed and delivered by the Tamworth Local Aboriginal Land Council, the Tamworth Justice Collaborative, and local stakeholders. The program has seen success in working intensively with five high-risk young people over a 16-week trial, which resulted in reduced police interactions, one participant gaining full-time employment, two participants securing stable housing, and others obtaining life documents, work skills, and meaningful engagement.⁴²⁸

We heard about the positive results of the program during our visits to Tamworth and Moree. We understand that a specific program for under 14 year olds is under consideration.

5.6.1.6 Youth Koori Court

The Youth Koori Court is an alternative sentencing process for Aboriginal and Torres Strait Islander young people. It is available at Parramatta, Surry Hills and Dubbo Children’s Courts.⁴²⁹

To be referred to the Youth Koori Court, the young person must:

- have pleaded guilty, indicated they will enter a guilty plea, or had an offence proven

⁴²³ Legislative Assembly Law and Safety Committee, Parliament of NSW, *The Adequacy of Youth Diversionary Programs in New South Wales* (Report No 2/56, September 2018) [1.56].

⁴²⁴ Ibid, [1.57].

⁴²⁵ The Law Society of NSW, *Submission 9* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

⁴²⁶ BackTrack, *Submission No 176 to Legislative Assembly Committee on Law and Safety, Parliament of NSW, Community safety in regional and rural communities* (7 June 2024) 1.

⁴²⁷ Ibid.

⁴²⁸ NSW, *Parliamentary Debates*, Legislative Council, 3 June 2025, 1 (Aileen MacDonald).

⁴²⁹ Children’s Court of NSW, *Practice Note 11: Youth Koori Court*, 17 March 2023, [2.1].

- be Aboriginal or Torres Strait Islander (by descent, self-identification, and community acceptance)
- be charged with an offence that will be finalised by the Children's Court
- be likely to receive a sentence that is either a community-based order with Youth Justice supervision or a control order
- be 10–17 years of age at the time of the offence and under 19 years old when proceedings commenced, and
- be willing to participate.⁴³⁰

At a Youth Koori Court Conference, participants include the young person, their family, Elders, support services, and legal representatives.⁴³¹ An Action and Support Plan is developed, to address matters such as cultural connection, education or employment, stable accommodation, and any health, drug, or alcohol issues.⁴³² This plan is approved by the Court.⁴³³

The Court reviews the young person's progress with the plan every 2–4 weeks. The final sentence imposed considers the young person's engagement and progress with the plan.⁴³⁴

5.6.1.7 The Cockatoo Initiative and My Path

The Cockatoo Initiative and My Path are pilot programs for young people in the Riverina and Western Sydney at risk of interacting with the youth justice system. They have been developed with community groups to identify and provide support at times when early intervention is required, such as where a young person is disengaging from school, being to domestic violence, or is engaging in alcohol and drug use.⁴³⁵

The Cockatoo Initiative has been operating in the Riverina since November 2024, delivering targeted intervention and support to young people aged 8-17 years, and My Path has been operating in Penrith since January 2025, supporting young people aged 8-12 years. So far, around 200 young people and their families have been involved in the diversionary efforts, with another 488 supported through groupwork or community events during school holidays.⁴³⁶

The programs are designed to be youth-friendly and culturally safe, offering Aboriginal children and young people the opportunity to spend time with local elders, First Nations mentors and First Nations youth workers who provide leadership, development and cultural support.⁴³⁷

5.6.2 Further improvements to diversion programs and services

Stakeholders made a range of suggestions for further improvement to diversion programs and services in NSW, including:

⁴³⁰ Ibid, [4.1].

⁴³¹ Ibid, [7.3].

⁴³² 'Youth Koori Court Factsheet' *Children's Court of NSW* (Web Page) 1 <https://childrenscourt.nsw.gov.au/documents/factsheets/Youth_Koori_Court_Factsheet_2024.pdf>.

⁴³³ Children's Court of NSW, *Practice Note 11: Youth Koori Court*, 17 March 2023, [8.1].

⁴³⁴ Ibid, [9.1], [12.1].

⁴³⁵ The Premier of NSW and NSW Minister for Youth Justice, 'Ministerial media release: Funding boost for leading-edge youth justice programs in the Riverina and Western Sydney' (Media Release, NSW Government, 28 August 2025) <<https://www.nsw.gov.au/ministerial-releases/funding-boost-for-leading-edge-youth-justice-programs-riverina-and-western-sydney>>.

⁴³⁶ Ibid.

⁴³⁷ Ibid.

- Increased investment in, and expanded availability of, Youth on Track and Keep on Track,⁴³⁸ YAMs,⁴³⁹ BackTrack,⁴⁴⁰ and the Youth Koori Court.⁴⁴¹
- Broadened eligibility for Youth on Track, noting it is not available for children previously subject to court-ordered supervision by Youth Justice NSW.⁴⁴²
- Improved training on, or implementation of, the Joint Protocol.⁴⁴³
- Increased investment in, and engagement with, ACCOs to design and deliver culturally appropriate diversion and intervention programs.⁴⁴⁴

As noted above, we are limited by our Terms of Reference to considering statutory diversion schemes. However, we understand that improvements to early intervention and diversion programs for young people in contact, or at risk of contact, with the criminal justice system may be underway or under consideration by the NSW Government. For example, the 2025–26 NSW Budget includes:

- \$5.1 million in 2025–26 as part of the \$20.8 million commitment for the NSW Police Force to deliver YAMs
- \$1.3 million to continue the Keep on Track Program for a further two years in Moree, Narrabri, Armidale and Tamworth, and
- \$830,000 for the Down the Track Program for young people in Lake Cargelligo and Murrin Bridge.⁴⁴⁵

Additionally, on 28 August 2025, the NSW Government announced it is investing \$4.2 million over two years to extend the Cockatoo Initiative and My Path pilot programs.⁴⁴⁶

In implementing these commitments, it is open to the NSW Government to have regard to the issues and suggestions raised by stakeholders in this Review.

⁴³⁸ Legal Aid NSW, *Submission 2* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); Youth Justice NSW, *Submission 12* (29 June 2025).

⁴³⁹ Youth Justice NSW, *Submission 12* (29 June 2025).

⁴⁴⁰ Legal Aid NSW, *Submission 2* (27 June 2025).

⁴⁴¹ Legal Aid NSW, *Submission 2* (27 June 2025); Aboriginal Affairs NSW, Premier's Department, *Submission 18* (2 July 2025); Youth Justice NSW, *Submission 12* (29 June 2025).

⁴⁴² The Law Society of NSW, *Submission 9* (27 June 2025).

⁴⁴³ Legal Aid NSW, *Submission 2* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); Office of the Senior Practitioner, Child Protection and Permanency, Department of Communities and Justice, *Submission 19* (2 July 2025).

⁴⁴⁴ Legal Aid NSW, *Submission 2* (27 June 2025); Community Restorative Centre, *Submission 3* (27 June 2025); Youth Justice NSW, Department of Communities and Justice, *Submission 12* (29 June 2025); Aboriginal Affairs NSW, Premier's Department, *Submission 18* (2 July 2025); SNAICC, *Submission 16* (1 July 2025); Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

⁴⁴⁵ NSW Government, *NSW Budget 2025–26: Our Plan for Regional New South Wales* (June 2025) 13, 31, 39.

⁴⁴⁶ The Premier of NSW and NSW Minister for Youth Justice, 'Ministerial media release: Funding boost for leading-edge youth justice programs in the Riverina and Western Sydney' (Media Release, NSW Government, 28 August 2025) <<https://www.nsw.gov.au/ministerial-releases/funding-boost-for-leading-edge-youth-justice-programs-riverina-and-western-sydney>>.

6 Addressing underlying causes of behaviour by 10–13 year olds

At a glance

Stakeholder feedback received during this Review conveys a clear and consistent message: current responses to offending behaviour by children aged 10–13 years are falling short, and meaningful change is needed. While stakeholders differed on the appropriate way forward, our view is that focusing reform efforts solely on *doli incapax* will not deliver the necessary improvements.

More effective outcomes for children and the broader community are likely to come from alternative, therapeutic interventions that are specifically directed to addressing underlying drivers of behaviour. Accordingly, we recommend that the NSW Government consider introducing a voluntary alternative intervention pathway for high-needs or high-risk children who require intensive support. We also recommend that the NSW Government consider new court orders to mandate engagement in therapeutic treatment in appropriate circumstances.

6.1 Introduction

In this Chapter, we explore how the presumption of *doli incapax* impacts on available responses to address underlying causes of behaviour by 10–13 year olds. In line with our Terms of Reference, we also consider alternative options for intervention that can better meet the interests of children and the broader community.

6.2 The impact of the presumption of *doli incapax*

While the presumption of *doli incapax* is intended to protect young children from punitive criminal justice responses, it is not specifically directed to addressing root causes of offending behaviour or facilitating long-term behavioural change. Throughout our Review, we heard a range of views about the impact of the operation of the *doli incapax* presumption, including that it:

- fails to prevent the child’s exposure to criminal justice processes, which can further entrench children in the criminal justice system or contribute to reoffending
- prevents accountability or consequences for negative behaviour and fails to provide reassurance to victims and the community, and
- fails to facilitate any impactful or long-term intervention.

These issues have also been identified in research.⁴⁴⁷

6.2.1 Failing to prevent exposure to criminal justice processes

Several submissions observed that, although *doli incapax* is intended to serve a protective function, in practice it does not shield children from involvement in criminal justice processes.⁴⁴⁸ Stakeholders

⁴⁴⁷ Susan Baidawi et al, ‘Children aged 10 to 13 in the justice system: Characteristics, alleged offending and legal outcomes’, *Report to the Criminology Research Advisory Council Grant: CRG 41/20–21* (Australian Institute of Criminology, January 2024) xi, 57–58.

⁴⁴⁸ Legal Aid NSW, *Submission 2* (27 June 2025); Just Reinvest NSW, *Submission 4* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); Law Council of Australia, *Submission 17* (1 July 2025).

attributed this to delayed consideration of *doli incapax* by criminal justice system actors — a concern which is explored in detail in **Chapters 3 and 4**.

Issues highlighted in submissions included:

- Children aged 10–13 years often experience prolonged and repeated contact with the criminal justice system, including extended periods on bail or remand, multiple arrests for bail breaches, and numerous court appearances.⁴⁴⁹
- Although charges are often withdrawn or dismissed due to the presumption of *doli incapax*, children aged 10–13 years may experience months of criminal justice system involvement, often in circumstances where they have been refused bail and are held in custody, which can be disruptive and harmful.⁴⁵⁰
- Impacts can include interference with routine and relationships, disengagement from school, sports and community,⁴⁵¹ and prolonged uncertainty and stress.⁴⁵² For Aboriginal children, the impacts also include disruption to or loss of cultural connections and support.⁴⁵³
- Exposure to criminal justice system processes can also have criminogenic effects and contribute to further offending.⁴⁵⁴

6.2.2 Preventing accountability for behaviour

A recurrent issue raised in stakeholder consultations was the importance of accountability on the part of the child and recognition of the harm caused to the community. Views expressed in submissions included that:

- The current operation of *doli incapax* results in repeated offending without consequences,⁴⁵⁵ which produces fear and frustration among victims and the community, particularly in regional areas.⁴⁵⁶
- Repeated engagement in the criminal justice system, without any outcome or consequence, can entrench cycles of offending and reinforce a lack of accountability.⁴⁵⁷
- It can create perverse incentives — children may recognise the limited consequences for offending before age 14, contributing to increased offending within the 10–13 year old cohort in some communities.⁴⁵⁸

⁴⁴⁹ The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); SNAICC, *Submission 16* (1 July 2025).

⁴⁵⁰ Community Restorative Centre, *Submission 3* (27 June 2025); NSW Council for Civil Liberties, *Submission 13* (30 June 2025).

⁴⁵¹ Legal Aid NSW, *Submission 2* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); Children’s Court of NSW, *Submission 24* (2 July 2025).

⁴⁵² Aboriginal Culture in Practice, Child Protection and Permanency, Department of Communities and Justice, *Submission 20* (2 July 2025).

⁴⁵³ Just Reinvest NSW, *Submission 4* (27 June 2025); SNAICC, *Submission 16* (1 July 2025); Aboriginal Culture in Practice, Child Protection and Permanency, Department of Communities and Justice, *Submission 20* (2 July 2025).

⁴⁵⁴ Legal Aid NSW, *Submission 2* (27 June 2025); The Shopfront Youth Legal Centre, *Submission 10* (27 June 2025); Youth Justice NSW, Department of Communities and Justice, *Submission 12* (4 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); AbSec, *Submission 25* (4 July 2025).

⁴⁵⁵ Police Association of NSW, *Submission 1* (27 June 2025).

⁴⁵⁶ NSW Police Force, *Submission 5* (27 June 2025).

⁴⁵⁷ Police Association of NSW, *Submission 1* (27 June 2025); Children’s Court of NSW, *Submission 24* (2 July 2025).

⁴⁵⁸ Youth Justice NSW, Department of Communities and Justice, *Submission 12* (29 June 2025); Children’s Court of NSW, *Submission 24* (2 July 2025).

6.2.3 Failing to result in impactful intervention

A consistent concern raised by stakeholders is that, in seeking to prevent inappropriate criminalisation of children, the *doli incapax* presumption can also prevent children from receiving the interventions necessary to steer them away from re-engagement with the criminal justice system. Views expressed in submissions included:

- The *doli incapax* presumption often results in short-term interventions — for example, while the child is on bail or remanded in custody — without long-term impact.⁴⁵⁹ Youth Justice NSW can offer voluntary bail support to children in the absence of a plea or finding of guilt, but uptake among children is low.⁴⁶⁰
- *Doli incapax* creates barriers to therapeutic services, as children may choose not to engage in these services while awaiting a justice outcome⁴⁶¹ or to preserve their ability to rely on the presumption.⁴⁶² There may be risks that a child's participation in therapeutic programs could be used as evidence to rebut the presumption.⁴⁶³
- Children found not criminally responsible due to *doli incapax* lose access to support services tied to formal justice outcomes.⁴⁶⁴ There is also insufficient support available to help children transition successfully back into the community.⁴⁶⁵

In consultations, we heard that Youth Justice NSW's ability to work with 10–13 year olds while proceedings are ongoing is limited, as any support must avoid offence-specific discussions to prevent interfering with the proceedings.

6.3 The need for an alternative response

The stakeholder feedback outlined above indicates that the criminal justice system is currently relied upon to both respond to offending behaviour by 10–13 year olds — providing reassurance to victims and the broader community — and to facilitate access to interventions to address underlying causes of such behaviour. However, in our view, the response which is actually provided is often inadequate in each of those respects. Our engagement with many community representatives indicated a general feeling of concern rather than reassurance.

Moreover, the comments of the Magistrate in *Harry*⁴⁶⁶ tend expressly against the proposition that the system facilitates access to interventions to address underlying causes of behaviour. It is therefore open to conclude that responses provided by the criminal justice system are not necessarily the most suitable or effective mechanisms for achieving the outcomes which are intended. This view was also expressed in several submissions.⁴⁶⁷

⁴⁵⁹ Youth Justice NSW, Department of Communities and Justice, Submission 12 (29 June 2025); Children's Court of NSW, Submission 24 (2 July 2025).

⁴⁶⁰ NSW Police Force, Submission 5 (27 June 2025).

⁴⁶¹ NSW Health, Submission 27 (7 July 2025).

⁴⁶² Youth Justice NSW, Department of Communities and Justice, Submission 12 (29 June 2025).

⁴⁶³ The Law Society of NSW, Submission 9 (27 June 2025); The Aboriginal Legal Service (NSW/ACT), Submission 22 (2 July 2025).

⁴⁶⁴ NSW Advocate for Children and Young People, Submission 7 (27 June 2025); The Shopfront Youth Legal Centre, Submission 10 (27 June 2025).

⁴⁶⁵ Just Reinvest NSW, Submission 4 (27 June 2025).

⁴⁶⁶ See **Chapter 2**.

⁴⁶⁷ Legal Aid NSW, Submission 2 (27 June 2025); NSW Bar Association, Submission 15 (30 June 2025); The Shopfront Youth Legal Centre, Submission 10 (27 June 2025); Australian Lawyers for Human Rights, Submission 11 (27 June 2025); Youth Justice NSW, Department of Communities and Justice, Submission 12 (29 June 2025); Law Council of Australia, Submission 17 (1 July 2025); The Aboriginal Legal Service (NSW/ACT), Submission 22 (2 July 2025).

While stakeholders differed on what an alternative approach should look like, there was broad consensus that therapeutic interventions outside the criminal justice system offer a more appropriate and effective way to address offending behaviours by 10–13 year olds. Views in submissions included:

- Early access to therapeutic services can better address underlying causes of offending, such as underlying mental health issues, disability and trauma.⁴⁶⁸
- Early intervention by Aboriginal and Torres Strait Islander community-led services is essential to reducing the over-representation of Aboriginal children in youth detention.⁴⁶⁹
- Increased therapeutic supports would be most effective in addressing the needs of children, reducing offending and protecting victims and the community.⁴⁷⁰
- Access to such supports should be de-coupled from the criminal justice system and not be contingent on a finding or admission of guilt.⁴⁷¹
- The criminal justice system should only be used as a last resort,⁴⁷² when all other interventions have failed to effectively protect the community from the child's harmful behaviour.⁴⁷³

6.4 Our recommended approach

We understand that the NSW Government is considering ways to identify alternative and additional responses needed to maintain community safety while supporting children aged 14 years and under who are demonstrating problematic and harmful behaviours to be diverted from the criminal justice system. We consider such children to be a priority cohort for an alternative, targeted response. This is because:

- The consistent message from stakeholders is that only a small number of 10–13 year olds engage in serious or persistent offending.
- Intensive therapeutic interventions for high-needs or high-risk young children may present a more cost-effective and impactful alternative to formal justice responses,⁴⁷⁴ which impose greater cost to the State,⁴⁷⁵ and which in many cases produce no, or no satisfactory, outcome, be it for the child or the broader community.
- Therapeutic intervention for the 10–13 year age group is needed to prevent those children becoming further entrenched along the criminal justice pathway. Interactions with police and the courts can set them on a downward trajectory and increase the likelihood of reoffending, which could be avoided through earlier intervention.

⁴⁶⁸ Aboriginal Culture in Practice, Child Protection and Permanency, Department of Communities and Justice (2 July 2025); NSW Health, *Submission 27* (7 July 2025).

⁴⁶⁹ Wirringa Baiya Aboriginal Women's Legal Centre, *Submission 6* (27 June 2025).

⁴⁷⁰ NSW Police Force, *Submission 5* (27 June 2025).

⁴⁷¹ Legal Aid NSW, *Submission 2* (27 June 2025); NSW Police Force, *Submission 5* (27 June 2025); NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); NSW Health, *Submission 27* (7 July 2025); Aboriginal Culture in Practice, Child Protection and Permanency, Department of Communities and Justice (2 July 2025); Children's Court of NSW, *Submission 24* (2 July 2025).

⁴⁷² NSW Advocate for Children and Young People, *Submission 7* (27 June 2025); Aboriginal Culture in Practice, Child Protection and Permanency, Department of Communities and Justice (2 July 2025).

⁴⁷³ Children's Court of NSW, *Submission 24* (2 July 2025).

⁴⁷⁴ The Law Society of NSW, *Submission 9* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

⁴⁷⁵ Children's Court of NSW, *Submission 24* (2 July 2025).

- Children in this age range are particularly vulnerable, often have significant and compounding needs, and may require intensive, individualised support.
- Diversion under current statutory schemes may not always be feasible or appropriate — for example, due to the seriousness of the child’s behaviour. A formal justice response may be unlikely to lead to a resolution, noting charges may likely be withdrawn or dismissed due to *doli incapax*.

We are driven to the conclusion that consideration must be given, as a matter of some urgency, to the formulation and implementation of a new therapeutic intervention pathway for offenders between the age of 10–13 years. The overwhelming consensus between the majority of stakeholders is that such a pathway is likely to produce outcomes which are more satisfactory, for both the child and the broader community, than those which are presently available.

We therefore recommend that the NSW Government explore the introduction of a voluntary alternative intervention pathway (**Recommendation 6**), as well as a mandatory treatment order scheme to direct engagement with therapeutic interventions in appropriate cases (**Recommendation 7**). In respect of these measures, we use the term ‘intervention’ — rather than ‘diversion’ — to highlight that they represent a more intensive and tailored approach than existing diversionary processes under the *Young Offenders Act 1997 (YOA)*; that is, warnings, cautions and Youth Justice Conferences (YJCs).

To ensure clarity and accessibility, we suggest these intervention measures be established in legislation — for example, via inclusion in the YOA⁴⁷⁶ or the *Children and Young Persons (Care and Protection) Act 1998*. In this regard, we think it of some significance that such measures would be entirely consistent with the objects of the YOA in particular. Those objects include:

- To establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of YJCs, cautions and warnings.
- To establish a scheme for the purpose of providing an efficient and direct response to the commission by children of certain offences.
- To establish and use YJCs to deal with alleged offenders in a way that:
 - enables a community-based negotiated response to offences involving all the affected parties
 - emphasises restitution by the offender and the acceptance of responsibility by the offender for their behaviour, and
 - meets the needs of victims and offenders.
- To address the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of YJCs, cautions and warnings.

While the timeframes for our Review did not allow for the development of a detailed model, our general recommended approach is outlined below. The specific design could be further developed by the NSW Government.

6.4.1 A new referral, assessment and case management pathway

During consultations, stakeholders highlighted the need for additional options to be available to police and the courts that support timely and appropriate interventions for 10–13 year olds, while also ensuring community safety.

We recommend that the NSW Government explore introducing a new referral, assessment and case management pathway or scheme for children aged 10–13 years who exhibit concerning or harmful behaviours (**Recommendation 6**). This approach meets the needs of children and the community by proactively targeting the underlying causes of young children’s behaviours, without the need for a

⁴⁷⁶ The Law Society of NSW, *Submission 9* (27 June 2025); NSW Bar Association, *Submission 15* (30 June 2025).

plea or finding of guilt.⁴⁷⁷ It would operate on a voluntary basis and independently of criminal proceedings.

This scheme could include a multidisciplinary body or panel that can receive and coordinate referrals (**Recommendation 6(2)(a)**). This reflects a suggestion made in submissions.⁴⁷⁸ Introducing such a panel may address concerns raised in consultations that, in the absence of clear referral pathways to appropriate services, young children may be unnecessarily drawn into the formal criminal justice system. Some submissions similarly highlighted the need for improved referral processes.⁴⁷⁹

Matters warranting further, detailed consideration include:

- **The diversity of expertise required:** For example, some submissions suggested that the panel could comprise multiple government agencies, practitioners and service providers, including Aboriginal Community-Controlled Organisations (ACCOs).⁴⁸⁰
- **The stage at which referrals can be made:** For example, the NSW Police Force strongly supported the availability of therapeutic interventions at all stages of engagement with the criminal justice system.⁴⁸¹
- **The threshold for making referrals:** For example, it was suggested that referrals could be made where a child presents with certain risk factors, such as disengagement from education, unstable housing, or substance use or mental health issues.⁴⁸²
- **The appropriate referring entities:** For example, the Police Association of NSW highlighted the need for frontline police to be able to refer children to programs or interventions.⁴⁸³ Other submissions suggested that referrals to the multidisciplinary body could be made by police, health practitioners, other NSW Government agencies, and community-based services.⁴⁸⁴ Referrals could also be made by services that provide legal representation to children.

We would observe that however this pathway might be implemented, its success is likely to be dependent upon a collaborative approach between all relevant agencies and practitioners. In particular, whilst we acknowledge that legal representatives of children have a fundamental duty to act in the best interests of their client, a pathway of the kind which we are recommending is directed towards, amongst other things, diverting children away from the criminal justice system and enhancing community safety. For the pathway to be successful, fundamental objectives of that kind must be a primary focus of all concerned.

We recommend that the new scheme enable assessments of the child and their needs, and development of tailored and holistic support plans to address those needs (**Recommendation 6(2)(a)**). This reflects suggestions made in submissions.⁴⁸⁵ Further consideration may also be given to additional functions that may be appropriate.

⁴⁷⁷ The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

⁴⁷⁸ The Law Society of NSW, *Submission 9* (27 June 2025); Youth Justice NSW, Department of Communities and Justice, *Submission 12* (29 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); Children's Court of NSW, *Submission 24* (2 July 2025).

⁴⁷⁹ Legal Aid NSW, *Submission 2* (27 June 2025), *Submission 2* (27 June 2025); NSW Police Force, *Submission 5* (27 June 2025).

⁴⁸⁰ The Law Society of NSW, *Submission 9* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); Children's Court of NSW, *Submission 24* (2 July 2025).

⁴⁸¹ NSW Police Force, *Submission 5* (27 June 2025).

⁴⁸² The Law Society of NSW, *Submission 9* (27 June 2025).

⁴⁸³ Police Association of NSW, *Submission 1* (27 June 2025).

⁴⁸⁴ The Law Society of NSW, *Submission 9* (27 June 2025); Children's Court of NSW, *Submission 24* (2 July 2025).

⁴⁸⁵ The Law Society of NSW, *Submission 9* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

We also recommend that the new scheme include a dedicated case management function or service to support implementation of the child's support plan and coordinate service delivery (**Recommendation 6(2)(b)**). This service could operate alongside, or be integrated into, the body or panel referred to above.

Recommendation 6(2)(b) responds to feedback received in consultations about the need for holistic, wraparound support for children who are engaging, or who are at risk of engaging, in offending behaviour. In consultations, we heard about the need for a whole-of-family approach, considering the needs of the family unit holistically and addressing family needs that can drive offending (such as disadvantage and dysfunction).

Consultations also highlighted the need for a whole-of-government or whole-of-community response, rather than different service systems operating in isolation. Similarly, some submissions raised the need for improved multi-agency collaboration.⁴⁸⁶

Further consideration could be given to any necessary information-sharing arrangements between agencies, noting Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* already allows for the exchange of information and coordination of services between agencies that have a responsibility for the safety, welfare or wellbeing of children.

The alternative pathway outlined in **Recommendation 6** would be available on a voluntary basis. To incentivise participation, we recommend legislative restrictions on the admissibility, in criminal proceedings against a child, of statements or disclosures made by the child while engaging in this scheme (**Recommendation 6(2)(c)**).

This reflects a suggestion made in submissions.⁴⁸⁷ Such protections may prevent potential barriers to engagement in the scheme, such as legal representatives advising children and families not to participate due to risks that information shared could be subpoenaed and used as evidence against the child.⁴⁸⁸

Introducing these protections would require careful consideration of the complex legal and practical issues involved. For example, the desirability of an absolute prohibition on admissibility warrants further examination, including whether certain limited exceptions may be necessary to enable admissibility of evidence in appropriate circumstances (for example, where the child discloses victimisation by or of another person).

Recommendation 6: Voluntary alternative intervention pathway for at-risk children aged 10–13 years

The NSW Government should consider introducing, by any legislation necessary, a voluntary alternative intervention pathway for 10–13 year olds who are in contact, or who are at risk of contact, with the criminal justice system which:

- (1) Operates independently of criminal justice proceedings or outcomes.
- (2) Includes the following features:
 - (a) A scheme that can receive referrals, conduct assessments and develop support plans for children who have complex needs, for example through a multidisciplinary body or panel.
 - (b) A case management function to enable implementation of the support plan and coordinate service delivery.
 - (c) Restrictions on the admissibility in criminal proceedings against a child of statements made by the child while engaging in this pathway.

⁴⁸⁶ Legal Aid NSW, *Submission 2* (27 June 2025); NSW Police Force, *Submission 5* (27 June 2025).

⁴⁸⁷ The Law Society of NSW, *Submission 9* (27 June 2025); NSW Bar Association, *Submission 15* (30 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); Children's Court of NSW, *Submission 24* (2 July 2025).

⁴⁸⁸ NSW Health, *Submission 27* (7 July 2025).

6.4.1.1 Illustrative case study: Application of Recommendation 6

This case study indicates how **Recommendation 6** could work in practice. It is an example of a more serious matter involving a child with complex needs, based on an amalgam of accounts we have heard.

A child aged 13 years, 'B', is charged with aggravated break and enter and motor vehicle theft. The child is disengaged from education due to learning difficulties or potential undiagnosed intellectual disability, which manifests in disruptive behaviour. B has a history of reoffending linked to boredom and lack of parental oversight (due to substance misuse).

At present, the outcomes may be as follows:

- Police arrest B and refuse bail due to B's significant criminal history and risk to community safety. B is remanded in custody, in a Youth Justice Centre that is far from their community. B is also exposed to more serious offenders while in custody.
- B proceeds to court and the matter is dismissed due to *doli incapax*, without any further intervention. B struggles to reintegrate into community after time spent in custody and reoffends, as the underlying causes of their behaviour are not addressed.
- B's offending becomes more serious due to the criminogenic effects of their exposure to the justice system and a further escalation of unmet needs.

In line with **Recommendation 6**, the response could be as follows:

- Before proceeding to charge, police consider that there is insufficient evidence to rebut *doli incapax*.
- Police instead refer B to the alternative intervention pathway which involves:
 - Multidisciplinary assessment of the B's needs, including health needs (learning difficulties or potential undiagnosed intellectual disability) or educational needs (such as a need for alternative education options).
 - Development of a therapeutic action plan to address those needs, such as:
 - prioritisation for health assessment/diagnosis and related treatment
 - connection to alternative education options
 - whole-of-family support (including parental support), and
 - connection with community programs or role models.
 - Intensive case management to support engagement with the plan (for example, assisting B with attending appointments).

6.4.2 New court orders to mandate engagement with therapeutic treatment

In consultations, we heard that some high-risk or high-needs children may be unwilling to voluntarily engage in therapeutic supports. Similarly, some submissions highlighted the need for mandatory interventions to be available in certain circumstances.⁴⁸⁹

We recommend that the NSW Government explore introducing court orders that can direct engagement by a child aged 10–13 years in therapeutic treatment in appropriate circumstances (**Recommendation 7**). Such orders could meet the interests of the child in facilitating engagement in therapeutic treatment and ensuring compliance through ongoing supervision.⁴⁹⁰ They may also

⁴⁸⁹ Police Association of NSW, *Submission 1* (27 June 2025); NSW Police Force, *Submission 5* (27 June 2025); NSW Health, *Submission 27* (7 July 2025).

⁴⁹⁰ NSW Police Force, *Submission 5* (27 June 2025).

serve the interests of victims and the community, by providing formal recognition that harm has occurred, and a response is required.⁴⁹¹

6.4.2.1 Proposed models

We note stakeholders held differing views about the preferred model. Models proposed included:

- A model where the court receives evidence about whether *doli incapax* is rebutted prior to commencing the prosecution of the substantive offence. If the presumption is not rebutted, but the court is satisfied the child had engaged or was engaging in behaviour that presented a significant risk to themselves or others, the court would be empowered to refer the child to therapeutic, education, child protection and/or cultural services.⁴⁹²
- An ‘inquisitorial’ model for 10–13 year olds who are charged with offences other than a ‘serious children’s indictable offence’ (SCIO)⁴⁹³ and are dealt with summarily in the Children’s Court:
 - Whether the presumption of *doli incapax* is rebutted is not initially assessed. Rather, the Court determines whether the child committed the offence based on the police fact sheet. If so, the Court can issue a temporary Therapeutic Intervention Order requiring the child to engage in treatment or pro-social activities.
 - If the young person continues offending or breaches the order, the matter escalates to a criminal proceeding. However, the processes are different: the Court determines whether the physical elements of the offence are proven on the balance of probabilities, the rules of evidence do not apply, and admissions are not required.
 - If the charge is proven on this basis, the Court can make a temporary Therapeutic Intervention Order. No conviction is recorded, and if treatment is effective the proceedings are dismissed. However, if treatment is ineffective, the matter escalates to the normal criminal justice process, where *doli incapax* is assessed.
 - In proceedings where the prosecution is unable to rebut *doli incapax*, but the physical elements of the offence are proven on the balance of probabilities, the court can impose a final Therapeutic Intervention Order.
 - Final orders are also available to be made for 10–13 year olds charged with a SCIO.⁴⁹⁴
- A model where a special verdict of ‘not criminally responsible because of *doli incapax*’ is available — for example, when the physical elements of the offence are proven but the presumption is not rebutted. This is similar to the special verdict of ‘act proven but not criminally responsible because of mental health impairment or cognitive impairment’ that is available in indictable criminal proceedings before the District or Supreme Court.⁴⁹⁵ Upon such a verdict, the orders available to the court include an order for the conditional or unconditional release of the defendant from custody.⁴⁹⁶

6.4.2.2 Consideration of proposed models and recommended inclusions

A key drawback of all the above proposed models is that they necessarily require the initiation of criminal proceedings and the child’s engagement in criminal justice processes. A recurring theme

⁴⁹¹ NSW Health, *Submission 27* (7 July 2025).

⁴⁹² Children’s Court of NSW, *Submission 24* (2 July 2025)

⁴⁹³ A ‘serious children’s indictable offence’ (SCIO) is defined in section 3 of the *Children (Criminal Proceedings) Act 1987* (NSW) and includes offences such as homicide, offences with a maximum penalty of 25 years or life imprisonment, serious sexual assault offences and certain firearms offences. SCIOs must be committed to the District or Supreme Court: at s 28(1).

⁴⁹⁴ NSW Police Force, *Submission 5* (27 June 2025).

⁴⁹⁵ *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) ss 30–31.

⁴⁹⁶ *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 33.

throughout this Review was the need to avoid prolonged exposure to criminal justice processes where possible, to reduce the likelihood of children becoming entrenched in the system.

Rather than being contingent on criminal proceedings, our preferred approach is for treatment orders to be available where other avenues have been considered or attempted but were unsuitable or ineffective (**Recommendation 7(2)(a)**). For example, orders could be sought where the child has proceeded through the alternative pathway (referred to in **Recommendation 6**) without success, or where criminal proceedings are not pursued due to insufficient evidence.

Given the young age and heightened vulnerability of children aged 10–13 years, and the application of the *doli incapax* presumption to this cohort, it is essential to approach treatment orders — which are a coercive measure — with caution. Accordingly, a high threshold should apply to the making of such orders, such as where there is significant risk of harm to the child or someone else, and the order would be in the child's best interests (**Recommendation 7(2)(a)**).

To ensure appropriate use of such orders, we recommend a requirement for multidisciplinary advice to be provided about whether a treatment order is warranted (**Recommendation 7(2)(b)**). For example, the multidisciplinary body referred to in **Recommendation 6** could be tasked with this responsibility. One submission specifically supported such an approach.⁴⁹⁷

We also recommend that the new order scheme include legal safeguards for statements or disclosures made by children participating in treatment pursuant to an order (**Recommendation 7(2)(c)**). This reflects stakeholder feedback about the need to ensure information shared in therapeutic settings is not used against children in current or future criminal proceedings.⁴⁹⁸

Further consideration could be given to whether orders should be able to require residential confinement to support treatment and, if so, how this would work in practice. For instance, it was suggested in consultations that youth bail accommodation centres could serve as a model. We understand a new bail accommodation centre, co-designed with community stakeholders, is being established in Moree.⁴⁹⁹

Other matters that may be considered further in developing a treatment order scheme include:

- Who is authorised to apply for an order.
- The implications of both successful completion and non-compliance with an order.
- Mechanisms for variation or revocation of, and appeals against, an order.

While we strongly support the availability of treatment orders independently of criminal proceedings, we also recognise the potential utility of orders also being available where a child has proceeded through the criminal justice process. Similar to the suggestion made in a submission,⁵⁰⁰ the outcomes could be that no conviction is recorded and the proceedings are dismissed upon successful completion of treatment pursuant to the order. Such an approach may help to avoid the harmful consequences of a conviction and promote engagement with therapeutic support. Although we did not have sufficient information to make formal recommendations in this area, we note this proposal for further consideration by the NSW Government.

⁴⁹⁷ NSW Health, *Submission 27* (7 July 2025).

⁴⁹⁸ Legal Aid NSW, *Submission 2* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025); NSW Health, *Submission 27* (7 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); Children's Court of NSW, *Submission 24* (2 July 2025).

⁴⁹⁹ The Premier of NSW and NSW Minister for Youth Justice, 'Ministerial media release: More than \$2 million in additional funding for Moree as Youth Justice NSW marks milestones' (Media Release, NSW Government, 7 February 2025) <<https://www.nsw.gov.au/ministerial-releases/more-than-2-million-additional-funding-for-moree-as-youth-justice-nsw-marks-milestones>>.

⁵⁰⁰ NSW Police Force, *Submission 5* (27 June 2025).

Recommendation 7: Mandatory court orders for at-risk 10–13 year olds to engage in therapeutic treatment

- (1) The NSW Government should explore introducing mandatory court orders that can direct engagement by a child aged 10–13 years in therapeutic treatment in appropriate circumstances.
- (2) The new treatment order scheme should include:
 - (a) A high threshold for the making of such orders, such as where: other measures have been considered or attempted but were unsuccessful or inappropriate; there is a significant risk of harm to the child or another person; and the order would be in the child's best interests.
 - (b) A requirement for multidisciplinary advice to be provided about whether a treatment order is needed in a particular case.
 - (c) Restrictions on the admissibility in criminal proceedings of statements made by the child while participating in treatment pursuant to an order.

6.4.2.3 Illustrative case study: Application of Recommendation 7

This case study illustrates the practical application of **Recommendation 7**, continuing from the earlier case of B.

After initially engaging with the alternative intervention pathway (outlined in **Recommendation 6**), B experiences a deterioration in their home environment and withdraws from voluntary participation. Still assessed as high-risk and high-needs, B is subject to a treatment order issued by the Children's Court, based on advice from a multidisciplinary panel.

The order requires B to participate in an intensive treatment program targeting the underlying causes of their behaviour. The treatment program is delivered in the community, allowing B to maintain community connections and avoid exposure to the criminal justice system.

6.5 Implementation of our recommended approach

6.5.1 Existing models in NSW that could be considered

The referral, assessment and case management pathway envisaged by **Recommendation 6** is not new. Existing models in NSW could be adapted or expanded to support its implementation.

For example:

- Youth Action Meetings involve NSW Government and non-government agencies coming together, in a structured forum, to share information, develop multi-agency action plans and implement strategies to support the referred young person (see **Chapter 5**).⁵⁰¹
- The Youth Koori Court is an alternative court process for sentencing Aboriginal and Torres Strait Islander children which involves NSW Government agencies and Elders developing an action plan to assist children to address the identified risk factors (see **Chapter 5**). Several submissions supported a model similar to the Youth Koori Court.⁵⁰²
- Youth Justice NSW's Bail Support service, which is available on a voluntary basis, can include connecting the young person with local community-based services, cultural groups or mentors,

⁵⁰¹ NSW Police Force, *Youth Strategy 2023-2025* (2023) 11.

⁵⁰² The Law Society of NSW, *Submission 9* (27 June 2025); Youth Justice NSW, Department of Communities and Justice, *Submission 12* (29 June 2025); Aboriginal Affairs NSW, Premier's Department, *Submission 18* (2 July 2025); Office of the Deputy Secretary, Child Protection and Permanency, Department of Communities and Justice, *Submission 21* (2 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

and liaising with the Department of Education about school attendance.⁵⁰³ In consultations, we received support for expanding the availability of this model to a broader range of circumstances.

There are also existing mechanisms in NSW to compel access to treatment, which could be considered in implementing **Recommendation 7**. For example, under section 75 of the *Children and Young Persons (Care and Protection) Act 1998*, the Children's Court can order a child aged under 14 years who is before the Court as part of care and protection proceedings, and is exhibiting sexually abusive behaviour, to attend a therapeutic program relating to such behaviour.

The order can also require the parents of the child to take whatever steps are necessary to enable a child to participate in a treatment program.⁵⁰⁴ A treatment plan must be presented to the Court before such an order is made.⁵⁰⁵

6.5.2 Models in other jurisdictions that could be considered

There are models in other jurisdictions that could be considered in implementing **Recommendation 6**. For example, some submissions referred to the Therapeutic Support Panel for Children and Young People (TSP) in the Australian Capital Territory (ACT).⁵⁰⁶

The TSP is a statutory body that delivers, oversees, and coordinates therapeutic supports for children and young people who are at risk of, or who are engaging in, serious harmful behaviours. Although introduced as part of reforms to raise the minimum age of criminal responsibility in the ACT, the measure is not limited to children below that age.⁵⁰⁷

The TSP works with children and their families to address unmet needs and the underlying causes of harmful behaviours, with the aim of reducing harm and improving positive outcomes, including enhanced community safety.⁵⁰⁸ It has been operating since 27 March 2024.⁵⁰⁹

There are three overlapping components of the TSP:⁵¹⁰

1. The Chair, who presides over and manages matters before the TSP.⁵¹¹ The Chair is a statutory position appointed by the ACT Minister for Children, Youth and Family Services.⁵¹²
2. The Panel, which comprises the Chair and other statutory members with expertise in areas such as child protection, mental health, disability, education, and Aboriginal and Torres Strait Islander services.⁵¹³ The functions of the Panel include receiving referrals, assessing needs of referred children, advising on appropriate therapeutic treatment and support, and assisting to develop therapy plans.⁵¹⁴
3. The Therapeutic Case Management Team, which operationalises and delivers the supports provided to children and their families referred to the TSP. Its functions include assessments,

⁵⁰³ NSW, Department of Communities and Justice, 'Youth Justice Remand Intervention and Bail Services Factsheet' NSW Government (Web Page, June 2024) 3 <<https://www.nsw.gov.au/sites/default/files/2024-06/Youth%20Justice%20Remand%20Intervention%20and%20Bail%20Services%20Factsheet.pdf>>.

⁵⁰⁴ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 75(1)(b).

⁵⁰⁵ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 75(3).

⁵⁰⁶ The Law Society of NSW, *Submission 9* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

⁵⁰⁷ Justin Barker, *Therapeutic Support Panel for Children and Young People: 2024 Report* (December 2024) 10.

⁵⁰⁸ *Ibid*, 11.

⁵⁰⁹ *Ibid*, 9.

⁵¹⁰ *Ibid* 11–13.

⁵¹¹ *Children and Young People Act 2008* (ACT) s 501G.

⁵¹² *Children and Young People Act 2008* (ACT) s 501F(1).

⁵¹³ *Children and Young People Act 2008* (ACT) s 501E.

⁵¹⁴ *Children and Young People Act 2008* (ACT) s 501C(1).

developing therapy plans, case coordination and casework, individual advocacy, transition planning, and collaborating with key stakeholders.⁵¹⁵

Referrals to the TSP can be made by a range of entities, including police, education providers, health practitioners, and judges or magistrates.⁵¹⁶ A referring entity can make a referral if they believe on reasonable grounds that the child has a genuine need and is at risk of engaging, or has engaged, in harm to themselves or others, serious damage to property, the environment, or cruelty to animals, or other serious or destructive behaviours.⁵¹⁷

A recent report on the TSP indicates that, although the program is still in its development and implementation phase, there are early signs of positive impacts. The report noted that demographic data shows the TSP is successfully reaching its intended target group — children and young people with complex needs who are, or who are at risk of, engaging in harmful behaviours — and that its practice model aligns well with the needs of this cohort.⁵¹⁸

There are also mandatory order schemes in other jurisdictions which could be considered or adapted in implementing **Recommendation 7** — such as the Intensive Therapy Order (ITO) scheme in the ACT or the Therapeutic Treatment Order (TTO) scheme in Victoria.

In the ACT, the Director-General (of the Community Services Directorate) can apply to the ACT Children's Court for a ITO in respect of a child or young person aged 10–17 years, which directs them to undergo an assessment of their behaviour, needs, and/or treatment in accordance with a therapy plan.⁵¹⁹ ITOs can also authorise the Director-General to issue a 'confinement direction' — allowing the child to be confined from time to time while the order is in effect — if deemed reasonably necessary as a last resort to support assessment or treatment.⁵²⁰

The TSP (outlined above) can recommend whether applications for an ITO should be made.⁵²¹ The Court can make an ITO if satisfied of certain matters, including that:

- if the order is not made, there will be a significant risk of harm to the child or someone else, and the risk of harm arises from the child's conduct
- less restrictive responses have been tried or considered, but were not successful or not appropriate, and
- making the order is in the best interests of the child.⁵²²

If the order includes a confinement direction, the order must state:

- that the child may be confined as a last resort while the order is in force
- the place and purpose of confinement, and
- any further conditions of the authorisation.⁵²³

In Victoria, the Secretary of Child Protection Services can apply for a TTO where a child aged 10–17 years has displayed problematic or abusive sexual behaviours and is in need of therapeutic

⁵¹⁵ Justin Barker, *Therapeutic Support Panel for Children and Young People: 2024 Report* (December 2024) 13.

⁵¹⁶ *Children and Young People Act 2008* (ACT) s 501A(1) (definition of 'referring entity').

⁵¹⁷ *Children and Young People Act 2008* (ACT) s 501Q(1).

⁵¹⁸ Justin Barker, *Therapeutic Support Panel for Children and Young People: 2024 Report* (December 2024) 33.

⁵¹⁹ *Children and Young People Act 2008* (ACT) ss 532(a), 539.

⁵²⁰ *Children and Young People Act 2008* (ACT) s 532(b).

⁵²¹ *Children and Young People Act 2008* (ACT) s 501C(1)(e).

⁵²² *Children and Young People Act 2008* (ACT) s 549.

⁵²³ *Children and Young People Act 2008* (ACT) s 550.

treatment.⁵²⁴ The Victorian Therapeutic Treatment Board, which is a specialised multidisciplinary panel, provides advice about whether it is appropriate to seek a TTO.⁵²⁵

The Victorian Children's Court may make an order if satisfied that the child has exhibited sexually abusive behaviours and that the order is necessary to ensure the child's access to, or attendance at, an appropriate therapeutic treatment program.⁵²⁶ TTOs may require the child to attend a treatment program, and/or the child's parent or guardian to take any necessary steps to enable the child to attend the treatment.⁵²⁷ Statements made by a child during participation in a therapeutic treatment program — whether under a TTO or voluntarily — are not admissible in any criminal proceedings involving that child.⁵²⁸

One submission observed that TTOs have been implemented effectively in Victoria, with families recognising their benefits and, in some cases, actively seeking them out to support their child's treatment.⁵²⁹

6.5.3 The critical role of accessible and effective therapeutic services

Effective implementation of **Recommendations 6** and **7** will rely significantly on the availability, accessibility and quality of relevant therapeutic services. In submissions, stakeholders highlighted issues with the current service system, including:

- A lack of available services, particularly in regional and remote areas, to assess and address risk factors including disability, mental health, and alcohol and other drug use.⁵³⁰ For many children, detention in Youth Justice Centres is often the first opportunity for comprehensive assessment.⁵³¹
- Service capacity issues, including limited operating hours, staffing and training.⁵³² Police often take on roles more appropriately suited to other service providers, due to gaps in service availability.⁵³³
- Significant reliance on ACCOs to provide psychological and support services to children, when these organisations are not resourced to meet demand.⁵³⁴

Feedback received during stakeholder consultations indicated that investment in therapeutic services and programs is low, sporadic and short-term, and that a systemic and strategic approach to funding services is needed. Similarly, the interim report of the Legislative Assembly Committee on Law and Safety's inquiry into community safety in regional areas found that service delivery is

⁵²⁴ *Children, Youth and Families Act 2005* (Vic) ss 244–246.

⁵²⁵ *Children, Youth and Families Act 2005* (Vic) s 245(6).

⁵²⁶ *Children, Youth and Families Act 2005* (Vic) s 248(1).

⁵²⁷ *Children, Youth and Families Act 2005* (Vic) ss 249(1), (2)(a).

⁵²⁸ *Children, Youth and Families Act 2005* (Vic) s 251.

⁵²⁹ NSW Health, *Submission 27* (7 July 2025).

⁵³⁰ Legal Aid NSW, *Submission 2* (27 June 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); NSW Health, *Submission 27* (7 July 2025).

⁵³¹ Office of the Senior Practitioner, Child Protection and Permanency, Department of Communities and Justice, *Submission 19* (2 July 2025).

⁵³² NSW Police Force, *Submission 5* (27 June 2025); Youth Justice NSW, Department of Communities and Justice, *Submission 12* (29 June 2025).

⁵³³ NSW Police Force, *Submission 5* (27 June 2025).

⁵³⁴ Aboriginal Affairs NSW, Premier's Department, *Submission 18* (2 July 2025).

often siloed and there is limited coordination, which may be due to the competitive nature of grant funding.⁵³⁵

We recognise that implementing **Recommendations 6 and 7** would require additional investment in, and development of, the current therapeutic service system. In doing so, the NSW Government may have regard to the suggestions made by stakeholders during this Review, including:

- Increased funding for diagnostic and support services for children with disabilities and mental health issues.⁵³⁶
- Increased investment in alcohol and other drug supports in regional areas.⁵³⁷
- Introducing specialised services for children who use violence.⁵³⁸
- Enhanced investment in ACCO-led supports and services.⁵³⁹

⁵³⁵ Legislative Assembly Committee on Law and Safety, Parliament of NSW, *Community safety in regional and rural communities – Interim Report: Addressing the drivers of youth crime through early intervention* (Report No 2/58, May 2025) 76.

⁵³⁶ Legal Aid NSW, *Submission 2* (27 June 2025); The Law Society of NSW, *Submission 9* (27 June 2025).

⁵³⁷ The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025).

⁵³⁸ The Law Society of NSW, *Submission 9* (27 June 2025).

⁵³⁹ Legal Aid NSW, *Submission 2* (27 June 2025); Community Restorative Centre, *Submission 3* (27 June 2025); NSW Council for Civil Liberties, *Submission 13* (30 June 2025); SNAICC, *Submission 16* (1 July 2025); Aboriginal Affairs NSW, Premier's Department, *Submission 18* (2 July 2025); The Aboriginal Legal Service (NSW/ACT), *Submission 22* (2 July 2025); AbSec, *Submission 25* (4 July 2025); Aboriginal Women's Advisory Network, *Submission 26* (4 July 2025).

Appendix A: Regional visits

Tamworth

On 18 June 2025, meetings were held with the following individuals and groups:

1. The Aboriginal Legal Service (NSW/ACT).
2. Jeff Budd, Deputy Mayor, Tamworth Local Council.
3. Legal Aid NSW.
4. NSW Police Force.
5. Tamworth Aboriginal Community-Controlled Organisations.
6. Tamworth Justice Collective.
7. Tamworth Local Aboriginal Land Council and the Fresh Footprints Program.

Moree

On 19 June 2025, meetings were held with the following individuals and groups:

1. Aboriginal Elders Group.
2. The Aboriginal Legal Service (NSW/ACT).
3. Brendan Moylan MP, Member for Northern Tablelands.
4. Legal Aid NSW.
5. Magistrate Paul Hayes.
6. Moree for Change Action Group.
7. Moree Mothers and Grandmothers Group.
8. Moree Plains Shire Council.
9. NSW Police Force.

Appendix B: Focus questions

Legal operation of <i>doli incapax</i>
- How is the presumption of <i>doli incapax</i> operating in practice? Do you have any comments in relation to: - the nature and extent of the evidentiary burden on the prosecution, and/or - the evidence available to the court in <i>doli incapax</i> matters, including what improvements could be made to improve the available evidence? - Are there potential evidentiary or operational reforms (for example, improved training) that should be considered to improve the evidence available to the court in <i>doli incapax</i> matters?
Approaches to <i>doli incapax</i> in Australian jurisdictions
- How should the principle of <i>doli incapax</i> be legislated in NSW? - Should legislation require consideration of <i>doli incapax</i> at early or multiple stages of the criminal justice process?
Impact of <i>doli incapax</i>
- How does the operation of the presumption of <i>doli incapax</i> impact on: - criminal justice responses to offending behaviour by children aged 10 to 13, and/or - the affected children themselves? - Are there any ways to facilitate access by accused children aged 10 to 13 to relevant services or support, without undermining the operation of <i>doli incapax</i>? If so, what changes should be made to enable this?
Interaction between <i>doli incapax</i> and diversion schemes
- How does the operation of <i>doli incapax</i> interact with: - diversion under the <i>Young Offenders Act 1997</i>? - mental health diversions under the <i>Mental Health and Cognitive Impairment Forensic Provisions Act 2020</i>? - Are there any ways to facilitate engagement in diversion by children aged 10 to 13 in contact with the criminal justice system? If so, what changes should be made to enable this?
Regional issues
Are there particular issues in regional or rural areas that may affect the operation of <i>doli incapax</i>?
Addressing offending by 10 to 13 year olds
Are there any other matters that you wish to raise about the appropriate response to offending behaviours by 10 to 13 year olds?

Appendix C: Written submissions

Note that submissions were assigned numbers based on the order in which they were received.

Submission No.	Stakeholder	Date received
1	Police Association of NSW	27-Jun-25
2	Legal Aid NSW	27-Jun-25
3	Community Restorative Centre	27-Jun-25
4	Just Reinvest NSW	27-Jun-25
5	NSW Police Force	27-Jun-25
6	Wirringa Baiya Aboriginal Women's Legal Centre	27-Jun-25
7	Office of the Advocate for Children and Young People	27-Jun-25
8	The Public Defenders	27-Jun-25
9	Law Society	27-Jun-25
10	The Shopfront Youth Legal Centre	27-Jun-25
11	Australian Lawyers for Human Rights	27-Jun-25
12	Youth Justice NSW, System Reform, Department of Communities and Justice (DCJ)	29-Jun-25
13	NSW Council for Civil Liberties	30-Jun-25
14	Intellectual Disability Rights Service	30-Jun-25
15	NSW Bar Association	30-Jun-25
16	SNAICC – National Voice for Our Children	30-Jun-25
17	The Law Council of Australia	1-Jul-25
18	Aboriginal Affairs NSW, Premier's Department	2-Jul-25
19	Office of the Senior Practitioner, Child Protection and Permanency (CPP), DCJ	2-Jul-25
20	Aboriginal Culture in Practice, CPP, DCJ	2-Jul-25
21	Office of the Deputy Secretary, CPP, DCJ	2-Jul-25
22	The Aboriginal Legal Service (NSW/ACT)	2-Jul-25

23	Kristie Morris	2-Jul-25
24	Children's Court of NSW	2-Jul-25
25	AbSec NSW	4-Jul-25
26	Aboriginal Women's Advisory Network	4-Jul-25
27	NSW Health	7-Jul-25
28	Office of the Director of Public Prosecutions	11-Jul-25

Appendix D: Consultations

Individual meetings

Over June–August 2025, individual meetings were held with the following stakeholders:

1. The Aboriginal Legal Service (NSW/ACT).
 2. Chief Magistrate of the Local Court.
 3. The Honourable Kevin Anderson MP, Member for Tamworth.
 4. Legal Aid NSW.
 5. Magistrates of the Children’s Court.
 6. The McNamara Family.
 7. NSW Police Force.
 8. The Office of the Director of Public Prosecutions.
 9. The President of the Children’s Court.
 10. Youth Justice NSW, System Reform, Department of Communities and Justice (**DCJ**).
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Group roundtables

Roundtable 1 — 3 July 2025

This roundtable was attended by representatives from:

1. The Aboriginal Legal Service (NSW/ACT).
2. Bureau of Crime Statistics and Research, Strategy, Policy and Commissioning (**SPC**), DCJ.
3. Justice Health NSW.
4. Legal Aid NSW.
5. NSW Police Force.
6. Office of the Advocate for Children and Young People.
7. Policy Reform and Legislation, Law Reform and Legal Services (**LRLS**), DCJ.
8. System Reform, DCJ.
9. Women, Family and Community Services, SPC, DCJ.

Roundtable 2 — 9 July 2025

This roundtable was attended by representatives from:

1. Aboriginal Affairs NSW, Premier’s Department.
2. Community Services Statewide Services, DCJ.
3. Department of Education
4. Moree Place-based Coordination Team, Premier’s Department.
5. Policy Reform and Legislation, LRLS, DCJ.
6. Regional Youth.

