# Examining the operation of *doli incapax* and implications for reform in New South Wales (NSW), Australia

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*A thesis submitted to fulfil the requirements for the degree of*

Doctor of Philosophy (Law)

*Sydney Law School,*
*The University of Sydney*

2026

Statement of originality

*This is to certify that the content of this thesis is my own work. This thesis has not been submitted for any other degree or purpose.*

*I certify that the intellectual content of this thesis is the product of my own work, and that all assistance received in preparing this thesis and all sources have been acknowledged.*

*No content produced by generative AI tools has been used in the preparation of this thesis.*

*Laura Metcalfe* | 25 February 2026

# Acknowledgements

I would like to express my sincere gratitude to my supervisors, Associate Professor Garner Clancey, Professor Emerita Judy Cashmore, and Dr. Betty Luu, for their guidance, generosity and intellectual rigour throughout this project. Thank you for pushing my thinking, sharpening my arguments, and patiently guiding me through the inevitable uncertainties of doctoral research.

I am especially grateful to the magistrates, legal practitioners, and other professionals who participated in this study. I appreciate the time you gave and the care with which you shared your experiences and perspectives. I also acknowledge the Children's Court of New South Wales and the Local Court of New South Wales for their assistance in facilitating recruitment and their support for this research.

I would also like to thank the Family and Community Services Insights, Analysis and Research (FACSIAR) team for access to the Human Services Dataset and for their assistance in navigating approvals and governance processes. I am grateful to the University of Sydney Human Research Ethics Committee for approving this research and for their careful oversight of a project that spanned multiple methods, datasets and approvals.

This research was supported in part by an Australian Government Research Training Program (RTP) stipend scholarship, and I gratefully acknowledge that support.

Finally, thank you to my friends and family for their patience, encouragement and practical support. In particular, I thank my parents for the many hours they spent reading drafts and offering thoughtful comments; my partner for his generosity and support, including during periods of medical examinations and specialty training; and Nessie, Kip and Charlie for their companionship and for reminding me to step away from the screen from time to time.

Author attribution statement

*This thesis presents the original work of the author. No part of this thesis has been previously published or submitted for publication.*

Laura Metcalfe | 25 February 2026

*As supervisor for the candidature upon which this thesis is based, I can confirm that the authorship attribution statement above is correct.*

Associate Professor Garner Clancey | 25 February 2026

This research was supported by an Australian Government Research Training Program (RTP) Scholarship and PRSS funding.

## Abstract

Children aged between 10 and 13 occupy a distinctive position within the criminal justice system in New South Wales (NSW). Under the common law doctrine of *doli incapax*, they are presumed incapable of criminal responsibility unless the prosecution can establish otherwise. Despite the centrality of this doctrine, relatively little empirical research has examined how it operates in practice, how legal actors interpret its requirements, or how it interacts with broader justice system processes. In NSW, in particular, there is a lack of publicly available data on how frequently the presumption is raised, how often it is rebutted, and how it shapes procedural outcomes such as bail or court finalisations. At the same time, debates about youth crime, community safety, and the appropriate age of criminal responsibility have intensified, often without sufficient attention to the day-to-day operation of existing legal safeguards or the lived experiences of children subject to them. This thesis addresses that gap through a mixed-methods examination of *doli incapax* as it operates across legal doctrine, courtroom practice, and children's trajectories across justice and related government systems in NSW. By integrating qualitative interviews with magistrates and legal practitioners (27 interviews), courtroom observations (20 observations), an online survey of Local Court magistrates (36 respondents), and large-scale linked administrative data (15,895 children with a police contact between ages 10–13), the study seeks to provide a comprehensive account of how *doli incapax* functions not only as a legal principle, but as a practical mechanism embedded within institutional processes and children's life courses. The findings demonstrate that *doli incapax* operates primarily as a procedural safeguard that limits conviction but does not prevent children's exposure to extended criminal justice processes. They further show that early justice system contact is highly concentrated among children experiencing cumulative and intersecting disadvantage, challenging individualised accounts of offending. In so doing, the thesis contributes new empirical insight into the operation of *doli incapax* and reframes debates about criminal responsibility by situating the presumption within broader questions of youth justice governance and system design.

## Contents

**Abstract** ........ **v**

**1. Chapter 1: Introduction** ........ **1**

1.1. The minimum age of criminal responsibility in Australia: Contemporary debates and concerns ........ 1

1.2. Reform inertia, political contestation and the turn to doctrinal safeguards ........ 2

1.3. Beyond the doctrine of *doli incapax* and the limits of formal protection ........ 5

1.4. Research aims, questions and thesis contributions ........ 7

1.5. Conceptual and theoretical frameworks ........ 10

1.5.1. Socio-legal approaches: Law in action ........ 10

1.5.2. Critical socio-legal perspectives: Protection and control ........ 11

1.5.3. Life-course and cumulative disadvantage frameworks ........ 13

1.5.4. Integrating doctrine, practice and trajectories ........ 14

1.6. Methods ........ 15

1.7. Positionality, Indigeneity and the scope of the research ........ 16

1.8. Structure of the thesis ........ 16

**2. Chapter 2: *Doli incapax,* youth justice and early system contact—A critical review of the literature** ........ **20**

2.1. Legal foundations and doctrinal uncertainty ........ 20

2.1.1. The age of criminal responsibility in Australia ........ 21

2.1.2. The political use of *doli incapax* ........ 22

2.2. *Doli incapax* in law: Doctrine, evidence and uncertainty ........ 23

2.2.1. Origins and rationale ........ 24

2.2.2. The common law presumption ........ 24

2.2.3. High Court and appellate authority ........ 25

2.2.4. Evidentiary requirements ........ 26

2.2.5. Critique and reform debates ........ 27

2.2.6. Codification and reform ........ 30

2.3. Socio-legal and developmental understandings of criminal responsibility ........ 30

2.3.1. Capacities relevant to criminal responsibility ........ 30

2.3.2. Adolescence as a period of continuing development ........ 32

2.3.3. Heterogeneity, trauma and neurodevelopmental difference ........ 32

2.3.4. Developmental evidence in law and policy ........ 33

2.4. Law in action: Courts, discretion and practice ........ 34

2.4.1. Law as practice ........ 35

2.4.2. Judicial discretion ....35
2.4.3. Magistrates as legal decision-makers: Legal cultures and interpretive labour 36
2.5. *Doli Incapax* in practice: Empirical evidence and knowledge gaps ....37
2.5.1. Australian empirical literature ....37
2.5.2. International cautionary evidence ....40
2.5.3. What remains unknown ....40
2.6. Children, systems and cumulative disadvantage ....41
2.6.1. Youth justice system and policy in NSW ....42
2.6.2. Diversion ....43
2.6.3. Patterns of early police contact and youth offending in NSW ....46
2.6.3.1. Offence profiles under 14 ....47
2.6.3.2. Criminogenic effects of early contact ....47
2.6.4. Cumulative and intersecting disadvantage ....48
2.7. Critical perspectives on care, control and diversion ....50
2.7.1. Diversion as policy ideal ....50
2.7.2. Discretion and gatekeeping ....51
2.7.3. Surveillance through welfare ....51
2.8. Synthesis and implications ....52
**3. Chapter 3: Methodology—A mixed-methods study of law in action ....54**
3.1. Mixed-methods research design and overview ....54
3.1.1. Ethics approval ....55
3.1.2. Overview of research components ....55
3.1.3. Integration across methods ....59
3.2. Semi-structured interviews with magistrates and legal practitioners ....59
3.2.1. Interview cohort ....59
3.2.2. Recruitment and sampling ....60
3.2.3. Interview procedure ....60
3.2.4. Data preparation and cleaning ....61
3.2.5. Coding and analyses ....61
3.2.6. Rigour and ethical considerations ....62
3.2.7. Limitations ....62
3.3. Online survey ....64
3.3.1. Online survey cohort ....64
3.3.2. Recruitment ....64
3.3.3. Survey procedures ....65
3.3.4. Ethics approval ....65
3.3.5. Survey data cleaning and organisation ....65

3.3.6. Analytic approach ....66
3.3.6.1. Quantitative analysis ....66
3.3.6.2. Qualitative analysis ....66
3.3.7. Integration with interview and observation data ....66
3.3.8. Limitations ....66
3.4. Courtroom observations ....67
3.4.1. Observation sites and samples ....67
3.4.2. Nature of observations ....72
3.4.3. Data recording and fieldnotes ....72
3.4.4. Ethical considerations ....73
3.4.5. Analytic approach ....73
3.4.6. Integration with interviews and surveys ....73
3.4.7. Limitations ....73
3.5. Human Services Dataset analyses ....74
3.5.1. Access and review processes ....75
3.5.2. HSDS datasets used in this research ....75
3.5.3. Ethics approval ....78
3.5.4. Study population ....78
3.5.5. Analytic approach ....78
3.5.5.1. Assessment of co-occurring risk ....79
3.5.6. Limitations ....80
**4. Chapter 4: Early justice system contact and escalation among *doli*-aged children ....84**
4.1. A note on interpretation ....84
4.2. What is the scale and geographic distribution of early police contact among *doli*-aged children? ....85
4.2.1. Age, gender and cultural background patterns ....86
4.2.2. Early onset and types of offending ....88
4.2.3. Concentration of offence categories ....88
4.2.4. Geographic distribution ....89
4.2.4.1. Proportional over-representation in remote areas ....90
4.2.4.2. Age at first contact by region classification ....91
4.2.4.3. Intensity of police contact by region classification ....92
4.2.4.4. Structural and cultural explanations ....93
4.3. How do children move from police contact into formal legal processes including diversion and court? ....94
4.3.1. Frequency of charges ....94
4.3.2. Age and gender patterns ....95

4.3.3. Regional patterns ....................96
4.3.4. Police interactions and charge pathways ....................97
4.3.5. Offence types ....................98
4.3.6. Cumulative and combined outcomes ....................98
4.4. Which children experience deeper entrenchment into the justice system and appear in court? ....................99
4.4.1. Age at first police contact and pathways to court ....................100
4.4.2. Intensity of police contact, offence types and patterns ....................101
4.4.3. Diversionary histories ....................101
4.4.4. Bail and remand ....................102
4.4.5. Pleas, verdicts, and *doli incapax* ....................102
4.4.6. Sentencing outcomes ....................103
4.4.7. How many come under YJNSW supervision and are held in youth detention? 104
4.4.7.1. Pathways into YJNSW ....................105
4.4.7.2. Offence profiles ....................106
4.4.7.3. Cumulative risk and early onset ....................107
**5. Chapter 5: Cumulative disadvantage and system entanglement among *doli*-aged children ....................109**
5.1. How many *doli*-aged children have been recorded by NSW Police as the victim of a crime? 109
5.1.1. Types and geographic distribution of victimisation ....................110
5.1.2. Victimisation in the year prior to first contact ....................111
5.1.3. Age-specific patterns ....................112
5.2. How many *doli*-aged children have experienced housing instability? ....................113
5.2.1. Overlap with justice and intersection with other adversities ....................113
5.2.2. Social Housing ....................114
5.2.3. Aggregate housing instability ....................115
5.3. How many *doli*-aged children have been suspended from school? ....................115
5.3.1. Suspensions and justice outcomes ....................117
5.3.2. Timing of suspension in relation to justice contact ....................117
5.3.3. Reasons for suspension ....................118
5.3.4. Age-specific trends ....................118
5.4. How many *doli*-aged children have been the subject of a child protection report and/or placed in out-of-home care? ....................119
5.4.1. Child protection ....................119
5.4.1.1. Primary helpline assessed issues ....................120
5.4.1.2. Proximity to justice events ....................122

5.4.2. Out-of-home care (OOHC) ... 122
5.4.2.1. Intersections with justice and co-occurring adversities ... 124
5.4.2.2. Year prior & middle childhood windows ... 124
5.5. How many *doli*-aged children have presented to hospital or called for an ambulance on the basis of an acute health concern or mental health concern? ... 125
5.5.1. Emergency Department (ED) presentations ... 125
5.5.2. Hospital admissions ... 126
5.5.3. Mental health ambulatory care ... 127
5.5.4. Ambulance episodes ... 129
5.5.5. Aggregate health burden ... 130
5.6. How many *doli*-aged children have a recorded disability and/or have received disability supports at school? ... 131
5.6.1. Education system supports and overlap ... 131
5.6.2. Intersections with other risk factors and justice outcomes ... 132
5.6.3. Developmental timing ... 132
5.7. How many *doli*-aged children have been referred to and/or participated in a service or support administered by YJNSW or DCJ? ... 133
5.7.1. YJNSW services ... 133
5.7.2. Brighter Futures ... 133
5.7.3. Intensive Family Supports/Programs (IFS/IFP) ... 134
5.7.4. Youth Hope ... 134
5.7.5. Aggregate service contact ... 135
5.8. To what extent do these risk and protective factors intersect among *doli*-aged children who come into contact with the police and who receive a finalised charge respectively? ... 138
5.8.1. Before age 14 ... 138
5.8.2. Between 8–10 years ... 139
5.8.3. Year prior to first police contact ... 140
5.8.4. Between 10–13 ... 141
5.8.5. Aggregates for children with a finalised charge ... 142
5.8.5.1. Between ages 8–10 among children with a finalised charge ... 143
5.8.5.2. In the year prior to first police contact among children with a finalised charge 144
5.8.5.3. Between ages 10–13 among children with a finalised charge ... 145
5.8.6. Cumulative risk: The gradient and where it steepens ... 146
5.8.6.1. Age windows and proximity to first police contact ... 148
5.8.6.2. Children with a finalised charge ... 149
5.8.6.3. Implications ... 149

**6. Chapter 6: The institutional operation of *doli incapax* in NSW .............................151**

6.1. A note on analytic presentation.......................................................................152

6.2. The *doli* cohort: Concentrated vulnerability in youth justice ...............................152

6.2.1. Seriousness, risk, and the moral burden of *doli* decision-making ................154

6.2.2. Aboriginal and Torres Strait Islander children and regional policing: *Doli* in the shadow of over-representation and local policing cultures....................................156

6.3. Operation of *doli incapax* across NSW ..............................................................157

6.3.1. Frequency, concentration and jurisdictional variation: "A lot of matters, but not many kids" ............................................................................................................157

6.3.1.1. Perceived changes in the frequency of doli incapax matters ................160

6.3.2. Structural sources of inconsistency in the application of *doli incapax*..........160

6.3.2.1. Geographic and resourcing differences: Regional disadvantage as legal disadvantage.............................................................................................................160

6.3.2.2. Specialist expertise and judicial role....................................................161

6.3.2.3. Subjectivity and downstream consequences for children .....................162

6.4. Professional knowledge and institutional capacity ..............................................164

6.4.1. Judicial officers ...........................................................................................164

6.4.2. Legal practitioners .......................................................................................165

6.4.3. Police...........................................................................................................165

6.5. The post-*RP* environment: Raised evidentiary thresholds and altered prosecutorial strategy ......................................................................................................................166

6.5.1. Perceived changes to the application of *doli incapax* ..................................167

6.5.2. Changes to evidentiary standards and reasoning ..........................................167

6.5.3. Impact on rebuttals and outcomes................................................................168

6.6. The evidentiary ecology of *doli* litigation: What is tendered, what persuades and why the gap is important...................................................................................168

6.6.1. Commonly adduced evidence ......................................................................169

6.6.2. Probative value of evidence: The primary of expert evidence.......................170

6.6.3. Practitioner perspectives on persuasive evidence .........................................171

6.6.4. School records: Frequent, weak and morally complicated ...........................172

6.6.4.1. What school records can and cannot show ..........................................173

6.6.5. *Doli incapax* interviews conducted by police ..............................................173

6.6.6. Prior criminal history and diversionary material ..........................................174

6.6.7. Evidentiary fragility and admissibility issues: Evidence from courtroom observations ............................................................................................................175

6.7. *Doli incapax* processes and outcomes: Rebuttals, withdrawals and police practice 176

6.7.1. Rebuttals of *doli incapax* ...............................................................................176

6.7.2. Withdrawals prior to or at hearing ..............................................................177

6.7.3. Timing of withdrawals and impacts on children ..... 178
6.7.4. Police charging practices ..... 180
6.8. Conclusion ..... 180
**7. Chapter 7: Governing children without conviction—Process, risk and cumulative disadvantage ..... 182**
7.1. Bail, bail conditions and remand in *doli incapax* matters ..... 182
7.1.1. Bail as the system's real response ..... 183
7.1.2. Onerous bail conditions and cycles of breach ..... 183
7.1.3. Bail refusal, remand, and the limits of the Children's Court ..... 184
7.1.4. Delay, prolonged bail, and coercive effects: Bail time as pressure to plead ..... 185
7.1.5. Bail as a mechanism of control ..... 186
7.2. Process as punishment: How *doli* matters can criminalise without conviction ..... 187
7.3. Services, supports and diversions for *doli*-age children ..... 188
7.3.1. Availability of services and supports ..... 188
7.3.2. Detention as a proxy for care ..... 188
7.3.3. Exclusion of high-needs children ..... 189
7.3.4. Children found not guilty and "dropped" from the system ..... 189
7.3.5. Regional and metropolitan disparities ..... 190
7.3.6. *Doli incapax* and diversion under the *Young Offenders Act* ..... 190
7.4. The threshold: A de facto raising of the age ..... 191
7.5. Failings of the adversarial process for children ..... 193
7.6. *Doli* and children's legal consciousness: "The only Latin…is *doli incapax*" ..... 193
7.7. Views on reform ..... 194
7.7.1. Reform to the presumption of *doli incapax* ..... 195
7.7.2. Raising the age of criminal responsibility ..... 196
7.7.3. System reflections ..... 197
7.7.4. Mandated services and supports ..... 198
7.8. Conclusion: *Doli* as a window into cumulative disadvantage and system-produced trajectories ..... 198
**8. Chapter 8: Conclusion—From protection to process—*Doli incapax* and youth justice governance in NSW ..... 200**
8.1. Early police contact and systematic sorting ..... 203
8.1.1. Scale and concentration: Episodic contact with a small, high-contact subgroup 203
8.1.2. Age 13 is a threshold ..... 204
8.1.3. Gendered visibility: Early adolescence and "doing masculinity" ..... 205
8.1.4. Early onset (ages 8–10) as a marker of intensified sorting ..... 206
8.1.5. Geography as an amplifier ..... 206

8.1.6. Offence clustering and the production of 'seriousness' 207
8.1.7. From police contact to finalisation 207
8.1.8. Interim implications 208
8.2. Diversion and the limits of protective responses 208
8.2.1. Diversion as the dominant response 209
8.2.2. Timing matters 210
8.2.3. Geography and discretion 210
8.2.4. Cycling through diversion 210
8.2.5. Interim implications 211
8.3. Cumulative disadvantage, system entanglement and the production of high-risk childhoods 211
8.3.1. Limits of measurement and visibility 212
8.3.2. Cumulative risk as a structuring feature 212
8.3.3. The 'housing cliff' and concentration of vulnerability 213
8.3.4. Timing, proximity and escalation 213
8.3.5. Child protection, care and justice 214
8.3.6. Education as a site of exclusion 214
8.3.7. Health, mental health and crisis-driven intervention 215
8.3.8. Fragmentation and the absence of an integrated safety net 215
8.3.9. Reframing responsibility 215
8.4. Rethinking early intervention, *doli incapax* and system design 216
8.4.1. Early justice contact and the limits of *doli incapax* 216
8.4.2. Adversarial processes and children's participatory capacity 218
8.4.3. System design and fragmentation 218
8.5. What *doli incapax* reveals about contemporary youth justice governance 219
8.5.1. *Doli incapax* and the management of uncertainty 220
8.5.2. Displacement of welfare responsibility into criminal process 220
8.5.3. Risk, visibility and the politics of youth crime 221
8.5.4. Protective doctrine and system stabilisation 221
8.6. Implications: Reframing the reform task 221
**References 224**
**9. Appendix: Supplementary methods materials 259**
9.1. Interview protocol 259
9.1.1. For magistrates 259
9.1.2. For practitioners 260
9.2. Survey protocol 262
9.3. The Human Services Dataset (HSDS): Additional information 265

9.3.1. Data governance....................266
9.3.2. Data cleaning and organisation procedures by dataset....................266
9.3.2.1. Date of birth (DOB) data....................267
9.3.2.2. Police data....................267
9.3.2.3. Postcode, SA2, regionality and SEIFA data....................268
9.3.2.4. BOCSAR data....................269
9.3.2.5. Youth Justice NSW data....................270
9.3.2.6. Child protection and out-of-home care (OOHC) data....................273
9.3.2.7. Participation in services and supports....................274
9.3.2.8. Health and mental health....................275
9.3.2.9. DCJ NSW homelessness and social housing data....................279
9.3.2.10. Department of Education (DoE) suspensions and disability supports data 280
9.3.3. Datasets received and not used....................281

## List of figures


Figure 1: Number of police contacts among children with at least one contact before age 14 86
Figure 2: Age at first police contact before age 14 ... 87
Figure 3: Cultural background of children with a police contact between 10–13 and for whom cultural background data were available (*n* = 2,724) ... 88
Figure 4: Number of children with a police contact between 10–13 by offence category ... 89
Figure 5: Number of children with a police contact between 10–13 by region and proportion of the general child population aged 0–14 by region ... 90
Figure 6: Number of children with a police contact between 10–13 by region and proportion of the child population aged 10–14 by region ... 91
Figure 7: Age at first police contact before age 14 by region ... 92
Figure 8: Number of police contacts (limited to 10) between 10–13 by region ... 93
Figure 9: Frequency of finalised charges between 10–13 by charge type ... 95
Figure 10: Age at first finalised charge by charge type ... 95
Figure 11: Age at first police contact by charge type ... 96
Figure 12: Number of children with a finalised charge by region and percentage of cohort by region ... 97
Figure 13: Police interactions by charge type ... 98
Figure 14: Number of children who went to court by region ... 100
Figure 15: Age at first police contact among children who went to court between 10–13 ... 101
Figure 16: Frequency of bail decisions by decision type among children who went to court between 10–13 ... 102
Figure 17: Frequency of sentencing outcomes by sentence type among children who went to court between 10–13 ... 104
Figure 18: Age at first admission to YJNSW between 10–13 ... 105
Figure 19: Frequency of admissions to YJNSW between 10–13 ... 105
Figure 20: Length of time on remand among children under YJNSW supervision between 10–13 ... 106
Figure 21: Number of children under YJNSW supervision by region and percentage of cohort by region ... 107
Figure 22: Number of children recorded as victims of crime by region and percentage of cohort by region ... 111
Figure 23: Number of victimisation episodes in the year prior to first police contact ... 112
Figure 24: Age at first homelessness or risk of homelessness episode before 14 ... 113
Figure 25: Frequency of suspension episodes before age 14 ... 116
Figure 26: Age at first suspension from school before age 14 ... 116
Figure 27: Children suspended before age 14 by region and percentage of cohort by region ... 117
Figure 28: Number of days suspended in the year prior to first police contact ... 118
Figure 29: Frequency of ROSH reports before age 14 ... 119
Figure 30: Frequency of child protection reports by Helpline-assessed issue ... 120
Figure 31: Number of Helpline-assessed risk factors before 14 ... 121

Figure 32: Children with a child protection report before age 14 by region and percentage of cohort by region ......121
Figure 33: Age at first OOHC placement before 14 ......123
Figure 34: Number of OOHC placements by placement type before 14......123
Figure 35: Number of presentations to ED before 14......125
Figure 36: Number of ED presentations by region and percentage of cohort by region......126
Figure 37: Number of hospital admissions by region and percentage of cohort by region...127
Figure 38: Age at first mental health ambulatory episode before 14......128
Figure 39: Number of mental health ambulatory episodes before 14 by region and percentage of cohort by region......128
Figure 40: Number of ambulance call-outs by region and percentage of cohort by region ..130
Figure 41: Number of children receiving a school disability support before 14 by region and percentage of cohort by region ......132
Figure 42: Overlap in service system contact among children with police contact between 10–13......136
Figure 43: Cumulative risk before age 14......139
Figure 44: Cumulative risk among children aged 8–10 years ......140
Figure 45: Cumulative risk in the year prior to first police contact......141
Figure 46: Cumulative risk among children aged 10–13......142
Figure 47: Cumulative risk before age 14 among children with a finalised charge between 10–13......143
Figure 48: Cumulative risk between 8–10 among children with a finalised charge between 10–13......144
Figure 49: Cumulative risk in the year prior to first police contact among children with a finalised charge between 10–13 ......145
Figure 50: Cumulative risk between 10–13 among children with a finalised charge between 10–13......146
Figure 51: Cumulative risk exposure across age windows and justice outcomes ......147
Figure 52: Escalation of police contact (5+ contacts) by cumulative risk level between ages 10–13......148
Figure 53: Frequency with which magistrates have *doli incapax* matters listed before them ......158
Figure 54: Frequency with which legal practitioners work with *doli incapax*-age children .159
Figure 55: Evidence commonly adduced to rebut *doli incapax* ......170
Figure 56: Frequency of *doli incapax* rebuttals by percentage proportion of responding magistrate and practitioner cohorts......177

**List of tables**

Table 1: Overview of mixed-methods research design ........................................................ 56
Table 2: Summary of observed *doli incapax* matters (courtroom observations) ..................... 69
Table 3: HSDS datasets used in this study ................................................................... 76

# Chapter 1: Introduction

## 1.1. The minimum age of criminal responsibility in Australia: Contemporary debates and concerns

The minimum age of criminal responsibility in Australia has been the subject of sustained national and international scrutiny over the past decade. Currently set at 10 years across most jurisdictions,[1] the age of criminal responsibility is widely criticised as inconsistent with international norms, incompatible with contemporary developmental science, and contrary to Australia's obligations under international human rights law governing the treatment of children in conflict with the law (Australian Human Rights Commission ('AHRC'), 2021). While public and political debate has often framed the issue in terms of community safety or youth crime control, a broad body of legal, medical, criminological and socio-legal scholarship has instead emphasised the developmental, procedural and structural implications of subjecting children as young as 10 to criminal prosecution (Allen, 2006; Amnesty International, 2018; Australian Child Rights Taskforce, 2018, p. 68; Australian Law Reform Commission ('ALRC'), 1997, Ch. 4; Australian Medical Association, 2020; Crofts, 2019; Cunneen, 2020; Law Council of Australia, 2021; National Legal Aid, 2020; O'Brien & Fitzgibbon, 2017; Richards, 2011; Royal Commission, 2017; Shoebridge, 2021; Trevitt & Browne, 2020; United Nations Committee on the Rights of the Child ('UNCRC'), 1997, 2005, 2012, 2019; UNSW Centre for Crime, Law and Justice, 2021).

A substantial interdisciplinary literature has raised concerns about Australia's low minimum age of criminal responsibility. Scholars across law, developmental psychology and criminology have questioned children's capacity to meaningfully participate in adversarial proceedings (Arthur, 2016, p. 277; McDiarmid, 2013); highlighted the disproportionate impact of early criminalisation on Aboriginal and Torres Strait Islander children (Cunneen, 2020; Haysom, 2022, p. 1504); and identified the criminogenic risks associated with early justice system contact (Goldson, 2013, pp. 121-122; Weatherburn et al., 2012, pp. 790-795). Children who enter the system at young ages are also more likely to present with intersecting forms of disadvantage, including trauma exposure, cognitive impairment, mental disorder, family violence and socioeconomic marginalisation (Justice Health & Forensic Mental Health Network and Juvenile Justice NSW ('JH&FMHN & JJNSW'), 2017; McArthur et al., 2021, pp. 18-20). Collectively, this body of research challenges the assumption that early criminal

[1] See *Crimes Act 1914* (Cth), s 4M; *Criminal Code Act 1995* (Cth), Div 7.1; *Children (Criminal Proceedings) Act 1987* (NSW), s 5; *Criminal Code Act 1983* (NT), s 38; *Criminal Code Act 1899* (Qld), s 29(1); *Young Offenders Act 1993* (SA), s 5; *Criminal Code Act 1924* (Tas), s 18(1); *Criminal Code Act Compilation Act 1913* (WA), s 29. Victoria and the Australian Capital Territory are the only jurisdictions to raise the age; see *Youth Justice Act 2024* (Vic), s 10; *Criminal Code 2002* (ACT), s 25.

responsibility promotes accountability or community safety, instead suggesting that it may entrench the very trajectories of persistence it seeks to prevent.

International human rights bodies have been similarly unequivocal. The United Nations Committee on the Rights of the Child has repeatedly criticised minimum ages below 14 (UNCRC, 2019, [22]-[23]) and cautioned that dual-age systems relying on presumptions of incapacity have "not proved… [to be protective] in practice" (UNCRC, 2019, [26]). Australia's retention of a low minimum age alongside the doctrine of *doli incapax* therefore sits uneasily within contemporary international standards.

Despite the breadth and consistency of these critiques, reform momentum has been uneven and contested. Debate has increasingly shifted away from structural change toward the capacity of existing legal mechanisms to mitigate the harms associated with early criminal responsibility. Central among these mechanisms is the common law presumption of *doli incapax.* In contemporary Australian policy and parliamentary discourse, the presumption is often invoked as evidence that children aged 10 to 13 are already protected from inappropriate criminalisation, and that the existing legal framework is sufficiently developmentally responsive (Australian Government, 2009, [278]; Australian Government, 2018, [65]). This framing has assumed heightened significance as reform efforts have stalled and as jurisdictions, including New South Wales (NSW), have turned toward recalibrating the operation of *doli incapax* rather than raising the age itself (*Children (Criminal Proceedings) and Young Offenders Legislation Amendment Act 2025* (NSW)).

Yet reliance on the presumption as a protective safeguard raises foundational questions about how it operates in practice. Despite its central role in debates about criminal responsibility, there is limited publicly available, jurisdiction-specific evidence documenting how *doli incapax* is raised, interpreted and applied in everyday court settings, or how it shapes outcomes for children subject to early police contact. This thesis is situated within that evidentiary gap. Rather than asking whether the age of criminal responsibility should be raised in the abstract, it interrogates how criminal responsibility is currently constructed, negotiated and experienced by children aged 10 to 13 within the NSW justice system. By examining the operation of *doli incapax* in practice, alongside patterns of early police contact and cumulative disadvantage, the thesis seeks to provide an empirical foundation capable of informing debates about the age of criminal responsibility, its reform, and its consequences. In so doing, it responds to longstanding calls (both domestic and international) for evidence-based approaches to child justice reform that move beyond formal doctrine to examine how law operates on the ground (UNCRC, 2019, [112]-[114]).

### 1.2. Reform inertia, political contestation and the turn to doctrinal safeguards

Despite sustained national and international criticism of Australia's age of criminal responsibility, legislative reform efforts have been characterised by fragmentation and political ambivalence (see Crofts, 2023). At the national level, reform momentum has largely

stalled at the threshold of incremental change. In 2019, the Council of Attorneys-General agreed to review the minimum age of criminal responsibility, and in 2021 supported developing a proposal to raise the age from 10 to 12 (Council of Attorneys-General, n.d.; Council of Attorneys-General, 2021, p. 4). The November 2021 proposal was widely criticised by legal experts, child advocates and human rights bodies as inadequate and inconsistent with the recommendations of the United Nations Committee on the Rights of the Child, which has repeatedly called for a minimum age of at least 14 (Law Council of Australia, 2021). The proposal was also criticised for entrenching a dual-threshold system that would continue to expose young children to criminal justice intervention, while offering little clarity about how children below the revised age would be supported outside the criminal law (Amnesty International, 2021).

In NSW, this broader pattern of reform inertia around the age of criminal responsibility has been particularly pronounced. The defeat of the *Children (Criminal Proceedings) Amendment (Age of Criminal Responsibility) Bill 2021* (NSW) which proposed raising the age to 14 and restricting detention for children under 16, reflected both political resistance to age-raising reform, and the salience of community anxiety about youth crime, particularly in regional and rural NSW (Speakman, 2022, p. 33). In public and parliamentary discourse, concerns about repeat offending, bail non-compliance and community safety have increasingly been invoked to justify retaining a low age of criminal responsibility, even in the face of evidence that early criminalisation is harmful and counterproductive (Artmann, 2025; Gregoire, 2025; Hawes, 2025; Schultz, 2025; Theocharous, 2025; Weatherburn & Ramsey, 2018).

Against this backdrop, *doli incapax* has emerged as a central doctrinal device through which policymakers and practitioners reconcile competing commitments to child protection and punitive responsiveness (Cunneen, 2020, pp. 9-12). The logic is familiar: although the legislated minimum age remains low, children aged 10 to 13 are presumed incapable of criminal responsibility unless the prosecution can prove that the child knew their conduct was seriously wrong (*RP v The Queen* (2016) 259 CLR 641, [9]-[10] (Kiefel, Bell, Keane and Gordon JJ)). On this basis, the presumption is said to mitigate the harshness of the minimum age and to function as a safeguard against inappropriate criminalisation (Australian Government, 2009, [278]; Australian Government, 2018, [65]). However, this reliance on *doli incapax* raises a series of unresolved empirical and conceptual questions. As international human rights bodies have observed, dual-age systems that rely on rebuttable presumptions of incapacity have not proved protective in practice, despite their formal intent (UNCRC, 2019, [26]). In Australia, government reporting has historically portrayed the presumption as shielding children from "the full force of the law" (Australian Government, 2009, [278]), yet there is remarkably little empirical evidence documenting how *doli incapax* works in everyday court practice (Cunneen, 2020, p. 10; Fitz-Gibbon & O'Brien, 2019). Basic questions remain largely unanswered: how often is the presumption raised? In what types of matters? What evidentiary strategies are deployed by prosecution and defence? How consistently is the presumption interpreted and applied across courts, magistrates and

jurisdictions? And to what extent does it meaningfully alter outcomes for children as opposed to delaying or reshaping criminal justice intervention?

These questions have become more acute in the NSW context following recent passing of the *Children (Criminal Proceedings) and Young Offenders Legislation Amendment Act 2025* (NSW), marking the first time that the presumption has been codified in statute in this jurisdiction. The reforms were framed by the Minns Labor Government as strengthening responses to youth crime by clarifying the operation of the presumption and improving the ability of prosecutors to rebut it (Daley, 2025). Central to these changes is the explicit authorisation for courts to consider the alleged conduct and surrounding circumstances when assessing criminal capacity, and the express statement that the presumption may be rebutted on the facts of the offending alone, with or without additional evidence (*Children (Criminal Proceedings) and Young Offenders Legislation Amendment Act 2025* (NSW), Sch. 1[1]). The passage of this legislation reflects growing concern within government about the perceived consequences of recent High Court authority on *doli incapax,* particularly *RP v The Queen* (‘*RP*’) ((2016) 259 CLR 641). Following that decision, conviction rates for children aged 10 to 13 in NSW reportedly declined sharply, prompting claims that the presumption has become overly onerous and was contributing to case attrition and perceived impunity (Gu, 2025).

The NSW Government commissioned an independent review into the operation of *doli incapax,* led by a former Supreme Court judge and former Deputy Police Commissioner, and characterised legislative reform as necessary to address dysfunction in the system (Bellew & Loy, 2025). Yet the codification and apparent recalibration of the presumption also intensifies the need for empirical scrutiny. By permitting rebuttal on the basis of the offending conduct alone, the reforms appear to shift the evidentiary balance in ways that may sit uneasily with longstanding common law principles emphasising that capacity cannot be inferred merely from the act (*RP* (2016) 259 CLR 641, [9]). Whether these changes enhance child protection, dilute it, or simply redistribute discretion among police, prosecutors and magistrates is not yet known. Crucially, there is no systematic baseline evidence documenting how *doli incapax* operated in NSW prior to codification, against which the effects of reform can be meaningfully assessed.

This absence of jurisdiction-specific, empirical evidence constitutes a central problem for both law reform and scholarly debate. Without a grounded understanding of how the presumption has functioned in practice—across charging decisions, bail hearings, evidentiary contests and case outcomes—claims that legislative reform will correct or improve the system remain largely speculative. It is this gap that underpins the first three research questions of this thesis, which examine how and under what conditions *doli incapax* operates in NSW courts; how magistrates understand and experience the presumption across different contexts; and how it is negotiated and resolved in real-time courtroom practice. By situating *doli incapax* within its institutional and procedural setting, this thesis seeks to move beyond abstract doctrinal debate and provide an empirical foundation for evaluating its role in contemporary youth justice governance (Brown & Charles, 2019; Lacey, 2002, p. 194).

### 1.3. Beyond the doctrine of *doli incapax* and the limits of formal protection

While debates about the minimum age of criminal responsibility and the operation of *doli incapax* have largely centred on legal doctrine, a second and closely related problem concerns what happens to children *before* questions of criminal responsibility are formally adjudicated. In Australia, children may come into contact with police well before their criminal capacity is tested in court or a prosecution proceeds. Research demonstrates that early and repeated police contact can itself be criminogenic, embedding children within pathways of surveillance and escalating system involvement rather than diverting them away from formal justice processes (McAra & McVie, 2005, 2022). Criminological research on developmental pathways into offending provides important context for understanding these dynamics. Longitudinal studies demonstrate that early onset justice system contact is one of the strongest predictors of persistent and serious offending across the life course (Akpanekpo et al., 2024; Livingston et al., 2008; Van Hazebroek et al., 2019), and children who experience police contact at younger ages are more likely to accumulate further justice interventions over time, including charges, court appearances, custodial remand and adult incarceration (Weatherburn & Ramsey, 2018). Crucially, this association persists even after controlling for individual behaviour, suggesting that system contact itself plays a role in amplifying risk (Laub & Sampson, 2003). From a life-course perspective, early police contact can operate as a form of institutional labelling, altering how children are perceived by authorities, schools and welfare agencies and shaping subsequent decision-making across systems (Bernberg & Krohn, 2003; Braithwaite, 1989; McAra & McVie, 2005, 2007).

Existing Australian evidence suggests that early justice system contact is neither randomly distributed nor evenly experienced. Administrative data consistently show that children who come into contact with police at younger ages are disproportionately drawn from socioeconomically disadvantaged communities and are more likely to experience intersecting forms of adversity, including poverty, unstable housing, family violence, parental criminal justice involvement, mental illness and disability (Hamilton et al., 2024; Homel et al., 1999; Homel et al., 2001; Malvaso et al., 2022; Weatherburn et al., 1997). Aboriginal and Torres Strait Islander children are particularly over-represented at every stage of early police contact, reflecting the cumulative effects of structural inequality and intergenerational trauma (Blagg, 2016; Crofts, 2015; Cunneen, 2001; Cunneen et al., 2021). These patterns raise concerns about whether the operation of the presumption can meaningfully mitigate the harms associated with early system exposure when children's justice involvement is already shaped by entrenched disadvantage long before capacity is litigated.

Despite the centrality of early intervention in youth justice policy, there is limited empirical research documenting the scale, timing and nature of police contact among children below the age of criminal responsibility, particularly those aged from about 8 to 13 years (Livingston et al., 2008). Public debate has focused overwhelmingly on the legislated minimum age and on formal court outcomes, obscuring the extent to which children may experience sustained justice system contact long before criminal responsibility is formally

determined (Weatherburn & Ramsey, 2018). As a result, children subject to the *doli incapax* presumption often appear in legal and policy discourse only at the moment when capacity is contested, rather than as participants in longer justice trajectories shaped by prior police interactions, informal and formal diversion, bail, child protection involvement and welfare interventions.

Yet children aged 8 to 13 occupy an uneasy position within this literature. Developmental research has focused heavily on early childhood (ages 0–5) as a formative period for later behaviour, while criminological scholarship has concentrated on adolescence as the stage at which offending trajectories consolidate, persist or desist (Cauffman et al., 2024; Monahan et al., 2009; Mulvey et al., 2010; Pearce et al., 2016; World Health Organisation, 2023; Yin et al., 2025). Children in middle childhood and early adolescence (those most directly affected by the presumption and age of criminal responsibility reform) remain comparatively under-examined in empirical research. As a result, little is known about how justice system contact unfolds during this critical period, or how legal doctrines such as *doli incapax* intersect with children's lived experiences of policing, welfare intervention and cumulative disadvantage.

This gap is particularly salient in the NSW context. While the Children's Court exercises jurisdiction over children charged with offences, many interactions between children and police occur outside formal court processes, including through warnings, informal resolutions, bail interactions, compliance checks and responses to behaviour associated with child protection placements (Baidawi et al., 2024a; 2024b). For children younger than 14, these encounters may never result in a finding of criminal responsibility, yet they can nonetheless structure ongoing justice involvement and shape the conditions under which the presumption later becomes legally relevant (Hadaway, 2025). Understanding how many children come into contact with police before age 14, the age at which those contacts begin, and the offence profiles associated with early contact is therefore essential to evaluating how criminal responsibility is effectively distributed in practice (Freeman & Donnelly, 2024).

Recent administrative analyses have begun to highlight the scale of this issue, suggesting that a substantial proportion of children who appear before the Children's Court have had prior police contact from age 10, often for low-level or non-violent offences (Weatherburn & Ramsey, 2018). These early contacts are frequently intertwined with involvement in other statutory systems, particularly child protection, education and mental health services (Baidawi & Sheehan, 2019a, 2019b). Children with histories of out-of-home care, placement instability and school exclusion are especially likely to experience repeated police interactions, often in contexts that blur the boundary between welfare response and criminal enforcement (Akhtar, 2022; Malvaso et al., 2017a, 2017b).

Against this backdrop, the expansion of diversionary options under the *Young Offenders Act 1997* (NSW) through the 2025 reforms takes on added significance. The *Children (Criminal Proceedings) and Young Offenders Legislation Amendment Act 2025* (NSW) modifies aspects of the *Young Offenders Act* (*1997* (NSW)) by relaxing the strict requirement that a child

admit to an alleged offence as a precondition to diversionary responses such as cautions or Youth Justice Conferences. These amendments reflect growing recognition that admission-based diversion frameworks can operate as a barrier for some children, particularly younger children, those with cognitive or communication impairments, and those advised to exercise their right not to participate in police interviews (Pearce, 2021). While the relaxation of admission requirements may facilitate diversion for some children, it also reinforces the discretionary power of police and courts to determine which children are channelled towards support and which are drawn further into formal justice processes (Green et al., 2019; Pearce, 2025; Richards, 2014). Without detailed empirical evidence on who encounters police before age 14, how often, and under what circumstances, it is difficult to assess whether reforms to the presumption and diversion operate as protective mechanisms or as filters that differentially allocate intervention and punishment along existing lines of disadvantage.

This thesis addresses these concerns by shifting analytical attention beyond doctrine to the broader justice trajectories of children below the age of criminal responsibility. Research Questions 4 and 5 examine how many children come into contact with NSW Police before age 14, the offence profiles associated with early contact, and the patterns of cumulative and intersecting disadvantage that characterise this cohort. By situating *doli incapax* within these trajectories, the thesis seeks to illuminate how criminal responsibility is not merely determined at trial but is effectively constructed over time through repeated institutional encounters that precede and shape formal legal adjudication (Ogilvie et al., 2024). In so doing, the thesis provides an evidence base capable of informing not only debates about whether the age should be raised, but how *doli*-aged children are currently governed, supported and constrained within contemporary youth justice systems.

## 1.4. Research aims, questions and thesis contributions

Sections 1.1–1.3 demonstrated that debates about the age of criminal responsibility in Australia have proceeded in the absence of a robust, jurisdiction-specific understanding of how criminal responsibility is actually assessed, negotiated and resolved in practice for children aged 10 to 13. While reform discourse has focused on the legislated age threshold, far less attention has been paid to the doctrinal, institutional and experiential operation of *doli incapax*—the legal mechanism that currently mediates criminal responsibility for this cohort—and to the system trajectories of the children most likely to encounter it. This thesis responds directly to that gap.

Section 1.1 situated the Australian minimum age of criminal responsibility within a broader international, developmental and human rights critique, highlighting sustained concern that criminal responsibility at a young age is incompatible with children’s evolving capacities, disproportionately impacts Aboriginal and Torres Strait Islander children, and risks entrenching cycles of criminalisation rather than preventing harm.

Section 1.2 demonstrated that, despite this critique, reform momentum has stalled in Australia, with political resistance increasingly justified by reliance on the presumption of *doli incapax* as a purported safeguard for children aged 10 to 13.

Section 1.3 then demonstrated that this reliance rests on remarkably thin empirical foundations. While *doli incapax* is invoked in policy and advocacy discourse as evidence of a developmentally sensitive system, there is little systematic evidence about the frequency with which it is raised, how it is argued, what forms of evidence are relied upon, or how decisively it shapes case outcomes for children aged 10 to 13. Recent legislative reform in NSW, which codifies the presumption and expands the circumstances in which it may be rebutted, has further heightened the urgency of addressing this evidentiary deficit.

The overarching aim of this thesis is to examine how *doli incapax* operates in practice in NSW courts, and how this operation intersects with children's broader trajectories of system contact and disadvantage. Against this backdrop, the first three research questions are directed squarely at the operation of law in practice.

Research Question 1: *How and under what conditions does* doli incapax *operate in practice in NSW Courts?*
This question seeks to move beyond abstract doctrinal statements to examine when the presumption is raised, the procedural contexts in which it becomes salient, and the factors that appear to influence whether it is contested, conceded or litigated.

Research Question 2: *How do Local Court magistrates experience and understand* doli incapax *across jurisdictions and contexts?*
This question recognises that the presumption is not applied in a vacuum, but is mediated through judicial interpretation, professional culture and local court conditions. By foregrounding magistrates' perspectives, this thesis examines how legal tests are understood, translated and applied by institutional actors responsible for determining criminal responsibility at first instance.

Research Question 3: *How is* doli incapax *negotiated and resolved in real-time courtroom practice?*
This question extends this analysis to the micro-level dynamics of courtroom decision-making, including the roles played by prosecutors, defence practitioners, evidentiary shortcuts, time pressures and assumptions about childhood, risk and responsibility.

Cumulatively, these questions address a blind spot in NSW scholarship: the absence of empirically grounded analysis of how *doli incapax* functions as a legal safeguard. They respond directly to international warnings that dual-age systems relying on presumptions of incapacity have 'not proved to be protective in practice', and to domestic reform efforts that have proceeded without a clear baseline understanding of existing practice (UNCRC, 2019).

By examining the presumption as a lived legal process rather than a purely doctrinal construct, the thesis provides evidence capable of informing both law reform and judicial practice at a moment of significant legislative change.

The final three research questions broaden the analytical lens beyond the courtroom to situate *doli incapax* within children's wider justice trajectories and patterns of disadvantage.

Research Question 4: *How many children come into contact with NSW Police before age 14 and what are their offence profiles and justice trajectories?*
This question addresses the lack of empirical research about the scale and nature of early police contact from ages 8 to 13. While public debate has centred on the legislated age of criminal responsibility, relatively little is known about how frequently children encounter police before reaching that age, how early those encounters occur, or how cases progress or are resolved over time. This question provides a descriptive and analytical foundation for understanding the population to whom *doli incapax* is most relevant and against whom claims about over- or under-criminalisation must ultimately be assessed.

Research Question 5: *What patterns of cumulative and intersecting disadvantage characterise children who come into contact with police before age 14?*
This question situates early justice contact within broader life-course and cumulative disadvantage frameworks. As Section 1.3 demonstrated, children who come into contact with police at young ages are disproportionately affected by trauma, disability, out-of-home care, educational exclusion and entrenched socio-economic disadvantage. Yet these factors are rarely examined systematically in relation to *doli incapax,* diversionary decision-making or prosecutorial discretion for children aged 10–13. By linking administrative justice data with indicators of disadvantage, the thesis examines how legal doctrines governing criminal responsibility intersect with broader systems of care and control.

Finally, Research Question 6: *How do legal doctrine, courtroom practice, and children's lived system trajectories intersect to shape outcomes for* doli-*aged children?*
This question serves as the integrative core of the thesis. It recognises that outcomes for children aged 10 to 13 are not produced by legal doctrine, courtroom practice or social disadvantage in isolation, but through their interaction. Doctrinal rules governing *doli incapax* establish formal thresholds of criminal responsibility; courtroom practices translate those rules through discretionary, time-bound and resource-constrained decision-making; and children's prior and ongoing trajectories through child protection, education, health and welfare systems shape how they are perceived, categorised and responded to within the justice system. By explicitly examining how these domains intersect, this research moves beyond fragmented accounts of youth justice to show how *doli incapax* operates as a node within a broader ecology of care and control (Cunneen & White, 2011; Cunneen et al., 2015; Garland, 2001; McGillivray, 1997). This integrative question provides the bridge between the thesis' qualitative examination of law in action and its quantitative analysis of early justice

contact and cumulative disadvantage, enabling a holistic account of how responsibility is constructed, contested and resolved for *doli*-aged children in contemporary NSW.

The contribution of this thesis is threefold. First, it provides a comprehensive, NSW-specific empirical account of how *doli incapax* operates in practice prior to its codification, creating an essential evidentiary baseline against which the effects of legislative reform can be evaluated. Second, it advances socio-legal understanding of criminal responsibility by demonstrating how doctrinal safeguards are shaped, constrained and sometimes undermined by everyday institutional practices. Third, it situates debates about the age of criminal responsibility within a broader empirical account of early justice contact and cumulative disadvantage, challenging reform approaches that focus narrowly on legal thresholds without addressing the pathways that draw children into repeated system involvement (Brown & Charles, 2019). Importantly, the thesis does not seek to resolve normative debates about youth crime or criminal responsibility in the abstract. Instead, it offers an empirically grounded account of how an existing legal doctrine operates in practice, and what this operation reveals about the alignment, or misalignment, between law, policy and children's lived realities.[2] In so doing, the thesis reframes the question of criminal responsibility away from a binary inquiry about age, and towards a more nuanced understanding of how law, discretion and disadvantage interact in governing children at the margins of the criminal justice system.

## 1.5. Conceptual and theoretical frameworks

This thesis is informed by three overlapping and complementary conceptual frameworks: socio-legal scholarship, critical socio-legal theory, and life-course and cumulative disadvantage approaches drawn from criminology and allied social sciences. Together, these frameworks provide the analytical foundations for examining how the presumption operates in practice in NSW, how it is experienced and enacted by legal actors, and how children's early justice system contact is embedded within broader trajectories of cumulative disadvantage (Wheeler & Thomas, 2000).

### 1.5.1. Socio-legal approaches: Law in action

This thesis draws on socio-legal scholarship that conceptualises law as a lived, institutional and organisational practice (Anleu, 2009; Tamanaha, 2001; Tamanaha, 2011, p. 214). From this perspective, legal principles such as *doli incapax* are understood as contingent, negotiated, and shaped by organisational constraints, professional norms and institutional processes and incentives (Banakar & Travers, 2005). Socio-legal approaches direct analytic attention to the gap between law as articulated and law as it is enacted in legal process and courtroom practice, emphasising the role of discretion, institutional context and everyday

[2] Note, this study does not include direct interviews with children; children's perspectives are therefore examined only as they are mediated through legal and institutional processes.

practice in shaping legal outcomes (Tamanaha, 1997; Twining, 1997; Wheeler & Thomas, 2000).

Socio-legal approaches also emphasise the institutional and social embeddedness of law, highlighting how legal processes intersect with other state systems such as child protection, education, health, and welfare (Schiff, 1976). Rather than viewing legal contacts as isolated events, socio-legal scholars adopt a systems-interaction perspective that situates legal involvement with longer trajectories of social regulation and cumulative disadvantage (Cunneen & White, 2011; Cunneen et al., 2015; Garland, 2001; Hagan & Dinovitzer, 1999; Parker et al., 2004). This body of literature demonstrates that early contact with legal institutions often reflects prior system involvement and structural vulnerability, and that legal processes can intensify rather than resolve underlying needs (McAra & McVie, 2007; McNeill, 2009, pp. 12-16). Law is understood as embedded in social relations and institutional routines, and as operating through everyday practices as much as through formal rules (Ewick & Silbey, 1998). This perspective emphasises that legal outcomes are shaped not only by doctrine but by discretionary decision-making, organisational constraints, professional cultures and structural inequalities—features that are particularly salient in lower courts and summary jurisdictions (Feeley, 1979; Galanter, 1974; Hawkins, 1992).

This orientation is salient for an understanding of *doli incapax* which formally turns on a highly individualised inquiry into a child's moral understanding at the time of the alleged offence. While appellate authority emphasises that this inquiry is subjective and cannot be resolved by inference from the act alone (*RP* (2016) 259 CLR 641), the practical resolution of *doli incapax* claims necessarily occurs within routine, high-volume criminal court settings (Anleu & Mack, 2005a, 2005b, 2014; Emerson, 1969; Mack et al., 2012). In these environments, magistrates, prosecutors and defence practitioners are required to translate abstract doctrinal standards into workable evidentiary thresholds, often on the basis of limited information about the child's developmental history, cognitive capacity or social context (Anleu & Mack, 2017; Parker, 1999). A central concern of socio-legal research is discretion; how legal actors interpret indeterminate rules and make decisions in context. Discretion is not understood as arbitrary individual choice but as socially patterned and institutionally constrained, shaped by professional norms, available resources and workload pressures (Hawkins, 1992; Lacey, 2016; Lacey et al., 1990). In court contexts, discretion is exercised through routine practices that include charging decisions, adjournments, bail determinations, evidentiary rulings, and informal negotiations, many of which occur outside formal judgments and leave limited documentary traces (Anleu & Mack, 2017). This also frames an understanding of the interpretive task imposed by the presumption; to draw upon 'social facts' in assessing and applying *doli incapax* (Burns, 2013; Luhmann, 2004).

### 1.5.2. Critical socio-legal perspectives: Protection and control

Critical socio-legal perspectives extend this analysis by foregrounding questions of power, governance and inequality (Cunneen & Tauri, 2022; Garland, 2001; O'Malley, 2004). Critical

scholarship has long emphasised that legal interventions framed as protective, benevolent or welfare-oriented may simultaneously function as mechanisms of surveillance, control and exclusion, particularly for marginalised populations (Blagg, 2016; Blagg & Wilkie, 1995; Cunneen, 2001).

From this perspective, formal legal protections do not necessarily reduce the reach of the state; rather, they may reconfigure how power is exercised and over whom (Hannah-Moffat, 2005). A governance-and-control lens further sharpens this thesis' account of how ostensibly protective legal forms can be translated into practical mechanisms of regulation. Scholarship on governmentality emphasises that contemporary power often operates less through overt punishment than through dispersed techniques for managing conduct, producing institutional 'knowledges', and rendering populations legible for intervention (Foucault, 2009; Rose, 1999). In youth justice contexts and specifically, in assessment of *doli incapax*, this orientation draws attention to how children's behaviour is governed through administrative records, assessments and institutional histories—materials that can become decisive in practice, even where the formal legal question is framed as an individualised inquiry into moral understanding. Relatedly, criminological scholarship on risk governance highlights how decision-making increasingly turns on the management of aggregate risk rather than adjudication of individual culpability (O'Malley, 2004). The "new penology" thesis argues that criminal justice practices have shifted towards actuarial logics focused on classification, prediction and control (Feeley and Simon, 1992). In youth justice, these logics can operate through hybrid welfare-penal rationalities in which 'needs' and 'risks' are fused and children are positioned as subjects of intervention in ways that can be simultaneously therapeutic and coercive (Cunneen & White, 2011; Cunneen et al., 2015; Hannah-Moffat, 2005).

Finally, socio-legal work on penal expansion beyond conviction provides language for understanding how regulation can intensify through non-criminal and quasi-welfare systems. The notion of 'net-widening' captures how reforms framed as diversionary or protective can extend the reach and duration of control (Cohen, 1985).

This insight is central to contemporary debates about the age of criminal responsibility and *doli incapax*. While the presumption is routinely invoked as evidence that children aged 10 to 13 are shielded from the "full force" of the criminal law, critical socio-legal scholarship cautions against assumptions that formal incapacity equate to substantive protection (Australian Government, 2009, [278]). Children who are excluded from criminal responsibility may nevertheless be subject to repeated police contact, bail conditions, diversionary interventions, or prolonged engagement with child protection, education, and health systems. These theoretical tensions are particularly acute for *doli*-aged children who occupy a liminal space between care and control. They are often deemed too young to be criminally responsible, yet old enough to be perceived as threatening, disruptive or beyond parental control. This literature suggests that this liminality produces inconsistent and often contradictory responses, as systems oscillate between care- and control-oriented logics (Cunneen & White, 2011; Cunneen et al., 2015).

In this sense, *doli incapax* operates within a broader field of governance in which children's behaviour is regulated across overlapping legal and administrative domains. This lens is particularly important in light of recent legislative reforms in NSW that seek simultaneously to strengthen the rebuttal of *doli incapax* and to expand diversionary options for children. While these reforms are framed as enhancing clarity, consistency and community safety, they also expand the discretionary space within which legal actors determine which children are diverted, charged or subjected to ongoing supervision. A critical socio-legal perspective therefore informs this study's examination of how *doli incapax* functions not only as a doctrinal safeguard but as part of a broader system that differentially allocates care and control (Cunneen & White, 2011; Cunneen et al., 2015; Garland, 2001; McGillivray, 1997).

Cumulatively, these approaches support an analysis of *doli incapax* beyond doctrine alone, situating it within broader patterns of institutional governance and intervention affecting children.

#### 1.5.3. Life-course and cumulative disadvantage frameworks

Finally, the thesis adopts a life-course and cumulative disadvantage framework to situate children's early justice involvement as embedded within broader trajectories of system contact (AHRC, 2024; Malvaso, Magann, et al., 2024; Maschi et al., 2008; McAra & McVie, 2007). Life-course criminology rejects event-based accounts of offending that treat criminal behaviour as isolated or episodic. Instead, it emphasises how early life experiences, structural disadvantage and institutional responses interact over time to shape patterns of persistence, escalation or desistance (Bernburg et al., 2006; Cunneen et al., 2013; McAra & McVie, 2007). Australian longitudinal and administrative data studies have been particularly influential in demonstrating how early system contact is patterned by disadvantage and accumulates across childhood, reinforcing the importance of analysing justice involvement as part of broader developmental trajectories (Stewart et al., 2002; Stewart et al., 2015).

The concept of cumulative disadvantage provides a central theoretical lens for this research. Cumulative disadvantage refers to the process by which early exposures to adversity increase the likelihood of subsequent harms, often through reinforcing institutional responses rather than discrete causal mechanisms. Early disadvantage does not merely persist; it compounds, narrowing future opportunities and intensifying system contact over time (Sampson & Laub, 1995). In the context of criminal justice, this process operates through both social mechanisms (such as disrupted education, or family stress) and institutional feedback effects whereby early system contact increases likelihood of subsequent surveillance, intervention or sanction (Bernburg & Krohn, 2003). Justice involvement becomes not only an outcome of disadvantage but a mechanism through which disadvantage is reproduced.

At first glance, *doli incapax* appears to be an individualised inquiry: did this child, at this moment, understand the act to be seriously wrong in a moral sense? Yet the practical

operation of the doctrine reveals how deeply this inquiry is embedded in children's broader institutional biographies. The very materials used to infer moral understanding (such as prior police contact, school discipline histories, out-of-home care placement records) are themselves products of cumulative system contact. This supports a life-course and cumulative disadvantage framing. Rather than treating early justice contact as an isolated behavioural event, this literature conceptualises it as part of an accumulating pattern of adversity and intervention that can narrow future opportunities and intensify surveillance over time.

Cumulative disadvantage frameworks further highlight how multiple forms of adversity cluster and compound, increasing children's exposure to state intervention and reducing access to protective measures (Baidawi & Sheehan, 2019b; Malvaso et al., 2017a, 2017b; Ogilvie et al., 2024; Thomsen & Homel, 2024; Weatherburn et al., 1997). This framework is especially relevant to children who come into contact with police before the age of 14. Existing criminological research has tended to focus on early childhood as a site of developmental risk or on adolescence as the primary period of offending onset and trajectory formation. Children in middle childhood and early adolescence have received comparatively little empirical attention. By examining how many children come into contact with NSW Police before age 14, their offence profiles and their justice trajectories (Research Question 4), this study addresses this empirical gap. The cumulative disadvantage framework enables analysis of the intersecting social, developmental and systemic factors that characterise these children's lives (Research Question 5), moving beyond individualised accounts of responsibility or risk (McAra & McVie, 2007; Sampson & Laub, 1992).

Closely related is a growing body of scholarship examining how children experience not a single system but the convergence of multiple systems over time (Baidawi & Sheehan, 2019a; Homel et al., 1999). Child welfare, education, health, housing and justice systems frequently intersect in ways that are poorly coordinated yet mutually reinforcing. Scholars have described this phenomenon as 'system entanglement', 'institutional layering' or 'carceral creep' capturing how non-penal systems can come to function in increasingly punitive ways (Beckett & Murakawa, 2012; Kim, 2020; Mahoney & Thelen, 2010; Thelen, 1999). Importantly, institutional interaction theories draw attention to how children themselves often have limited agency within these processes (Cashmore, 2025; Parkinson & Cashmore, 2008). Decisions are made across systems, often without the child's meaningful participation, and outcomes in one domain shape possibilities in another. This challenges legal frameworks that treat criminal capacity as an individual cognitive attribute, abstracted from social context.

#### 1.5.4. Integrating doctrine, practice and trajectories

Cumulatively, these three frameworks provide an integrated analytical approach central to the final research question guiding this thesis: how legal doctrine, courtroom practice and children's lived system trajectories intersect to shape outcomes for *doli*-aged children (Research Question 6). Together, these frameworks support analysis of *doli incapax* as both a

legal doctrine and social process, enabling this thesis to link courtroom practice with children's lived system trajectories and to examine how responsibility, protection and punishment are negotiated across institutional settings.

Socio-legal analysis illuminates how the presumption operates in action; critical socio-legal theory interrogates the power relations and governance effects embedded in its operation; and life-course and cumulative disadvantage frameworks situate these legal processes within the broader social and institutional contexts of children's lives. By combining these perspectives, the thesis moves beyond debates framed solely in terms of whether the age should be raised. Instead, it examines how children below that age are currently governed, how legal protections are operationalised in practice, and how early justice system contact interacts with cumulative disadvantage to shape long-term outcomes. This integrated framework provides the conceptual foundation for the empirical analyses that follow and positions the thesis to contribute both to doctrinal debates about *doli incapax* and to broader socio-legal and criminological understandings of childhood and responsibility.

## 1.6. Methods

This thesis adopts a mixed-methods research design to examine how *doli incapax* operates in practice in NSW and how early justice system contact is patterned across children's lives. At a general level, the methodological design is structured around two interlocking components. The first focuses on the operation of *doli incapax* within legal institutions, examining how the presumption is understood, interpreted and resolved in courtroom contexts (Research Questions 1–3). The second situates these doctrinal and practical processes within broader population-level patterns of early police contact and cumulative disadvantage among children under 14 in NSW (Research Questions 4–6).

Together, these components enable the thesis to connect micro-level legal decision-making with macro-level system trajectories via four complementary research methodologies:

1. Semi-structured interviews with magistrates and legal practitioners (*n* = 27) to examine experiential and interpretive dimensions of *doli incapax*, particularly in relation to how the presumption is understood and applied in practice (Research Questions 1–2).
2. An online survey of Local Court magistrates (*n* = 36) to capture broader patterns of judicial experience and attitudes across NSW, complementing interview findings and extending analysis of judicial interpretation and variation (Research Question 2).
3. Courtroom observations of Children's Court proceedings (*n* = 20) to analyse how the presumption is negotiated and resolved in situ, including the interaction between legal actors and evidentiary practices (Research Question 3).
4. Quantitative analysis of linked administrative data from the NSW Human Services Dataset to examine population-level patterns of early police contact and cumulative

system involvement ($n$ = 15,895 children with a police contact between 10–13 in the birth cohort, Research Questions 4–6).

These methods enable triangulation across data sources, perspectives, and levels of analysis, strengthening the study's capacity to examine both process and structure. All components of the study were approved under distinct ethics approvals granted by the University of Sydney Human Research Ethics Committee (Protocol No. 2022/HE000541, 2022/HE000573, and 2022/HE000574, respectively). Further detail regarding the research design, data collection and analytical approach is set out in Chapter 3.

### 1.7. Positionality, Indigeneity and the scope of the research

This thesis is conducted by a non-Indigenous researcher and is situated within a socio-legal field that is profoundly shaped by the ongoing effects of colonisation, structural inequality and the over-representation of Aboriginal and Torres Strait Islander children within Australian youth justice systems (Cunneen & Tauri, 2022). I am acutely conscious that questions of criminal responsibility, early justice system contact and child governance have particular historical, cultural and political significance for Aboriginal and Torres Strait Islander peoples, and that there exists a substantial body of Indigenous-led scholarship, advocacy and community knowledge addressing these issues (Anthony, 2020; Cripps & Davis, 2012; Cunneen & Tauri, 2022; Sherwood & Kendall, 2013). This thesis does not seek to speak for, represent or substitute that work, nor to occupy a space more appropriately led by Indigenous researchers (Behrendt, 2019; Martin & Mirraboopa, 2003; McGlade, 2019; McGlade & Tarrant, 2021; Newton et al., 2025; Rigney, 1999; Smith, 1999). Rather, it examines how a specific legal doctrine—*doli incapax*—operates in practice within NSW courts and administrative systems, recognising that its effects are unevenly distributed and deeply entangled with broader structures of colonial governance. Consistent with critical socio-legal scholarship and Indigenous research ethics, the thesis situates its empirical findings within the broader conceptual and policy literature documenting the disproportionate impact of early criminalisation on Aboriginal and Torres Strait Islander children, while acknowledging the limits of what can be responsibly claimed within a non-Indigenous, institutionally focused empirical project.[3]

### 1.8. Structure of the thesis

This thesis is structured across eight substantive chapters, followed by references and appendices. While the overarching aim is to examine how *doli incapax* operates in practice in

[3] Although Indigenous status is recorded within the NSW Human Services Dataset, this variable is not disaggregated or comparatively analysed in the quantitative components of the study. This decision reflects a combination of ethical, methodological and epistemological considerations, including concerns about extractive research practices, deficit framings, and the risks of decontextualised statistical comparison in the absence of Indigenous governance over research design and interpretation.

NSW, the thesis proceeds on the premise that legal doctrines do not operate in isolation. Rather, they are encountered by children whose pathways into the justice system are already shaped by patterns of institutional contact, cumulative disadvantage, and structural inequality. Accordingly, the thesis adopts a layered analytical approach. It begins by mapping the population to whom the presumption most often applies before turning to the institutional practices through which criminal responsibility is interpreted and enacted. This sequencing reflects a central socio-legal insight: the operation of a legal safeguard can only be properly understood once the social and institutional conditions under which it is activated are made visible (Anleu, 2009; Brown & Charles, 2019; Schiff, 1976).

This chapter (Chapter 1: Introduction) introduced the study and established its conceptual and analytical foundations. It identified the central problem addressed by the thesis: the scarcity of jurisdiction-specific, empirical evidence about how the presumption of *doli incapax* operates in practice in NSW and how it intersects with broader patterns of early justice system contact and cumulative disadvantage among children aged 10 to 13. The chapter situated the study within contemporary debates about the age of criminal responsibility and recent legislative reform in NSW; introduced the research questions; developed the socio-legal, critical and life-course frameworks guiding the analysis; and provided an overview of the methodological approach adopted.

Chapter 2 (*Doli Incapax,* Youth Justice and Early System Contact—A Critical Review of the Literature) reviews existing empirical, doctrinal and policy literature relevant to the thesis. It examines what is currently known about the presumption in Australia, highlighting the paucity of empirical research on its practical operation. The chapter then reviews criminological and socio-legal scholarship on early police contact, diversion, judicial discretion, and the criminogenic effects of system involvement, identifying gaps in relation to children under 14 in NSW, and Australia more broadly. This chapter establishes the empirical and conceptual lacunae that the thesis seeks to address.

Chapter 3 (Methodology—A Mixed-Methods Study of Law in Action) outlines the study's mixed-methods research design, explaining how each method contributes to answering distinct research questions. It details the qualitative components of the study—semi-structured interviews with magistrates and legal practitioners, courtroom observations, and a survey of Local Court magistrates—as well as the quantitative analysis of linked administrative data from the NSW Human Services Dataset. The chapter address issues of ethics, reflexivity, validity and methodological integration, explaining how qualitative and quantitative findings are brought into dialogue in the analysis.

Chapter 4 (Early Justice System Contact and Escalation Among *Doli*-Aged Children) provides the empirical foundation for the thesis by mapping the scale, distribution, and characteristics of children who come into contact with police before age 14. Drawing on linked administrative data from the NSW Human Services Dataset, the chapter documents patterns of early police contact, offence profiles, geographic variation, and pathways into

legal proceedings. Positioning this analysis at the outset is deliberate. Because *doli incapax* governs criminal responsibility for children aged 10–13, understanding who these children are, how they encounter police, and which trajectories bring them before the court is essential to interpreting how the presumption operates in practice. The chapter therefore establishes the institutional entry points through which the doctrine becomes relevant.

Building on this population-level mapping, Chapter 5 (Cumulative Disadvantage and System Entanglement Among *Doli*-Aged Children) examines the concentration and co-occurrence of disadvantage among children with early justice contact. It analyses intersections between policing, child protection, education, health, housing, disability, and service systems, demonstrating that early justice involvement is heavily concentrated among a small cohort experiencing profound cumulative adversity. Together, Chapters 4 and 5 shift the analytical lens outward from courtroom doctrine to the broader ecology of care and control within which *doli incapax* is activated. They show that children who encounter the presumption are rarely typical members of the child population; rather, they are disproportionately drawn from contexts of entrenched vulnerability. This empirical foundation clarifies what is at stake when criminal responsibility is determined for young children.

Chapter 6 (The Institutional Operation of *Doli Incapax* in NSW) marks the analytic pivot of the thesis from population patterns to the institutional production of criminal responsibility. Having established which children are most likely to encounter the presumption and the cumulative disadvantage shaping their pathways into the justice system, the thesis turns to the courtroom as the site at which responsibility is interpreted, negotiated and enacted. Drawing on interviews, survey responses and courtroom observations, the chapter examines how *doli incapax* is understood and operationalised in everyday practice across NSW. It explores judicial reasoning, prosecutorial and defence strategies, evidentiary practices and the role of discretion across different courts and contexts. By situating doctrinal safeguards within the realities of institutional practice, the chapter demonstrates that *doli incapax* rarely functions as a discrete capacity determination. Instead, it operates through procedural pathways that reshape how children are governed within the justice system.

Chapter 7 (Governing Children Without Conviction—Process, Risk and Cumulative Disadvantage) extends this analysis by turning to the downstream consequences of these institutional practices. It examines what the operation of the presumption produces for children who encounter it, tracing how risk is managed through bail, adjournment, diversion and service absence even where criminal responsibility remains uncertain or unlikely. Read together, Chapters 6 and 7 trace the movement from doctrine to institutional practice to lived effect, demonstrating that the significance of *doli incapax* lies not only in whether it prevents conviction but in the procedural pathways it activates. Together, these qualitative chapters form the empirical core of the thesis.

Chapter 8 (Conclusion—From Protection to Process—*Doli Incapax* and Youth Justice Governance in NSW) integrates the thesis' quantitative and qualitative findings to examine

how legal doctrine, courtroom practice, and children's trajectories intersect to shape outcomes for *doli*-aged children. The chapter argues that early justice contact is highly concentrated among a small cohort of children experiencing extreme cumulative disadvantage, and that existing legal and policy frameworks struggle to provide sustained, protective responses to this group. It demonstrates how doctrinal safeguards and diversionary mechanisms operate unevenly within fragmented service systems, often displacing responsibility into criminal process rather than preventing it. This chapter reframes early justice involvement as a problem of system design and governance rather than individual culpability and develops the institutional implications of this analysis for debates about the age of criminal responsibility, *doli incapax,* diversion, and the organisation of welfare-based responses to children with complex needs.

A full list of references follows Chapter 8, and the Appendices provide detailed methodological material, including data cleaning procedures, variable construction, analytical decisions and supplementary tables relating to the quantitative analysis, ensuring transparency and reproducibility.

# Chapter 2: *Doli incapax,* youth justice and early system contact—A critical review of the literature

This chapter reviews the bodies of legal, socio-legal and criminological scholarship necessary to situate this thesis' empirical investigation of *doli incapax* in NSW. Part 1 examines the age of criminal responsibility and traces the doctrinal structure of *doli incapax* and its contemporary deployment as a safeguard in the context of a persistently low minimum age. Part 2 analyses *doli incapax* as a doctrine in action, focusing on its evidentiary demands, appellate clarification and the practical indeterminacy that characterises its application in court settings. Part 3 synthesises empirical research on early police contact, youth justice pathways and cumulative disadvantage, demonstrating that children subject to the presumption are often already deeply embedded within multiple systems of intervention before questions of criminal capacity are raised and resolved. Part 4 engages critical socio-legal perspectives on diversion, early intervention and the care/control paradox to interrogate the assumption that non-conviction (or *doli incapax*) equates to protection from criminalisation. The chapter concludes by identifying a persistent gap across these literatures: despite the central role attributed to *doli incapax* in legal and policy debates, there is a paucity of empirically grounded accounts of how the presumption operates and/or intersects with children's trajectories of system contact.

## 2.1. Legal foundations and doctrinal uncertainty

At common law in Australia, criminal responsibility is structured around three age-based thresholds. Below a lower threshold, children are conclusively presumed incapable of criminal responsibility. Above that threshold and up to a higher age, children are subject to a rebuttable presumption of incapacity known as *doli incapax*. Upon reaching the age of majority, young people are no longer subject to presumptions of incapacity and are dealt with under the ordinary principles of criminal responsibility applicable to adults. This structure reflects a long-standing attempt in common law jurisdictions to reconcile developmental immaturity with accountability for wrongdoing (Crofts, 2002).

Comparative scholarship suggests that the age of criminal responsibility is best understood not as a single legal threshold but as part of a broader constellation of age-based legal distinctions reflecting contested assumptions about childhood, autonomy and capacity (see Barker & Andersen, 2023; Munn, 2012, 2016). Barker and Andersen's comparative methodology situates the age of criminal responsibility alongside other legal age limits (including consent to medical treatment, alcohol consumption, and participation rights), illustrating the internal incoherence of legal constructions of childhood and the limited utility of the age of criminal responsibility as a proxy for developmental capacity (Barker & Andersen, 2023). While their work is primarily methodological, it underscores the difficulty of grounding criminal responsibility in age alone and invites closer attention to how layered

thresholds and presumptions function as governance tools. This comparative perspective is important because it highlights two features that recur throughout Australian debate. First, the instability of age as a proxy for capacity; and second, the tendency for legal systems to rely on layered thresholds and presumptions to manage that instability. The following section traces how this layered approach has developed in Australia, and why, in jurisdictions that retain a low minimum age, *doli incapax* becomes the doctrinal mechanism through which 'developmental sensitivity' is claimed and contested.

#### 2.1.1. The age of criminal responsibility in Australia

Historically, in Australia, children under the age of 7 were conclusively presumed incapable of criminal responsibility while children aged 7 to under 14 were subject to the rebuttable presumption (Urbas, 2000, p. 2). Although the upper age at which *doli incapax* applies has remained largely stable, the minimum age of criminal responsibility was progressively raised across Australian jurisdictions from 7 to 10 between 1976 and 2000 (Crofts, 2023, p. 118). The final shift occurred when Tasmania and the Australian Capital Territory adopted a uniform age of 10 following the Australian Law Reform Commission's (ALRC) recommendation for national consistency (ALRC, 1997). Now, the lower age is codified at 10 federally and across most states and territories in Australia.[4]

Despite longstanding academic, professional and international support for raising the age, Australian governments largely resisted reform for more than two decades after the ALRC's call for national consistency (ALRC, 1997). This inertia began to shift after the 2016 ABC *Four Corners* exposé of youth detention practices in the Northern Territory which precipitated the Royal Commission into the Protection and Detention of Children in the Northern Territory (Royal Commission, 2017). The Commission recommended raising the age to 12, retaining the rebuttable presumption for 12- and 13-year-olds, and prohibiting detention of children under 14. While the Northern Territory government initially accepted the intent of these recommendations, implementation has been uneven, with subsequent policy and legislative settings shifting over time and continuing to attract political contestation (Northern Territory Government, 2018).

National reform efforts have produced limited consensus. Although the Council of Attorneys-General supported developing a proposal to raise the age from 10 to 12 (Council of Attorneys-General, 2021), no nationally consistent framework has been implemented. This lack of national leadership resulted in increasing jurisdictional divergence. The Australian Capital Territory is unique in raising the age to 14 with a carve-out for several serious offences including murder, intentionally inflicting grievous bodily harm and sexual assault

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[4] See *Crimes Act 1914* (Cth), s 4M; *Criminal Code Act 1995* (Cth), Div 7.1; *Children (Criminal Proceedings) Act 1987* (NSW), s 5; *Criminal Code Act 1983* (NT), s 38; *Criminal Code Act 1899* (Qld), s 29(1); *Young Offenders Act 1993* (SA), s 5; *Criminal Code Act 1924* (Tas), s 18(1); *Criminal Code Act Compilation Act 1913* (WA), s 29. Victoria and the Australian Capital Territory are the only jurisdictions to raise the age; see *Youth Justice Act 2024* (Vic), s 10; *Criminal Code 2002* (ACT), s 25.

for which a presumption against criminal responsibility applies between ages 12–14 (*Criminal Code 2002* (ACT), s 25). Victoria has also raised the age of criminal responsibility to 12 years with a rebuttable presumption that children aged 12–13 cannot commit an offence (*Youth Justice Act 2024* (Vic), ss 10, 11). South Australia, the Northern Territory and Tasmania have introduced legislative and policy proposals to raise the age, albeit to different thresholds.[5] By contrast, reform has stalled or been expressly rejected in other jurisdictions. In NSW, the government has indicated that it is not currently considering raising the age, while in Western Australia, although a parliamentary motion to raise the age has previously been passed, no legislative change has resulted (Knowles, 2021; McLeod & Rose, 2024). Following, and in the context of, jurisdictional actions to raise the age, the Standing Council of Attorneys-General Working Group reconvened and released a report in September 2023 that provides guidance to Australian jurisdictions considering raising the age from 10 (Attorneys-General, 2023). However, the lack of national consistency to date risks a fragmented landscape in which children's exposure to criminal prosecution depends on jurisdiction rather than principle, echoing concerns raised by the ALRC in the 1990s and recently reiterated by the National Children's Commissioner in her 'Help way earlier!' report (AHRC, 2024; ALRC, 1997). This jurisdictional divergence intensifies the practical and rhetorical burden placed on *doli incapax* in jurisdictions that retain a minimum age of 10, where the presumption operates as the primary mechanism through which developmental protection is claimed without legislative change.

#### 2.1.2. The political use of *doli incapax*

The contemporary Australian architecture (an absolute minimum age combined with a rebuttable presumption up to 14) creates a distinctive legal and institutional environment. In a system where the minimum age remains low, *doli incapax* becomes a central doctrinal safeguard intended to prevent inappropriate attribution of criminal responsibility to children who lack the requisite moral understanding. Yet because the presumption operates within ordinary criminal proceedings, its protective force is mediated by discretionary decisions about policing, charging, prosecution, legal representation, and the practical availability of evidence capable of rebutting (or sustaining) the presumption. For this reason, the doctrine's formal test cannot be understood without attention to the institutional conditions through which it is activated and applied. Importantly, how this doctrinal safeguard functions in practice remains contested and empirically under-examined.

Beyond its doctrinal function, *doli incapax* has assumed broader policy significance. In policy discourse, parliamentary debate and government submissions, the presumption is invoked as evidence that Australia already operates a developmentally sensitive and rights-

[5] The South Australian Attorney-General's Department is considering raising the age to 12 and has called for submissions for development of an alternative diversion model, see Attorney-General's Department, (n.d.). In the Northern Territory, the minimum age was raised to 12 years in August 2023 and lowered to 10 in October 2024. Tasmania has introduced a proposal to increase the age to 14 by 2029, see Department for Education, Children and Young People (2023).

compliant approach to childhood criminal responsibility, thereby diminishing the urgency of raising the minimum age (Australian Government, 2009, [278]; Australian Government, 2018; [65]). Similarly, domestic policy reviews and law reform processes have tended towards a conceptualisation of the presumption as a mitigating feature of the current system, rather than as an object of empirical scrutiny in its own right (Attorneys-General, 2023). Critics have challenged reliance on *doli incapax* as a substitute for raising the age. For example, Cunneen (2020, p. 9) has observed that the presumption is frequently cited as a primary reason not to reform the age threshold, despite absence of robust evidence about how consistently or effectively it operates in practice. The Standing Council of Attorneys-General's Age of Criminal Responsibility Working Group similarly acknowledged that while the presumption is often presented as a protective mechanism, there is limited empirical data demonstrating its practical impact on outcomes for children (Council of Attorneys-General, 2018). This disconnect between political reliance on the presumption and empirical uncertainty about its operation represents a central tension in contemporary reform debates.

From a socio-legal perspective, the political use of *doli incapax* illustrates how legal doctrines can be symbolically mobilised to manage reform pressure while leaving underlying structures of criminalisation intact (Cohen, 1985). The presumption's formal existence enables governments to claim developmental sensitivity without confronting the broader implications of early criminalisation. This thesis situates the political use of *doli incapax* as a critical backdrop to its empirical investigation. By examining how the presumption works in practice, the study seeks to move beyond abstract claims about protection or dysfunction and provide an evidence base capable of interrogating whether *doli incapax* functions as the safeguard it is claimed to be, or whether its political deployment has obscured deeper structural issues in the governance of *doli*-aged children. This tension between symbolic reassurance and practical uncertainty is the point of entry for the doctrinal analysis that follows. The next section therefore turns to the legal foundations of *doli incapax* including its rationale, evidentiary thresholds, and the sources of doctrinal ambiguity that make its application contested and institutionally consequential. Establishing that foundation is necessary before this thesis can examine, empirically, how the presumption is operationalised across policing, prosecution and Children's Court practice in NSW.

## 2.2. *Doli incapax* in law: Doctrine, evidence and uncertainty

The doctrine of *doli incapax* operates as a rebuttable presumption that children below a specified age lack the capacity to commit criminal offences. Rooted in long-standing common law principles concerning childhood, moral development and culpability, the doctrine reflects a normative commitment to distinguishing between adults and children in the attribution of criminal responsibility. The presumption occupies a distinctive and uneasy position within Australian criminal law. On the one hand, it formally recognises that criminal responsibility between ages 10 and 13 is contingent rather than automatic, and that childhood is marked by developmental immaturity affecting moral understanding, judgment and self-control (*C (A Minor) v Director of Public Prosecutions* [1996] AC 1, 38). At the same time,

*doli incapax* sits within a legal framework that otherwise presumes the coherence, rationality and autonomy of legal subjects (Lacey, 2016). This tension has generated longstanding doctrinal ambiguity, evidentiary uncertainty and practical inconsistency in the presumption's application (Hamer & Crofts, 2023). The discussion that follows proceeds in three steps: it first outlines the doctrine's historical rationale and common law test; it then examines the evidentiary demands and institutional practices through which rebuttal is attempted; and finally, it situates these uncertainties within contemporary critique and reform debates.

### 2.2.1. Origins and rationale

The common law presumption of *doli incapax* reflects longstanding judicial assumptions that young children lacked the cognitive and moral capacity to distinguish seriously wrongful conduct from mischief or naughtiness. Historical sources indicate that distinctions between younger and older children in attributing criminal liability were discernible as early as the 14th century (Cipriani, 2009; Crofts, 2002, 2016). According to Blackstone (1769), the presumption of incapacity existed at least from the reign of Edward III, although precise age demarcations were not firmly settled until the 17th century. By the early modern period, English common law had crystallised around the familiar structure of an irrebuttable presumption for very young children and a rebuttable presumption for older children, with evidentiary requirements for rebuttal developed through 19th and early 20th century case law (Cipriani, 2009; Crofts, 2016; Van Krieken, 2013).

This framework was inherited by Australian jurisdictions largely without modification. In NSW, the absolute presumption was extended from 7 to children under 8 in the 1930s (NSW Parliament, 1939), and later to children under 10, aligning with reforms in Queensland and elsewhere (Crofts, 2016). Despite these changes, the underlying structure of *doli incapax* has remained intact. The rationale underpinning the presumption is not simply developmental but moral. Criminal punishment is understood to be justified only where an individual child possesses sufficient understanding of the moral wrongfulness of their conduct. *Doli incapax* thus operates as a safeguard against the imposition of criminal liability where blameworthiness cannot be meaningfully established. This rationale was articulated by the High Court in *RP* ((2016) CLR 641, [8]), which described the presumption as reflecting the view that children under 14 are not sufficiently intellectually and morally developed to appreciate the difference between right and wrong in a way that supports criminal culpability.

### 2.2.2. The common law presumption

At common law, *doli incapax* requires the prosecution to establish beyond reasonable doubt that, at the time of the alleged offence, the child knew that their conduct was seriously wrong, rather than merely naughty or mischievous (*RP* (2016) CLR 641, [9]). Contemporary Australian authority has consistently emphasised that this inquiry is a moral, not a legal, one, directed to the child's subjective appreciation of wrongdoing rather than their awareness of illegality or likely punishment (*RP* (2016) CLR 641, [10]; *BP v The Queen* [2006] NSWCCA

172, [27]-[28]; *R v Gorrie* (1918) 83 JP 136; *KT v The Queen* (2008) 182 A Crim R 571). Foundational principles governing rebuttal were developed in English case law, including the requirement that guilty knowledge be proved by evidence independent of the act itself (*R v Owen* (1830) 4 C&P 236), and that such evidence be strong and clear (*R v Gorrie* (1918) 83 JP 136; also see *C (A Minor) v Director of Public Prosecutions* [1996] AC 1, 38C). Preclusion of rebuttal on the basis of inference from the commission of the act alone is significant in light of recent reforms (*RP* (2016) CLR 641, [9]; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1, 38). Although some Australian judges have questioned whether proof of the act could, in principle, support an inference of capacity, appellate courts have generally rejected this approach, maintaining that assumptions about children's moral understanding cannot be drawn from conduct alone (*R v ALH* [2003] VSCA 129). Even conduct that would appear self-evidently wrongful to an adult decision-maker, cannot, without more, establish the requisite level of moral understanding on the part of the child (*RP* (2016) CLR 641, [9]).

These common law principles remained relatively stable in formulation but uneven in application, particularly where courts permitted inferential shortcuts or treated behavioural cues as proxies for moral comprehension. It was against this background of drift and inconsistency that the High Court in *RP* re-articulated the requirements for rebuttal and the limits of permissible inference.

#### 2.2.3. High Court and appellate authority

The High Court's decision in *RP* represents a pivotal clarification of the doctrine of *doli incapax* with important implications for everyday courtroom practice (Crofts, 2017; Freckelton, 2017). The court articulated a number of key principles including that: 1) the prosecution must rebut the presumption as an element of the prosecution case; 2) proof requires that the child appreciated the moral wrongfulness of the alleged offence, as opposed to being aware that the conduct was naughty; 3) the evidence to rebut must be clear and beyond all reasonable doubt; and 4) the evidence is not mere proof that the child did the act, however horrifying or obviously wrong it may be (Judicial Commission of NSW, n.d.). While *RP* did not alter the formal structure of the presumption, it significantly constrained the evidentiary shortcuts that had developed in some courts and reinforced the presumption's protective intent. For example, in re-affirming that the presumption requires proof that the child understood the conduct to be seriously wrong in a moral sense, evidence of pre- and post-offence conduct became insufficient; evidence that a child ran from police, attempted to conceal their actions, or expressed fear of getting into trouble cannot, without more, establish the requisite moral understanding. Nor can assumptions be drawn from the seriousness of the offence itself. These forms of reasoning, while previously relied upon in practice, were explicitly cautioned against by the High Court.

For prosecutors, *RP* raises the evidentiary threshold and narrows the range of material that can safely be relied upon to rebut the presumption. It makes generic inferences from

behaviour, age, or prior system contact more difficult to sustain and emphasises the need for case-specific evidence of moral comprehension at the time of the alleged offence. At the same time, *RP* does not resolve key practical questions. It offers limited guidance on what positive evidence of moral understanding looks like in practice, particularly for children with developmental delay, trauma histories, or neurodivergence. Freckelton's (2017) analysis of *RP* confirms that while courts may consider a wide range of evidence, the evaluation of capacity remains highly discretionary and fact-sensitive. As a result, while *RP* clarifies what cannot be relied upon to rebut the presumption, it leaves unresolved the evidentiary ambiguity at its core. The consequences of this ambiguity extend beyond courtroom adjudication to earlier stages of the criminal process including police practices around investigation, evidence-gathering and charging (Bellew & Loy, 2025). Generally, while *RP* has been characterised as raising the evidentiary bar for rebuttal, its practical implications for everyday decision-making across the justice process, and the extent to which it has reshaped legal and policing practices remain open empirical questions.

#### 2.2.4. Evidentiary requirements

The evidentiary dimension of the presumption further complicates its operation. Courts have recognised a wide range of evidence as potentially relevant to rebuttal, including school records, evidence from teachers or caregivers, expert psychological assessments, accounts of the child's home environment and aspects of the child's behaviour before, during and after the alleged offending (*AL v The Queen* [2017] NSWCCA 34, [149]-[151]; Crofts, 2018). Yet much of this evidence operates only indirectly as a proxy for the child's moral understanding at the time of the alleged offence (Pillay, 2019, pp. 227-228).

Admissions and post-offence behaviour are frequently relied upon by the prosecution (*BP v The Queen* [2006] NSWCCA 172, [15]-[16]). However, appellate authority has repeatedly cautioned that such evidence is often equivocal (*C (A Minor) v Director of Public Prosecutions* [1996] AC 1). Behaviour suggesting awareness of wrongdoing, such as flight, concealment, or expressions of fear, may equally reflect fear of authority, learned compliance, or a generalised sense of being 'in trouble' as opposed to a moral appreciation of serious wrongfulness (*C (A Minor) v Director of Public Prosecutions* [1996] AC 1, 39; Siegal, 1988). Educational materials, including disciplinary records and teacher testimony, are routinely relied upon to demonstrate that a child has been instructed about rules or boundaries. Courts have warned against conflating familiarity with institutional rules and genuine moral comprehension, noting that knowledge of prohibition does not necessarily establish an appreciation of serious moral wrongdoing (*EL v The Queen* [2021] NSWDC 585). Evidence drawn from family and social context raises similar concerns. Parent or carer testimony that a child has been taught the difference between right and wrong may provide contextual insight but risks substituting generalised assumptions about upbringing for offence-specific proof of capacity (*B v The Queen* [1958] 44 Cr App R 1). Prior justice contact presents an additional evidentiary tension. While it may suggest exposure to formal sanctioning processes, reliance on such material risks circular reasoning whereby earlier system involvement is treated as

evidence of capacity rather than as a reflection of prior intervention. Expert evidence can offer developmental insight but does not resolve these difficulties (Apler, 2000). Courts have emphasised that determinations of criminal capacity remain a legal question and cannot be ceded to experts (*R v Director of Public Prosecutions; L v Director of Public Prosecutions; H v Director of Public Prosecutions* [1997] Crim LR 127). At the same time, assessments conducted significantly after the alleged offence may be shaped by the child's subsequent experiences of investigation, detention or intervention, calling into question their probative value in relation to the child's understanding at the relevant time (*R v LMW* [1999] NSWSC 1342).

Cumulatively, these evidentiary sources illustrate the complexity and practical fragility of the presumption. Although *doli incapax* is framed as an inquiry into the child's moral understanding at the time of the alleged offence, the evidence typically relied upon to establish or contest that understanding rarely comes from a single source. Instead, the presumption becomes a point at which information produced across multiple institutional domains is assembled and given legal meaning. Police interviews, school records, child protection histories, clinical reports, and accounts from carers or practitioners may all become materials through which the child's capacity is inferred. This creates an inherent tension where the doctrine demands case-specific proof of moral wrongfulness beyond reasonable doubt, yet the evidentiary materials available are often indirect proxies for moral understanding and shaped by institutional priorities that are not designed to measure culpability. The doctrinal requirement may therefore be clear, while the evidentiary pathway remains structurally ambiguous.

This equivocality places courts in a difficult position. On the one hand, the presumption demands proof beyond reasonable doubt of a child's moral capacity. On the other, the available evidence is rarely direct and often mediated through adult interpretations of a child's behaviour (Freckelton, 2017). These tensions help explain why *doli incapax* has become a recurring site of critique—not because its underlying moral logic is obscure, but because its practical operation depends on evidentiary pathways that are often indirect, unevenly available and institutionally contested.

#### 2.2.5. Critique and reform debates

Despite its protective intent, *doli incapax* has attracted sustained critique (see Crofts, 2023, p. 131; Moritz & Tuomi, 2022; Urbas, 2000, pp.4-5; Van Krieken, 2013, pp. 9-10, 18-19). First, the doctrine has long been criticised for its conceptual vagueness. The distinction between conduct that is 'seriously wrong' and conduct that is merely 'naughty' has been described as elusive, context-dependent, and normatively loaded (C *(A Minor) v Director of Public Prosecutions* [1996] AC 1, 33-4). What constitutes 'serious' wrongdoing is not defined by statute, and judicial explanations have often relied on contrastive reasoning rather than positive articulation (*R (A Child) v Whitty* (1993) 66 A Crim R 462). This indeterminacy is amplified by the fact that children's moral development does not follow a linear or uniform

trajectory. Cognitive capacity, emotional regulation, lived experience, exposure to trauma and social context all shape how children understand rules, authority and harm (Steinberg & Icenogle, 2019). As a result, *doli incapax* resists mechanistic application and instead invites highly individualised, fact-sensitive assessment (Hamer & Crofts, 2023).

Second, some commentators argue that the doctrine is conceptually outdated, relying on assumptions about childhood that no longer reflect contemporary social realities (see Crofts, 2003; Wilson, 2001). Others contend that its rebuttable nature generates inconsistency and uncertainty, particularly where evidentiary standards are unevenly understood or applied (Boulten, 2022; Fitz-Gibbon & O'Brien, 2019; Tuomi & Moritz, 2023). For example, former Law Council of Australia President, Arthur Moses SC characterises the presumption as "extremely difficult to apply in court" and marred by confusion "as to whether the defence or prosecution bears the burden of proving that a child knew their conduct to be wrong" (Brown, 2019).

Children's rights advocates have advanced a different critique, arguing that the presumption operates as an inadequate substitute for raising the minimum age of criminal responsibility (AHRC, 2021; McLachlan, 2023; Tuomi & Moritz, 2023; UNCRC, 2019, [26]). From this perspective, *doli incapax* places the burden of protection within adversarial criminal proceedings rather than removing young children from the justice system altogether. Protection is contingent on legal representation, prosecutorial discretion and judicial interpretation, producing uneven outcomes.

Debates about *doli incapax* in Australia have been repeatedly shaped by 'reform-by-exception' pressures; episodic responses to serious or high-profile cases that generate moral panic and prompt calls to narrow, reverse, or abolish the presumption rather than to undertake systemic reform (Attorney-General's Department, 1990, rec. 8.15; Van Krieken, 2013, pp. 18-19). Legal and political attention to the presumption has historically intensified following cases involving grave harm or repeat offending by young children with reform proposals often framed around exceptional facts rather than the everyday operation of the presumption (Crofts, 2023). In NSW, the prosecution of an 11-year-old for manslaughter following the death of Corey Davis in 1999 catalysed renewed judicial and political scrutiny of the presumption, with Senior Children's Court Magistrate Scarlett publicly questioning whether the presumption should apply up to age 14 in contemporary conditions (Dean, 1999; Doherty, 2000). Similar dynamics have recurred in Western Australia where legislative proposals sought to displace the presumption for repeat offenders under 14 on the basis that prior justice contact itself demonstrated capacity, effectively transforming exception-based reasoning into a statutory rule (*Criminal Code Amendment Bill (No 3) 2003* (WA)). These proposals were explicitly justified by reference to perceived community risk posed by a small number of children, rather than empirical evidence about the broader population to whom the presumption applies. Contemporary debates in NSW continue to reflect this pattern, with public and political concern periodically reignited by serious youth crime incidents, even as empirical evidence indicates that most children subject to *doli incapax* proceedings are

charged with low-level offences and experience extensive prior system contact (Freeman & Donnelly, 2024; Gu, 2025). As Crofts (2023) observes, reform-by-exception risks distorting the function of *doli incapax* by re-centring questions of dangerousness and repetition, rather than moral capacity, and by privileging extraordinary cases over the routine realities of courtroom practice.

Comparative analysis from England and Wales highlights the consequences of abolishing the presumption without replacing it with a meaningful developmental safeguard. In England and Wales, *doli incapax* was abolished in 1998 following sustained political and media pressure in the aftermath of the killing of James Bulger by two ten-year-old boys (*Crime and Disorder Act 1998* (UK), s 34). The case catalysed a broader moral panic about youth crime and public confidence in the justice system, prompting legislative reform that framed the presumption as an unjustified barrier to accountability (Goldson, 2000). Its abolition lowered the threshold for criminal responsibility for children aged 10–13 without introducing an alternative mechanism for assessing developmental capacity. Subsequent scholarship questioned whether this shift enhanced community safety or exposed children to punitive criminal processes without adequate recognition of developmental immaturity (McDiarmid, 2016). For example, Fitz-Gibbon's (2016) interview-based study of judicial officers, defence practitioners and prosecutors involved in serious child homicide cases in the UK revealed widespread concern that existing legal frameworks fail to recognise children's developmental immaturity and provide inadequate protection once the presumption is removed. The majority of practitioners supported raising the age of criminal responsibility and introducing a defence grounded in developmental immaturity rather than abnormality of mind (Fitz-Gibbon, 2016, pp. 405-407). Although the Law Commission proposed such a defence in 2005, it was not adopted in subsequent reforms, leaving English law without any age-graded capacity mechanism for older children (Law Commission UK, 2005, p. 163). Fitz-Gibbon's findings suggested that this gap contributed to increased detention and longer sentences for children without demonstrable deterrent effect (Fitz-Gibbon, 2016, pp. 402-403).[6] Similar concerns underpin Australian scholarly proposals to extend *doli incapax* beyond age 14 or introduce an incapacity defence for adolescents, although critics warn that such reforms may strain court resources and increase reliance on expert evidence (Fitz-Gibbon & O'Brien, 2019; Tuomi & Moritz, 2023).

Despite the volume of legal, policy and advocacy commentary on *doli incapax,* a persistent limitation across this literature is the absence of empirical evidence about how often the presumption is raised, how it is resolved, and what procedural pathways children experience in practice (Fitz-Gibbon & O'Brien, 2019). Critiques of the presumption frequently proceed on the basis of anecdote, isolated high-profile cases, or normative assumptions about

[6] It should be noted, however, that more recent statistics from England and Wales show long-term declines in youth offending overall. For example, in the year ending March 2024, there were approximately 35,600 proven offences committed by children aged 10-17, representing a 61% decline from the year ending March 2014, see Youth Justice Board, 2025.

inconsistency and unfairness, rather than grounded analysis of routine court outcomes or institutional decision-making.

#### 2.2.6. Codification and reform

Recent legislative developments in NSW bring these doctrinal and evidentiary complexities into sharper relief. The statutory codification of *doli incapax*, via passage of the *Children (Criminal Proceedings) and Young Offenders Legislation Amendment Bill 2025* (NSW), and the express authorisation for courts to consider the circumstances of the alleged offending alone when assessing rebuttal represent a recalibration of the doctrine. While framed as providing clarity and consistency, such reforms risk further diluting the presumption by collapsing the distinction between evidence of conduct and evidence of capacity (Hamer & Crofts, 2023). They also raise questions about how closely statutory formulations align with existing High Court authority emphasising that capacity cannot be inferred merely from the act itself (*RP* (2016) 259 CLR 641, [9]-[10]).

This section has established the doctrinal foundation for this thesis' empirical inquiry. By situating the presumption as a legally indeterminate and evidentially fragile doctrine, it underscores the need to examine how it is interpreted by magistrates, negotiated by legal practitioners and resolved in real-time courtroom practice.

### 2.3. Socio-legal and developmental understandings of criminal responsibility

Debates about the minimum age of criminal responsibility and the operation of *doli incapax* are increasingly shaped by insights from developmental science, particularly research on cognitive, moral and psychosocial development during childhood and adolescence. Developmental scholarship has consistently demonstrated that the capacities relevant to criminal responsibility, such as understanding wrongfulness, anticipating consequences, regulating impulses and resisting peer influence, develop gradually and unevenly rather than emerging at a fixed chronological age (Cauffman & Steinberg, 2000; Crofts, 2015, p. 127; Newton & Bussey, 2012). These findings challenge legal frameworks that rely on arbitrary age thresholds or binary assessments of capacity and instead point towards a more nuanced understanding of children's evolving abilities.

#### 2.3.1. Capacities relevant to criminal responsibility

Criminal responsibility assumes that children possess the capacities necessary not only to distinguish right from wrong but also to participate meaningfully in criminal proceedings. Scholars and advocacy bodies have highlighted that exposure to criminal processes at a young age may jeopardise children's ability to engage with the cognitive, emotional and psychosocial demands of adversarial court processes (Arthur, 2016; Haysom, 2022; McDiarmid, 2013). Participation rights enshrined in both domestic youth justice legislation

and international instruments presuppose a level of comprehension, foresight and decision-making capacity that many children aged 10 to 13 do not possess in this context (ALRC, 1997, Ch. 4; Convention on the Rights of the Child, 1989, arts 12, 40(2)(b); Grisso, 1981). Concerns have been raised that children in this age group may struggle to understand the nature of the proceedings, the role of legal actors, the consequences of plea decisions, or the longer-term implications of criminal records and court orders, even when procedural safeguards are formally in place (Arthur, 2016; Elliott, 2011; Rap, 2016). These participation deficits go directly to the assumptions about comprehension, judgment and moral reasoning upon which the attribution of criminal responsibility depends.

These concerns point to the constellation of capacities upon which criminal responsibility rests (Hart, 1968; Lacey, 2001, pp. 353-354). Cognitive capacity involves the ability to comprehend actions and consequences, while moral capacity concerns the ability to evaluate conduct as right or wrong in a normative sense. Volitional control relates to impulse regulation and the capacity to act in accordance with moral judgments rather than immediate desires or external pressures (see Tadros, 2005). The presumption of *doli incapax* is most directly concerned with the second of these capacities (moral evaluation) yet is often operationalised through proxies including behavioural cues, compliance and prior justice contact that may reflect cognitive awareness of rules or fear of authority rather than moral understanding. This is one reason the doctrine's evidentiary demands sit uneasily with what developmental research suggests about how children reason and comply. Developmental psychology has long shown that these capacities do not mature simultaneously; rather, they develop at different rates and are influenced by biological maturation, social context and lived experience (Cauffman & Steinberg, 2000; Johnson et al., 2009; Shulman et al., 2016; Steinberg, 2013; Royal Society, 2011; Weinberger et al., 2005).

Neuroscientific research has reinforced these conclusions, demonstrating that brain regions associated with executive function, emotional regulation and risk assessment (particularly the prefrontal cortex) continue to develop well into late adolescence (Pillay, 2019, p. 230; Sentencing Advisory Council of Victoria, 2012, p. 11). This ongoing maturation affects children's ability to inhibit impulses, weigh long-term consequences and regulate emotionally charged behaviour, particularly in stressful or high-arousal situations (Cauffman & Steinberg, 2000; Pillay, 2019). As a result, children may possess a basic understanding that conduct is 'wrong' while lacking the capacity to fully appreciate its seriousness or to consistently act in accordance with that understanding (Icenogle et al., 2019; Steinberg & Icenogle, 2019).

These findings are directly relevant to the presumption, which requires proof of a child's moral appreciation that conduct was 'seriously wrong'. Developmental evidence suggests that moral reasoning in children is often situational and authority-oriented, particularly in middle childhood. Children may comply with rules to avoid punishment or gain approval rather than because they have internalised moral norms in an abstract or principled sense (Kohlberg, 1981; Smetana, 2013; Turiel, 1983). This complicates legal attempts to infer

moral capacity from behaviour such as concealment, flight or admissions, which may reflect fear or learned responses rather than genuine moral understanding (Hamer & Crofts, 2023).

### 2.3.2. Adolescence as a period of continuing development

Adolescence is widely recognised as a distinct developmental phase characterised by heightened impulsivity, sensitivity to reward and increased susceptibility to peer influence (Benthin et al., 1993; Furby & Beyth-Marom, 1992; Gardner & Steinberg, 2005; Lennings & Lennings, 2014; Steinberg & Monahan, 2007). Even where adolescents demonstrate cognitive abilities comparable to adults in calm and structured settings, their decision-making is more easily compromised in emotionally charged or socially salient contexts (Cauffman & Steinberg, 2000, p. 759; Lennings & Lennings, 2014, p. 795). This 'dual systems' model of development highlights the imbalance between socio-emotional systems, which mature relatively early, and cognitive control systems, which develop more slowly (Schulman et al., 2016; Steinberg, 2009). Empirical studies have shown that adolescents are more likely than adults to engage in risk-taking behaviour, particularly in the presence of peers, and are less likely to consider long-term consequences when making decisions (Cauffman & Steinberg, 2000; Nurmi, 1991; Sentencing Advisory Council of Victoria, 2012). These developmental features are especially pronounced among younger adolescents, including those aged 10 to 13 who fall within the scope of *doli incapax* (Icenogle et al., 2019). Importantly, these patterns are normative rather than pathological, reflecting typical developmental processes rather than individual deficits.

From a legal perspective, this challenges the assumption that children who engage in serious or repeated offending must necessarily possess adult-like moral capacity. Instead, developmental research cautions against equating the apparent sophistication or seriousness of conduct with the presence of mature criminal responsibility (Monahan et al., 2015; Steinberg, 2009), suggesting that offending during early adolescence may often reflect transient developmental vulnerabilities rather than entrenched criminal intent (Scott & Steinberg, 2008). For children aged 10–13, these are precisely the years in which risk-taking and peer-oriented decision-making can increase even as capacities for consistent self-regulation remain uneven, making behavioural inference an unstable foundation for attributing mature culpability.

### 2.3.3. Heterogeneity, trauma and neurodevelopmental difference

While developmental research identifies broad age-related patterns, it also emphasises substantial heterogeneity among children (Lennings & Lennings, 2014, p. 793). Development does not occur in a social vacuum and exposure to adversity can significantly shape development across cognitive, emotional and moral domains (Crofts et al., 2022; van der Kolk, 2003). Children who come into contact with the criminal justice system are disproportionately likely to have experienced trauma, victimisation, neglect, disability, neurodevelopmental conditions and systemic disadvantage (Cicchetti & Toth, 2005;

Herrenkohl et al., 2000; Loeber & Farrington, 2000; Malvaso, Day et al., 2022; McLachlan, 2024) and these experiences can disrupt developmental trajectories and impair capacities relevant to criminal responsibility (Baidawi et al., 2024b; Baldry, 2014, 2017; Baldry & Dowse, 2013; Centre for Social Justice, 2012, p. 202; Dowse et al., 2014).

Trauma exposure, in particular, has been shown to affect emotional regulation, impulse control and threat perception, and increase the likelihood of reactive and survival-oriented responses to perceived stressors (Cicchetti & Toth, 2005; van der Kolk, 2003). Neurodevelopmental conditions including intellectual disability, attention-deficit/hyperactivity disorder, and foetal alcohol spectrum disorder further complicate assessments of capacity by affecting comprehension, reasoning and suggestibility (Anderson et al., 2016; Baldry, 2017; McCausland & Baldry, 2017, p. 294; Snow et al., 2016). These factors raise concerns about the fairness and reliability of capacity determinations that rely heavily on behavioural inferences or brief forensic assessments (Blagg et al., 2016). The socio-legal significance of this heterogeneity is that it disrupts any assumption that a single evidentiary template can reliably capture children's understanding (Pillay, 2019). It also raises distributional concerns where the children most likely to have their capacity scrutinised are often those whose developmental trajectories have been shaped by trauma, disability and state intervention—conditions that complicate communication, trust and participation in forensic settings.

Importantly, developmental vulnerability is not evenly distributed; Aboriginal and Torres Strait Islander children are over-represented among cohorts experiencing cumulative adversity including child protection involvement, educational exclusion and early police contact (Crofts, 2015; Davis, 2019; Freckelton, 2017). Developmental science thus intersects with socio-legal critiques of criminal responsibility by highlighting how formal equality in legal standards can mask profound substantive inequality in children's lived circumstances (AIHW, 2025; Roy et al., 2016).

#### 2.3.4. Developmental evidence in law and policy

Despite the growing influence of developmental science in legal debates, researchers have cautioned against simplistic or selective translation of scientific findings into legal rules (Delmage, 2013). Developmental evidence does not yield precise age cut-offs or deterministic conclusions about individual capacity; rather, it supports probabilistic and population-level insights about typical patterns of development and vulnerability. When incorporated into law without attention to institutional context, such evidence risks being misused to justify either expanded criminalisation or increased discretionary control (Scott & Steinberg, 2008). Courts face particular challenges in applying developmental evidence within adversarial proceedings. Capacity determinations often occur retrospectively, under time pressure, and on the basis of incomplete information (Lacey, 2016). Expert evidence may be unevenly available or differentially contested, raising concerns about consistency and fairness (Freckelton, 2017). There is also a risk that developmental narratives are mobilised

selectively; invoked to explain vulnerability in some cases and sidelined in others where punitive responses are politically or institutionally favoured (Hamer & Crofts, 2023). For these reasons, developmental researchers and human rights bodies have increasingly argued that the primary protective function of developmental science lies not in individualised capacity assessments but in structural safeguards such as higher minimum ages of criminal responsibility and robust diversionary frameworks (Haysom, 2022). From this perspective, reliance on *doli incapax* as a compensatory mechanism for a low age threshold may place unrealistic demands on courts and expose children to inconsistent and potentially unjust outcomes (Pillay, 2019; UNCRC, 2019).

Developmental research helps explain why *doli incapax* is normatively compelling and institutionally difficult to administer. It supports the moral intuition that childhood culpability is contingent and evolving, while also underscoring how unreliable it can be to infer 'moral appreciation' from conduct, compliance or brief forensic interactions. In short, developmental science explains why the law should be cautious in attributing culpability to children; socio-legal theory explains why that caution is difficult to sustain in routine institutional settings; and the absence of empirical data means we do not yet know how these tensions resolve in practice. The next section shifts from developmental capacity in the abstract to capacity in practice: how courts, lawyers and police operationalise these ideas under constraints of time, evidence, resources and local legal culture.

### 2.4. Law in action: Courts, discretion and practice

The operation of the presumption is shaped by a distinct institutional environment. Matters involving children aged 10 to 13 are primarily heard in the Children's Court, where specialist magistrates, diversionary norms, and welfare-oriented principles formally coexist with adversarial criminal procedure. In metropolitan areas, access to specialist legal services and Children's Courts, psychologists and health and mental health assessments may facilitate more consistent engagement with the presumption. In regional and rural contexts, however, courts often operate on circuit schedules with limited access to assessments and fewer specialist practitioners. These structural constraints can affect whether *doli incapax* is raised, how evidence is gathered, and the timeframes within which matters are resolved (Fitz-Gibbon & O'Brien, 2019).

While this thesis examines these dynamics empirically in later chapters, situating the presumption within the NSW institutional context underscores that its operation is mediated by court structures, resource availability, and local practice cultures that condition how legal principles are translated into everyday decision-making. Socio-legal scholarship has long emphasised that law does not operate solely through formal rules or appellate doctrine but through everyday institutional practices in which legal meaning is produced, interpreted and applied (Twining, 1997). From this perspective, doctrines such as *doli incapax c*annot be fully understood by reference to their abstract legal formulation alone; instead, their significance lies in how they are mobilised, negotiated and resolved within the routine work

of courts (Merry, 1988). This section situates the presumption within a broader ‘law in action’ framework, focusing on courts as sites of practice, the centrality of judicial discretion, and the interpretive labour undertaken by magistrates as frontline legal decision-makers.

### 2.4.1. Law as practice

A core insight of socio-legal research is the distinction between ‘law on the books’ and ‘law in action’ (Pound, 1910). While formal doctrine sets the parameters of legal decision-making, it is through institutional practice that law acquires its practical meaning. Courts are not neutral conduits through which legal rules are mechanically applied; they are organisational environments in which legal outcomes are shaped by time pressures, resource constraints, procedural routines and informal norms (Feeley, 1979). In lower courts, such as the Children’s Court and Local Court, decision-making occurs under conditions of high volume, limited time and competing demands (Anleu & Mack, 2017). Matters are often resolved through negotiated processes rather than full evidentiary hearings, and legal questions may be addressed pragmatically rather than exhaustively (Haines, 2011). Within this context, doctrinal standards that appear clear at an appellate level may be translated into simplified heuristics or procedural shortcuts in everyday practice (O’Malley, 2004). In this context, the significance of the presumption of *doli incapax* depends not only on its formal legal content, but on whether it is practically visible, procedurally workable and institutionally prioritised within these settings.

Understanding *doli incapax* as ‘law in action’ directs attention to the procedural moments at which the presumption becomes salient, such as charging decisions, bail hearings, committal processes or plea negotiations, and to the institutional conditions that shape whether it is raised at all. It also foregrounds the fact that courts operate within a broader justice ecosystem that interacts with police, prosecutors, defence practitioners and welfare agencies, each of which influence how legal responsibility is framed and resolved.

### 2.4.2. Judicial discretion

Judicial discretion is a defining feature of lower-court decision-making and a central mechanism through which legal doctrine is translated into outcomes (Hawkins, 1992). Discretion in this context does not imply unfettered choice; rather, it reflects the space within which judicial officers interpret legal standards, weigh competing considerations and exercise judgment in circumstances not fully determined by rules (Hawkins, 1992). In youth justice contexts, discretion is particularly pronounced. Magistrates are routinely required to balance legal principles, welfare considerations, community safety concerns and assessments of a child’s needs and behaviour (Anleu & Mack, 2017). *Doli incapax* is therefore not applied in a vacuum, but in a discretionary field shaped by broader institutional logics that include risk management, diversionary policies, and expectations about judicial efficiency.

Critical socio-legal scholars have shown that discretion can operate both as a protective mechanism and as a site of unequal governance (Garland, 2001). While discretion allows decision-makers to respond flexibly to individual circumstances, it also introduces variability and opacity, and outcomes may differ across courts, regions or judicial officers even where legal standards are formally identical (Anleu & Mack, 2007). In the context of the presumption, discretion influences whether the presumption is raised, the type of evidence considered relevant, and the threshold at which capacity is deemed established or rebutted (Fitz-Gibbon & O'Brien, 2019). Importantly, discretion is exercised within structural constraints where time pressures, evidentiary limitations and the availability of diversionary options all shape how magistrates approach questions of criminal responsibility (Feeley & Simon, 1992). This means that discretionary decisions about the presumption may reflect not only assessments of a child's moral understanding, but also pragmatic judgments about what is institutionally feasible in a given case.

### 2.4.3. Magistrates as legal decision-makers: Legal cultures and interpretive labour

Magistrates occupy a distinctive position within the legal system. As frontline judicial officers, they are responsible for resolving the vast majority of criminal matters, including cases involving children (Anleu & Mack, 2005a). Their work involves interpretive labour of translating abstract legal principles into decisions under conditions of uncertainty, incomplete information and procedural constraint (Anleu & Mack, 2005b). Socio-legal research emphasises that magistrates do not operate as interchangeable appliers of law. Rather they work within legal cultures comprising shared understandings, norms and practices that develop within particular courts, jurisdictions and professional communities (Friedman, 1975). These cultures shape how legal doctrines are understood, prioritised and enacted. Differences in training, experience, court specialisation and exposure to youth matters can all influence how magistrates interpret concepts such as criminal capacity, moral responsibility and developmental immaturity (Anleu & Mack, 2014).

In the context of *doli incapax,* magistrates are tasked with making judgments about a child's moral understanding—an inquiry that is inherently evaluative and context-dependent. This requires magistrates to draw on a mix of legal knowledge, experiential insight and professional expertise (Lacey et al., 1990). The absence of clear procedural guidance on consistent evidentiary frameworks can further amplify the role of individual interpretation. Understanding magistrates as situated decision-makers also highlights the importance of examining how they experience and understand *doli incapax* in practice. Their accounts provide insight into how the presumption is perceived (whether as a meaningful safeguard, a procedural hurdle, or a marginal consideration) and how it interacts with other aspects of youth justice decision-making such as bail, diversion and sentencing.

Cumulatively, these perspectives underscore the importance of moving beyond doctrinal analysis to examine the presumption as a lived legal practice. Courts, discretion and judicial interpretation are not peripheral to the operation of the presumption; they are constitutive of it

(Merry, 1988). Without attention to how magistrates navigate legal standards within institutional constraints, debates about the protective function of *doli incapax* risk remaining abstract and disconnected from practice (UNCRC, 2019, [112]-[114]). This law in action framework provides a critical foundation for the empirical chapters that follow. It informs the qualitative focus on magistrates' experiences and courtroom practice, and it complements the quantitative analysis of children's justice trajectories by situating individual outcomes within broader institutional processes.

## 2.5. *Doli Incapax* in practice: Empirical evidence and knowledge gaps

Despite the centrality of *doli incapax* to Australian debates about the minimum age of criminal responsibility, there is limited empirical visibility of how the presumption operates in everyday legal practice. Official datasets in NSW do not record when the presumption is raised, what evidence is relied upon, or how often rebuttal succeeds; and doctrinal commentary often proceeds by anecdote or high-profile cases rather than routine procedural pathways. As a result, claims about the presumption's protective function, especially in NSW, often rest on assumption rather than empirical analysis. This matters because the doctrine's normative justification (developmental contingency) and its institutional administration (adversarial proof under constraints) may pull in different directions.

### 2.5.1. Australian empirical literature

In Australia, the empirical literature on *doli incapax* is extremely limited and largely indirect. There are no routine administrative data collected by courts, police or prosecution agencies that record how often the presumption is raised, the nature of the evidence relied upon to rebut it, or the proportion of matters that fail or succeed on *doli incapax* grounds. As a result, most existing accounts rely on doctrinal analysis, practitioner commentary, or inference drawn from broader court outcome statistics (Cunneen, 2020, pp. 12-13).

The most frequently cited empirical insight comes from Victoria, where small-scale qualitative studies and practitioner reports suggest that the presumption has, in practice, fallen into relative disuse (Fitz-Gibbon & O'Brien, 2019). Fitz-Gibbon and O'Brien's (2019) Victorian study examined the operation of the presumption via semi-structured interviews with Victorian legal stakeholders and youth justice practitioners. Their study found firstly, that despite support for the availability of the presumption among legal practitioners, there was a general view that *doli incapax* had fallen into disuse and that despite the onus being on the prosecution to rebut the presumption, in practice, the onus fell to the defence to bear the unofficial burden of providing a report to prove the defendant is *doli incapax* (Fitz-Gibbon & O'Brien, 2019, pp. 21-22). The authors also identified a disparity between regional and metropolitan areas in the use of the presumption. Specifically, Fitz-Gibbon and O'Brien found *doli incapax* to be used less in regional areas of Victoria compared with metropolitan areas (2019, p. 23). This bolsters commentary from the National Children's and Youth Law Centre that practitioners in rural and regional areas of Victoria were not familiar with the

principle (Schetzer, 2000). The authors attributed disuse of *doli incapax* in regional areas to a lack of specialist youth justice training and expertise, access to support services, and funding and expertise required to arrange *doli incapax* assessments. Prevalence of these issues in regional areas is exacerbated by increased pressures on the courts with the number of children appearing before regional courts increasing between 9 and 64 per cent from 2012–2013 to 2013–2014, and underutilisation of diversion strategies such that at-risk youth were more likely to experience ‘repeated and extensive’ contact with the youth justice system (Fitz-Gibbon & O’Brien, 2019). Overall, the study found that the complexities present in the process of rebutting the presumption and proving the test led to inconsistencies in practice (Fitz-Gibbon & O’Brien, 2019, pp. 21-22). These findings suggest that the presumption does not operate as a uniform or automatic protection, but rather as a contingent and negotiated feature of practice, shaped by local court cultures and professional norms.

Beyond Victoria, empirical research tends to be thinner. National reviews and law reform inquiries repeatedly acknowledge the absence of reliable data on the operation of *doli incapax,* noting that its practical effects cannot be meaningfully evaluated (Council of Attorneys-General, 2020, p. 89). In NSW specifically, there has been minimal published empirical research examining how the presumption is argued, interpreted or resolved in Children’s Court or Local Court proceedings despite the state’s size, diversity of court settings, and central role in national youth justice debates (Hadaway, 2025, pp. 3-4). As a result, claims about the presumption’s protective function in NSW rest largely on assumption rather than evidence (Cunneen, 2020, p. 14).

There are two recent exceptions to this relative scarcity. The first, and one of the few empirical attempts to examine the operation of the presumption using administrative data, is a NSW Bureau of Crime Statistics and Research (BOCSAR) study by Gu, published in May 2025, that sought to determine the influence of *RP* on court outcomes for children aged 10–13 in NSW via comparative analysis of Children’s Court data across a cohort of 10–13-year-olds and 14–17-year-olds. In so doing, it used proxy measures, i.e. patterns in finalised court outcomes, to infer changes in how the presumption operates in practice since *RP*. Gu (2025) found a sharp and sustained decline in the proportion of cases resulting in proven offences for 10–13-year-olds after *RP,* alongside a marked increase in prosecutorial withdrawals and a reduction in guilty pleas. These trends ran parallel with a stable volume of court appearances over the same timeframe. Cumulatively, these patterns are consistent with a heightened evidentiary threshold for rebutting the presumption and greater prosecutorial caution in proceeding to conviction, rather than changes in charging behaviour or offence profiles.

While insightful, this study underscores the administrative invisibility of the presumption. Official datasets record only final outcomes, not the legal reasoning or procedural pathways that produce them. As a result, researchers are compelled to infer the operation of the presumption indirectly. This reliance on proxy indicators highlights both the value and limitations of administrative data in understanding how the presumption functions in practice, and points to the need for complementary qualitative and observational methods capable of

illuminating the procedural and institutional dynamics that remain hidden in aggregate statistics.

The second is an independent review of the operation of the presumption in NSW, led by the Honourable Geoffrey Bellew SC and Mr Jeffrey Loy APM, and released in August 2025 (Bellew & Loy, 2025). The Review reaffirmed that the current test articulated in *RP* imposes a high evidentiary threshold and found that most prosecutions fail to rebut the presumption, often resulting in charges being withdrawn or dismissed. It concluded that legislating the common law test with statutory guidance would clarify application and promote consistency while also recommending enhanced police training, amendments to diversion eligibility to reduce justice system contact, and the creation of voluntary therapeutic intervention pathways for at-risk children to address underlying needs rather than reliance on formal proceedings. The Review's emphasis on protecting children's legal rights and on intervening early outside the criminal process reflects concerns that current practices expose children to harmful system contact without substantive support, even where the presumption operates successfully. It also highlights misunderstandings about how the test is applied and the practical challenges faced by police and courts in giving effect to *RP*'s high threshold.

However, the Review necessarily operates within the constraints of aggregate trends and stakeholder perspectives, rather than nuanced data on *doli incapax* decision-making itself, and does not resolve key empirical questions about when and how the presumption is raised, contested, or determinative at the case level. This thesis responds to this gap by using mixed methods including professional interviews, courtroom observations, survey data, and linked administrative records to trace the lived procedural pathways of *doli*-aged children from first contact through diversion, charging, court processes, and *doli incapax* adjudication, thereby empirically illuminating practices and outcomes that remain opaque in both official statistics and high-level reviews.

Together, these publications represent the most comprehensive recent efforts to examine *doli incapax* in NSW, combining doctrinal analysis, stakeholder consultation and population-level court outcome data, and they provide an important contemporary context for this thesis. Notwithstanding the significance of these contributions, critical empirical and institutional questions remain unresolved. Both the Independent Review and Gu's analysis are necessarily constrained by the limits of existing administrative data and high-level system perspectives. Neither is able to directly observe how *doli incapax* is raised, contested or resolved in everyday practice, nor to trace children's lived procedural pathways across police decision-making, diversion, courtroom interaction and post-court outcomes. The absence of routine administrative indicators capturing when the presumption is invoked or determinative means that population-level analyses must continue to rely on proxy measures, while review processes remain focused on formal doctrine, policy settings and aggregate trends rather than real-time institutional practice. This research addresses these gaps by triangulating courtroom observations, interviews with magistrates and practitioners, survey data and linked administrative records to examine the presumption as a lived legal process embedded within

children's cumulative system trajectories. In so doing, it extends existing scholarship beyond questions of legal correctness or aggregate outcomes, offering an empirically grounded account of how the presumption, institutional practice, and children's life-course disadvantage intersect in shaping justice system experiences for *doli*-aged children.

### 2.5.2. International cautionary evidence

Internationally, the evidence base on presumptions of incapacity is similarly limited, though it provides important cautionary insights. As noted earlier, international human rights bodies have expressed scepticism about the protective value of dual-age systems. In its 2019 *General Comment No 24,* the United Nations Committee on the Rights of the Child observed that presumptions of incapacity, while formally protective, have "not proved to be protective in practice", particularly where they operate alongside low minimum ages of criminal responsibility and broad prosecutorial discretion (UNCRC, 2019, [26]). Comparative research suggests that presumptions may create an appearance of developmental sensitivity while exposing children to complex evidentiary disputes, prolonged court involvement and inconsistent outcomes (Goldson, 2013).

Studies from jurisdictions such as England and Wales (prior to the abolition of *doli incapax* in 1998) indicate that presumptions of incapacity were unevenly applied and often rebutted on the basis of contextual or behavioural inference rather than robust developmental evidence (Ingleby, 1960; McDiarmid, 2013). Researchers have argued that such presumptions can function as 'procedural hurdles' rather than substantive protections, shifting the burden of developmental assessment into adversarial settings ill-suited to nuanced evaluations of children's moral and cognitive understanding (McDiarmid, 2013).

Crucially, international research highlights that the operation of presumptions like *doli incapax* cannot be understood in isolation from broader institutional dynamics. Prosecutorial charging practices, access to expert evidence, court workloads, bail frameworks and diversionary options all shape whether and how the presumption is raised and resolved. These insights reinforce the need for empirically grounded, context-specific analysis rather than reliance on abstract doctrinal claims (Goldson, 2013).

### 2.5.3. What remains unknown

Cumulatively, this body of doctrinal and empirical research positions *doli incapax* as a doctrine characterised by formal protection and practical fragility. It purports to recognise children's developmental immaturity yet relies on evidentiary practices and institutional processes that may undermine that recognition in practice (Crofts, 2018). It invites individualised justice yet operates within systems shaped by time pressure, resource constraints and risk-oriented decision-making (McAra & McVie, 2007). Crucially, despite its centrality to debates about the age of criminal responsibility, there remains minimal empirical evidence documenting how *doli incapax* actually functions in contemporary NSW courts. In

the Australian context, and particularly in NSW, we lack empirical evidence on the most basic aspects of *doli incapax* in practice. There is little understanding of how frequently the presumption is raised, at what procedural stages it becomes salient, or how evidentiary thresholds are interpreted by magistrates (Hadaway, 2025, p. 3). We know little about how prosecutors decide whether to contest capacity, how defence practitioners assess the viability of *doli incapax* arguments, or how resource constraints shape these decisions (Fitz-Gibbon & O'Brien, 2019, p. 19). Equally absent is research examining how the presumption is experienced and understood by judicial officers across different court contexts. Children's Court magistrates and Local Court magistrates operate under different workloads, institutional expectations and levels of specialisation, yet their interpretations of capacity are often treated as interchangeable in policy debate (Fitz-Gibbon & O'Brien, 2019, pp. 23-25). Without empirical insight into these differences, assumptions about consistency and coherence in the application of the presumption remain untested (Cunneen, 2020, p. 15).

Importantly, existing scholarship has largely failed to situate the presumption within the broader trajectories of children's system contact. The presumption is typically analysed as a discrete doctrinal safeguard, rather than as one moment within a child's cumulative interaction with police, courts, child protection, education and welfare systems. As a result, little is known about which children are most likely to encounter *doli incapax,* how early police contact shapes subsequent justice pathways, or how intersecting forms of disadvantage influence legal outcomes and lived experience.

### 2.6. Children, systems and cumulative disadvantage

Although *doli incapax* is doctrinally framed as a presumption that operates at trial, its practical significance unfolds across a much longer and more fragmented decision pathway. In practice, a child's exposure to criminal responsibility is shaped by a sequence of discretionary decisions that occur well before the formal question of rebuttal is ever adjudicated. The pathway typically begins with police contact, often in response to theft, violence, bail breaches or disorderly conduct (Freeman & Donnelly, 2024). At this initial stage, officers exercise discretion as to whether a child is warned, diverted, or charged (*Young Offenders Act 1997* (NSW) ('YOA')). While police codes of practice acknowledge the relevance of *doli incapax* for children aged 10 to 13, the presumption does not operate as a threshold bar to charge (NSW Police, 2018, p. 33; NSW Police, 2020). As a result, children who may ultimately be found incapable of criminal responsibility can nonetheless be formally charged and brought before the court.

Following charge, matters proceed to court listing, frequently in the Children's Court. The prosecution bears the onus to rebut the presumption, and the concomitant evidentiary burden to gather sufficient evidence capable of rebutting the presumption. Resolution can then occur in several ways: 1) the prosecution may elect to withdraw the charges; 2) the court may determine that the presumption has not been rebutted, and the matter is dismissed; 3) the presumption may be found rebutted and the matter proceed to a finding of guilt. Crucially,

even where matters are withdrawn or *doli incapax* is upheld, children may have already experienced system contact throughout this period via bail and bail refusal, referral into justice-adjacent services, or repeat court appearances. This pathway underscores the point that the presumption operates not as a discrete legal moment in time, but as one element within a broader institutional process that can itself be consequential.

A growing body of criminological and socio-legal research demonstrates that early contact with police and justice systems is a key inflection point in children's life-course trajectories, particularly for those experiencing multiple and intersecting forms of disadvantage (Akpanekpo et al., 2024; Chen et al., 2005; McAra & McVie, 2022; Sampson & Laub, 1995; Stewart et al., 2008). This section situates early police contact (before age 14) within the structure of the NSW youth justice system and examines empirical evidence concerning patterns of early contact, offence profiles for children under 14, and the consequences of early system involvement.

These early pathways are not incidental but are structured by the institutional architecture of youth justice itself. To understand how early police contact translates into divergent trajectories of diversion, court involvement, or system exit, it is necessary to situate these discretionary decisions within the legal, organisational and policy framework of youth justice in NSW.

### 2.6.1. Youth justice system and policy in NSW

The NSW youth justice system is formally structured around principles of diversion, proportionality and detention as a last resort, as reflected in the *Young Offenders Act 1997* (NSW) ('YOA') and the *Children (Criminal Proceedings) Act 1987* (NSW). Responsibility for administering youth justice is distributed across multiple agencies with Youth Justice NSW (YJNSW), situated within the Department of Communities and Justice, playing a central role. YJNSW supervises children and young people subject to community-based orders, remand or custodial sentences, and coordinates Youth Justice Conferences (Department of Communities and Justice, 2022). Its statutory mandate includes promoting the rehabilitation of young people, reducing reoffending, and facilitating their reintegration into family, education and community settings (*Children (Criminal Proceedings) Act 1987* (NSW), s 6; Department of Communities and Justice, 2022). Through the preparation of bail assessments, pre-sentence reports and suitability assessments for diversionary options, YJNSW plays a significant role in shaping children's justice trajectories. Other key institutional actors include the NSW Police Force which acts as the principal gatekeeper to the justice system through decisions about apprehension, charging, bail, and eligibility for diversion under the YOA (NSW Police, n.d.). Police discretion at this early stage is particularly consequential for children aged 10–13 for whom criminal responsibility is contingent on rebuttal of the presumption (Chan, 1996; White & Alder, 1994). As has previously been noted, the Children's Court and, in some cases, the Local Court, provide the primary judicial forums for determining youth matters, and prosecutorial discretion exercised

by police prosecutors and the Office of the Director of Public Prosecutions in more serious matters, further shapes whether and how cases involving young people proceed (Office of the Director of Public Prosecutions, 2023).

A body of Australian scholarship identifies youth justice as characterised by overlapping and often incompatible mandates, including community safety, accountability, rehabilitation and child protection (Clancey et al., 2020; Clancey & Metcalfe, 2022; Malvaso, Day, et al., 2024). Rather than reflecting a coherent philosophical orientation, contemporary systems embody welfare and punitive logics simultaneously, leaving frontline practitioners to navigate unresolved tensions in practice. Empirical research indicates that frontline practitioners experience this ambiguity acutely, often managing competing expectations without clear guidance as to their relative priority (Malvaso & Day, 2025). Practice is therefore shaped less by formal policy coherence than by what actors perceive to be feasible, legitimate and defensible within local institutional constraints. Researchers increasingly caution that this multiplicity of objectives produces institutional ambiguity, shaping discretionary decision-making and contributing to uneven outcomes across jurisdictions and court contexts. These conditions are significant because they form the environment within which doctrines such as *doli incapax* are interpreted and operationalised. Across this literature runs a sense of reform fatigue. Youth justice systems have been repeatedly subjected to inquiries that identify similar problems yet generate limited sustained change, producing an overcrowded policy space marked by high expectations and weak institutional alignment (Clancey et al., 2020; Clancey & Metcalfe, 2022; Malvaso, Day, et al., 2024).

Viewed against this backdrop, the operation of *doli incapax* cannot be understood solely as a question of legal doctrine or evidentiary thresholds. Rather, it is embedded within a fragmented youth justice system characterised by competing objectives, limited service integration and unresolved tensions between welfare and justice. Within this fragmented and multi-mandated system, diversion functions as the primary mechanism through which tensions between welfare, accountability and risk are managed in practice. Diversionary schemes are tasked with absorbing a wide range of policy expectations including: preventing unnecessary criminalisation, addressing underlying needs, and maintaining public confidence, all while operating through discretionary decision-making at the frontline. The following section examines how diversion is structured in NSW and how its operation interacts with early police contact and the presumption of *doli incapax*.

### 2.6.2. Diversion

Diversionary options for young people in NSW are designed to prevent unnecessary entry into, and entrenchment within, the criminal justice system by redirecting children away from formal judicial processes, criminal orders and custodial outcomes (NSW Government, 2018, p. 7). These approaches are grounded in the principle that detention should be used only as a last resort, consistent with Australia's obligations under the Convention on the Rights of the Child which requires deprivation of liberty to occur only where strictly necessary, and for the

shortest appropriate time (1989, art 37(b)). NSW policy frameworks emphasise that diversion seeks to identify and respond to the underlying causes of offending behaviour through early and proportionate intervention, ideally before offending escalates or becomes recurrent (Department of Communities and Justice, n.d.).

Diversion in NSW is conceptualised broadly, encompassing responses from early intervention through to post-sentence supports, and reflecting a policy commitment to minimising children's formal justice system involvement (Department of Communities and Justice, n.d.). This expansive conceptualisation reflects evidence that opportunities for diversion can arise at every point of contact with the justice system and should not be confined to pre-court decision-making alone (Johnstone, 2018). The primary legislative framework governing youth diversion in NSW is the YOA which establishes a 'graduated hierarchy of responses'—warnings, cautions, and Youth Justice Conferences—with court proceedings as a measure of last resort (Law Society of NSW, 2018, p. 2). The Act is underpinned by principles requiring the least restrictive response to alleged offending and discouraging initiation of criminal proceedings where alternative means of resolution are available and appropriate (*YOA 1997* (NSW), ss 7(a), (c)). The scheme applies to children aged 10 to 17 at the time of the alleged offence and allows matters to be dealt with under the Act until the young person reaches 21 years of age, subject to offence-based exclusions (*YOA 1997* (NSW), ss 7A, 8).

Within this framework, police exercise initial discretion to determine eligibility for diversion and may issue: a) warnings for minor summary offences, b) cautions for more serious eligible matters; or c) referral to a Youth Justice Conference where restorative engagement is considered appropriate (*YOA 1997* (NSW), Parts 3 (warnings), 4 (cautions)). Courts are similarly empowered to issue cautions or refer matters to conferences where statutory criteria are met (*YOA 1997* (NSW) s 31). At the lowest level, warnings can be issued by police for minor offences, involve no formal admission of guilt and impose no conditions on the young person. A caution represents a more formal response and may be administered where the child admits the offence and are usually delivered in the presence of a parent, caregiver or responsible adult. Youth Justice Conferences, administered by YJNSW, are explicitly restorative in orientation and aim to promote accountability, repair harm, and address criminogenic needs through agreed outcome plans that may include counselling, rehabilitation or referral to treatment services (*YOA 1997* (NSW), Part 5; Youth Justice NSW, n.d.). Again, admission of guilt is a prerequisite to the availability of a conference.

Importantly, the requirement that a child or young person admit to having committed the offence to be eligible for a caution or conference has been recognised as a key barrier to diversion (Pearce, 2021; *YOA 1997* (NSW), ss 19(b); s36(b)). Empirical research demonstrates that this requirement operates as an especially significant barrier to diversion for Aboriginal and Torres Strait Islander children and those advised to exercise their right to silence, and that mechanisms designed to mitigate this barrier, such as the Protected

Admissions Scheme,[7] are inconsistently utilised and sometimes resisted in practice, reflecting enduring tensions between diversionary objectives and law-enforcement priorities (Pearce, 2021, pp. 286-294; *R v Jai* [2023] NSWChC 9).

Beyond the statutory diversionary framework, NSW has developed a dispersed landscape of early intervention and support programs operating across justice, health, education and child protection domains (Law and Safety Committee, 2018, Ch. 1). These initiatives span the trajectory of a young person's contact with the criminal justice system, from pre-offending early intervention (such as Youth on Track and the Got It! Program) to pre-court, and bail-stage supports (including the Bail Assistance Line and police-led case management through Police & Community Youth Clubs and Youth Liaison Officers), specialist court-based models (notably the Youth Koori Court) and post-sentence or post-release rehabilitation and reintegration services (Law and Safety Committee, 2018, [1.27]-[1.44]). While these initiatives reflect an explicit policy commitment to prevention and detention as a last resort, their breadth also underscores the system's reliance on discretionary decision-making and uneven service availability (Law and Safety Committee, 2018, [1.12]-[1.45]).

Research consistently demonstrates that diversion is associated with lower rates of reoffending compared to court-based responses, particularly for younger children and those involved in less serious offending (McCarthy et al., 2025). However, access to diversion is unevenly distributed. Studies document significant attrition as matters progress through the system, with children who experience repeated police contact and bail breaches increasingly excluded from diversionary pathways (Gaskin et al., 2022; Green et al., 2019; Kelly & Armitage, 2015; Stephens, 2012). This pattern is reinforced by evidence that Aboriginal and Torres Strait Islander children, children in out-of-home care, and children in regional and socioeconomically disadvantaged communities are less likely to receive diversion despite statutory eligibility (Allard et al., 2010; Blagg et al., 2016; Cunneen et al., 2021; Green et al., 2019; Holland et al., 2024; Pearce, 2021).

Where diversion is declined, unavailable or unsuccessful, proceedings are governed by the *Children (Criminal Proceedings) Act 1987* (NSW) which regulates bail, adjudication and sentencing for children appearing before the courts (ss 5-6, 28). While diversion occupies a central place in youth justice policy, its effects cannot be assessed solely by reference to legislative intent or program design. The following sections draw on administrative and empirical research to examine how children move through the system in practice, including patterns of early police contact, offence profiles and subsequent justice outcomes.

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[7] The Protected Admissions Scheme is a non-statutory diversionary mechanism that allows children and young people to make admissions in the course of accessing diversions under the YOA without those admissions being used against them in subsequent criminal proceedings. While admissions made under the scheme are treated as protected in practice, the scheme itself is not legislated and operates through policy and procedural arrangements (primarily between ALS and NSW Police) rather than statutory guarantee.

### 2.6.3. Patterns of early police contact and youth offending in NSW

Statistics and empirical research consistently show that youth offending in NSW and Australia more broadly has declined over the past two decades, particularly for serious violent offences, notwithstanding periodic public and political concern about youth crime (see McCarthy et al., 2025). Long-run analyses of police and court data demonstrate sustained reductions in youth offending rates from the mid-2000s, with contemporary offending increasingly concentrated among a small subgroup of children and young people (Freeman & Donnelly, 2024; NSW Bureau of Crime Statistics and Research [‘BOCSAR’], n.d.; Payne, 2025; Payne, Brown & Broadhurst, 2018). Recent NSW data confirm that overall youth justice involvement has remained stable or continued to decline, even as specific offence categories, notably motor vehicle theft in regional areas, have experienced short-term increase, contributing to heightened public anxiety disproportionate to broader trends (Cook, 2023; Cook & Fitzgerald, 2024). National and international research similarly highlights that contemporary youth offending is characterised less by widespread delinquency than by early onset, persistence and co-occurring adversity (Akpanekpo et al., 2024; Basto-Pereira, et al., 2016; Malvaso et al., 2022; Skardhamar, 2009).

Longitudinal and trajectory-based research consistently demonstrates that early onset justice system contact is a strong predictor of persistent offending and later incarceration (Akpanekpo, et al., 2024; Chen et al., 2005; McAra & McVie, 2007, 2022; Myner et al., 1998; Ogilvie et al., 2024; Payne & Weatherburn, 2016; Ringland et al., 2015; Tuomi & Moritz, 2023; Weatherburn & Ramsey, 2018). NSW re-offending data show that nearly 80 per cent of children convicted at least once re-offend within ten years, with the highest risks concentrated among younger adolescents and Aboriginal and Torres Strait Islander young people (Agnew-Pauley & Holmes, 2015, p. 1; also see Pisani, 2022). Multi-state modelling confirms that children entering the system between ages 10–13 face the highest probabilities of transitioning into adolescent and adult incarceration, particularly when mental disorders and socioeconomic disadvantage are present (Akpanekpo et al., 2025, pp. 5-8). Freeman and Donnelly (2024, p. 19) provide a particularly important account of offending and outcomes for children aged 10–13 in NSW in 2023. Their research demonstrates that children in this age bracket account for a small proportion of all young people (up to age 18) proceeded against by police (around 20%); that the majority engage in non-violent offending; and that overall, rates of legal proceedings against children aged 10–13 are declining. The authors also find that children in this cohort are disproportionately Aboriginal and Torres Strait Islander.

Comparable patterns have been identified in other Australian jurisdictions. Ogilvie et al. (2024), examining children under 14 who came into contact with the youth justice system in Queensland, likewise find that early justice contact is concentrated among a relatively small cohort, dominated by non-violent offending, and strongly patterned by age, gender and Aboriginal and Torres Strait Islander status. Importantly, their analysis highlights the extent to which early justice contact is intertwined with cumulative disadvantage and prior system involvement, lending further empirical support to arguments that early criminalisation

captures a narrow but highly vulnerable group of children rather than reflecting widespread serious offending. Similar findings are reported by Baidawi et al. (2024b) who, in a retrospective study of Victorian children aged 10–13 with police contact in 2017 ($n$ = 1,369), found that most were aged 12 or 13, male, Aboriginal and Torres Strait Islander, and had come to police attention primarily for non-violent offending.

#### *2.6.3.1. Offence profiles under 14*

The offence profiles of children under 14 who come into contact with police are characterised by low-level, repeat and welfare-linked conduct rather than serious violent offending. Empirical analyses consistently identify property offences, theft, malicious damage to property, breach-type offences, and public order matters as the most common allegations for this age group (Baidawi et al., 2024b; Freeman & Donnelly, 2024; Ogilvie et al., 2024). Research further indicates that repeat contact among younger children is often driven less by offence seriousness than by heightened police visibility, compliance monitoring and bail enforcement (Colvin, 2022; Jones, 2018; McDonald et al., 2026; Richards & Renshaw, 2013; Stubbs, 2010). In this sense, offence profiles cannot be understood independently of policing practices that prioritise surveillance and enforcement in highly disadvantaged communities, particularly in regional and remote areas (Barclay et al., 2007; Butcher et al., 2019; Freeman & Donnelly, 2024; Vinson et al., 2007). For Aboriginal and Torres Strait Islander children, these dynamics are intensified by longstanding patterns of over-policing and structural inequality, resulting in over-representation among children with early and repeat police contact (Anthony, 2013; Australian Institute of Family Studies, 2015, p. 140; Cunneen, 2001; Papalia et al., 2019).

#### *2.6.3.2. Criminogenic effects of early contact*

A substantial body of criminological research demonstrates that early contact with the justice system can be criminogenic, increasing rather than reducing the likelihood of subsequent offending and system entrenchment (Cunneen, 2020, p. 19; Goldson, 2013; McAra & McVie, 2007; Payne, 2007; Weatherburn et al., 2012). Labelling theory has long posited that formal intervention can consolidate 'deviant' identities and weaken pro-social attachments, particularly for children whose behaviour is developmentally malleable (Bernburg & Krohn, 2003; Bernburg et al., 2006; Haines, 2011; Heilicher et al., 2025; McAra & McVie, 2005, 2007; Willis, 2018).

These concerns are compounded by evidence that routine justice processes—including police contact, court appearances, bail conditions and short periods of remand—can disrupt schooling, destabilise family relationships, entrench stigma and normalise criminal justice involvement as a feature of everyday life (Hughes et al., 2022; McAra & McVie, 2007, p. 2010; Queensland Family & Child Commission, 2022, p. 21). From this perspective, subjecting children to criminal processes at young ages risks creating the very trajectories of persistence and escalation that youth justice systems purport to prevent (Arthur, 2010, 2016;

Braithwaite, 1989; McAra & McVie, 2005). Contemporary studies provide support for this claim, demonstrating that children who experience early police or court contact are more likely to reoffend, experience custodial sanctions and remain under justice supervision over time (Chen et al., 2005; Ogilvie et al., 2024; Payne & Weatherburn, 2016). These effects are especially pronounced for children experiencing cumulative disadvantage. Rather than addressing underlying drivers of behaviour, early justice contact often operates as a gateway to further institutional control or exclusion including school exclusion, child protection involvement and restrictive bail conditions (McAra & McVie, 2007). This criminogenic potential is significant because it reframes early justice contact not as a neutral procedural step, but as an intervention capable of reshaping children's developmental and institutional trajectories.

Within this context, *doli incapax* assumes particular importance. Legal discussions of *doli incapax* often treat the absence of a conviction as synonymous with protection from punishment. However, a growing body of socio-legal and criminological scholarship cautions against this assumption. For children aged 10 to 13, the experience of criminal justice intervention can be burdensome and disruptive even where charges are withdrawn or the presumption is rebutted. Recent empirical research on youth justice in Australia demonstrates that early system contact is shaped less by formal determinations of guilt than by institutional logics of risk management and bail compliance (Freeman & Donnelly, 2024; Gu, 2025). This literature shows how children may experience repeated arrest, remand and supervision even where legal safeguards or diversionary frameworks exist. These interventions can disrupt schooling, family life, and peer relationships, and may expose children to heightened surveillance across multiple systems. From this perspective, *doli incapax* functions as a safeguard against conviction but not against criminalisation in a broader sense. The distinction matters because it reframes the question from whether the presumption 'works' in doctrinal terms to whether it meaningfully limits the harms associated with early justice system involvement. This insight is central to understanding why the presumption's operation must be examined beyond verdicts alone.

Cumulatively, these findings challenge the assumption that absence of conviction equates to absence of harm. They underscore the need to examine early justice contact not only in legal terms but through a broader lens attentive to cumulative disadvantage and the lived consequences of system involvement. The following sections situate these patterns within scholarship on cumulative and intersecting disadvantage, before turning to critical perspectives on diversion, care and control.

#### 2.6.4. Cumulative and intersecting disadvantage

Australian and international research consistently show that children who come into contact with police at a young age are not randomly distributed; rather, early contact is patterned by structural disadvantage including poverty, housing instability, school exclusion, disability, mental illness, trauma exposure and child protection involvement (Baglivio et al., 2015;

DeLisi & Piquero, 2011; Freeman & Donnelly, 2024). Nowhere is this patterned distribution more visible than in the over-representation of Aboriginal and Torres Strait Islander children (Cunneen, 2020; Haysom, 2022, p. 1504). Aboriginal and Torres Strait Islander children are vastly over-represented at every stage of the youth justice system, from police contact and bail refusal through to detention, with disparities particularly pronounced among younger cohorts (AIHW, 2025; Ogilvie et al., 2024). Researchers situate this pattern within a broader history of colonial governance, child removal, and structural disadvantage, arguing that early criminalisation can operate as a contemporary mechanism through which Aboriginal and Torres Strait Islander children are drawn into cycles of surveillance, intervention and punishment (Anthony, 2013; Cunneen, 2009, p. 209; Cunneen, 2020, pp. 6-9).

A critical body of scholarship situates the age of criminal responsibility within processes of criminalising social, developmental and welfare concerns. Children who come into contact with the justice system at young ages are disproportionately likely to have histories of trauma, cognitive or neurodevelopmental impairment, mental disorder, family violence, poverty, housing instability and out-of-home care (JH&FMHN & JJNSW, 2017; McArthur et al., 2021, pp. 18-20; Ransley et al., 2024). Rather than being meaningfully addressed through coordinated welfare, health and education systems, these intersecting vulnerabilities are frequently reframed as matters of individual culpability and behavioural control once a child crosses the threshold of criminal responsibility (Baldry et al., 2018; Haines, 2011; McFarlane, 2018, p. 424). Researchers have argued that this reframing obscures the structural origins of children's behaviour while legitimising punitive intervention in circumstances where therapeutic or supportive responses would be more appropriate (Goldson & Muncie, 2015). This perspective is central to the concept of cumulative disadvantage, revealing how children's needs are institutionally translated into legal risk.

A substantial body of Australian and international literature documents the overlap between child protection involvement and subsequent youth justice contact, often described as the 'care-crime nexus' or 'care-criminalisation'. Longitudinal and administrative data show that children with histories of child protection involvement, particularly those placed in out-of-home care, are significantly more likely to experience early and repeated police contact, court proceedings, and detention (Akhtar, 2022; Baidawi & Sheehan, 2019a, 2019b; Lindquist, 2023; Malvaso et al., 2022; Moriarty et al., 2025). This overlap reflects both the accumulation of pre-existing adversities including maltreatment, disability, trauma and family instability, and the operation of institutional practices that increase surveillance and formal responses to behaviour in care settings.

In a NSW context, Gerard, McGrath, Colvin and Gainsford's *Children, Care and Crime: Trauma and Transformation* (2023) offers a detailed empirical account of how children in out-of-home care become criminalised through everyday institutional practices. Drawing on qualitative research with children, carers, police and justice professionals, the authors demonstrate how trauma, placement instability, and inadequate supports intersect with risk-averse organisational cultures to produce repeated police contact, early court involvement and

escalating justice supervision. This process of care-criminalisation is structurally entangled with the over-representation of Aboriginal and Torres Strait Islander children, reflecting broader legacies of colonisation, removal and systemic neglect (Baidawi, 2019; Baidawi & Sheehan, 2019b). Research has additionally shown that behaviours commonly managed informally within family contexts are more likely to attract police involvement when they occur in residential care environments, contributing to the criminalisation of care-related behaviours (Akhtar, 2022; Gerard et al., 2023; McFarlane, 2018). Children who traverse both systems (often termed 'crossover youth') tend to come to police attention at younger ages, experience higher rates of remand and repeat contact, and face poorer long-term educational, health and social outcomes than children involved with only one system (Akhtar, 2022; Baidawi, 2019; Colvin et al., 2020; Moriarty et al., 2025). The over-representation of Aboriginal and Torres Strait Islander children, together with the care-crime nexus, illustrates how disadvantage operates as a cumulative and mutually reinforcing process.

The concept of cumulative disadvantage provides a critical framework for understanding how multiple forms of adversity intersect and compound over time. Rather than viewing disadvantage as a single risk factor, this literature emphasises the layering of harms: for example, how school suspension may increase unsupervised time and police visibility; how out-of-home care placement heightens surveillance and reporting to police; or how unmet health and disability needs shape behavioural responses that are then criminalised. Cumulatively, these literatures challenge individualised explanations of early offending and instead position criminalisation as emerging from layered structural disadvantage.

### 2.7. Critical perspectives on care, control and diversion

Diversion and early intervention occupy a central place in youth justice policy, frequently presented as evidence-based alternatives to punitive criminal justice responses. In NSW, and across Australia, diversion is routinely framed as a mechanism for steering children away from criminalisation, reducing system entrenchment, and addressing underlying developmental or social needs before offending escalates (Cunneen, 2020, pp. 6-9). However, critical socio-legal scholarship has long cautioned that diversionary systems operate within a paradoxical logic whereby they are formally oriented towards care and prevention while simultaneously capable of extending the reach of control and intervention into children's lives (Goldson, 2000; McGillivray, 1997). This 'care/control' paradox is particularly salient for *doli*-aged children who may be formally insulated from conviction yet subject to intensive and repeated forms of institutional governance.

#### 2.7.1. Diversion as policy ideal

Within policy discourse, diversion is commonly positioned as an unambiguously progressive response to youth offending; justified by reference to developmental science, desistance theory, and the criminogenic effects of early justice system contact (Scott & Steinberg, 2008). International human rights frameworks similarly endorse diversion as a means of ensuring

that justice involvement remains a last resort for children (Convention on the Rights of the Child, 1989, arts 37(b), 40(3)(b)). In NSW, diversionary mechanisms are explicitly linked to goals of rehabilitation, proportionality and detention avoidance, and are frequently invoked in debates about the adequacy of the age of criminal responsibility. In this context, *doli incapax* is often portrayed as complementing diversion by ensuring that children lacking moral capacity are shielded from formal punishment. Yet, as socio-legal researchers have observed, the aspirational framing of diversion can obscure the realities of how diversionary systems operate in practice (Daly, 2001, 2003; Goldson & Muncie, 2015; Muncie, 2021). Diversion does not eliminate state intervention; rather it reconfigures its form, shifting children from one set of institutional processes to another (O'Malley, 2004). This raises questions about whose behaviour is deemed suitable for diversion, under what conditions diversion is offered or withheld, and how diversionary pathways intersect with broader regimes of risk management.

### 2.7.2. Discretion and gatekeeping

Diversionary systems are inherently discretionary. Decisions about eligibility, suitability and compliance are typically made by police, prosecutors, magistrates and caseworkers, often in the absence of transparent criteria or review mechanisms. In NSW, access to diversion under the YOA is contingent on a range of discretionary judgments including offence type, prior history, perceived risk, and assessments of remorse or cooperation (*YOA 1997* (NSW), ss 8, 20, 36). For *doli*-aged children, these discretionary processes intersect with determinations about criminal capacity. Critical scholarship has highlighted that discretion within diversionary schemes frequently functions as a form of gatekeeping, filtering children into or out of supportive pathways in ways that reflect institutional priorities rather than children's needs (Allard et al., 2010; Green et al., 2019; Pearce, 2025; Richards, 2014; Ringland & Smith, 2013; Stephens, 2012; Stewart & Smith, 2004). Children with complex histories may be deemed unsuitable on the basis of non-compliance, perceived risk or prior system involvement, notwithstanding the vulnerabilities the diversion purports to address (O'Brien & Fitz-Gibbon, 2017, p. 145). For example, a study undertaken in Queensland explored police perceptions of young people via semi-structured interviews with police officers ($n = 41$; Richards, Cross & Dwyer, 2018). The authors found that most participant officers perceived young people as a "problem to be managed" and requiring "constant containment". These findings are important in light of the key gatekeeping role police play in responding to offending behaviour among children and young people (White & Alder, 1994). In this way, diversion can reproduce stratified outcomes, concentrating support on those already deemed 'manageable' while intensifying control over those positioned as persistently problematic (McAra & McVie, 2005, 2007).

### 2.7.3. Surveillance through welfare

From a critical socio-legal perspective, diversion and early intervention can be understood as mechanisms of 'surveillance through welfare' whereby caring rationales legitimise expansion

of monitoring, information sharing and behavioural regulation (Garland, 2001). Researchers have shown that welfare-oriented interventions can entail intrusive oversight of family life, schooling, health care and housing, particularly for children from marginalised communities (Donzelot, 1979; Cohen, 1985; McGillivray, 1997; Rose, 1999). These dynamics are especially pronounced for Aboriginal and Torres Strait Islander children whose disproportionate representation in both child protection and youth justice systems reflect the entanglement of care and coercion (Cunneen & Tauri, 2022; Cunneen & White, 2011; Cunneen et al., 2015).

For *doli*-aged children, the operation of the presumption does not necessarily curtail these dynamics. While *doli incapax* may limit formal criminal liability, it does not prevent children from being subject to repeat police contact, court appearances or bail conditions. By framing children as simultaneously vulnerable and risky, diversionary systems may intensify rather than diminish institutional scrutiny (Richards & Renshaw, 2013). This reinforces critiques that legal safeguards can coexist with, and even enable, more pervasive forms of control (Simon, 2007).

These tensions have implications for children aged 10 to 13 who sit at the intersection of criminal responsibility doctrine, diversionary policy and welfare intervention. The reliance on discretionary diversion as a response to a low age of criminal responsibility risks obscuring the cumulative burdens imposed by repeat system contact, particularly where *doli incapax* delays or complicates the resolution of criminal proceedings.

### 2.8. Synthesis and implications

Cumulatively, the literature provides strong reasons to doubt that current arrangements reliably protect children under 14 from inappropriate criminalisation, while also revealing how difficult it is to empirically evaluate that claim. Legal scholarship offers doctrinal clarity about what the presumption requires but limited evidence about how the presumption functions across everyday institutional settings. Empirical scholarship describes the population of *doli*-aged children who encounter police and courts, and documents the over-representation of children experiencing intersecting disadvantages, but often cannot specify how capacity shapes charging, bail, remand, negotiation and resolution. A recurring limitation across empirical research is that the operation of *doli incapax* is largely invisible in routine administrative data. Police, court, and youth justice datasets typically record offences and outcomes without specifying whether a withdrawal, dismissal, or acquittal reflects the presumption of incapacity or some other basis. This has two consequences. First, it constrains quantitative research from describing baseline facts that are essential to assessing the presumption's practical significance; how often it is raised, how often it succeeds, whether it varies across regions, courts, offence types, or representation. Second, it encourages reliance on proxies (such as age-based conviction patterns or withdrawal rates) to infer how the doctrine operates. The result is that *doli incapax* is administratively opaque in the very systems through which it is applied.

This chapter demonstrates that, despite the prominence of *doli incapax* in legal and policy discourse, its operation in practice remains largely obscured. Existing research provides important doctrinal guidance and cautionary insights but falls short of explaining how the presumption functions within contemporary youth justice systems (UNCRC, 2019, [112]-[114]). As a result, there remains no integrated account that connects 1) the presumption as legal test for incapacity; 2) the institutional practices through which *doli* matters are processed; and 3) the life-course trajectories of system contact that characterise the children to whom the presumption applies. This gap is particularly acute in NSW, where recent legislative reforms have altered the legal framework governing capacity without robust empirical understanding of the regime they reformed (*Children (Criminal Proceedings) and Young Offenders Legislation Amendment Act 2025* (NSW)). The present study responds directly to this gap. By combining interviews and surveys with magistrates and practitioners, courtroom observations, and linked administrative data analysis, it seeks to produce a jurisdiction-specific, empirically grounded account of the presumption in practice in NSW. The following chapter outlines the mixed-methods design employed to address these gaps.

# Chapter 3: Methodology—A mixed-methods study of law in action

## 3.1. Mixed-methods research design and overview

This thesis adopts a mixed-methods research design to examine the operation of *doli incapax* in NSW and to situate its contemporary application within the broader social, institutional, and developmental contexts of children aged 10–13 who come into contact with the criminal justice system. Neither the Children's Court nor BOCSAR publish statistics on how often the presumption is raised, how frequently it is rebutted, or the evidentiary basis on which rebuttal succeeds or fails. As a result, reliance on a single method would necessarily produce a partial account. The mixed-methods design therefore enables the study to examine the operation of the presumption across four distinct but complementary empirical dimensions:

1. Semi-structured interviews with legal practitioners, Children's Court and Local Court magistrates illuminate how the presumption is understood, interpreted, and applied by magistrates and practitioners, including evidentiary thresholds, discretionary practices and perceived system constraints.
2. The survey extends these insights across a broader cohort of Local Court magistrates, capturing patterns of experience and attitudes that cannot be inferred from a smaller interview sample.
3. Courtroom observations provide a reality check on interview and survey accounts by documenting how *doli incapax* matters unfold in practice as well as children's engagement with proceedings.
4. Human Services Dataset (HSDS) analysis maps who comes into contact with police before age 14, when that contact occurs, and the extent to which justice involvement is embedded in wider patterns of cumulative disadvantage across child protection, education, housing, health, and disability systems. Essentially, it paints a picture of the children to whom the presumption applies and their trajectory prior to, and throughout, justice system contact.

Together, these methods enable theoretical triangulation (linking legal doctrine to cumulative disadvantage frameworks), temporal triangulation (connecting early childhood system contact to early adolescent justice outcomes and courtroom practice), and methodological triangulation (providing cross-validation of findings across data sources; see Nielsen, 2010). Rather than privileging one method as primary, this thesis integrates each component at the interpretive stage to identify convergence, divergence and complementarity across data sources. This approach supports analytic rigour and enables the thesis to move beyond doctrinal accounts of *doli incapax* towards an empirically grounded understanding of how the presumption works as a legal and institutional mechanism (Creutzfeldt et al., 2019).

### 3.1.1. Ethics approval

All components of the study were approved under distinct ethics approvals granted by the University of Sydney Human Research Ethics Committee (Protocol No. 2022/HE000541, 2022/HE000573, and 2022/HE000574, respectively). The approvals covered use of de-identified linked administrative data, interviews and surveys with judicial officers and legal practitioners and non-participant courtroom observations. Additionally, approval of HSDS analyses was granted by Family and Community Services Insights Analysis and Research which operates within the Department of Communities and Justice (DCJ) and coordinates data access and governance to the HSDS.

Ethical approval was accompanied by ongoing reflexive consideration of the researcher's positionality and the ethical limits of institutional empirical inquiry in a field shaped by colonial histories and structural inequality. As outlined in Chapter 1, this research is conducted by a non-Indigenous researcher and does not seek to produce Indigenous-led analysis or to displace Indigenous scholarship on youth justice and criminalisation (Sherwood & Anthony, 2020). This positionality informed a series of methodological decisions across the study, including restraint in the use and interpretation of administrative data, caution in drawing comparative claims, and an emphasis on institutional processes rather than population-level difference. While Aboriginal and Torres Strait Islander children are disproportionately impacted by early criminalisation, this thesis examines that impact indirectly through its focus on legal doctrine, courtroom practice, and patterns of cumulative system contact, rather than through disaggregated demographic comparison. Across qualitative and quantitative components, analytic attention is directed to how legal and administrative systems operate, how discretion is exercised, and how children encounter state institutions over time. This approach reflects an effort to align empirical analysis with ethical responsibility, ensuring that the methods employed remain consistent with the scope of the research, the limits of the data, and the researcher's position within the field.

### 3.1.2. Overview of research components

Table 1 summarises the four empirical components of the study, including the method, sample, participants and analytic focus.

Table 1: Overview of mixed-methods research design

| *Research question* | *Research component and method* | *Sample size, participants/unit of analysis* | *Analytic approach and focus* | *Contribution to thesis* |
| --- | --- | --- | --- | --- |
| **RQ1.** How and under what conditions does *doli incapax* operate in practice in NSW courts? | Semi-structured interviews<br><br>Qualitative interview | 27 participants<br><br>16 magistrates; 11 legal practitioners (defence and prosecution) | Reflexive thematic analysis (NVivo)<br><br>Professional interpretation, discretion, evidentiary thresholds, and reform perspectives | Provides in-depth insight into judicial and practitioner interpretations of the presumption, evidentiary thresholds, discretion and post-*RP* practice |
| **RQ2.** How do Local Court magistrates experience and understand *doli incapax* across jurisdictions and contexts? | Online survey<br><br>Cross-sectional online survey (Qualtrics) | 36 respondents<br><br>Local Court magistrates | Descriptive statistics; thematic analysis of open-ended responses<br><br>Breadth of judicial experience and perceptions, consistency of views, perceived impacts of the presumption | Broadens coverage beyond interview sample; captures variation across geography, experience and workload; allows comparison with interview themes |
| **RQ3.** How is *doli incapax* negotiated and resolved in real-time courtroom practice? | Courtroom observations<br><br>Overt non-participant observation | 20 matters observed<br><br>*Doli incapax* proceedings in Children's Court and Local Court | Thematic analysis of fieldnotes; process mapping<br><br>Procedural dynamics, evidentiary practices, bail | Grounds interview and survey accounts in observed practice; illuminates procedural dynamics, evidentiary practices, child |

| *Research question* | *Research component and method* | *Sample size, participants/unit of analysis* | *Analytic approach and focus* | *Contribution to thesis* |
|---|---|---|---|---|
| | | | decision-making, and child participation | engagement and routinised withdrawals |
| **RQ4.** How many children come into contact with NSW Police before age 14, and what are their offence profiles and justice trajectories? | Administrative data analysis<br><br>Linked population-level analysis (HSDS) | Birth cohort: 527,294 children (2001–2006); justice-involved sub-cohort: 15,895<br><br>Children with police contact aged 10–13 | Descriptive statistics; cohort profiling (Stata)<br><br>Scale, timing, and patterns of police and justice system contact | Establishes scale, timing and patterns of early police contact and justice outcomes |
| **RQ5.** What patterns of cumulative and intersecting disadvantage characterise children in contact with police before age 14? | Administrative data analysis<br><br>HSDS (linked justice, child protection, education, health, housing datasets) | Same cohort as RQ4 | Descriptive statistics; cumulative risk and co-occurrence analysis across developmental windows (Stata)<br><br>Life-course and systems-interaction (non-causal, non-predictive) | Demonstrates concentration and sequencing of adversity; identifies high-need subgroups and structural patterns |
| **RQ6.** How do legal doctrine, courtroom practice, and | Mixed-methods integration | Cross-dataset synthesis | Triangulation; comparative thematic synthesis | Integrates doctrinal, institutional and life-course perspectives; explains why |

| *Research question* | *Research component and method* | *Sample size, participants/unit of analysis* | *Analytic approach and focus* | *Contribution to thesis* |
|---|---|---|---|---|
| children's system trajectories intersect to shape outcomes for *doli*-aged children? | Interviews, survey, observations, HSDS | | Convergence and divergence between structural patterns (HSDS), professional accounts (interviews/surveys), and observed practice (court observations | *doli incapax* functions as a de facto age-raising mechanism without structural reform |

### 3.1.3. Integration across methods

Integration occurs at both the analytic and interpretive stages. Interview and survey themes informed the observational coding framework, while observation data were used to corroborate or challenge professional accounts. Administrative data findings contextualise courtroom practices by demonstrating that *doli incapax* matters arise against a backdrop of extensive prior system contact, cumulative disadvantage, and service fragmentation.

This triangulated research design allows the thesis to demonstrate not only how often children encounter the justice system before age 14, but how those encounters are processed, why matters frequently collapse at the point of *doli incapax,* and what consequences follow for children, courts, and communities. In doing so, the mixed methods approach supports a central argument of the thesis: *doli incapax* in contemporary NSW operates less as a discrete doctrinal presumption and more as a site where evidence law, developmental theory, institutional capacity, and social policy collide.

## 3.2. Semi-structured interviews with magistrates and legal practitioners

Semi-structured interviews were conducted with magistrates and legal practitioners to examine judicial and legal professionals' perspectives and experiences of the way *doli incapax* operates in practice (Choongh, 2017; Halliday & Schmidt, 2010). Interviews were chosen to capture experiential, interpretive, and normative dimensions of the presumption that cannot be observed through administrative data alone (Brinkmann & Kvale, 2014; Mack et al., 2018; Mason, 2017). Research examining the operation of *doli incapax* is impeded in part by a lack of available administrative data regarding application of the presumption (BOCSAR, 2023). Interviews enabled participants to reflect on how the presumption is operationalised within everyday court processes, including points of discretion, uncertainty and system constraint.

### 3.2.1. Interview cohort

Sixteen magistrates participated in interviews: 10 (63%) are currently Children's Court magistrates and 6 (38%) are Local Court magistrates. Local Court magistrates sit as Children's Court magistrates in regional and rural areas of NSW where there isn't a specialist Children's Court, and occasionally in areas with specialist Children's Courts during holidays, conferences or other periods when specialist magistrates are unavailable (Children's Court NSW, n.d.). In NSW, there are currently 16 specialist Children's Court magistrates and 159 Local Court magistrates (Children's Court NSW, n.d.). Proportionally, 63% of Children's Court magistrates participated in an interview and 4% of Local Court magistrates. Eight participants (50%) have 5 or more years' experience as a magistrate, four (25%) have three to four years' experience, and four (25%) have one to two years' experience. All interviewed

magistrates were based in regional or in both regional and metropolitan areas of NSW at the time of interview.

Eleven legal practitioners also participated in interviews. Nine (82%) have five or more years' experience working as a legal practitioner, and two (18%) have between one and three years' experience. Nine participants (82%) were based in a metropolitan area of NSW, with the remaining two (18%) based in regional areas. Five practitioners (45%) were employed by Legal Aid NSW, three (27%) worked in private practice or community legal centres, two (18%) worked for the Aboriginal Legal Service (ALS) and one (9%) was employed by the Director of Public Prosecutions (DPP).

### 3.2.2. Recruitment and sampling

Interview participants were recruited using purposive and snowball sampling strategies to ensure maximum coverage across jurisdictions (Children's Court and Local Court), professional roles (judicial officers and legal practitioners), and geographic locations (metropolitan, regional and remote NSW; Noy, 2008; Patton, 2014). Magistrates were approached via professional networks and formal invitations from senior officers including the President of the Children's Court and Chief Magistrate of the Local Court. Similarly, legal practitioners were recruited through senior officers within respective legal agencies and organisations including Legal Aid NSW, Aboriginal Legal Service (ALS), private practice networks, and referrals from interviewees.

Although both metropolitan and regional practitioners were included, regional and Children's Court perspectives were proportionally more prominent in the sample than in the broader NSW judiciary. This reflects both the success of recruitment but also the fact that *doli incapax* matters arise more frequently in particular areas. This may have the effect of foregrounding challenges associated with regional scarcity and repeat offending, potentially underrepresenting more routine or less complex cases.

Eligibility criteria required participants to have direct professional experience with matters involving children aged 10–13 years and recruitment continued until thematic saturation was reached (Braun & Clarke, 2021; Guest et al., 2006).

### 3.2.3. Interview procedure

All interviews took place remotely via Microsoft Teams between July 2023 and November 2024. Interviews typically lasted between 45 and 60 minutes. All participants were provided with a participant information sheet outlining the study aims, confidentiality arrangements, and their right to withdraw, and informed consent was obtained prior to participating either in writing or on audio-recording.

A semi-structured interview protocol[8] was used to ensure consistency across interviews while allowing flexibility for participants to elaborate on issues of particular relevance to their experience (Kallio et al., 2016). Core question domains included:

- The practical operation of the presumption in court proceedings including issues around frequency and consistency
- Evidence commonly adduced to rebut the presumption and its probative value
- Police charging practices and decision-making
- Bail and remand decision-making and outcomes for *doli*-aged children
- Services and supports available for *doli*-aged children
- Views on reform, training and policy implications.

With consent, interviews were audio-recorded and transcribed using Microsoft Teams software.

### 3.2.4. Data preparation and cleaning

Transcripts were reviewed and cleaned by the researcher prior to analysis. Transcript cleaning and anonymisation followed established qualitative data preparation practices (Halcomb & Davidson, 2006; Kaiser, 2009). Cleaning in this context involved four distinct stages. First, transcripts were read in full to achieve familiarisation with the data and were checked against the audio recording for completeness and accuracy; any obvious transcription errors were corrected including misheard legal terms, court locations, procedural terminology and agency names. Second, transcripts were standardised for readability across interviews. This included reducing non-substantive fillers such as “um” or “yeah” where their removal did not alter meaning, reorganising text into distinct phrases to maximise accuracy and meaning, and creating paragraphs to assist with readability. Third, all identifying information was redacted or masked to protect confidentiality; this included names of children, family members, practitioners, judicial officers, police, schools, towns or places and any distinctive details that could risk re-identification. Where contextual meaning was important, identifiers were replaced with bracketed descriptors such as [regional court], [Legal Aid solicitor]. Fourth, transcripts were formatted for coding including marking inaudible segments, adding emphases, reconciling sections of overlapping speech and interruptions. Cleaned transcripts were then imported into NVivo (version 15) for qualitative analyses and coding.

### 3.2.5. Coding and analyses

Qualitative interview data were analysed using NVivo (version 15) to support coding and organisation of cleaned transcripts. Analysis followed an iterative, reflexive thematic approach, combining inductive and deductive coding strategies (Braun & Clarke, 2021;

[8] This interview protocol is included in the Appendix at page 259.

Malvaso & Day, 2025). A deductive approach was used to organise the data in the first instance according to key components of *doli incapax* practice and an initial coding framework was developed based on the study's research questions and themes emerging from existing literature on *doli incapax.* This framework was used to guide a first cycle of coding, while remaining open to identification of new, unanticipated themes arising from the data. Then, emerging themes were interpreted as they relate to the coding framework and refined in an iterative process that involved going back and forth between interpreting the data and developing themes and subthemes (Malvaso & Day, 2025, p. 418). Throughout the process, researcher characteristics and reflexivity were considered via use of analytic memos to record emerging interpretations, methodological decisions, and reflexive observations. These memos allow recognition of the subjectivity of the researcher and the potential for this role to influence the interpretation and organisation of data.

Coding proceeded in a number of stages and decisions were revisited iteratively to ensure consistency and conceptual clarity. First, transcripts were coded at a descriptive and conceptual level to capture key ideas, practices, and perceptions expressed by participants in line with the initial coding framework. Codes were applied flexibly and revised as analysis progressed. Second, codes were grouped into broader thematic categories that reflected emerging patterns and relationships across interviews and participant groups. Particular attention was paid to points of convergence and divergence between cohorts including magistrates, defence practitioners and prosecutors. Third, themes were refined and defined through an iterative process of reviewing coded extracts against the broader dataset.

#### 3.2.6. Rigour and ethical considerations

A number of strategies were employed to ensure analytic rigour. First, triangulation was achieved by comparing interview data with survey responses from Local Court magistrates and direct courtroom observations (Denzin, 2009; Flick, 2022). Second, reflexivity was maintained through memo-writing and ongoing consideration of the researcher's positionality throughout the data collection and analysis processes (Finlay, 2002).

This component of the research was approved by the University of Sydney Human Research Ethics Committee (Protocol No. 2022/HE000574). Given the professional status of participants and the sensitivity of the subject matter, care was taken to protect anonymity and avoid attributing potentially identifying combinations of role, location and case detail. Quotations used in this thesis are anonymised and attributed only by role and broad geographic classification.

#### 3.2.7. Limitations

Several limitations should be acknowledged in relation to the qualitative interview component of this research.

First, while the interview sample included a substantial number of magistrates and legal practitioners with experience of *doli incapax* matters, it was not intended to be statistically representative of all judicial officers or practitioners in NSW. Participation was voluntary and it is possible that those who elected to participate held stronger views about the presumption, youth crime, or system processes more broadly. The findings should be interpreted as reflecting the perspectives of experienced and engaged participants rather than as a comprehensive account of all professional viewpoints. Additionally, as noted earlier, regional and Children's Court perspectives were more prominent in the interview sample which may impact emphasis placed on issues associated with regional scarcity and repeat offending.

Second, the data are based on self-reported accounts which are shaped by participants' recall, interpretation and professional positioning (Fadnes et al., 2009). Interviews required participants to reflect retrospectively on cases and practices which may introduce recall bias or selective emphasis on particularly salient matters. Magistrates and practitioners may also frame their accounts in ways that align with professional norms, institutional responsibilities, or perceived expectations of the research context. While efforts were made to triangulate data, the interviews themselves remain interpretive accounts capturing how participants perceive *doli incapax* in practice rather than providing direct measures of frequency or effectiveness.

Third, the interview participants occupy different roles within the justice system, and their perspectives are necessarily shaped by these roles. Magistrates, prosecutors and defence lawyers encounter the presumption at different procedural stages and with different constraints. As a result, some themes (e.g. frustration with bail decision-making or police charging practices) may reflect institutional tensions rather than neutral assessments of system processes.

Importantly, the study did not include interviews with police officers or young people themselves. This was primarily due to time constraints associated with a doctoral thesis and the ethical thresholds required to include these cohorts in empirical research. This is a significant gap that should be addressed in future research. Police decision-making and children's lived experiences are necessarily interpreted in these findings via other participating professionals which limits insight into those perspectives and reinforces an adult-centric framing of children's behaviour, capacity and experience.

Fifth, *doli incapax* engages participants in consideration of sensitive issues including child development, Aboriginal and Torres Strait Islander over-representation, community safety, and judicial discretion. Despite assurances of confidentiality, participants may have moderated their responses due to social desirability bias, particularly when discussing more controversial topics such as bail decision-making and remand of young children. Conversely, it is possible that some participants over-emphasised systemic dysfunction to underscore the urgency of reform.

Finally, although interviews were coded and analysed using NVivo, qualitative analysis is interpretive. Coding decisions, theme development, and synthesis reflect the researcher's analytic judgement and theoretical orientation. Additionally, all coding and analyses were conducted by one researcher. While reflexive practices were employed to enhance rigour, alternative readings of the data are possible. The interview findings should therefore be understood as analytically robust but not definitive, contributing depth and context to this study's broader mixed methods design rather than standing alone as conclusive evidence.

## 3.3. Online survey

The survey was devised after a number of interviews had been scheduled and conducted to address an emerging gap in the sample of interviewees, with a majority of interviews conducted with Children's Court magistrates and fewer with Local Court magistrates. The perspective of Local Court magistrates is especially important in an exploration of *doli incapax* as research on its operation in other states and anecdotally, in NSW, suggest a discrepancy between specialist and non-specialist judicial officers in terms of their application and understanding of the presumption (Crofts, 2018; Fitz-Gibbon & O'Brien, 2019). To ensure a representative sample of magistracy across NSW, the online survey was developed to complement the qualitative interview and observational components of the study by capturing broader patterns of judicial experience and attitudes across the Local Court jurisdiction (Mack et al., 2018, p. 3; McConville & Chui, 2017).

### 3.3.1. Online survey cohort

Thirty-six Local Court magistrates completed the online survey. This represents 23% of the current number of Local Court magistrates in NSW. Of this cohort, 25 (69%) have five or more years' experience as a magistrate, eight (22%) have three to four years,' experience and three (8%) have one to two years' experience. Fifteen magistrates (42%) were based in regional areas of NSW, fifteen (42%) in metropolitan areas, four (11%) reported working across both regional and metropolitan areas, and two (6%) were based in remote areas. All surveyed magistrates reported experience working in regional and/or remote areas of NSW, consistent with typical circuit court arrangements.[9] Four magistrates (11%) reported prior experience as a specialist Children's Court magistrate.

### 3.3.2. Recruitment

The survey link was distributed to Local Court magistrates via the Chief Magistrate and Deputy Chief Magistrate of the Local Court. The survey remained open between March and

[9] Magistrates are required to undertake country postings for a period of two years, see Gleeson (2003).

July 2025 to allow magistrates sufficient opportunity to participate, recognising judicial workload and scheduling constraints.

### 3.3.3. Survey procedures

The survey instrument was developed using the interview protocol and following a review of themes emerging from preliminary interviews and court observations.[10] The survey items included a combination of closed-ended questions (multiple choice and Likert-scale items) and open-ended questions inviting respondents to elaborate on their experiences and views in their own words. This mixed-format design enabled both descriptive quantitative and qualitative thematic analyses of responses.

The surveys were administered online using Qualtrics, a secure web-based survey platform compliant with University of Sydney data security and privacy requirements. Participation was voluntary and anonymous. No identifying information was collected, and respondents were informed that individual responses would not be attributable. A participant information statement was provided at the start of the survey, outlining the purpose of the research, the voluntary nature of participation, and data handling procedures. Consent was implied via completion of the survey.

### 3.3.4. Ethics approval

This study was approved by the University of Sydney Research Ethics Committee, Protocol number 2022/HE000574.

### 3.3.5. Survey data cleaning and organisation

Survey responses were exported from Qualtrics for analysis. Quantitative survey data were exported in spreadsheet format into Excel and checked for completeness, duplicate entries and any obvious data entry errors. Incomplete responses were retained where respondents had provided responses to at least 75% of the survey and had provided substantive answers to key questions, particularly open-ended items.

Open-ended responses were exported separately and imported into NVivo for qualitative analysis. Prior to analysis, these responses were reviewed to remove any potentially identifying information such as references to cases, locations, or individuals. This process allowed preservation of anonymity while retaining substantive content and meaning.

[10] This survey protocol is included in the Appendix at page 262.

### 3.3.6. Analytic approach

#### *3.3.6.1. Quantitative analysis*

Descriptive statistics were used to summarise closed-ended survey questions, including frequencies and proportions for categorical variables and summary measures for Likert-scale items. These analyses were used to identify broad patterns in magistrates' views regarding the operation of *doli incapax*, perceived evidentiary thresholds, procedural efficiency, and impacts on court practice.

#### *3.3.6.2. Qualitative analysis*

Open-ended survey responses were coded using NVivo software. An inductive thematic analysis approach was used, consistent with the broader qualitative methodology of this study. Initial coding focused on identifying recurring patterns and issues raised by magistrates. Coding was iterative and reflexive. Early codes were refined, merged, or disaggregated as analysis progressed, and higher-order themes emerged that captured broader patterns across responses. Particular attention was paid to areas of convergence and divergence between survey responses, interview data, and courtroom observations. This allowed survey responses to be analytically integrated into the broader qualitative framework rather than treated as a standalone dataset.

### 3.3.7. Integration with interview and observation data

Survey findings were triangulated with data from the semi-structured interviews and courtroom observations. Areas of alignment—for example, issues around admissibility of evidence, procedural inefficiencies, and service scarcity—were used to strengthen analytic findings. Areas of divergence were also examined to identify differences in perspective between magistrates responding anonymously via survey and those participating in interviews or observed proceedings.

### 3.3.8. Limitations

Several limitations should be considered when interpreting findings from the online survey of Local Court magistrates. Many of the limitations associated with the interview component also apply to the survey data and are not repeated in full here. For example, self-selection bias is a limitation in both the survey and interview samples. Participation was voluntary and it likely that magistrates with stronger views about *doli incapax* were more inclined to participate. Magistrates with limited exposure to *doli* matters may be underrepresented. As a result, the survey findings may over-reflect the perspectives of more experienced or concerned judicial officers.

Second, self-reported perceptions and recollections rather than objective measures of practice typify survey responses as well as interview accounts. Consequently, responses about the frequency of *doli* matters, rebuttals, withdrawals or bail decisions are subject to recall bias. Similarly, magistrates working in jurisdictions with a small number of highly complex matters may perceive *doli incapax* as more prevalent or problematic than those in jurisdictions where such matters arise infrequently.

Third, while the survey captured years of experience and geographic location, it did not capture workload composition (i.e. the proportion of adult vs children's matters). As a result, it is not possible to differentiate between magistrates whose responses are informed by regular Children's Court exposure and those whose experience is intermittent or historical.

Fourth, geographic representation across the cohort may not fully reflect variation across Local Court locations in NSW. Specifically, magistrates in very remote or circuit-based locations may face distinct constraints and practices that are not proportionally captured in the survey responses. This limitation is partially mitigated by the qualitative interview and observation components which provide deeper insight into regional and remote contexts.

Finally, the survey protocol prioritised breadth of content over depth, consistent with its descriptive purpose. Closed-ended response options simplify complex legal and procedural realities. For example, classifying the frequency of rebuttals as "never", "occasionally", or "often" cannot fully capture the nuance of decision-making and processes. Although free-text responses allowed some elaboration, these do not substitute for the depth achieved through interviews.

### 3.4. Courtroom observations

Courtroom observations were undertaken as a qualitative component of this study to examine the operation of *doli incapax* in practice, and to complement the interview and survey data from magistrates and practitioners. Whereas interviews and surveys capture retrospective accounts and normative views, direct observation allows analysis of how *doli incapax* is negotiated and resolved in situ through courtroom interactions, evidentiary practices and procedural decision-making (Atkinson & Drew, 1979; Dingwall, 1997; Feeley, 1979; Hammersley & Atkinson, 1995). It also allows the researcher to directly observe the impacts of these processes for children participating in *doli incapax* matters (Kupchik, 2006). The observations illuminated the routine processes, constraints and patterns that shape the practical application of the presumption (Travers, 2017; Walenta, 2019).

#### 3.4.1. Observation sites and samples

Observations were conducted in the NSW Children's Court and Local Court between June 2023 and May 2024, across both metropolitan and regional locations. Courts were selected

purposively to capture variation in geography, court workload, and practitioner composition, and to reflect sites identified through interview data as frequently dealing with *doli incapax* matters.

In total, 20 *doli incapax* matters were observed including 11 matters in regional NSW, and 9 matters in metropolitan NSW. Cumulatively, the observations took place across 8 days (approximately 56 hours) and ranged in location from Dubbo Local Court, NSW to Parramatta Children's Court, NSW (see Table 2). Matters were identified through liaison with court and administrative staff. Observed matters necessarily reflect cases in which the presumption was contested rather than resolved earlier through diversion or withdrawal.

Table 2 summarises the *doli incapax* matters observed across metropolitan and regional courts during the study period. The table abstracts individual cases to highlight common offence types, evidentiary strategies, procedural dynamics and outcomes, without including identifying information.

As discussed in Chapters 6 and 7, the observations reveal consistent patterns in how *doli incapax* matters are negotiated and resolved in practice. However, the data are necessarily limited by the absence of access to court transcripts, police briefs or background material. Information included reflects only what was raised during proceedings or discussions in court, and in some cases, key contextual details were not available to the researcher.

Table 2: Summary of observed *doli incapax* matters (courtroom observations)

| ***Case ID*** | *Court/Setting* | *Child (Age at Offence)* | *Alleged Offending/Charges* | *Relevant Background/History (Non-Identifying)* | *Doli Incapax Evidence Sought/Adduced* | *Key Procedural Issues* | *Outcome* |
|---|---|---|---|---|---|---|---|
| **A** | Metropolitan Children's Court | Female, 13 | Common assault | Extended school disengagement (no attendance for ~1 year) | None adduced; prosecution sought adjournment to gather school/background material | Adjournment refused due to delay and lack of confidence evidence could be obtained | Matters withdrawn |
| **B** | Metropolitan Children's Court | Female, 13 | Malicious damage to property; breach of AVO | No background material raised | No *doli* evidence adduced | Matter adjourned | Adjourned |
| **C** | Regional Local Court | Male, 10-11 | 70+ charges over ~7 months including break and enter, robbery, property damage, intimidation, bail breaches | Aboriginal and Torres Strait Islander child; extensive prior system contact; repeated remand and bail cycles | Criminal history (business records); carer statements; police interviews; Protected Admissions Scheme interview; pre/post-offence conduct | Extensive admissibility disputes; evidence excluded on unfairness/impropriety | Many charges withdrawn; later not guilty by reason of *doli incapax* |

| ***Case ID*** | *Court/Setting* | *Child (Age at Offence)* | *Alleged Offending/Charges* | *Relevant Background/History (Non-Identifying)* | *Doli Incapax Evidence Sought/Adduced* | *Key Procedural Issues* | *Outcome* |
|---|---|---|---|---|---|---|---|
| **D** | Regional Local Court | Male, 11-12 | Multiple property and violent offences | Multiple prior court appearances; family justice exposure normalised | Prior arrests; carer statements; police opinion; offence conduct | Court rejected inference-based reasoning; emphasised moral vs legal wrongfulness | Matters withdrawn |
| **E** | Regional Local Court | Female, 11 | Multiple charges | Aboriginal and Torres Strait Islander child; child not consistently in attendance | School records; carer statements; police-conducted *doli* interview with hypotheticals | Interview excluded due to improper cautions and Protected Admission Scheme confusion | Matters withdrawn |
| **F** | Regional Local Court | Male, 12 | Aggravated break and enter; carry and convey | Aboriginal and Torres Strait Islander child; distress observed during proceeding | Prior police interview conducted for unrelated matter under the YOA | Interview excluded (YOA completion; inadmissibility) | Matters withdrawn |
| **G** | Regional Local Court | Multiple children | Multiple matters | - | - | Adjournments sought due to unavailable prosecution witnesses | Matters withdrawn |
| **H** | Metropolitan Children's Court | Multiple children | Multiple matters | - | - | Many matters withdrawn prior to substantive hearing | Matters withdrawn |

| ***Case ID*** | *Court/Setting* | *Child (Age at Offence)* | *Alleged Offending/Charges* | *Relevant Background/History (Non-Identifying)* | *Doli Incapax Evidence Sought/Adduced* | *Key Procedural Issues* | *Outcome* |
|---|---|---|---|---|---|---|---|
| **I** | Metropolitan Children’s Court | Multiple children | Multiple matters | Some children in custody on remand | Limited or contested *doli* evidence | Adjournments common; evidentiary disputes unresolved | Adjourned/partially withdrawn |

### 3.4.2. Nature of observations

Observations were non-participant and overt. The researcher attended the court subject to judicial permission. Proceedings observed included:

- Substantive hearings involving *doli incapax*
- Arguments concerning admissibility of *doli* evidence
- Adjournment applications for the purpose of gathering *doli* evidence
- Bail applications where *doli incapax* was a live issue
- Judicial reasoning delivered orally in court relating to *doli incapax*
- Withdrawal of charges where *doli incapax* was a live issue.

Particular attention was paid to:

- Types of evidence tendered or adduced to rebut the presumption
- Judicial responses to tendered evidence
- Bail decision-making in the context of unresolved *doli* matters
- The behaviour, engagement and apparent comprehension of child defendants during proceedings
- Informal interactions and negotiations between prosecution and defence observable in court.

### 3.4.3. Data recording and fieldnotes

Data were recorded contemporaneously through detailed handwritten fieldnotes taken during and immediately after each court session (Gobo, 2008). These notes were subsequently typed. Notes focused on:

- Procedural sequences
- Submissions by prosecution and defence
- Judicial interventions and rulings
- Evidentiary arguments
- Observed child behaviour and courtroom dynamics
- Reflections on the accessibility and child-friendliness of proceedings.

No audio or visual recording was made, and no verbatim transcripts of proceedings were produced. Names and identifying details of children, families, and practitioners were removed or replaced with pseudonyms at the point of notetaking. Fieldnotes were subsequently expanded and refined within 24 hours of each observation to enhance accuracy and analytic observations.

### 3.4.4. Ethical considerations

Courtroom observations were conducted in accordance with ethical approval granted by the University of Sydney Human Research Ethics Committee (Protocol No. 2022/HE000573). In accordance with ethics approval, no identifying information is reported, and all case descriptions are anonymised and presented at a level of abstraction sufficient to preclude identification.

Where permission to observe was denied by a magistrate, the researcher complied without challenge and no notes were taken. This occurred in one matter in a metropolitan area of NSW. The study did not involve direct interaction with children, families, or court staff during proceedings.

### 3.4.5. Analytic approach

Observation data were analysed using thematic qualitative analysis, integrated with interview and survey findings. Observational field notes were imported into NVivo using the same coding framework used for interview and survey data. This enabled triangulation between what participants reported in interviews and surveys, and what was observed in courtroom practice. Specifically, deductive codes were derived from interview and survey themes (e.g. evidentiary threshold, admissibility issues, bail tensions) and inductive codes were developed from recurring patterns observed in court (e.g. routine withdrawal of matters, child disengagement, and informal pre-negotiation of *doli* evidence).

Analytic attention was focused not only on outcomes (e.g. withdrawal of matters), but on processes including delays, adjournments, and expressions of frustration or constraint. Observational data were treated as analytically complementary to interview and survey data, providing key context for themes emerging from practitioner and magistrate accounts.

### 3.4.6. Integration with interviews and surveys

Findings from observations were triangulated with interview and survey data to assess convergence and divergence between what magistrates and practitioners say about the presumption, and what occurs in day-to-day court practice. Observations were particularly valuable in corroborating interview claims regarding procedural inefficiencies and evidentiary thresholds. They also illuminated dynamics such as child disengagement and the dominance of admissibility arguments, that were otherwise less visible in self-reported data.

### 3.4.7. Limitations

A number of limitations should be acknowledged in relation to interpretation of courtroom observation findings. First, the researcher’s presence as an observer may have influenced

courtroom dynamics (Webley, 2010, p. 937), although this risk was mitigated by the non-participatory role adopted.

Second, courtroom observations necessarily capture only the visible dimensions of legal decision-making. Many critical processes shaping case trajectories, including charge negotiation, evidentiary assessment, prosecutorial decision-making, defence strategy, and informal discussions between legal practitioners, occur outside the courtroom and were not accessible to the researcher. Observations therefore reflect the public performance of legal process rather than the full deliberative context within which decisions are formed.

Third, the dataset is structurally selective. Observations are skewed, reflecting only matters that proceeded to court and not those resolved earlier through police discretion, prosecutorial withdrawal or diversion. The data likely underrepresent the volume of matters resolved informally. As a result, the observations should not be interpreted as representative of all matters involving *doli*-aged children, but rather as illustrative of how the presumption operates once formal proceedings are underway.

Finally, observational research is inherently interpretive, shaped by the researcher's analytic lens and positionality. To enhance rigour, observational insights were triangulated with interview, survey and administrative data, enabling patterns identified in court to be tested against multiple sources of evidence. The convergence of findings across these methods strengthens confidence in the analytic claims advanced while acknowledging the partial and situated nature of courtroom observation.

### 3.5. Human Services Dataset analyses

To examine how children interact with the NSW criminal justice system and to describe the characteristics and life-course circumstances of children who come into contact with police before age 14, this study draws on the HSDS. The HSDS is a large-scale, longitudinal, linked administrative data resource containing data on children born or living in NSW since 1990 who have engaged with one of the services captured in the HSDS. At the time of extraction and analysis, the HSDS comprised records for approximately 3.38 million individuals, including children and their family members, and incorporated over eight million records drawn from more than 135 administrative files spanning 11 government agencies with coverage across decades. The breadth of the HSDS enables examination of children's interactions across multiple service systems including justice, child protection, education, housing, health, and education-based disability supports (including Integration Funding Support (IFS-DoE) and Support Class Enrolment (SCAS), thereby supporting a cumulative risk and life-course analytical framework (Stewart et al., 2002; Stewart et al., 2008; Malvaso, McGee, et al., 2024).

Probabilistic data linkage of the administrative datasets is undertaken by the Centre for Health Record Linkage (CHeReL) using best-practice linkage protocols. Following linkage, datasets are de-identified prior to release and made available to approved researchers through a secure, controlled-access computing environment administered by the Department of Customer Services (DCS). Researchers do not have access to identifying information, nor to linkage keys used by CheReL.

### 3.5.1. Access and review processes

Access to the HSDS is governed through a formal external review and approval process administered by Family and Community Services Insights, Analysis and Research (FACSIAR) within DCJ. Consistent with FACSIAR's Guidelines for Access to and Use of the HSDS, all proposed research projects must be assessed and approved prior to data release—a process that typically takes several weeks from submission to approval. Applications are evaluated against criteria including public interest, necessity, and proportionality of the requested data, ethical approval, privacy and security safeguards, and consistent with the permitted purposes of the HSDS.

Researchers must demonstrate approval from a recognised Human Research Ethics Committee and compliance with applicable privacy instruments, including Public Interest Directions issued under NSW privacy legislation. Approved researchers are granted access only to de-identified, linked datasets, which are made available within a secure, controlled-access computing environment managed by DCS.

FACSIAR retains oversight throughout the project lifecycle which includes mandatory review of analytic outputs prior to export. This occurs through a staged approval process. First, analytic materials must receive formal export approval before they can be released from the secure environment—a process that typically requires several weeks. Second, outputs intended for dissemination are subject to an additional endorsement review to verify appropriate interpretation, correct data usage, and compliance with privacy, security and disclosure requirements. These procedural requirements extend the analytic timeline but constitute an important safeguard against re-identification risk. Collectively, this governance framework provides a substantial layer of external oversight beyond university ethics approval and reflects the sensitivity of the linked administrative data used in this study.

Detailed records of methodological approaches and processes are described in the Appendix from page 265.

### 3.5.2. HSDS datasets used in this research

This study draws on linked data from the following agencies and datasets (see Table 3):

Table 3: HSDS datasets used in this study

| *Government agency* | *Dataset and description* |
|---|---|
| NSW Department of Customer Service | **NSW Registry of Births, Deaths and Marriages (RBDM)**: This dataset contains births, deaths and marriages registered in NSW during the period of study, used to establish cohort eligibility and demographic baselines. |
| NSW Department of Communities and Justice (DCJ) | **DCJ cohort demographics**: This dataset contains the demographic information for children who were involved in a child concern report or an OOHC placement in NSW. |
| | **DCJ child protection data**: This dataset contains child protection reports received from 1987/88 to 2019/20 inclusive in NSW including Risk of Significant Harm (ROSH) assessments and helpline-identified issues. |
| | **DCJ Out-of-Home Care (OOHC) data**: Two datasets were appended (OOHC data to 2016/17 and OOHC data to 2019/20) to create a complete dataset containing placements for children to 30 June 2020 in NSW. |
| | **DCJ Brighter Futures, Youth Hope and Intensive Family Services/Programs (IFS/IFP) data**: These datasets contain data for children and family members in the Brighter Futures program, the IFS/IFP program, and children referred to the Youth Hope program in NSW respectively. |
| | **DCJ NSW homelessness client year-to-date (YTD) data**: This dataset contains client data recorded by specialist homelessness services who are funded by DCJ in NSW. |
| | **DCJ housing and social housing datasets**: These datasets contain details of persons in social housing, and of social housing applicants in NSW respectively. |
| NSW Bureau of Crime Statistics and Research (BOCSAR) | **BOCSAR adult contacts**: This dataset contains information for persons involved in NSW court finalisations, cautions under the *Young Offenders Act 1997* (NSW) and youth justice conferences from 1994 to present. |
| | **BOCSAR adult finalised charges**: This dataset contains information for persons whose charges were finalised in a NSW criminal court from 1994 to present including details of the charges. |
| NSW Police Force | **Police data**: This dataset contains records of individuals identified by police in relation to alleged offending (person of interest (POI) records) in NSW. |
| | **Police victim data**: This dataset contains police reports of incidents recorded on the NSW Police Force's Computerised Operational Policing System from 1997–2019. Each recorded incident has information about the date |

| | |
|---|---|
| | of the incident, the perpetrator/person of interest, the person of interest's relationship to the victim and the type of incident. |
| *Government agency* | *Dataset and description* |
| Youth Justice NSW (formerly Juvenile Justice NSW) | **Juvenile Justice (JJ) admissions data**: This dataset contains Juvenile Justice admissions data for children admitted to Juvenile Justice from 2000–2018 in NSW. |
| | **Juvenile Justice program referrals data**: This dataset contains information for children referred to programs and services funded by YJNSW including:<br>o JJ referrals, other services<br>o JJ referrals<br>o JJ program referrals |
| Department of Education (DoE) | **DoE suspension data**: This dataset contains the information for student suspensions from schools in NSW. |
| | **DoE disability targeted support data**: This dataset contains information for students who received targeted specialist provisions for disability between 2011–2019 in NSW including either Integrated Funding Support (IFS-DoE) and/or Support Class Enrolment (SCAS). |
| NSW Health | **Health Emergency Department data**: This dataset contains records of presentations to an emergency department in NSW. |
| | **Health Admitted Patient data**: This dataset records inpatient discharges, transfers and deaths from public hospitals, public psychiatric hospitals, multi-purpose services, private hospitals and private day procedure centres in NSW. Approximately 400 facilities contribute to this data collection. |
| | **Health Mental Health Ambulatory data**: This dataset contains information relating to the assessment, treatment, rehabilitation or care of non-admitted patients in NSW and can include mental health day programs, psychiatric outpatients and outreach services, care provided by hospital-based consultation-liaison services to admitted patients in non-psychiatric and hospital emergency. |
| | **Health Ambulance data**: This dataset contains information collected during a patient care episode recorded by paramedics in NSW. |

### 3.5.3. Ethics approval

This research component was approved by the University of Sydney Research Ethics Committee, Protocol number 2022/HE000541. All analyses were conducted using de-identified data within a secure data environment in accordance with ethics approval conditions and data governance requirements.

### 3.5.4. Study population

A retrospective, population-based cohort study was conducted of all children born in NSW between 2001–2006 inclusive ($n$ = 527,294). From this birth cohort, children were identified as justice-involved if they had at least one recorded contact with NSW Police in relation to alleged offending between 2011 and 2019, when aged 10–13 years.

A total of 15,895 children met these criteria and formed the primary cohort for this analysis. The choice to report up to 2019 takes into account completeness of data available within the HSDS up to this timeframe, i.e., the most recent records for some datasets were for 2019–2020 at the time of extraction, cleaning and analysis.

### 3.5.5. Analytic approach

This analysis of the HSDS adopts a descriptive and cumulative risk analytic framework to examine patterns of early police contact and the co-occurrence of risk and protective factors across multiple service systems prior to, and alongside, justice involvement. Analyses focused on:

- The proportion of children with police contact before age 14
- The timing and frequency of police contact
- The justice system response and outcomes for this cohort
- The prevalence of co-occurring adversities (including suspension, victimisation, child protection involvement, health and mental health system contact, housing instability, disability supports and service engagement)[11]

[11] For the purposes of this analysis, each domain of adversity is operationalised using administrative indicators of recorded system contact. School suspension refers to any suspension recorded in the NSW Department of Education suspension dataset. Victimisation refers to incidents in which the child is recorded as a victim in NSW Police Force data drawn from the Computerised Operational Policing System. Child protection involvement is defined by the presence of a child protection report recorded by the NSW Department of Communities and Justice, including Risk of Significant Harm assessments. Health and mental health system contact is indicated by any recorded presentation or admission in NSW Health Emergency Department, Admitted Patient, Mental Health Ambulatory or Ambulance datasets. Housing instability is captured through records in the NSW homelessness client dataset and NSW housing and social housing datasets. Disability support is indicated by receipt of targeted specialist provisions recorded in the NSW Department of Education disability targeted support dataset, including IFS-DoE and/or SCAS. Service engagement refers to recorded

- The accumulation and intersection of these factors across different age windows (before age 14, ages 8–10, ages 10–13, and the year prior to first police contact).

Descriptive statistics were calculated including frequencies, proportions, and distributions for categorical variables, and summary measures for continuous variables where relevant. Co-occurrence was operationalised using binary indicators for each risk domain including: victimisation, school suspension, child protection involvement, health or mental health system contact, and housing instability respectively. Each indicator was coded as 1 (present) or 0 (absent) within the specified timeframes. This binary approach (present/absent) prioritises comparability across systems and avoids imposing assumptions about severity or intensity that cannot be consistently inferred from administrative data. The approach is briefly described below.

##### *3.5.5.1. Assessment of co-occurring risk*

Initial assessment examined pairwise overlaps between domains (such as victimisation and suspension or suspension and child protection). Cross-tabulations were calculated to identify: the proportion of children exposed to both domains; and how overlap patterns differed by justice outcome (police contact as POI only and finalised charge). This stage establishes whether risks tend to cluster rather than occur in isolation.

Consistent with cumulative risk approaches commonly used in developmental and life-course research, a cumulative risk index was constructed by summing binary indicators across domains for each child. This produced a count-based score reflecting the number and breadth of risk domains experienced by each child rather than the severity of any single risk. For example:

- Risk Level 1 included victimisation and suspension, and
- Risk Level 2 included victimisation, suspension, and child protection involvement.

The distribution of children across increasing risk levels was examined descriptively to identify the proportion of the cohort experiencing multiple adversities, and thresholds at which the cohort becomes increasingly concentrated among children experiencing multiple adversities.

Co-occurrence was also examined within specific developmental windows recognising that timing matters for justice involvement. For each time window, cumulative risk counts were recalculated to assess: early clustering of risk (ages 8–10), proximal clustering of risks (year prior to first police contact), and risk accumulation during early adolescence (ages 10–13).

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referral to and/or participation in government-funded family and youth support programs including Brighter Futures, Intensive Family Services/Programs, and Youth Hope as captured in NSW Department of Communities and Justice program datasets. These measures reflect formal system contact as recorded by government agencies and should be interpreted as proxies for adversity rather than comprehensive indicators of children's lived experience.

Finally, cumulative risk profiles were stratified by justice outcome (police contact and finalised charge) to assess whether greater co-occurrence is associated with deeper system involvement.

Results are presented using frequency tables and bar charts to demonstrate the number of children at each cumulative risk level, comparative figures across age windows and justice outcomes, and narrative interpretation focused on patterns of concentration, not prediction.

There are limitations inherent to this approach. First, co-occurrence reflects recorded system contact, not underlying need or lived experience. Second, binary indicators do not capture severity, chronicity or sequencing within domains. Third, this approach cannot distinguish whether risks are causally linked, mutually reinforcing or independently driven by structural disadvantage. Fourth, absence of a recorded indicator should not be interpreted as absence of the underlying issue. Findings are descriptive and structural, highlighting patterns of overlap that are relevant for policy and service integration, rather than individual-level diagnosis and analysis.

Analyses were conducted using Stata for Windows, with results presented at the population and sub-cohort levels to illustrate gradients of cumulative risk and service system involvement.

#### 3.5.6. Limitations

Several limitations should be acknowledged, First, the HSDS captures administrative records of system contact which reflect reported or recorded events rather than the true underlying presence of risk factors such as mental health problems, disability, or housing instability. Administrative data are generated for operational and service delivery purposes, not for research, and therefore rely on proxy indicators of need. As a result, recorded service contact should be interpreted as an imperfect marker of underlying vulnerability rather than a comprehensive measure of children's lived experience. Many experiences relevant to children's development and justice involvement may remain undocumented, particularly those managed informally, within families, communities, or non-government service systems.

Second, administrative data are subject to systematic underestimation of certain conditions highly relevant to this population. For example, Foetal Alcohol Spectrum Disorder is widely recognised as substantially underdiagnosed and inconsistently recorded within health and disability systems, particularly among justice-involved children (Bower et al., 2018; McLachlan et al., 2020; Passmore et al., 2016). Similarly, cognitive impairment, trauma-related neurodevelopmental difficulties, and learning disorders are often unidentified or recorded only when they reach service thresholds. The absence of a recorded diagnosis or service contact should therefore not be interpreted as absence of need. This limitation is especially salient for a cohort characterised by complex and intersecting disadvantage, where unmet need is likely to be substantial.

Relatedly, the scope of the HSDS necessarily reflects the boundaries of participating government agencies. Important sources of support and intervention for justice-involved children sit outside the datasets available for linkage. Community-based and non-government programs such as Youth on Track, Police Citizens Youth Clubs, Youth Action Meetings, Aboriginal Community Controlled Organisations, and other locally delivered diversionary or early intervention services are not systematically captured. Consequently, this analysis is likely to understate the true level of service engagement among this cohort and cannot account for protective factors or informal supports that may mitigate risk but fall outside administrative visibility.

Fourth, because datasets are released post-linkage, it is not possible to independently assess the quality or completeness of the linkage process, nor to determine whether an individual child's service use history is under- or over-represented due to linkage error. While CheReL employs rigorous linkage methods, some degree of misclassification or inaccuracy is possible in large-scale administrative data.

Fifth, geographic analyses are necessarily constrained to broad regional levels. Although finer spatial resolution (such as Statistical Area Level 2 or postcode) could provide more granular insights into place-based disadvantage, reporting at these levels poses an unacceptable risk of re-identification within this small and highly distinctive cohort of children with early police contact. To preserve confidentiality and meet data governance requirements, analyses are therefore restricted to region-level geography. This limits the capacity to examine neighbourhood-level variation and local service ecologies in detail. This constraint is particularly significant in the NSW policy context where there has been long-standing recognition that youth offending and vulnerability are place-based phenomena (Brantingham & Brantingham, 1999; Butcher et al., 2019; Homel, Branch & Freiberg, 2023; Weisburd et al., 1992). Patterns of youth crime, service access, community attitudes, and institutional response vary substantially across and between metropolitan, regional, and remote communities, shaped by local socioeconomic conditions, population composition, housing markets, policing practices, and service infrastructure (Bursik, 1986; Oberwittler, 2004; Swartz, 2000). As a result, repeated inquiries and reform agendas in NSW have emphasised the importance of place-based and locally tailored service responses, cautioning against uniform, state-wide program models that assume homogeneity across communities (Law Society of NSW, 2024, p. 3; Legislative Assembly Committee on Law and Safety, 2025).

However, the need to aggregate geography to broad regional units means this study cannot examine the fine-grained spatial dynamics through which disadvantage, service environments, and justice system contact interact at the community level. It is therefore not possible to assess how localised concentrations of poverty, housing instability, school exclusion, policing intensity or service scarcity shape early police contact within specific communities. Nor can this analysis capture how the same formal program may operate differently across local contexts depending on community trust in institutions, availability of complementary service, or informal support networks. In this sense, the geographic limitations of administrative data analysis mirror the very

policy challenge that has been repeatedly identified in NSW; that is, the tension between centrally administered service systems and the highly localised manifestations of youth crime and disadvantage (Legislative Assembly Committee on Law and Safety, 2025). Findings presented here should be interpreted as identifying broad regional patterns of cumulative system contact. They underscore the need for this population-level evidence to be complemented by place-based research capable of engaging with local service systems, communities, and lived experience to inform effective, context-responsive intervention strategies.

Sixth, while Indigenous status is recorded in the HSDS, this demographic variable is not disaggregated or compared in this analysis. This decision reflects a combination of ethical, methodological, and analytic considerations. First, the decision not to include Indigeneity as an analytic variable is in accordance with the Warawarni-gu Guma Statement, which cautions against deficit-based comparisons between Aboriginal and non-Indigenous populations (Ngarluma Aboriginal Corporation, 2018). This is particularly pertinent to this research given its focus on cumulative system contact and co-occurring adversity which risks reinforcing deficit-based interpretations without capacity to adequately model the structural, historical, and policy drivers underpinning these patterns. While this limits the ability to quantify Indigenous over-representation directly, it reflects an ethical commitment to respectful and non-extractive use of administrative data. Additionally, the analytic aim of this research component is to document the concentration and sequencing of system contacts among children who come to the attention of police before age 14, not to explain differential risk between population groups. Finally, in the absence of Aboriginal governance arrangements specific to this research, the decision to not report on Indigenous status reflects caution about secondary use of administrative data in ways that may reproduce harm without clear benefit or accountability to Aboriginal communities. Meaningful analysis of Indigenous status would require analytic frameworks capable of accounting for colonisation, systemic racism and intergenerational trauma—all of which are beyond the scope of this thesis and the available data.

Seventh, regression modelling was not employed as the primary analytic strategy because the aim of this analysis was descriptive and explanatory rather than predictive or causal. While regression techniques are well suited to estimating independent effects of individual predictors on a defined outcome, they are less appropriate for capturing the intersecting nature of disadvantage that characterises justice-involved children. In this context, regression models would obscure the lived reality of cumulative adversity by statistically siloing co-occurring risks that are, in practice, deeply entangled. Latent class analysis was also considered but ultimately not adopted. While it can be useful for identifying unobserved subgroups based on shared patterns of exposure, there were a number of limitations that precluded its use in this analysis. First, the size of the cohort and prevalence of near-universal exposure to particular risk domains increase risk that latent classes would be driven by marginal differences rather than meaningful distinctions. Second, latent class solutions can obscure gradients of severity by collapsing children into mutually exclusive categories where risk exposure exists along a continuum which can be problematic in the context of justice-involved children's experience of escalating accumulation of risk. Third, latent class solutions produce model-dependent classifications that can be sensitive to analytic

decisions such as the number of classes retained which in turn reduces transparency and reproducibility. By contrast, the cumulative risk approach adopted offers clearly defined, policy-relevant groupings that can be readily interpreted by system stakeholders.

Finally, administrative datasets are shaped by institutional practices and thresholds meaning that observed patterns reflect not only children's behaviours and needs but also system responses, surveillance practices, and policy settings. As such, findings should be interpreted as illustrating interactions between children and government systems, rather than as neutral indicators of risk.

Together, these methods provide a multi-layered and internally corroborated account of the presumption in practice. Having set out the mixed-methods design and analytic approach underpinning this study, the thesis now turns to empirical findings. The chapters that follow are structured to move from population-level evidence about the children to whom the presumption applies, to the institutional practices through which *doli incapax* is enacted in everyday justice processes.

Chapters 4 and 5 map the pathways that bring children into justice processes and situate those trajectories within broader patterns of cumulative disadvantage across welfare, education, health, housing, and disability systems. Together, they establish the structural conditions under which the presumption is later engaged. Chapters 6 and 7 shift focus to institutional practice, analysing how *doli incapax* is interpreted, negotiated and applied in court and examining the governance effects that follow when criminal responsibility remains uncertain.

# Chapter 4: Early justice system contact and escalation among *doli*-aged children

This chapter presents descriptive, population-level findings drawn from the HSDS to map *doli*-aged children's early contact with the justice system. Focusing on children under the age of 14—the population to whom the presumption applies—it traces the progression from initial police contact through legal proceedings, court appearances, and Youth Justice NSW (YJNSW) supervision in order to identify when, how, and for whom system escalation occurs.

Situating this analysis within the operation of *doli incapax* is critical. The presumption is often understood as a doctrinal safeguard governing criminal responsibility, yet it is applied only after children have already entered institutional pathways shaped by policing practices, diversionary decisions, evidentiary thresholds, and service availability. Mapping these pathways therefore provides essential context for understanding the practical conditions under which the presumption is later invoked, contested, and operationalised.

Three questions guide the analysis. First, what is the scale and geographic distribution of early police contact among *doli*-aged children? Second, how do children move from police contact into formal legal processes including diversion, court, and YJNSW supervision? Third, which children experience deeper entrenchment into the justice system, and at what stages does escalation become most visible?

Cumulatively, these findings establish the institutional architecture within which criminal responsibility is assessed for children presumed incapable of crime. They identify the points at which discretion is exercised, diversion is attempted or bypassed, and formal authority intensifies. This chapter focuses on justice-system pathways. Chapter 5 extends this analysis by examining the broader ecology of cumulative disadvantage surrounding these children, drawing on linked administrative data across child protection, education, health, housing and disability systems. Together, the two chapters situate the presumption not as an abstract doctrinal rule, but as a legal safeguard applied within dense landscapes of institutional contact.

## 4.1. A note on interpretation

The analysis is intentionally descriptive. Its purpose is not to establish causal relationships but to document the scale, timing and distribution of system response to alleged offending among children under the age of 14. By examining these pathways sequentially, the chapter reveals that while most children experience limited or episodic contact with police, a smaller cohort progresses into increasingly formal and intrusive forms of justice intervention. This

raises important questions about how legal protections function for children already embedded within system processes.

Percentages reported in this and the following chapter may not sum to 100%. This reflects the fact that children can experience multiple forms of contact or outcomes within the observation period, meaning categories are not mutually exclusive. Percentages should therefore be interpreted as indicating the proportion of children exposed to each outcome rather than as components of a single distribution.

### 4.2. What is the scale and geographic distribution of early police contact among *doli*-aged children?

This section establishes the scale and frequency of early police contact among children under 14 in NSW, providing a baseline for understanding which children progress to formal justice responses and those who do not. The data reveal that out of 527,294 children born in NSW between 2001 and 2006 (HealthStats, n.d.),[12] 3% ($n$ = 17,058) came to the attention of NSW Police for alleged offending at least once before age 14.[13] Crucially, the majority of these children ($n$ = 14,482, 85%) experienced only 1 to 4 interactions with police, indicating that early police contact is often limited or episodic rather than persistent, consistent with well-established findings that a small cohort of young offenders are accountable for a disproportionate amount of youth crime (Freeman & Donnelly, 2024; Skardhamar, 2009). A smaller subset ($n$ = 2,576, 15%) accounted for multiple interactions (5+), suggesting a concentrated group of children with more intensive patterns of police contact (see Figure 1).

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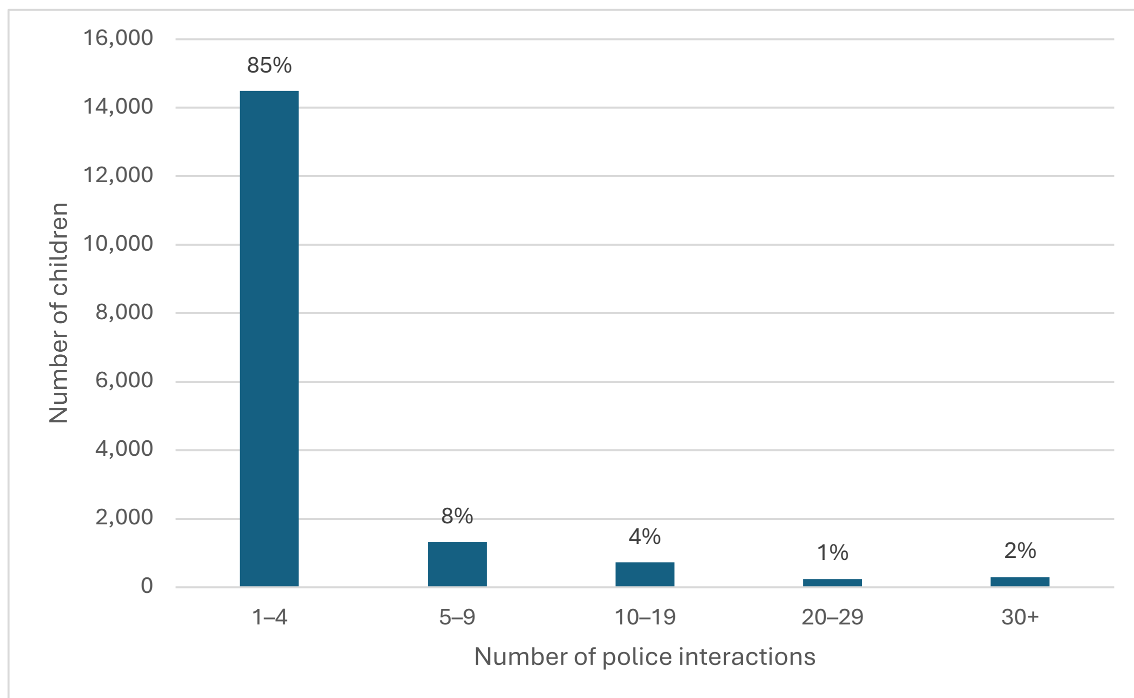
[12] Note, the number of births documented within this timeframe on HealthStats NSW does not align with the consolidated date of birth (DOB) data from RBDM, DCJ, YJNSW and BOCSAR datasets in the HSDS ($n$ = 607,909), indicating a potential duplication of DOB records across these datasets. See Appendix, page 267 for a detailed summary of DOB consolidation processes used in this study.

[13] This excludes contact with police for adjacent purpose policing such as accidents, public or entertainment events, administrative processes and routine checks (see Appendix, page 267 for a detailed summary).

Figure 1: Number of police contacts among children with at least one contact before age 14



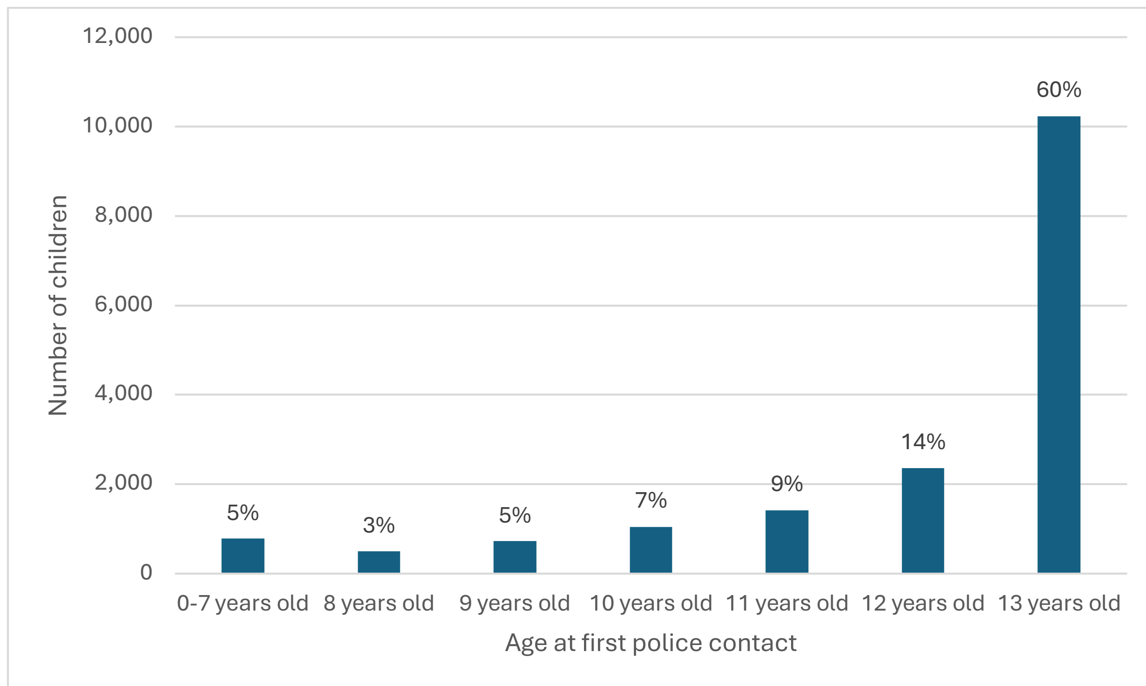

### 4.2.1. Age, gender and cultural background patterns

Most first interactions occurred between ages 10–13 ($n$ = 15,057, 88%), with age 13 standing out as the most common point of initial contact ($n$ = 10,233, 60%) (see Figure 2). This corresponds with existing national data showing that 13-year-olds comprise the majority of 10–13-year-olds proceeded against by police in 2021–22 (57%; Australian Bureau of Statistics ('ABS'), 2023).

Males are consistently overrepresented ($n$ = 11,477, 67%),[14] reflecting broader gendered patterns in youth offending (ABS, 2023–24b) and aligning with masculinities research that highlights crime as a means of "doing masculinity" in early adolescence (Messerschmidt, 1993). Across all major offence categories, males outnumber females, comprising around two-thirds to three-quarters of those alleged to have committed theft, assault, property damage, or regulatory offences. This gender imbalance is consistent with broader criminological evidence that boys are more likely to engage in physical risk-taking, violence, and destructive behaviour, particularly in adolescence (see Messerschmidt, 1993; Messerschmidt & Tomsen, 2017).

[14] Gender data were available for 17,050 children (99.9% of the cohort).

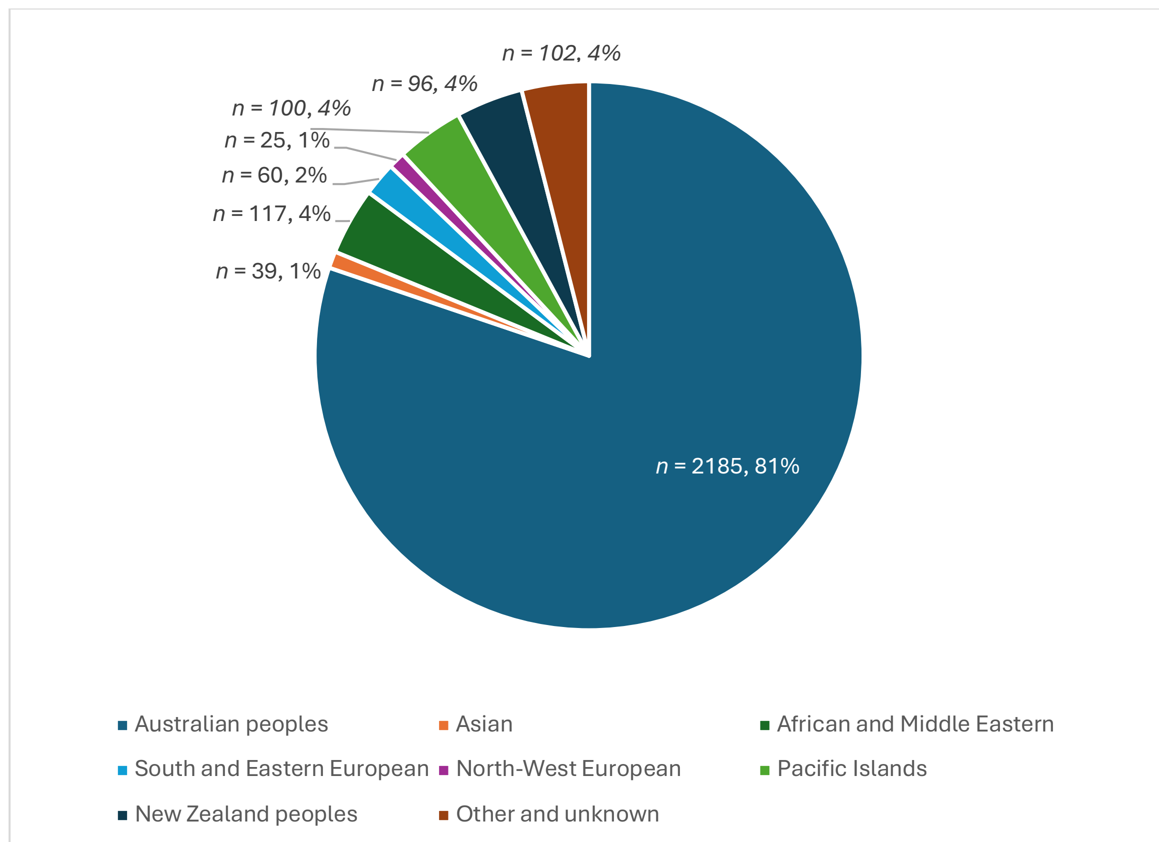
Figure 2: Age at first police contact before age 14




These trends in age and gender persist when we examine the cohort of children with at least one police contact between ages 10 to 13 inclusive (*n* = 15,895). That is, the majority are male (67%) and just over half were 13 years-old at their first police contact (*n* = 8,245, 52%).

Cultural background data were inconsistently recorded across datasets, limiting analysis to a subset of cases. Consequently, data on cultural background were only available for 17% (*n* = 2,724) of this cohort (see Figure 3). A majority of children within this narrower cohort identified as Australian including Aboriginal and/or Torres Strait Islander (*n* = 2,185, 80%).

Figure 3: Cultural background of children with a police contact between 10–13 and for whom cultural background data were available ($n$ = 2,724)




### 4.2.2. Early onset and types of offending

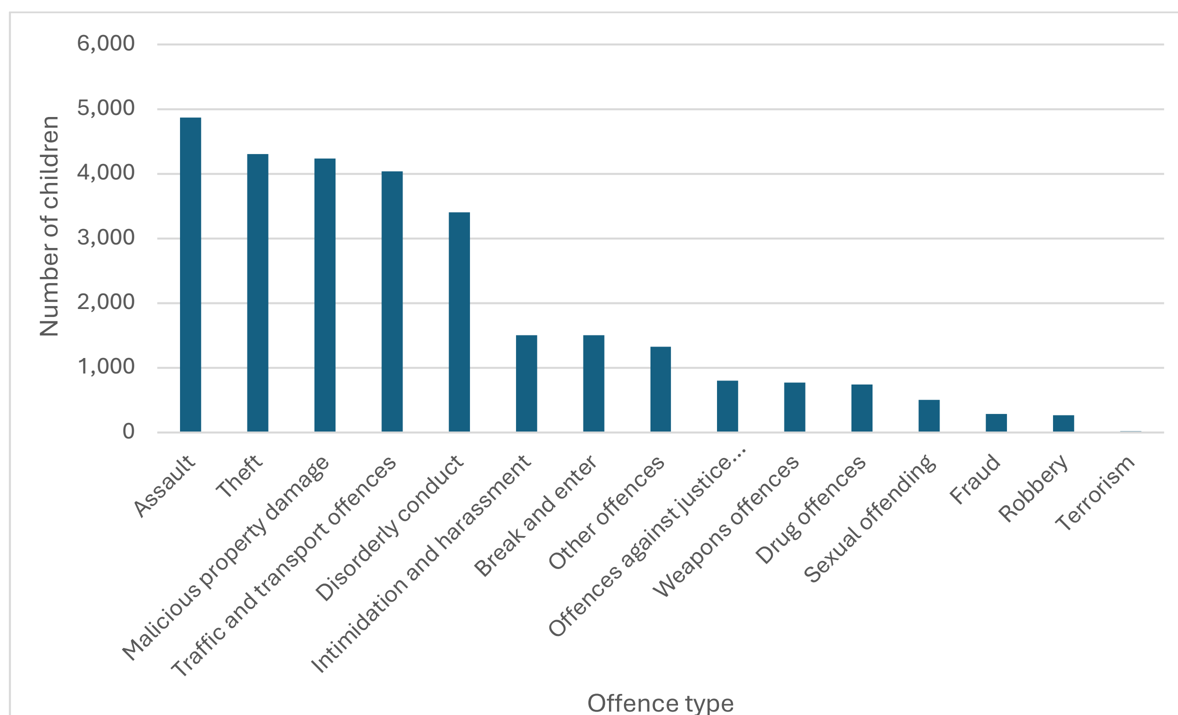
A smaller group—10% ($n$ = 1,751) of those with police contact before age 14 years—came to police attention as early as ages 8–10. For this group, common reasons for contact were malicious damage to property/arson ($n$ = 696, 40%), assault and other offences against the person ($n$ = 443, 25%), and theft ($n$ = 430, 25%). These patterns are notable because early onset offending, particularly violent or destructive behaviour, has been associated in prior research with more persistent offending trajectories (see Chen et al., 2005).

### 4.2.3. Concentration of offence categories

Most children with police contact between ages 10–13 ($n$ = 15,895) were linked to a small number of offence categories. Assaults and other offences against the person ($n$ = 4,873, 31%), theft ($n$ = 4,309, 27%), and malicious damage or arson ($n$ = 4,235, 27%) were the most common reasons for contact, with traffic and transport regulatory offences also highly represented ($n$ = 4,034, 25%, see Figure 4). These patterns suggest that youth offending at this age is largely clustered around interpersonal violence, acquisitive crime, and property

destruction—offences often associated with peer influence, situational conflict, and risk-taking behaviours typical of early adolescence.

Figure 4: Number of children with a police contact between 10–13 by offence category




The high rate of traffic and transport regulatory offences is particularly notable, with just over 80% of those charged aged 13 at first police contact. This pattern is consistent with the emergence of driving-related offences at the threshold of adolescence, potentially reflecting access to cars, rural and regional policing contexts, and peer-driven "performance crime" dynamics (such as joyriding and posting videos to social media).

#### 4.2.4. Geographic distribution

Nearly all children with a police contact between ages 10–13 were linked to a regional classification using Australian Bureau of Statistics correspondence data (*n* = 15,887, 99%).[15] The majority of this cohort reside in major cities (*n* = 9,269, 58%) or inner regional areas (*n* = 4,542, 29%), with much smaller numbers in outer regional (*n* = 1,715, 11%), remote (*n* = 294, 2%), and very remote (*n* = 67, 0.4%) areas. This distribution reflects the population concentration of NSW, where most children live in urban centres. However, when adjusted for the proportion of children in each region, a more complex and unequal picture emerges.

[15] See Appendix, page 268 for a summary of geographic correspondence processes.

##### *4.2.4.1. Proportional over-representation in remote areas*

While absolute numbers are highest in cities, children in very remote areas are significantly overrepresented among the cohort, with 6% of all 0–14-year-olds and 22% of all 10–14-year-olds in those regions having police contact between 10–13. This is in stark contrast to major cities, where only 1% of 0–14s and 3% of 10–14s had contact. Inner and outer regional areas fall in between but still show elevated proportions compared to urban centres. Figures 5 and 6 present the same cohort of children with police contact between ages 10–13 but differ in their population denominators with Figure 5 using the general child population aged 0–14 and Figure 6 using only children aged 10–14. These findings are consistent with prior research suggesting that rurality and remoteness may intensify disadvantage and increase the likelihood of criminal justice involvement (Carrington et al., 2013; Carrington & Scott, 2008).

Figure 5: Number of children with a police contact between 10–13 by region and proportion of the general child population aged 0–14 by region

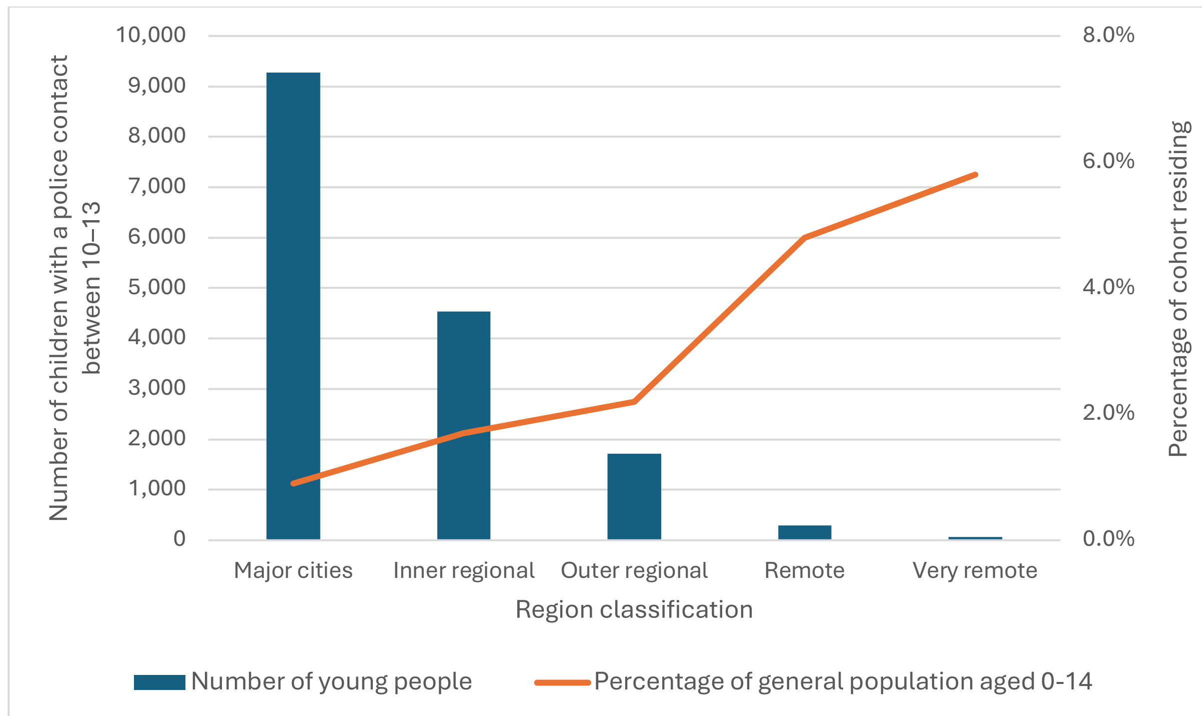
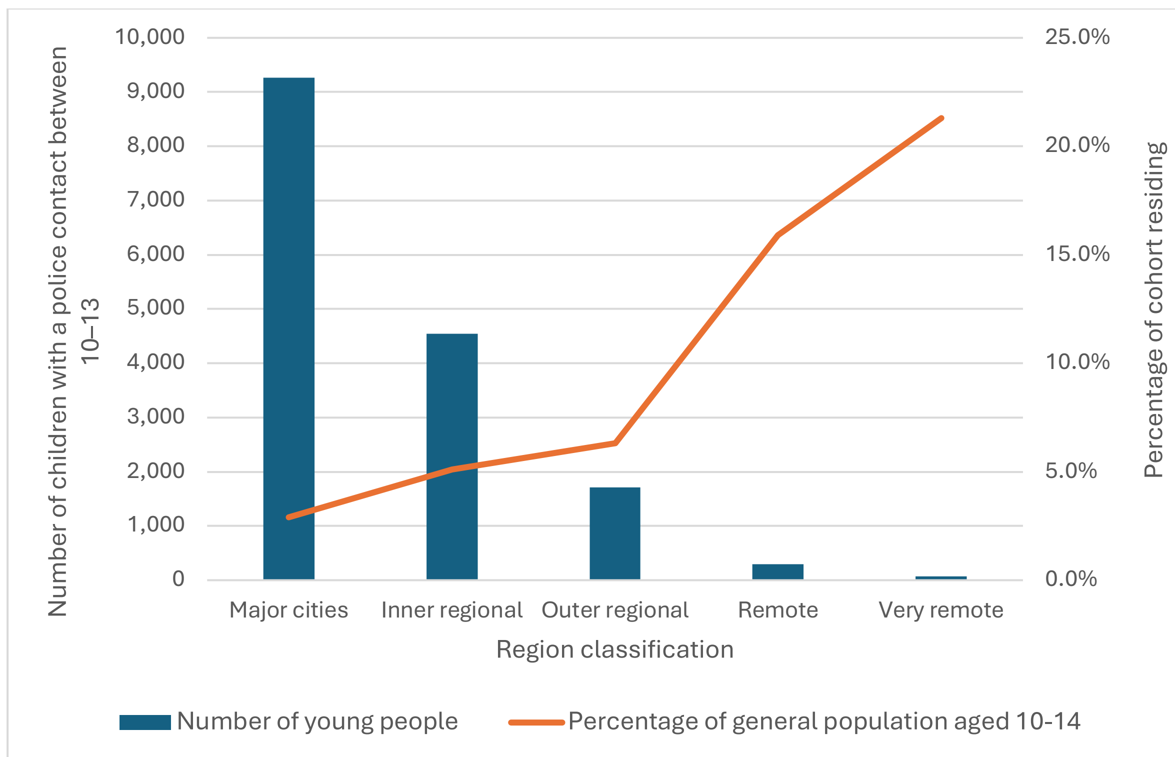


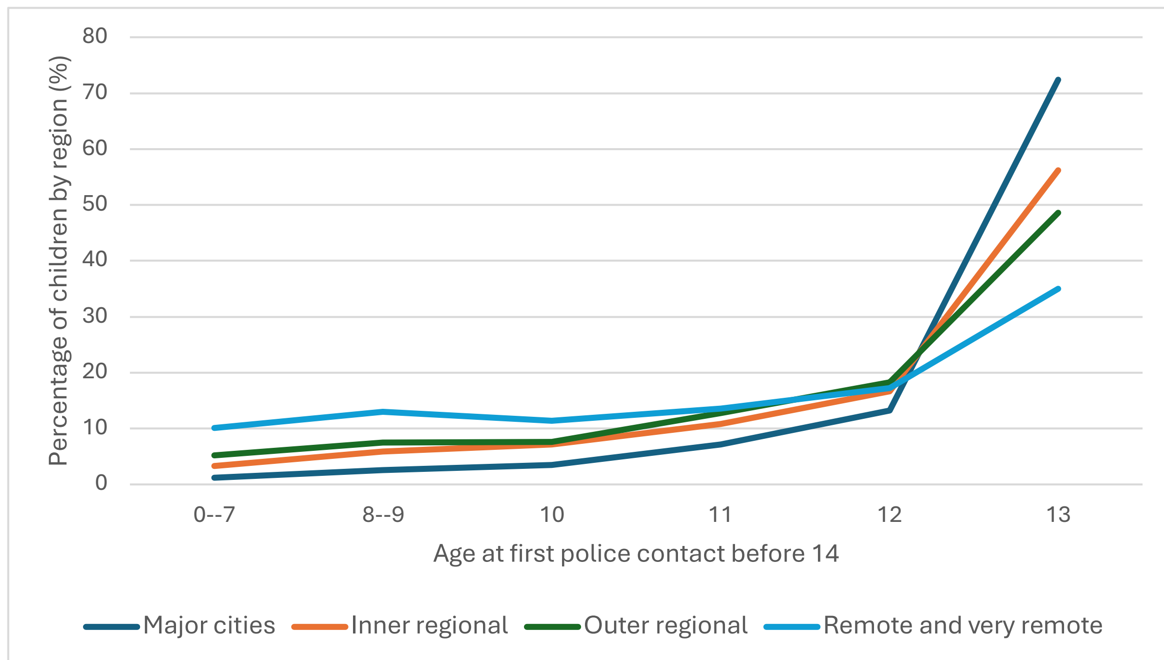
Figure 6: Number of children with a police contact between 10–13 by region and proportion of the child population aged 10–14 by region




### *4.2.4.2. Age at first contact by region classification*

Across all regions, age 13 is the peak point of first contact, with a sharp incline from age 12 to 13 in major cities and inner regional areas. In outer regional and remote locations, however, this decline is less pronounced, suggesting that earlier onset contact is more common in less urban areas (see Figure 7). This may reflect differences in policing practices (closer surveillance in smaller communities), as well as limited access to youth services and diversionary programs that might otherwise prevent escalation. However, the data do not permit causal inference.

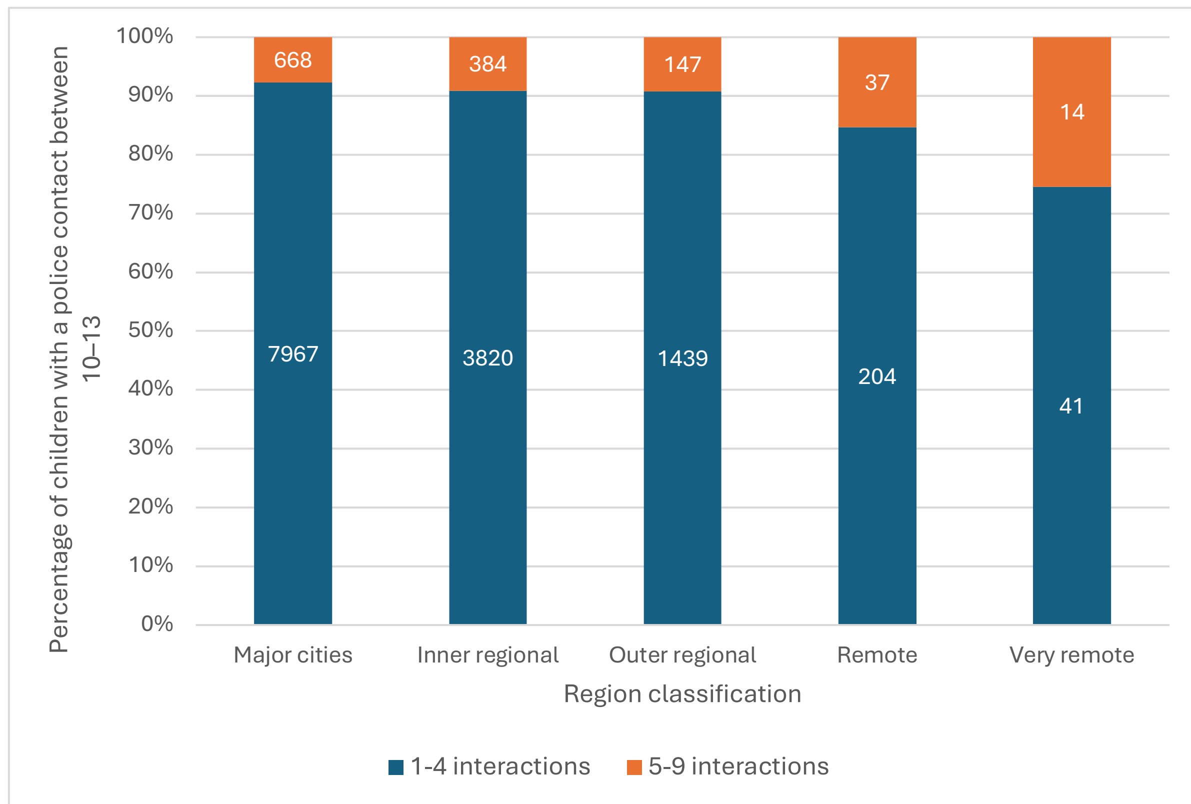
Figure 7: Age at first police contact before age 14 by region




### *4.2.4.3. Intensity of police contact by region classification*

The distribution of police interactions shows that most children across all regions had only 1–4 interactions between ages 10–13. However, in very remote areas, 21% of the cohort had 5–9 interactions ($n$ = 14), a higher proportion than elsewhere (see Figure 8). This points to a more intensive cycle of repeated police involvement for a small subset of children in very remote communities.

Figure 8: Number of police contacts (limited to 10) between 10–13 by region




### *4.2.4.4. Structural and cultural explanations*

These geographic disparities likely reflect a convergence of factors. First, these data are indicative of a concentration of disadvantage where remote and very remote areas in NSW typically have higher levels of poverty, unemployment, and limited services. Second, smaller communities may attract more visible police surveillance and fewer opportunities for informal resolution. Third, a lack of programs, recreational opportunities and youth support services in regional and remote areas may increase the likelihood of behaviours escalating to police contact. Finally, Aboriginal and Torres Strait Islander children are disproportionately located in regional and remote areas and face systemic over-representation in the youth justice system across NSW.

Ultimately, while most children with police contact live in NSW's major cities, children in remote and very remote areas are disproportionately affected. They experience earlier and more frequent interactions with police, reflecting the intersection of geography and structural inequality (see Allard et al., 2017).

### 4.3. How do children move from police contact into formal legal processes including diversion and court?

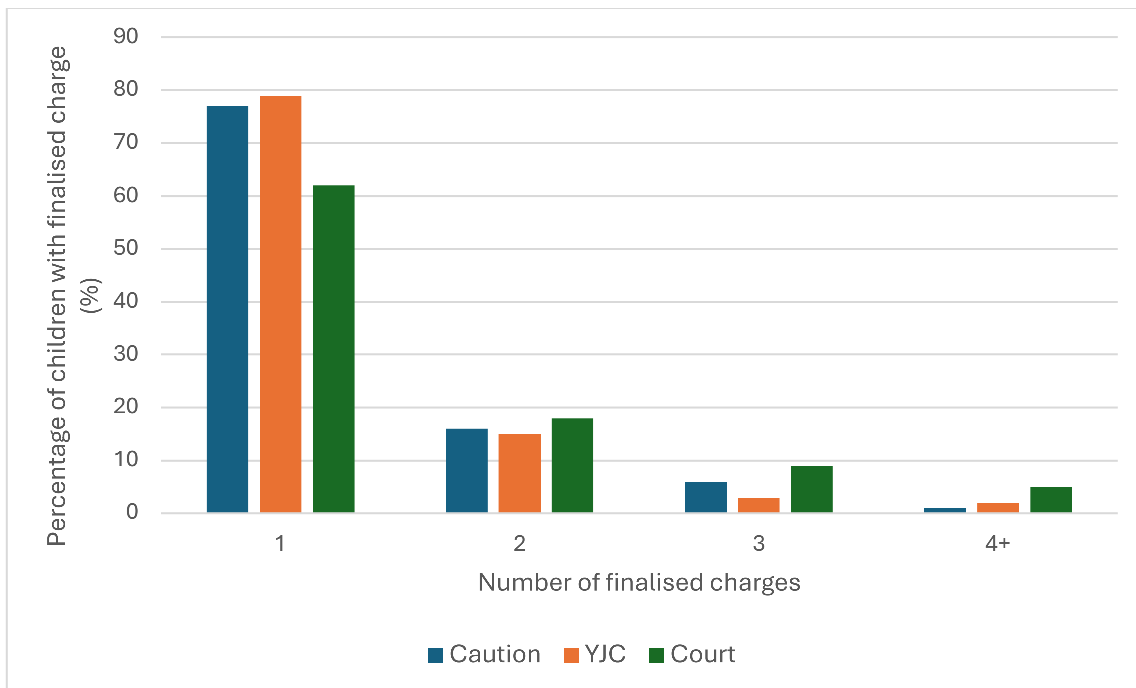
Of the total cohort of children who came to the attention of police for alleged offending aged 10–13, around 30% (*n* = 4,804) had legal proceedings initiated against them (hereafter referred to as receiving a finalised charge) before turning 14.[16] The majority of this cohort received a police caution (*n* = 4,227, 88%), fewer appeared in court (*n* = 1,130, 24%) or were referred to a Youth Justice Conference (YJC) (*n* = 481, 10%). This distribution suggests that diversion remained the primary approach to addressing offending among children in this cohort.

#### 4.3.1. Frequency of charges

Most children with a finalised charge had only one charge finalised prior to age 14 (76% of children with a caution, 79% with a YJC, and 62% with a court appearance respectively). The sharp drop-off between one and two charges, and the relatively small proportion with four or more charges demonstrates that, for most children, early offending episodes do not escalate into repeated formal justice outcomes within this age range (see Figure 9). This pattern is consistent with developmental research suggesting that much young offending is episodic rather than persistent, and aligns in part with Moffitt's (1993) account of "adolescence-limited" offending, while recognising that this framework was developed primarily in relation to older adolescents (see also Piquero & Moffitt, 2010). At the same time, the presence of a smaller group with repeated charges suggests the early formation of more persistent trajectories (Tibbetts & Rivera, 2017).

[16] Legal proceedings initiated by police include court proceedings and diversions (specifically, cautions and Youth Justice Conference referrals). Data on warnings were not available at the time of the analysis.

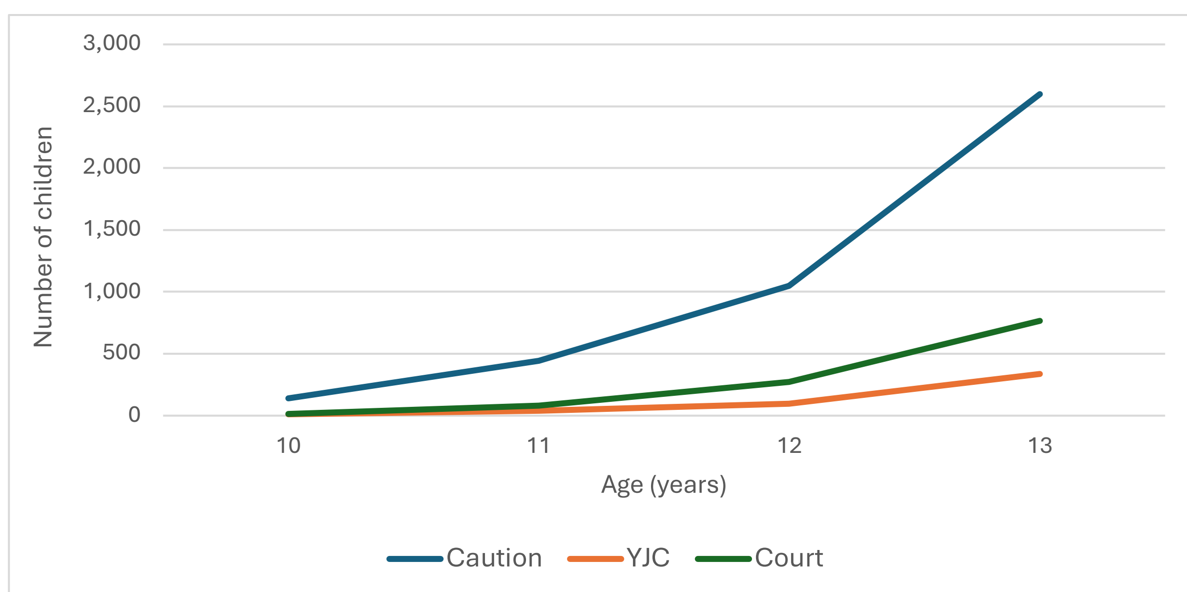
Figure 9: Frequency of finalised charges between 10–13 by charge type




### 4.3.2. Age and gender patterns

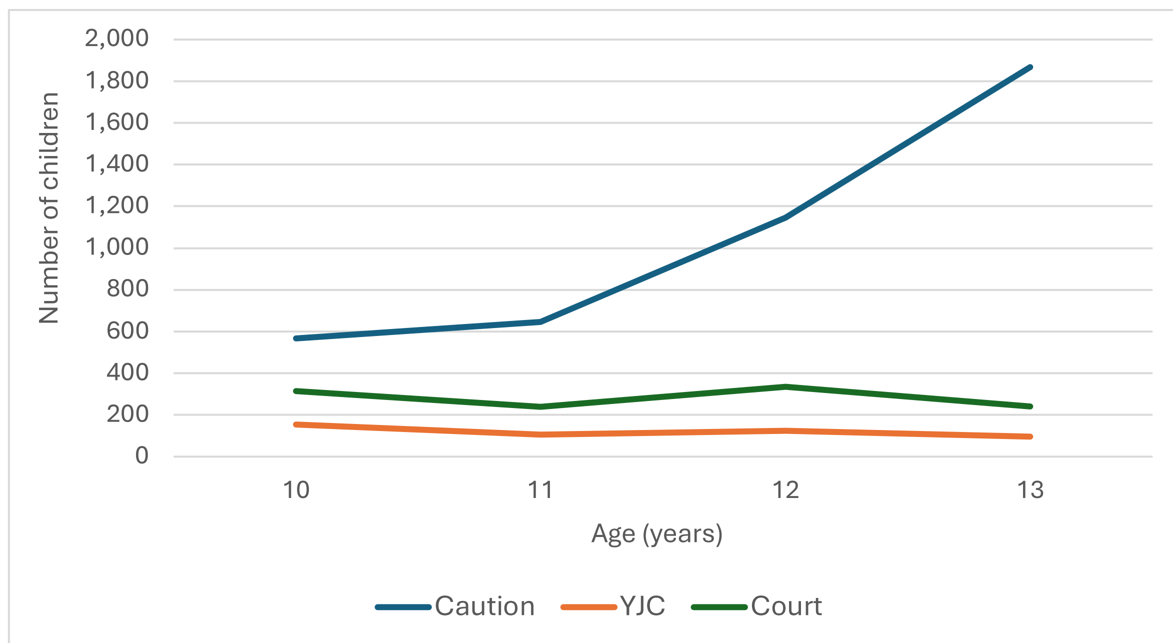
Age is central to these findings. Most children were 13 years old at the time of their first finalised charge (*n* = 3,701, 77%). Consistent with this pattern, the mean age at finalisation across all charges between ages 10–13 was also concentrated at 13 (*n* = 3,329, 69%, see Figure 10).

Figure 10: Age at first finalised charge by charge type



However, differences in age at first police contact between age 10–13 by finalised charge type are revealing (see Figure 11). For example, cautions are more likely linked to a first police contact at age 13 (*n* = 1,868, 44%); court appearances are more often associated with first police contact at ages 10–12 (*n* = 888, 79%), suggesting earlier and more serious pathways; and YJC referrals are over-represented among those first interacting with police at age 10 (*n* = 154, 32%), pointing to a small group of early onset offenders for whom conferencing is used as a developmental and restorative alternative.

Figure 11: Age at first police contact by charge type

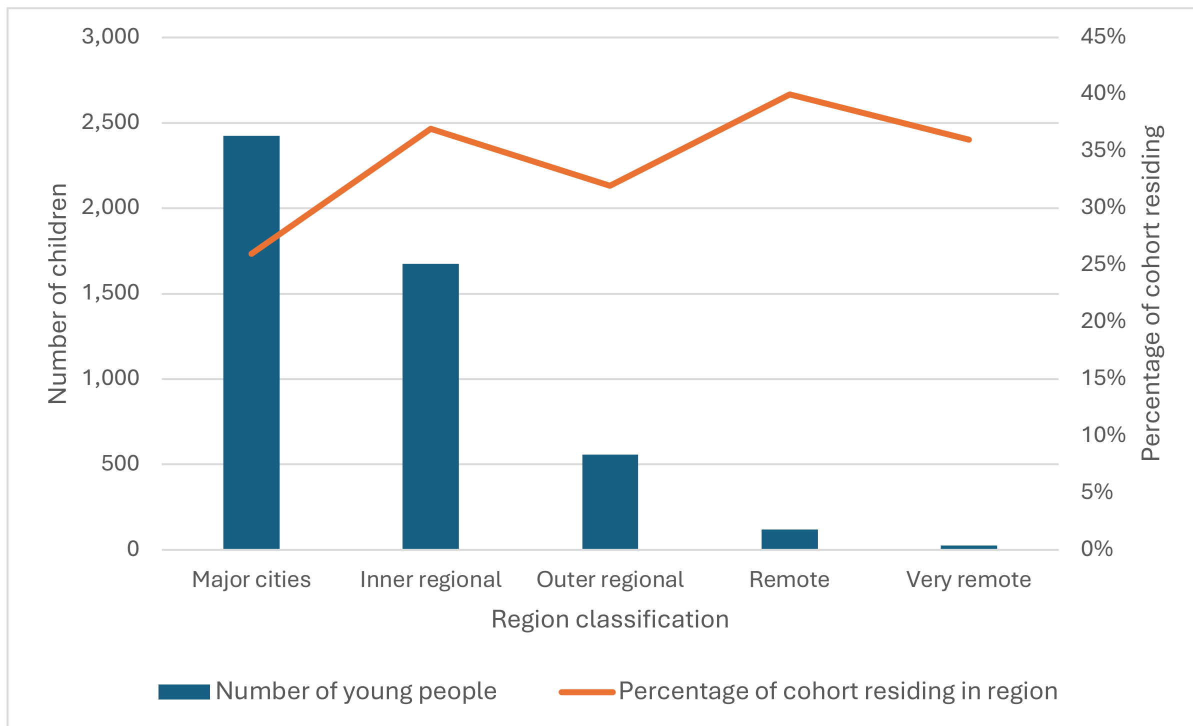



These distinctions indicate that the type of response is patterned not only by offence but also by timing of entry into the system, with earlier contact more likely to lead to more formal outcomes including YJCs and court appearances. Additionally, as with the cohort who came to the attention of police aged 10–13, the majority of children with a finalised charge are male (*n* = 3,279, 68%) and approximately a third are female (*n* = 1,524, 32%).

#### 4.3.3. Regional patterns

Children residing in remote (*n* = 119, 40%) and very remote (*n* = 24, 36%) NSW were proportionally more likely than those in urban centres (*n* = 2,426, 26%) to receive a finalised charge (see Figure 12). This echoes the over-representation of remote youth in overall police contact data.

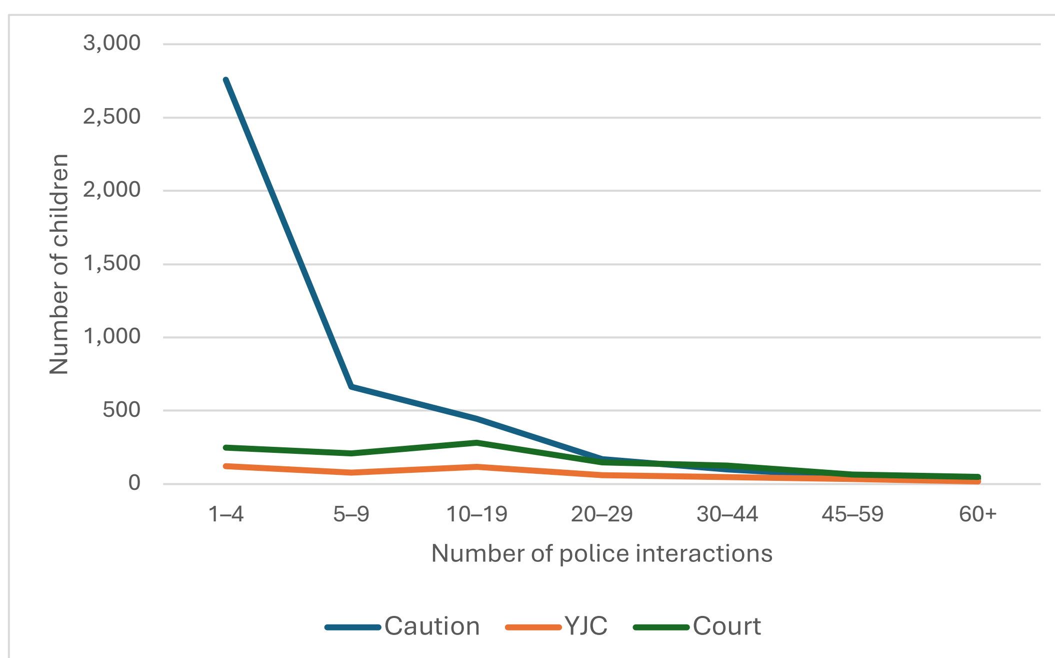
Figure 12: Number of children with a finalised charge by region and percentage of cohort by region




### 4.3.4. Police interactions and charge pathways

Children who received cautions typically had only a handful of police interactions (1–4; *n* = 2,758, 65%). By contrast, those who ended up in court showed a pattern of higher and more sustained contact with police, with a quarter having 10–19 interactions (*n* = 282) and over a third maintaining 20–60 plus (*n* = 391, 35%). Similarly, a quarter of children referred to a YJC had between 10–19 interactions with police (*n* = 117) and 34% had 20 plus interactions (*n* = 162, see Figure 13).

Figure 13: Police interactions by charge type




### 4.3.5. Offence types

Among those with a finalised charge, theft (*n* = 861, 24%), assault (*n* = 737, 20%), and malicious damage to property/arson (*n* = 666, 18%) were the most common offence types recorded. These offences mirror broader adolescent offending patterns: acquisitive and status-seeking crime, situational violence, and property destruction as forms of risk-taking. The presence of violence and theft in particular signals behaviours that are more likely to attract police attention and lead to formal processing.

### 4.3.6. Cumulative and combined outcomes

An analysis of charge combinations shows that some children moved between diversion and formal processing (e.g., caution and court, or YJC and court). For example, 679 children (14%) received a caution and went to court between ages 10–13, and 230 children (5%) were referred to a YJC and went to court. Importantly, such transitions may occur not only across separate matters but also within the same matter where a child does not complete the requirements of diversion and is consequently referred to court. These patterns reflect the design of the diversionary framework under the YOA which does not purport to resolve the underlying social, developmental or welfare-related issues that often shape children's justice contact. Rather than linear progression through a single intervention, some children experience cyclical movement between diversion and court-based processes, highlighting the limits of stand-alone interventions in the absence of coordinated, sustained support. The relatively high proportion of those receiving multiple cautions[17] (*n* = 363, 53%) before

[17] Noting a maximum of three cautions, (*YOA 1997* (NSW), s 31(5)).

eventually going to court indicates that diversion under the YOA is, in many respects, operating as intended by prioritising informal responses and providing repeated opportunities to divert children away from formal prosecution. At the same time, the eventual transition of some of these children to court highlights the limits of diversionary mechanisms where underlying structural, developmental or social risk factors remain unaddressed.

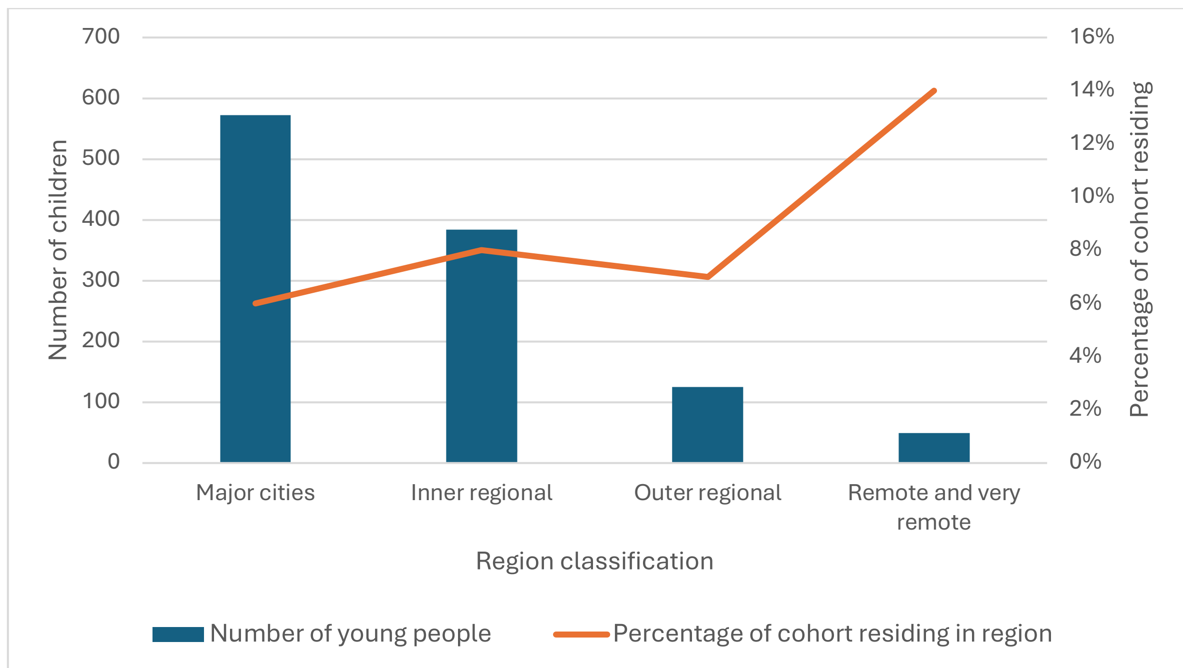
Ultimately, these findings illustrate several important dynamics: first, during the timeframe for this analysis and among this cohort, most children are diverted from the formal justice system and are cautioned. Second, age 13 is the peak for both first contact and finalised charges, highlighting a key transition point for intervention and critical juncture in children's lives. Third, children who first interact with police at ages 10–12 are more likely to appear in court, underscoring the importance of early intervention. Fourth, remote and very remote children are disproportionately likely to receive finalised charges, which likely reflects regional inequity in justice processes and outcomes. Finally, while most children desist after one caution, a smaller subset accumulate multiple charges and court outcomes, consistent with cumulative risk pathways and potential life-course persistence and indicating a small, but significant high-risk group of young offenders. In short, the data reveal that most early adolescent offending is met with diversionary responses and does not escalate. However, a disproportionately disadvantaged group—especially those with very early onset, repeated police contact, and from remote communities—face greater risks of entrenchment in the justice system.

Together, these findings show that escalation into finalised charge (including caution, YJC or court appearance) is patterned by early age of first contact, intensity of police interaction, and regional location. While diversion is the dominant response for most children, those who enter the system earlier and more frequently are more likely to experience court-based intervention.

### 4.4. Which children experience deeper entrenchment into the justice system and appear in court?

Almost a quarter of children with a finalised charge (24%) and 7% of children with a police contact aged 10–13 appeared in court ($n$ = 1,130). Of this cohort, just over two-thirds were male (71%). Geographically, while the largest numbers of court cases were located in major cities and inner regional NSW, the proportional risk of court appearance was highest in remote and very remote areas ($n$ = 49, 14% of all children with a police contact, see Figure 14). Again, this indicates regional inequities where children in remote areas (disproportionately Aboriginal and Torres Strait Islander) are more likely to have matters escalate to court rather than being resolved through diversionary pathways.

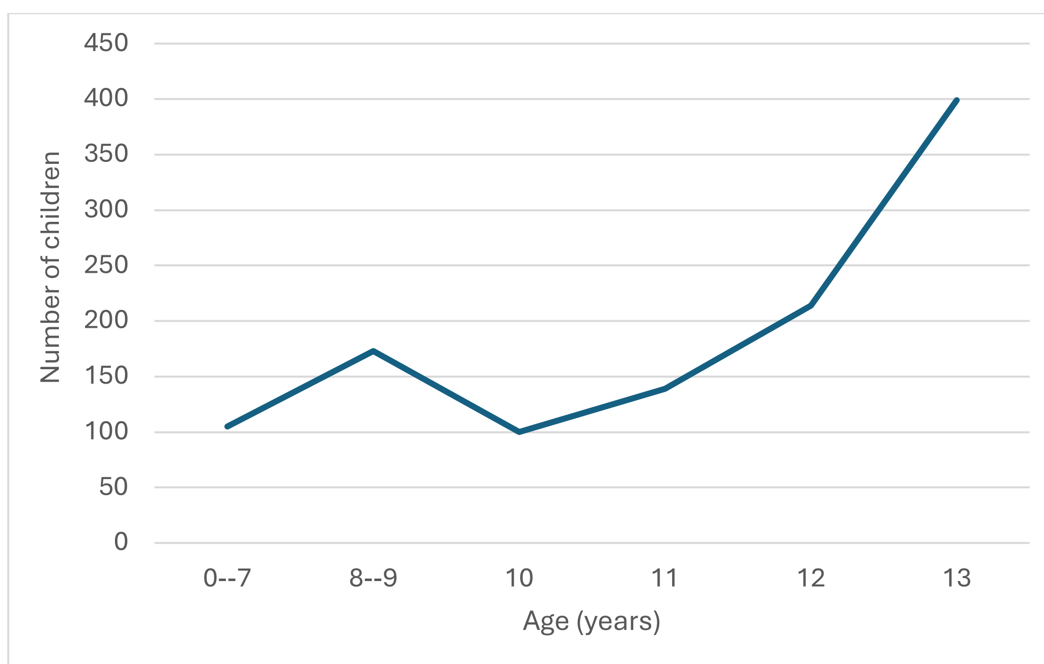
Figure 14: Number of children who went to court by region




### 4.4.1. Age at first police contact and pathways to court

Most children who appeared in court first came to police attention aged 12–13 (*n* = 613, 54%) but a substantive minority had police contact much earlier: 15% between ages 8–9 (*n* = 173, see Figure 15). The fact that this cohort progressed to court suggests missed opportunities for effective diversion or early support. Nearly half waited more than a year between first police contact and court appearance for the same charge (*n* = 550, 49%). This lag likely reflects court procedural delays, but it also risks prolonging children's engagement with the justice system while they await a court hearing.

Figure 15: Age at first police contact among children who went to court between 10–13




### 4.4.2. Intensity of police contact, offence types and patterns

Children who went to court generally had higher levels of police interaction than those diverted. A quarter had between 10–19 contacts by age 14 ($n$ = 282, 25%), and many others had 20 plus contacts ($n$ = 391, 35%). Among children whose matter proceeded to court with a single most common offence type as recorded by police ($n$ = 868, 77%), property-related and interpersonal offences dominated with 23% ($n$ = 203) allegedly committing arson and malicious damage to property, 21% ($n$ = 185) allegedly committing assault and other offences against the person, and 19% ($n$ = 166) allegedly committing theft. These categories mirror earlier patterns in the broader cohort, but their prominence among court matters shows how offences involving direct harm to persons or property are most likely to escalate to formal adjudication.

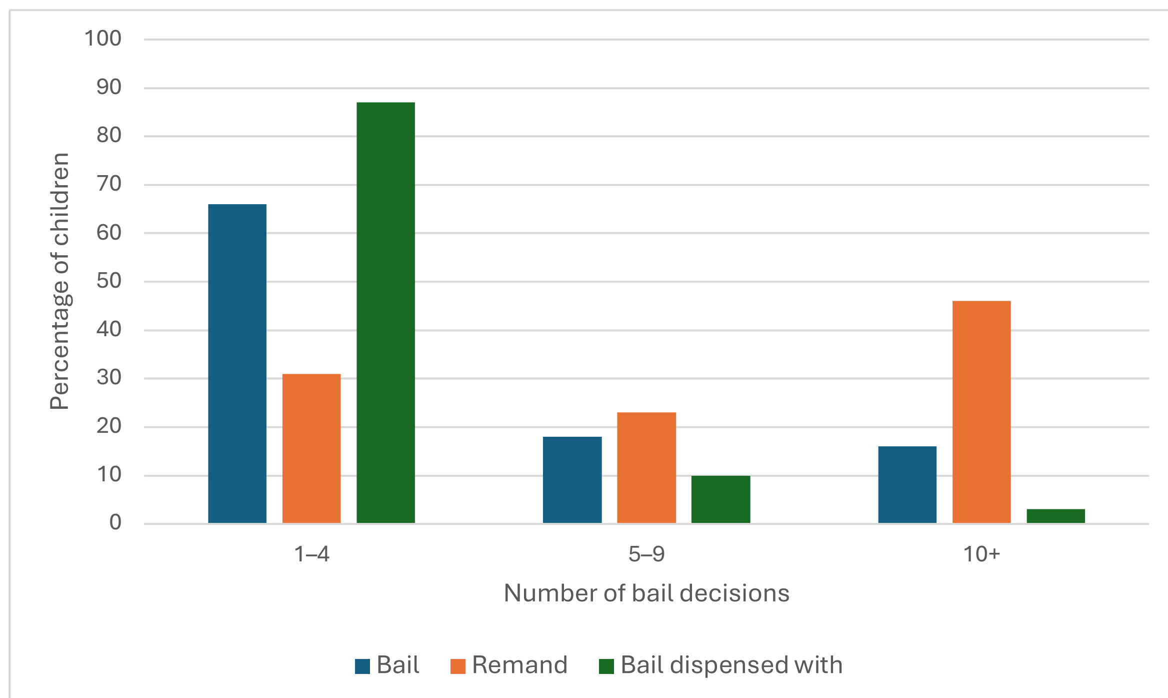
### 4.4.3. Diversionary histories

Almost half of those who went to court had no prior diversion (caution or YJC; $n$ = 530, 47%). This is troubling, as it suggests that for many children, court was their first substantive justice intervention. However, an unknown proportion of this cohort may have been effectively precluded from diversion due to refusal to participate in a police interview, or to admit the alleged offence, both of which are prerequisites for diversion under the YOA. This limitation complicates interpretation of the absence of prior diversion and highlights the role of procedural thresholds and discretionary decision-making in shaping children's pathways. For those who did experience diversion, repeated movement between cautions, YJCs, and court illustrates the limits of single interventions in contexts of cumulative disadvantage.

#### 4.4.4. Bail and remand

Nearly all children were granted bail at least once (*n* = 677, 60%) or had bail dispensed with at least once (*n* = 654, 58%), while 11% (*n* = 128) were placed on remand. Worryingly, a significant subset of children placed on remand (*n* = 59, 46%) experienced ten or more remand episodes between age 10–13 (see Figure 16). Repeated remand is highly disruptive to education, family life, and wellbeing, and at such young ages may compound existing vulnerabilities rather than mitigate them (Bartkowiak-Theron & Colvin, 2022).

Figure 16: Frequency of bail decisions by decision type among children who went to court between 10–13




#### 4.4.5. Pleas, verdicts, and *doli incapax*

Most children who went to court between age 10–13 pled guilty at least once (*n* = 737, 65%), and nearly three-quarters had at least one proven charge (*n* = 815, 72%). However, almost half of the cohort (*n* = 526, 47%) pled not guilty at least once, and over a third (*n* = 444), 39% did not enter a plea.

Children whose matter proceeds to court can either be found guilty, not guilty, have their matter withdrawn or receive a mental health dismissal. For those who pled not guilty, the most common verdict was that the matter was withdrawn (*n* = 192, 37%) followed by a finding of not guilty (*n* = 111, 21%). Broadly, the majority of children who went to court were found guilty at least once (*n* = 815, 72%), a fifth were found not guilty at least once (*n* = 213, 19%), and about 40% had at least one matter withdrawn (*n* = 464, 41%). A minority of this cohort received at least one mental health dismissal (*n* = 111, 10%).

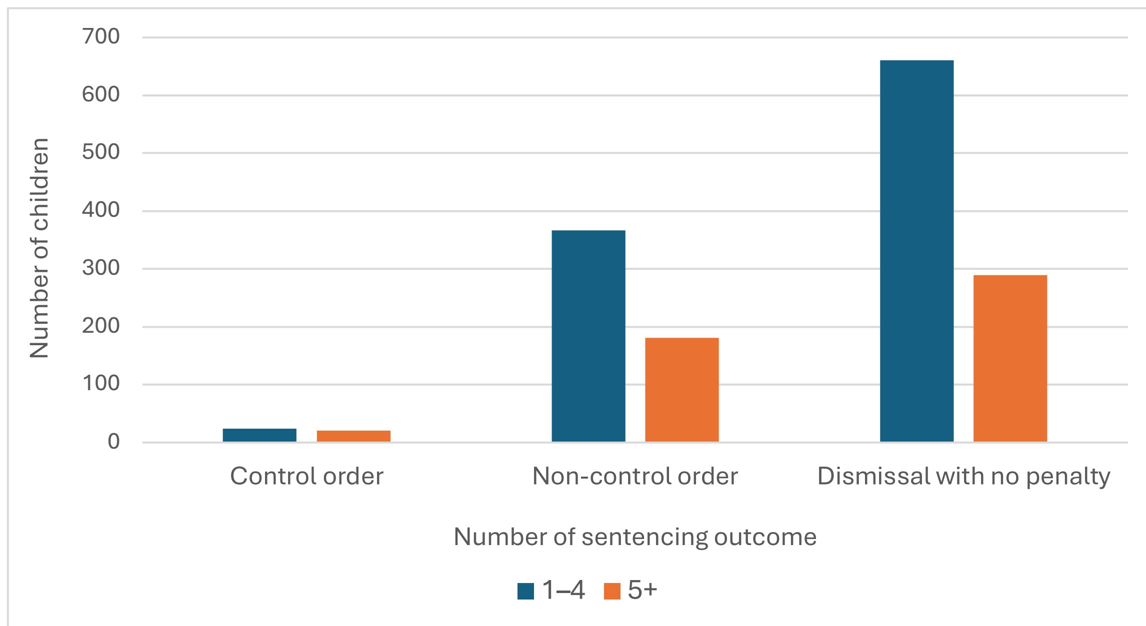
Despite a finding of guilt for 815 children, the majority were ultimately dismissed with no penalty (*n* = 635, 78%) or sentenced to a non-custodial order (*n* = 548, 67%). A minority were sentenced to a control order (*n* = 45, 6%).

The presence of not guilty pleas leading to guilty verdicts (10% of children who entered a plea of not guilty) for *doli*-age children indicates that *doli incapax* was rebutted in these matters. Of this cohort, their offending was concentrated around theft (23%), offences against justice procedures (21%), and traffic and transport regulatory offences (21%). This suggests that particular offence types may have been treated as proxy indicators of criminal capacity, notwithstanding the doctrinal requirement for evidence of moral understanding. It should be noted that without disaggregating by year, it is not possible to determine whether these matters were resolved before or after the High Court's *RP* which re-articulated the presumption and clarified the evidentiary constraints governing its rebuttal (discussed further in Chapter 6). Nevertheless, this finding reinforces critiques of the historical, and to some degree, current inconsistent application of *doli incapax* and its vulnerability to erosion in practice.

#### 4.4.6. Sentencing outcomes

The majority of court outcomes for the cohort were dismissals with no penalty (*n* = 950, 84%) or non-custodial orders (*n* = 548, 49%), with only a small minority receiving control orders (*n* = 45, 4%). Figure 17 illustrates the frequency of sentencing outcomes for children who went to court between age 10–13. While high rates of non-custodial orders indicate judicial reluctance to impose custodial sentences on very young children, the fact that some received multiple control orders (53% received 1–4 and 47% received 5+ control orders) highlights the existence of a small group perceived as high-risk or persistent offenders. Importantly, the repetition of dismissals and non-control orders point to system churn where children remain subject to legal processing without substantive change to their circumstances.

Figure 17: Frequency of sentencing outcomes by sentence type among children who went to court between 10–13




Ultimately, these findings illustrate that while diversion remains the primary response for most children during this research period, those who progress to court are disproportionately male, often from remote areas, and frequently entangled in cycles of disadvantage. Their court pathways reflect a convergence of early onset offending, high police contact and limited diversionary opportunities. The prevalence of property damage, assault, and theft underscores the situational and status-oriented nature of early adolescent offending, often entangled with peer dynamics and masculinities (Farrington, et al., 2023; Richards, 2011). Although custodial sanctions are rarely imposed, the reliance on repeated remand, dismissals, and non-control orders reflects a system that struggles to respond coherently to underlying risks and unmet needs.

#### 4.4.7. How many come under YJNSW supervision and are held in youth detention?

In the period 2011–2019, 700 children aged 10–13 were placed under YJNSW supervision, representing 15% of those with a finalised charge and 4% of children with a police contact. The cohort was overwhelmingly male (*n* = 497, 71%).

Most admissions clustered at the upper end of the age range with 69% admitted at age 13 (*n* = 480, see Figure 18). A sizeable minority (32%) entered supervision earlier, including a small but concerning group with multiple admissions (*n* = 108, 15% had 4–6 admissions between 10–13, see Figure 19).

Figure 18: Age at first admission to YJNSW between 10–13

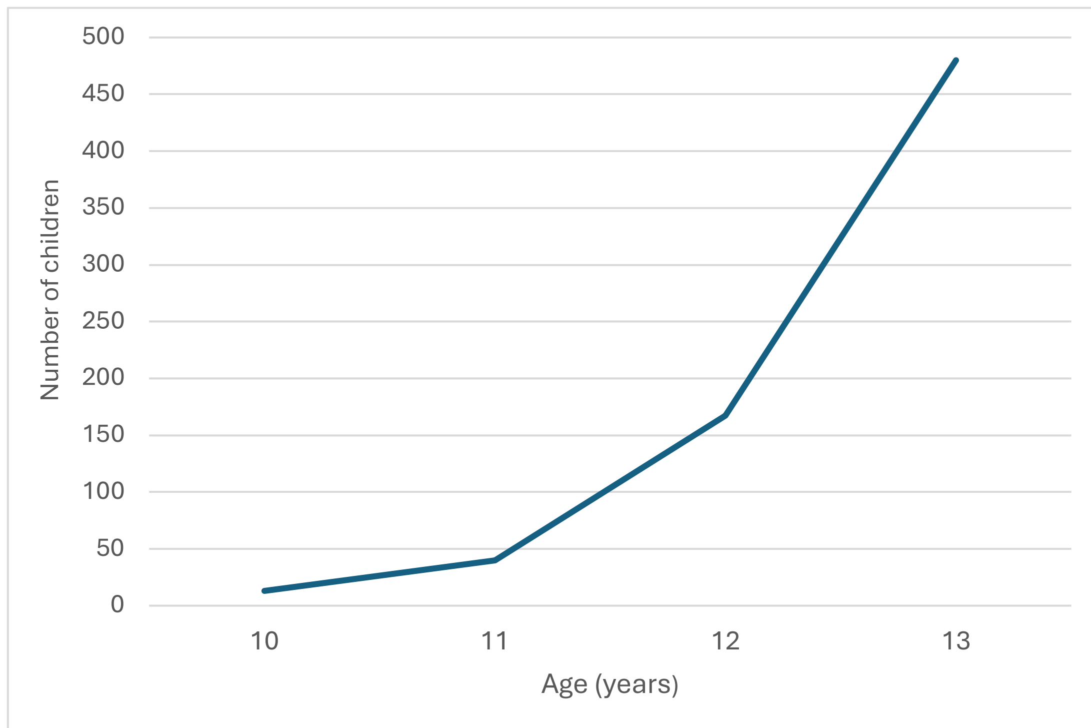
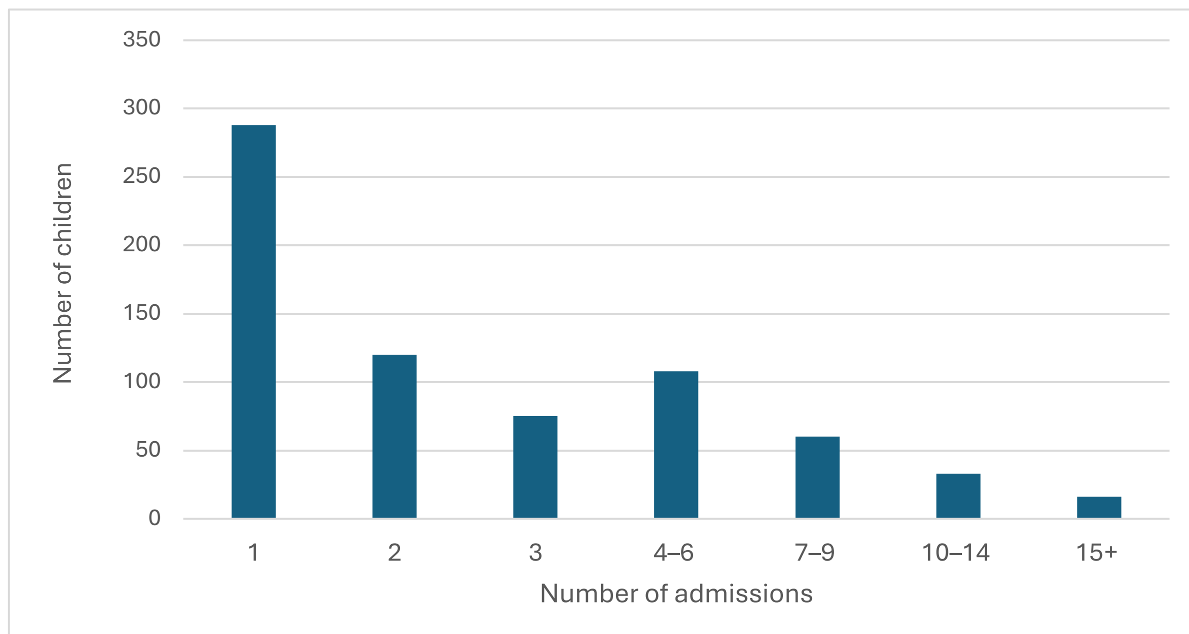



Figure 19: Frequency of admissions to YJNSW between 10–13

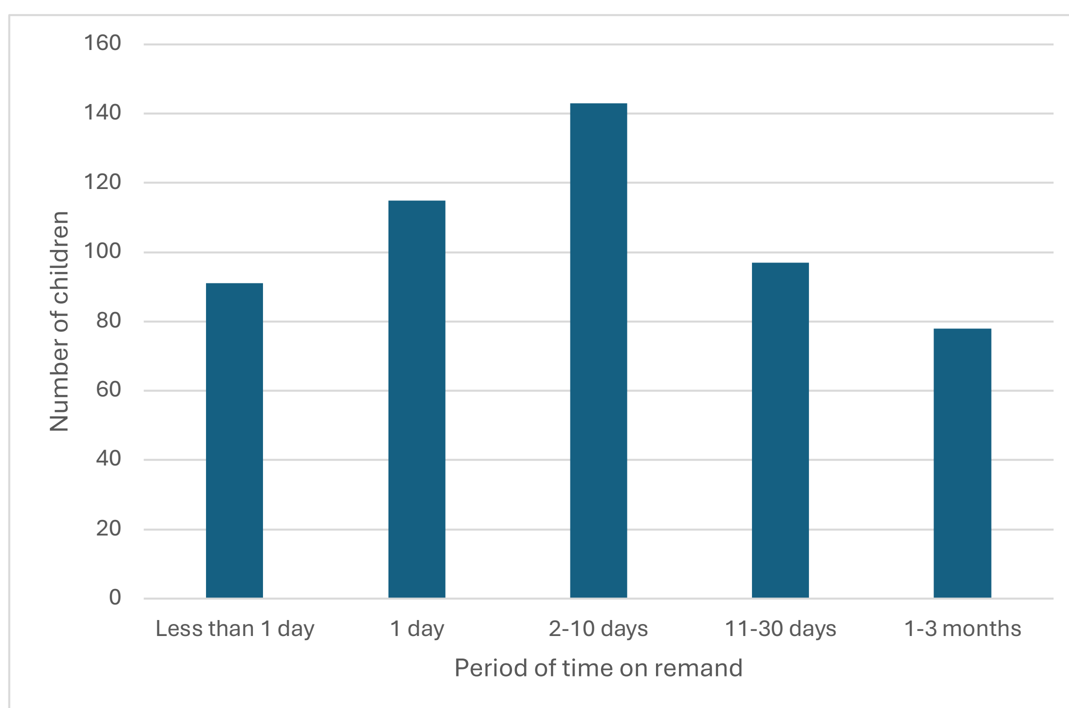



#### *4.4.7.1. Pathways into YJNSW*

More than half of the cohort (*n* = 383, 55%) had at least one year's gap between first police contact and admission to YJNSW, indicating a prolonged period of police visibility and justice system exposure before formal supervision. Nearly half (*n* = 344, 49%) spent more

than six months under YJNSW supervision, signalling that even when supervision commences at a young age, it is often protracted. YJNSW involvement was heavily skewed toward custodial pathways with 80% (*n* = 557) experiencing remand at least once, and 7% (*n* = 48) subject to control orders; 58% were under community supervision (*n* = 403). The fact that remand affected four in five children under YJNSW's mandate suggests a troubling reliance by police and court on bail refusal for children of very young ages (Colvin, 2022). Moreover, repeat remand was common: a quarter of those remanded had three to five episodes (*n* = 137) and almost a fifth had six or more episodes (*n* = 101, 18%). A quarter of this cohort (*n* = 143, 26%) spent between 2–10 days on remand, and one in five spent over one month on remand (*n* = 111, 20%, see Figure 20). This again raises concerns about systemic cycling—children moving in and out of custody without rehabilitative intervention.

Figure 20: Length of time on remand among children under YJNSW supervision between 10–13



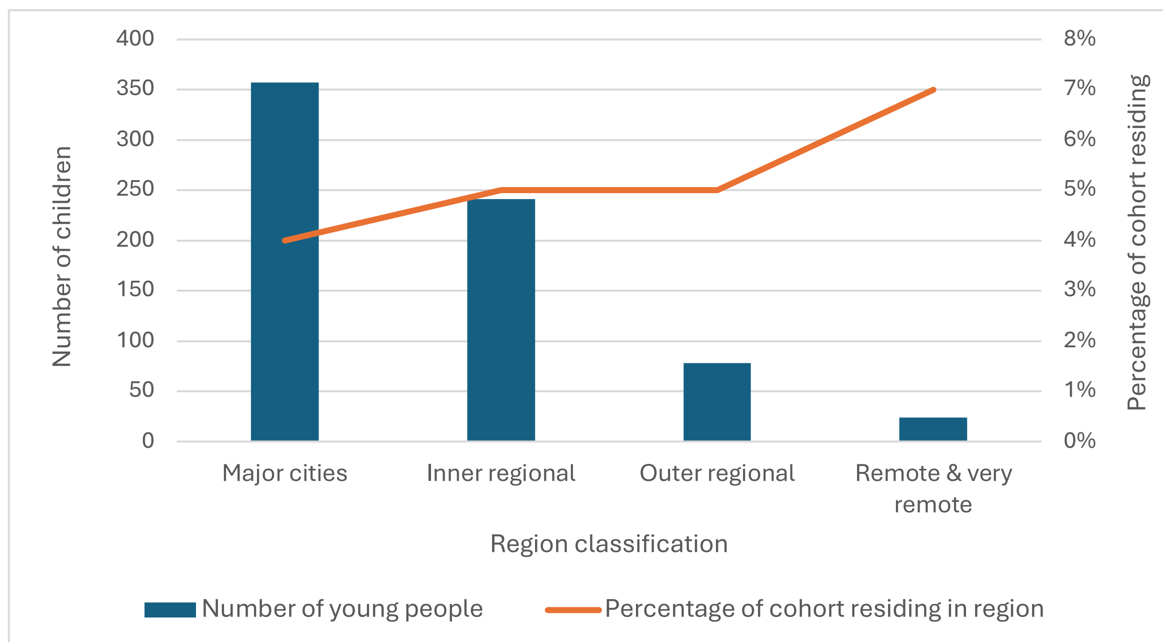

*4.4.7.2. Offence profiles*

The majority of children (*n* = 453, 65%) under YJNSW supervision had assault or offences against the person as their most serious charge, followed by break and enter (*n* = 149, 21%). This offence profile points toward direct interpersonal harm and acquisitive crime as the triggers for formal supervision, consistent with patterns observed in those progressing to court. It also suggests that offences perceived as particularly serious, harmful, or disruptive are disproportionately represented among children entering custodial pathways.

#### *4.4.7.3. Cumulative risk and early onset*

Almost a third ($n$ = 204, 29%) of the YJNSW cohort came to police attention for alleged offending between ages 8–10, and most had 10–44 interactions with police prior to admission ($n$ = 439, 63%). This confirms that YJNSW supervision tends to apply to children with long-standing histories of contact. Additionally, the largest number of children under supervision were located in major cities in NSW ($n$ = 357), while the proportional risk was concentrated in remote and very remote NSW (7% of all children with police contact, see Figure 21).

Figure 21: Number of children under YJNSW supervision by region and percentage of cohort by region




Cumulatively, these findings highlight that YJNSW supervision at ages 10–13 is not evenly distributed across all children with police contact but is concentrated among a smaller, disadvantaged subgroup. Their supervision is characterised by:

- Male over-representation and likely Aboriginal and Torres Strait Islander over-representation (though not detailed here, consistent with broader NSW data)
- Later escalation into YJNSW (predominantly at age 13) following prolonged police contact
- Heavy reliance on remand, often repeatedly
- Serious interpersonal offences, reinforcing that the justice system prioritises supervision for violent and high-impact crimes.

While this chapter has mapped how *doli*-aged children move through formal justice processes, institutional pathways alone cannot explain why certain children become more deeply enmeshed in these systems than others. Escalation is not randomly distributed; instead, it is patterned by forms of social, developmental, and structural disadvantage that often predate first police contact. The next chapter therefore shifts analytic focus from justice processes to the broader ecology of children's lives. Drawing on linked administrative data across child protection, education, health, housing, and disability systems, Chapter 5 examines the concentration and intersection of adversities among children who come to police attention while still subject to the presumption of *doli incapax*. In so doing, it demonstrates that early justice contact is rarely an isolated legal event but instead unfolds within a dense landscape of institutional involvement that precedes, and often conditions, criminalisation.

## Chapter 5: Cumulative disadvantage and system entanglement among *doli*-aged children

Having mapped the institutional pathways through which children encounter the youth justice system, this chapter examines the broader conditions that shape those trajectories for children who are, in law, presumed incapable of crime under the doctrine of *doli incapax.* It analyses linked administrative data to identify the prevalence, timing, and intersection of adversities experienced by children who come to police attention before the age of 14.

The findings show that children subject to *doli incapax* are frequently visible across multiple state systems well before their first alleged offence. Victimisation, child protection contact, school exclusion, housing instability, disability, and health-system engagement often cluster rather than occur in isolation. For a substantial subgroup, these experiences accumulate across childhood, producing layered forms of disadvantage that narrow developmental opportunities while simultaneously increasing institutional surveillance.

The chapter proceeds in two stages. It first documents the prevalence of key risk domains across the cohort before examining how these adversities intersect through a cumulative risk framework. Read through a *doli incapax* lens, this approach reveals a gradient of vulnerability where while many children experience one or two forms of disadvantage, a smaller but highly marginalised group carries multiple, compounding risks. By situating early police contact within this broader ecology, the analysis reframes the population to whom the presumption applies. Rather than encountering the justice system as otherwise typical children who momentarily offend, many are already deeply embedded within overlapping welfare, education, and health interventions. The chapter therefore challenges interpretations of youth offending that focus narrowly on individual behaviour, demonstrating instead that justice involvement among *doli*-aged children is often embedded within long-standing patterns of structural inequality and system contact.

Unless otherwise specified, proportions reported in the following sections are calculated on the cohort of children with at least one police contact aged 10–13 ($n$ = 15,895). Where analyses refer to children with a finalised charge ($n$ = 4,804) or a court appearance ($n$ = 1,130), this is stated explicitly. As with the previous chapter, percentages may exceed 100% where children experienced multiple outcomes during the study period; categories are therefore not mutually exclusive.

### 5.1. How many *doli*-aged children have been recorded by NSW Police as the victim of a crime?

Just over 60% ($n$ = 9,736, 61%) of children aged 10–13 with a police contact were also victims of crime before age 14. Police victimisation records capture incidents reported to, or

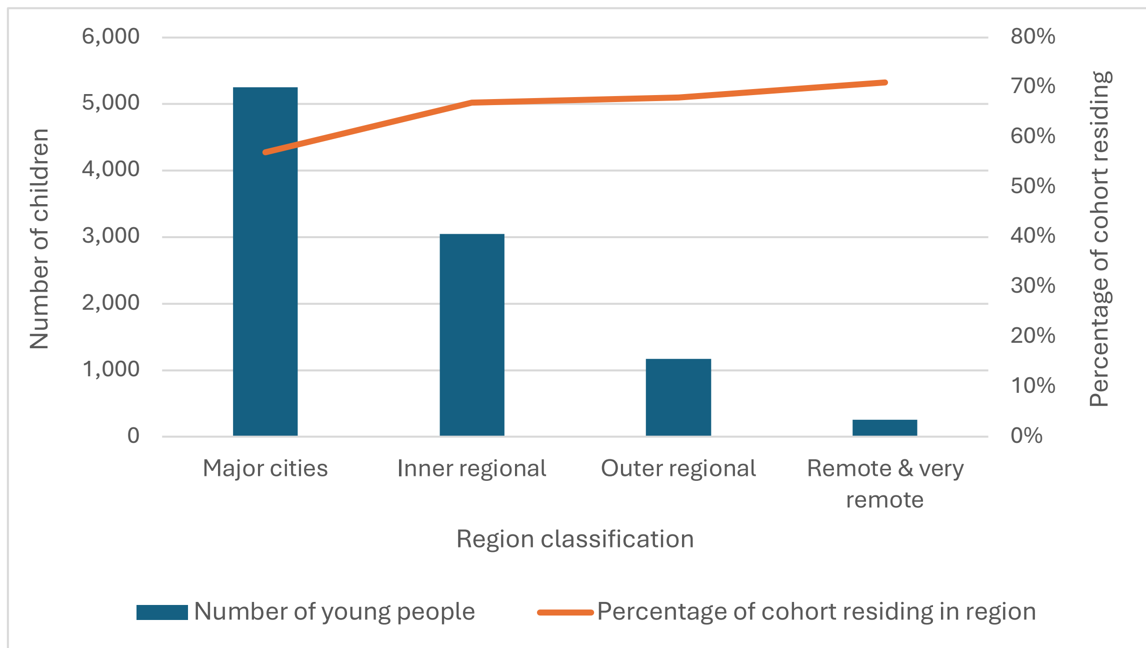
otherwise detected by police, including matters reported by victims, caregivers, schools, service providers, or third parties, as well as offences identified through police attendance at incidents. As with all police-recorded victimisation data, these figures reflect reported and recorded incidents rather than the true prevalence of victimisation and are therefore likely to understate children's actual exposure to harm. Research consistently demonstrates that many forms of violence and victimisation affecting children (particularly family violence, neglect, peer violence, and exploitation) are substantially under-reported to police (ABS, 2023–24a; Finkelhor, 2008). Notwithstanding these limitations, the high level of overlap observed in this cohort demonstrates the dual status of many children as both offenders and victims within official justice data. This finding supports criminological frameworks that emphasise the blurred boundaries between victimisation and offending (Athanassiou et al., 2021; Pires & Almeida, 2023; Preski & Shelton, 2001; Queensland Government Statistician's Office, 2023).

#### 5.1.1. Types and geographic distribution of victimisation

Non-violent incidents (*n* = 7,955, 82%) dominate, reflecting theft, property damage, or similar events. However, nearly half (*n* = 4,629, 48%) had experienced violent victimisation, and nearly one in four were victims of domestic and family violence (*n* = 2,230, 23%) or sexual offences (*n* = 2,210, 23%). These findings highlight that many children entering the justice system have already endured significant trauma, often in contexts of family harm. Exposure to domestic and sexual violence is particularly concerning given established links to emotional regulation difficulties, school disengagement, and later offending (Malvaso et al., 2017a).

When disaggregated by region, most children with a recorded incident of victimisation reside in NSW's major cities (*n* = 5,253). However, when expressed as proportions of the children in the cohort residing in each region, the percentage of affected youth rises progressively with remoteness (see Figure 22). This demonstrates that while the bulk of children at risk live in metropolitan settings (reflecting population distribution), the burden of risk exposure is disproportionately higher in more remote communities.

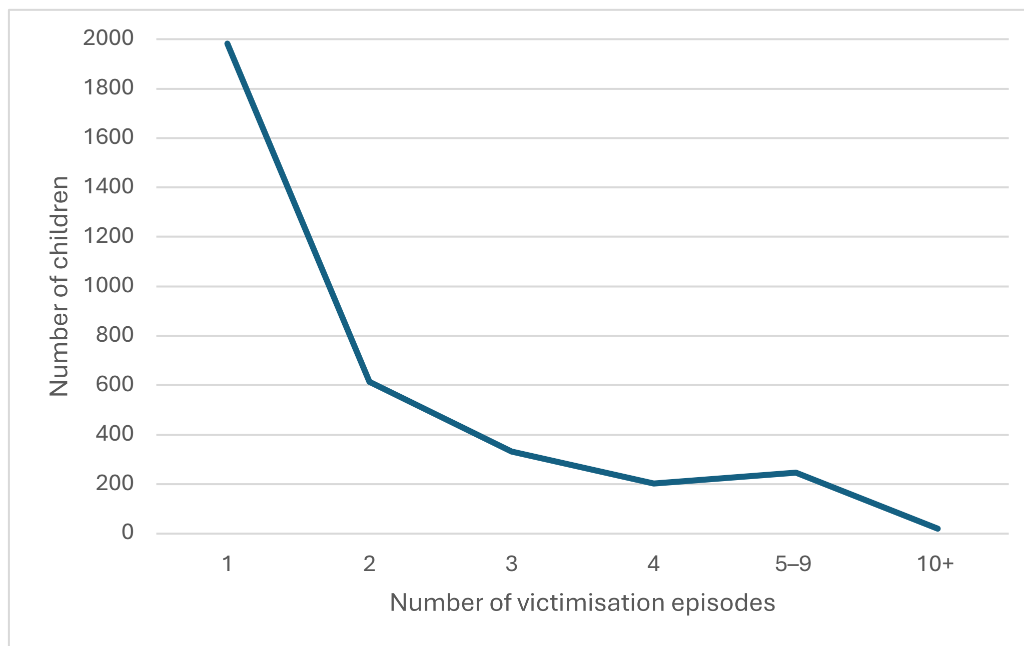
Figure 22: Number of children recorded as victims of crime by region and percentage of cohort by region




### 5.1.2. Victimisation in the year prior to first contact

One in five children were recorded as victims of a crime in the year before their first alleged offence ($n$ = 3,398, 21%). Most experienced one episode ($n$ = 1,982, 58%) but a substantive minority faced repeated victimisation ($n$ = 615, 18% with two incidents, and $n$ = 801, 24% with three or more, see Figure 23). Among this cohort, violent victimisation ($n$ = 1,474, 43%), domestic and family violence ($n$ = 481, 14%), and sexual victimisation ($n$ = 624, 18%), were already prominent.

Figure 23: Number of victimisation episodes in the year prior to first police contact




This temporal proximity is consistent with victimisation forming part of the immediate context in which first police contact occurs.

#### 5.1.3. Age-specific patterns

Between ages 8–10, 16% of these children (*n* = 2,601) were victims, with most experiencing non-violent incidents (*n* = 2,008, 77%); 27% exposed to violence and 11% to sexual offences (*n* = 712 and *n* = 278 respectively). This indicates that victimisation begins well before adolescence for many, increasing the cumulative risk of later justice involvement.

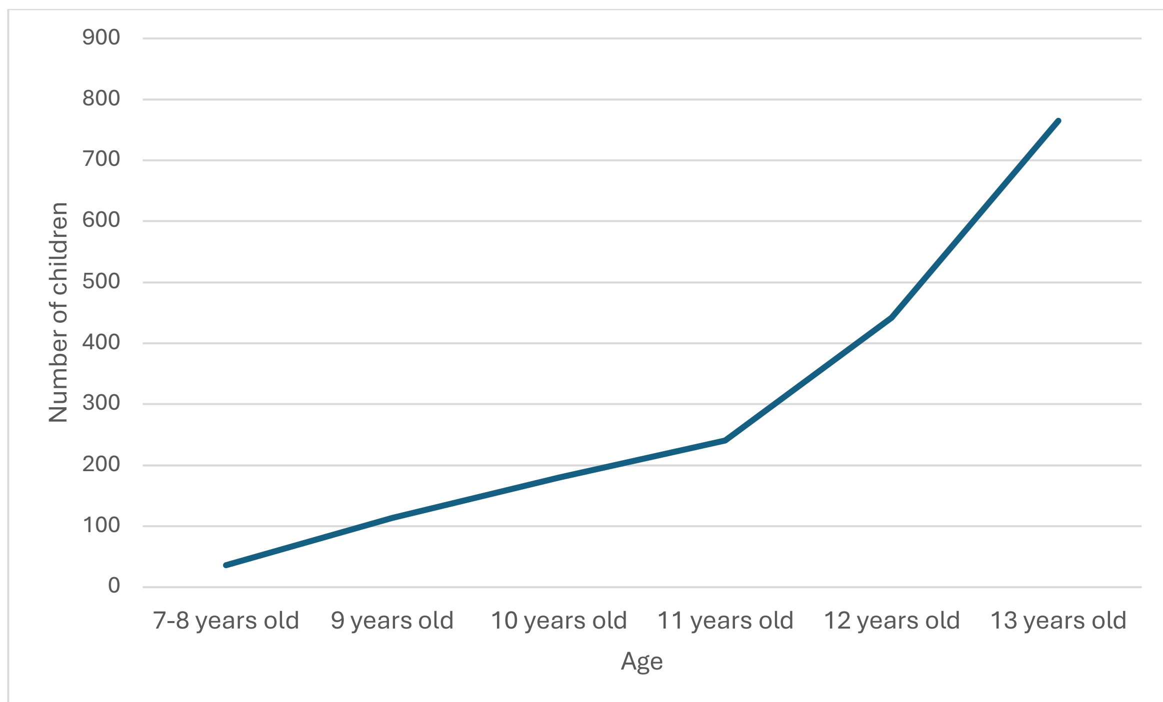
For children aged 10–13, nearly half (*n* = 7,270, 46%) were victims in this timeframe, with a sharp rise in violent victimisation (*n* = 3,722, 51%) and domestic/sexual victimisation (*n* = 1,509–1,642, 21–23%). This suggests that as children reach early adolescence, they become more exposed to interpersonal violence and high-impact trauma, which may intersect with identity formation, peer dynamics, and early offending.

These findings underscore that victimisation is not incidental but central to the profiles of children with justice contact. Many of the behaviours bringing these children to police attention likely arise in contexts of prior harm, strongly supporting theories of cumulative disadvantage and life-course criminology where early life adversities constrain opportunities and exposure to violence increases the likelihood of persistent offending (Moffitt, 1993; Sampson & Laub, 1995). The overlap of sexual abuse and domestic violence in particular reflects pathways into offending grounded in survival strategies, emotional dysregulation, or peer group affiliation for safety and belonging.

### 5.2. How many *doli*-aged children have experienced housing instability?

Before age 14, 1,778 children with a police contact experienced homelessness or were at risk of it (11% of the cohort). It should be noted that throughout this section, experiences and risk of homelessness are likely the experiences of children's families. Figure 28 illustrates the distribution of age at first homelessness or risk of homelessness episode before age 14. The steep rise in episodes from ages 12–13 (with *n* = 765, 43% of first episodes at age 13) highlights how housing instability intensifies in early adolescence, a developmental period already marked by vulnerability.

Figure 24: Age at first homelessness or risk of homelessness episode before 14




Approximately a quarter of homeless or at-risk children (*n* = 200–324, 25–29%, respectively) experienced homelessness or risk of homelessness in the year before their first police contact. This supports arguments that housing crises may form part of the context in which justice contact occurs, whether through survival strategies, association with risk-prone peers, or heightened visibility to police.

#### 5.2.1. Overlap with justice and intersection with other adversities

Just over 40% of homeless (*n* = 334, 42%) and at-risk children (*n* = 457, 41%) received a finalised charge. A smaller subset of homeless (*n* = 90, 11%) and at-risk children (*n* = 141, 13%) were subsequently admitted to YJNSW. These proportions indicate that homelessness is disproportionately represented among children who progress from police contact to finalised charge and YJNSW supervision.

Intersecting homelessness with other indicators shows compounding disadvantage among children who experienced homelessness or risk of homelessness. For example:

- 81% (*n* = 647) of homeless children were also suspended from school
- 33% (*n* = 262) received a disability support at school, and
- 83% (*n* = 661) were victimised before age 14.

Similarly, for children at-risk of homelessness:

- 81% (*n* = 898) were suspended from school
- 31% (*n* = 388) received disability support, and
- 82% (*n* = 902) were victimised before age 14.

These findings reflect cumulative risk dynamics, where housing instability co-occurs with victimisation, disability, and exclusion from education—each co-occurring with justice system involvement.

### 5.2.2. Social Housing

Social housing data reinforce these dynamics. Nearly 40% of children in the cohort (*n* = 6,062) were recorded as a family member in an application for, or placement in, social housing before their 14th birthday. Social housing exposure began very early with 30% (*n* = 1,842) included on an application with family members as infants, before 12 months of age. Importantly, these data primarily capture applications for social housing rather than confirmed placements and therefore reflect housing need and prior instability rather than sustained residence in social housing. A third (35%) of this cohort received a finalised charge, 11% went to court, and 7% were admitted to YJNSW. It is important to note that these figures do not permit conclusions about the protective or stabilising efficacy of social housing itself, nor should they be interpreted as evidence that social housing contributes to offending. Rather, they indicate that a substantial proportion of children who later come into contact with police are raised in contexts of long-term economic hardship and constrained housing options where social housing may function as a critical stabilising support.

Social housing was also associated with other adversities: school suspension (*n* = 4,890, 81%), disability supports (*n* = 2,055, 34%), victimisation (*n* = 4,730, 78%), child protection reports (*n* = 5,783, 95%) and out-of-home care (*n* = 1,599, 26%). The clustering of these adversities alongside social housing contact underscores the intensity of need among families seeking housing assistance. Importantly, the majority of children who were homeless (*n* = 565, 71%) or at risk (*n* = 752, 68%) were also applying for social housing, suggesting that social housing can operate as a buffer against housing insecurity, even as broader structural disadvantages continue to shape children's trajectories.

### 5.2.3. Aggregate housing instability

In constructing the aggregate housing instability measure, interactions with social housing services were retained alongside homelessness and risk of homelessness as a proxy for sustained economic disadvantage. In these data, the social housing measure captured contact with the housing system (including applications for assistance), not confirmed placement or duration of housing and, therefore, indicate prior exposure to housing insecurity rather than the potential stabilising effects of social housing itself. That is to say, inclusion of social housing reflects its role as a likely marker of constrained housing security rather than an assumption of causal association with justice involvement (Flanagan et al., 2020). This approach recognises that while social housing can provide stability (Prentice & Scutella, 2020), it often co-occurs with prior homelessness, repeat relocations, and broader structural adversity that shape children's trajectories (Martin et al., 2025).

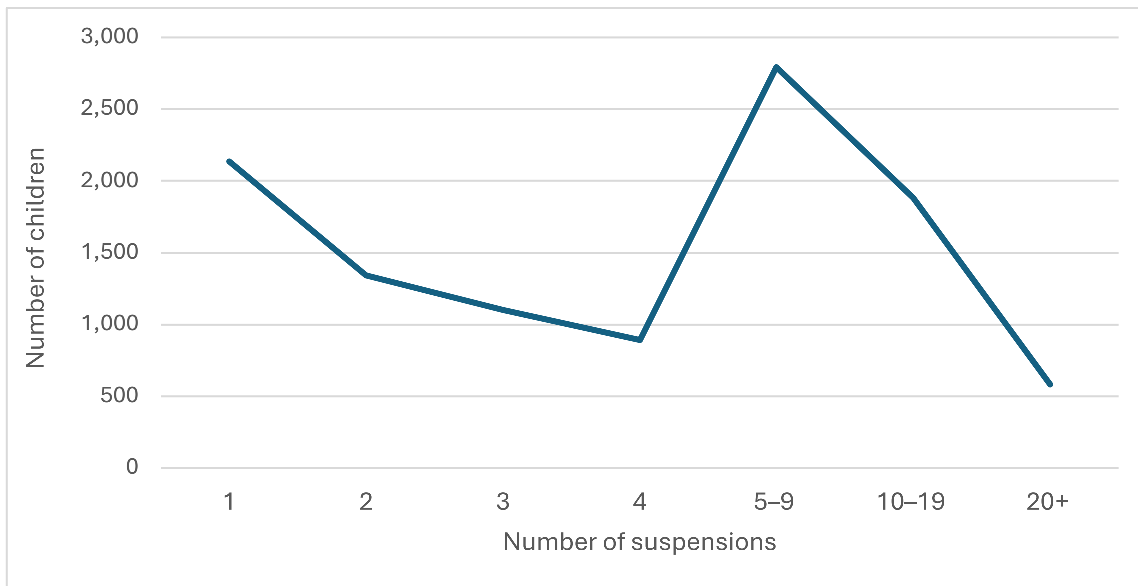
Overall, 42% of children (*n* = 6,612) with a police contact experienced housing instability (including either homelessness, risk of homelessness, or contact with social housing) before age 14. Among those with deeper justice involvement, rates of housing instability were higher: 65% of children (*n* =735) who went to court and 70% of those under YJNSW supervision (*n* = 487). Almost half (*n* = 2,231, 49%) of those with finalised charges experienced instability. One in five of this cohort experienced housing instability in the year prior to their first police contact (*n* = 1,298, 20%).

Together, these findings suggest that housing instability is both a symptom of structural disadvantage and a critical site of intervention, where stabilising supports such as social housing may mitigate exposure to other risk factors. Children who are homeless, at risk, or reliant on social housing are more likely to experience repeat instability, school exclusion, victimisation, and disability—all of which increase their risk of offending and reduce their access to protective systems.

## 5.3. How many *doli*-aged children have been suspended from school?

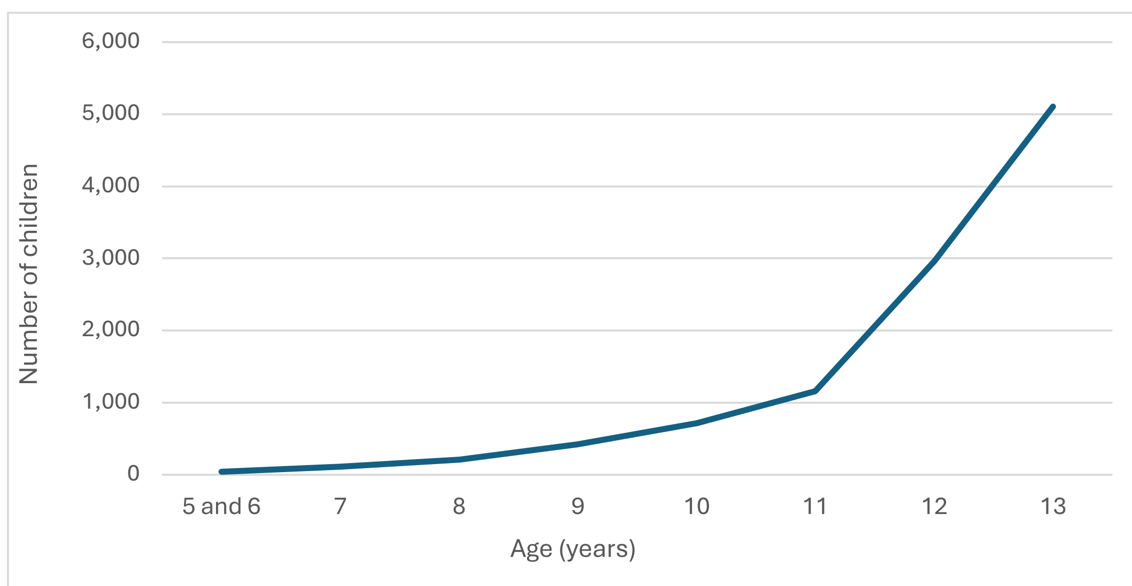
Suspension from school is highly prevalent among children aged 10–13 with police contact. Two-thirds (*n* = 10,726, 67%) were suspended at least once before age 14 and half of this cohort (*n* = 5,256, 49%) were suspended at least five times, indicating that repeated exclusion is common rather than exceptional (see Figure 25).

Figure 25: Frequency of suspension episodes before age 14



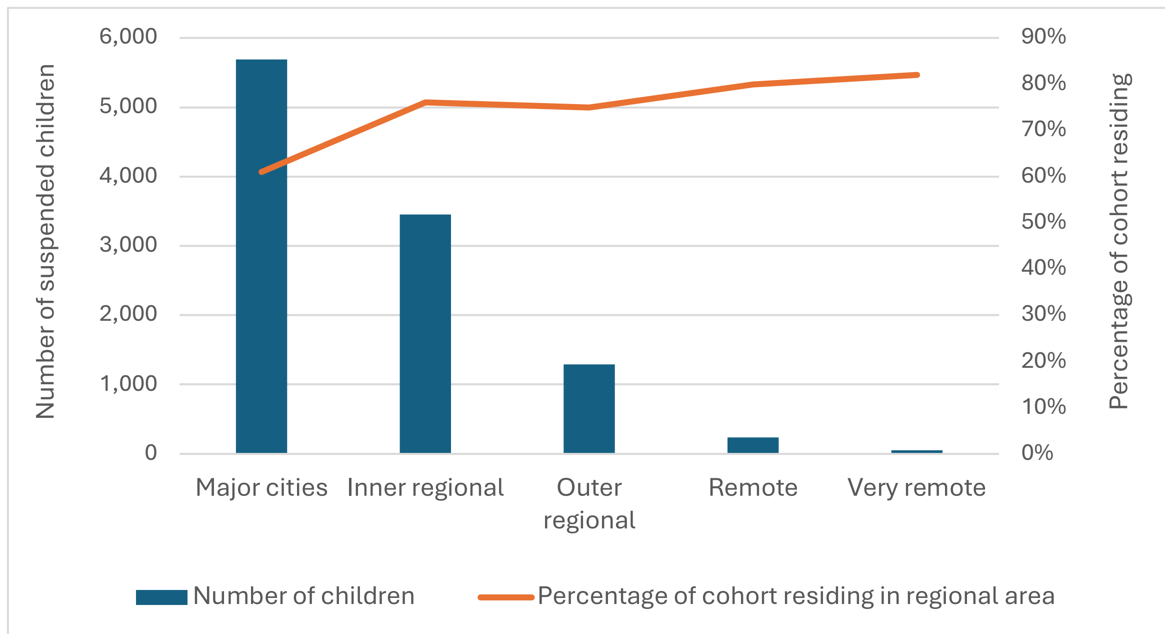

The age distribution in Figure 26 shows that suspensions peak at age 13, with nearly half (*n* = 5,106, 48%) suspended for the first time at this age. This coincides with the peak age for first police/justice system contact and the transition from primary to early high school, reinforcing the interaction between school exclusion and justice involvement.

Figure 26: Age at first suspension from school before age 14




Suspension is more common outside metropolitan centres with 82% (*n* = 55) of children in very remote NSW, 80% (*n* = 235) of children in remote NSW, and 76% of children in inner regional NSW suspended at least once before 14 (see Figure 27).

Figure 27: Children suspended before age 14 by region and percentage of cohort by region



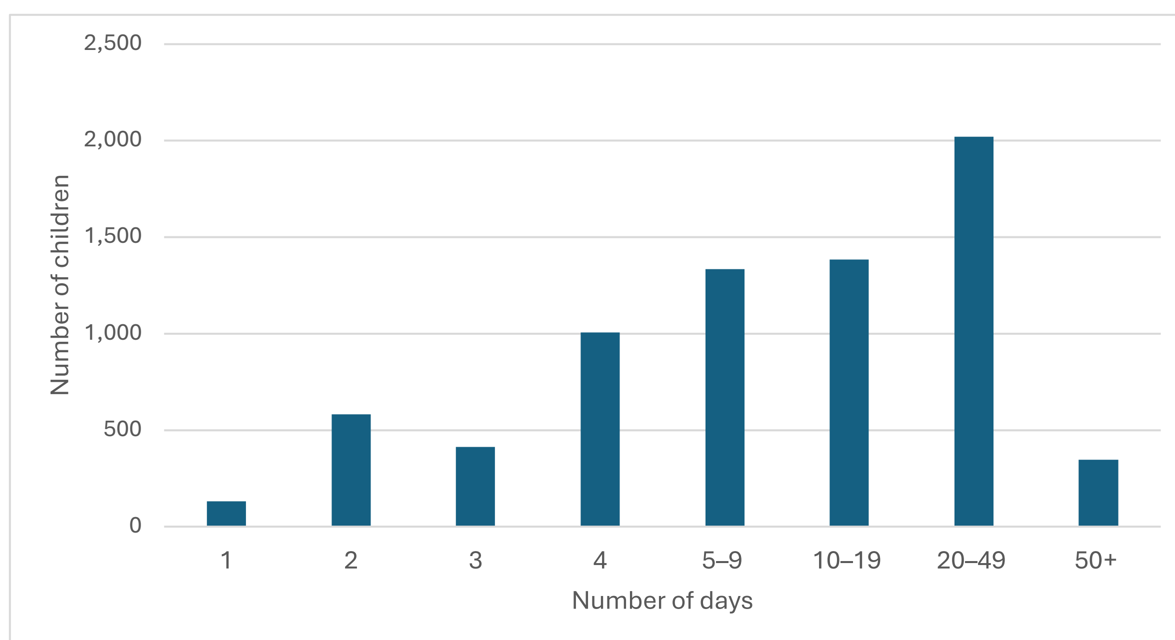

### 5.3.1. Suspensions and justice outcomes

There is a significant overlap between suspension from school and justice involvement. For example, a majority (*n* = 3,797, 79%) of children with a finalised charge were suspended at least once before they turned 14, 88% (*n* = 993) of children who went to court were suspended, and 91% (*n* = 636) of children under YJNSW supervision were suspended. Among the YJNSW-supervised cohort, nearly half (*n* = 274, 43%) had 10 or more suspensions.

### 5.3.2. Timing of suspension in relation to justice contact

In the year prior to first police contact, nearly half of the cohort (*n* = 7,217, 45%) had at least one suspension, with many suspended for prolonged periods (20–49 days, see Figure 28). This temporal pattern indicates that school exclusion was commonly recorded before children's initial justice system contact.

Figure 28: Number of days suspended in the year prior to first police contact




### 5.3.3. Reasons for suspension

Across both younger (ages 8–10) and older (10–13) cohorts, the most common reasons for suspension were aggression (*n* = 1,515–7,995, 62–75% for 8–10 and 10–13-year-olds respectively), and general misbehaviour (*n* = 1,344–7,640, 55–72%). These categories encompass a wide range of conduct, from low-level disruptive behaviour to more serious interpersonal incidents, and do not necessarily map neatly onto criminal offending. The predominance of suspensions for aggression and misbehaviour likely points to the central role of schools in responding to behavioural distress and conflict, rather than to rare or exceptional incidents alone. The reliance on suspension in these circumstances raises questions about whether schools are adequately equipped or resourced to provide alternative behavioural and therapeutic supports, particularly for children experiencing trauma, disability, or other unmet needs.

### 5.3.4. Age-specific trends

Between ages 8–10, 15% of the cohort (*n* = 2,431) with a police contact during this timeframe were also suspended, many repeatedly, with some missing significant schooling (10–49 days: *n* = 886, 36%). Between ages 10–13, 67% were suspended, with high levels of repeated exclusion (*n* = 2,966, 28% suspended 5–9 times). Many lost between 1–3 months of schooling due to suspensions (*n* = 3,437, 32%). These data show that exclusion accelerates with age, culminating in widespread educational disengagement by early adolescence.

These findings demonstrate that school suspension is a marker of cumulative disadvantage and is associated with deeper system involvement. Suspension is disproportionately

experienced by children in remote areas and is more common among children who progress further into justice system responses. The prevalence of repeated suspensions suggests that, for a small subgroup, schooling may operate less as a protective environment and more as an additional site of exclusion.

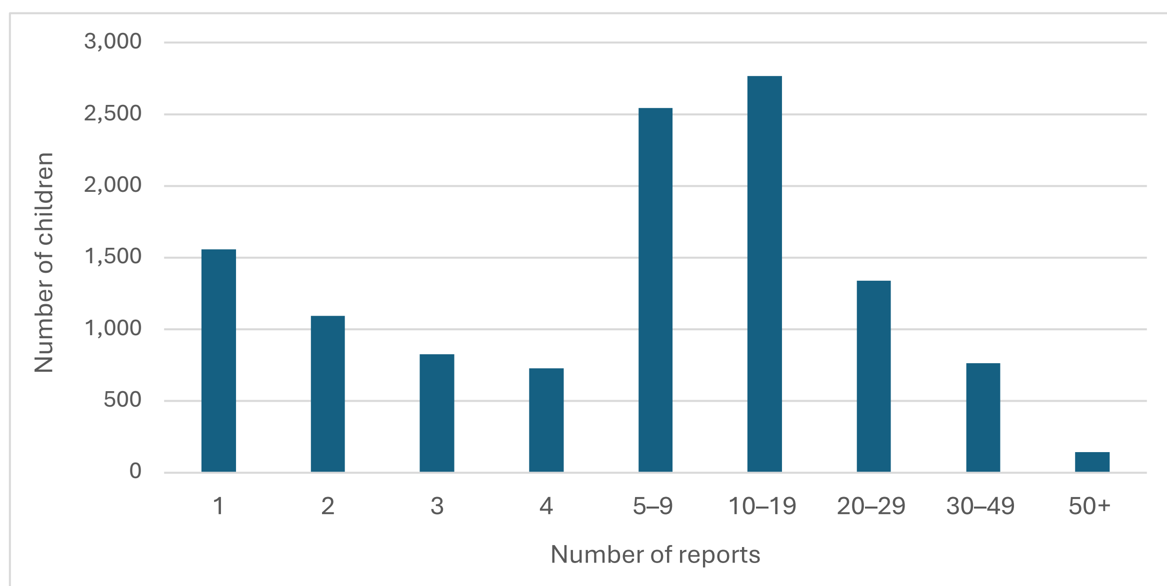
## 5.4. How many *doli*-aged children have been the subject of a child protection report and/or placed in out-of-home care?

### 5.4.1. Child protection

The prevalence of child protection reports among justice-involved children is high: 79% (*n* = 12,504) with a police contact aged 10–13 had at least one child protection report before age 14 and 94% (*n* = 11,763) of this cohort had at least one Risk of Significant Harm (ROSH) report. Just over one in three children in this cohort (*n* = 4,411, 35%) had their first child protection report as infants, before the age of 12 months, and a further 22% (*n* = 2,649) by age 2.

The data also show that contact is chronic, not episodic with approximately one in five children the subject of between 5–9 child protection reports (*n* = 2,235, 18%), 10–19 reports (*n* = 2,682, 21%), and a third subject of 20 plus reports (*n* = 4,115, 33%) before their 14$^{th}$ birthday. Similar distributions appear for frequency of ROSH reports (see Figure 29). This pattern signals enduring family adversity and system surveillance rather than one-off crises.

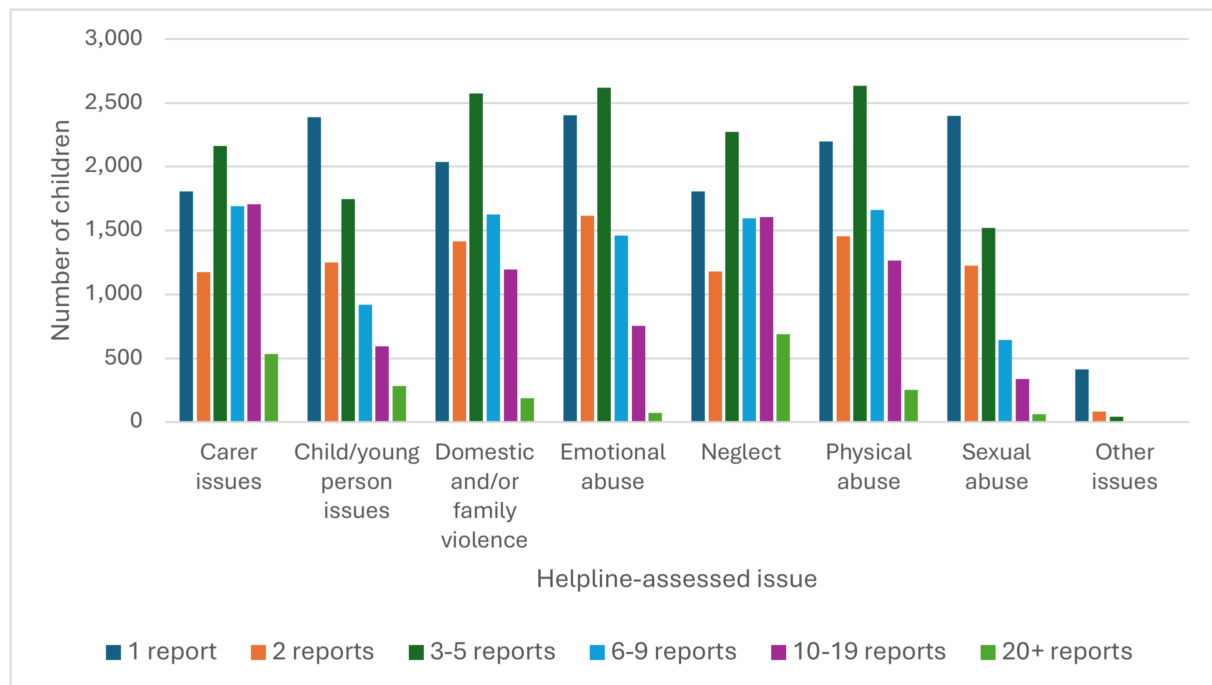
Figure 29: Frequency of ROSH reports before age 14



### *5.4.1.1. Primary helpline assessed issues*

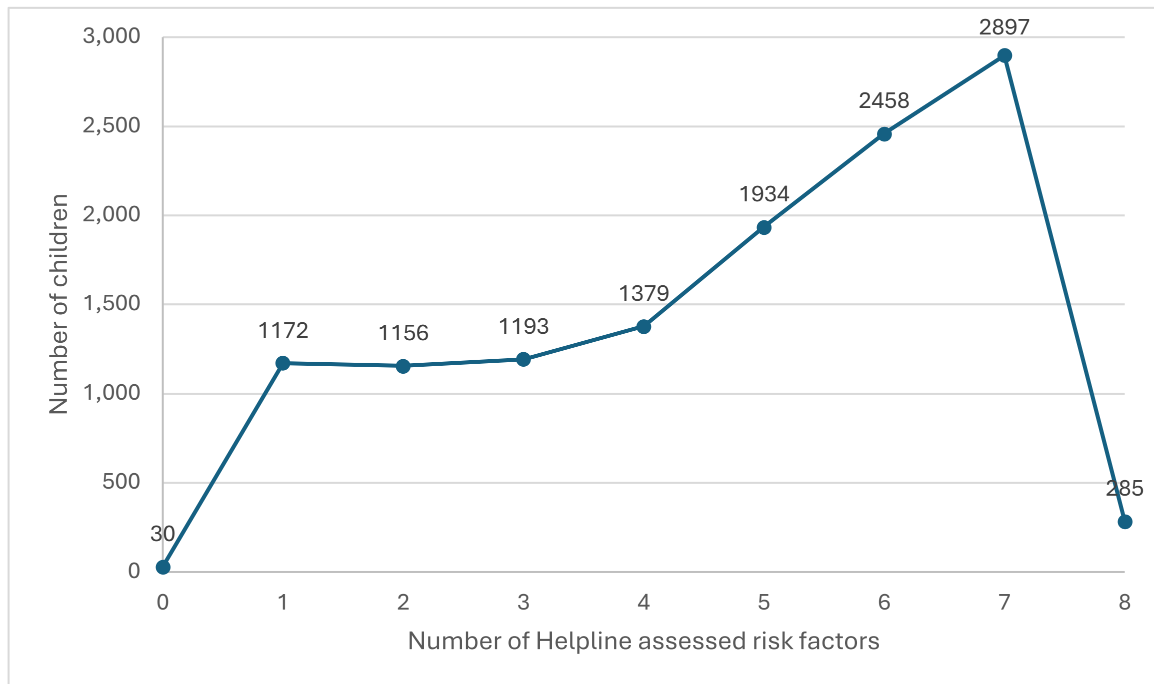
Helpline-assessed issues among this cohort were dominated by physical abuse (*n* = 9,462, 76%), neglect (*n* = 9,145, 73%) and carer issues (*n* = 9,080, 73%) with domestic and family violence (DFV, *n* = 9,035, 72%) and emotional abuse (*n* = 8,927, 71%) also prominent. The modal frequency for issue-specific reports was 3–5 reports, indicating recurrent multi-issue concern rather than single incidents (see Figure 30).

Figure 30: Frequency of child protection reports by Helpline-assessed issue



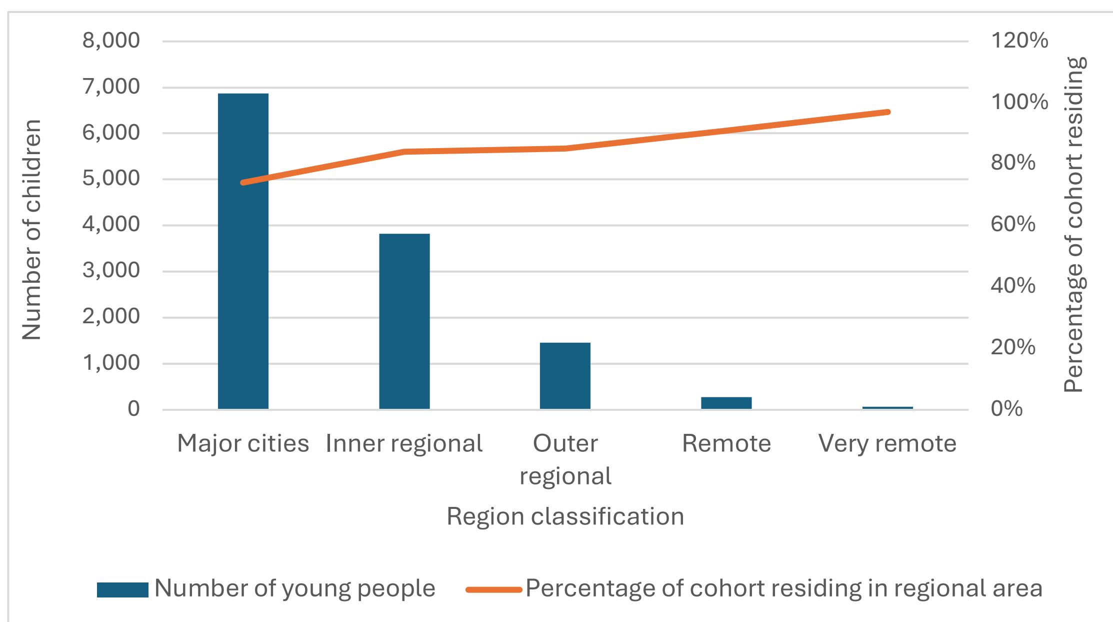

By age 14, almost a quarter of this cohort (*n* = 2,897, 23%) had seven Helpline-assessed risk factors on their record, one in five had six (*n* = 2,458, 20%) and 15% had five (*n* = 1,934, see Figure 31).

Figure 31: Number of Helpline-assessed risk factors before 14




Exposure to the child protection system is near-universal among children with a police contact residing in very remote NSW ($n$ = 65, 97%) but is a majority across all regions (see Figure 32). This matches broader evidence that remoteness concentrates disadvantage and intensifies service contacts.

Figure 32: Children with a child protection report before age 14 by region and percentage of cohort by region



#### *5.4.1.2. Proximity to justice events*

In the 12 months prior to first police contact, 43% of the cohort had a child protection report (*n* = 6,786) and 80% had a ROSH report (*n* = 5,398, often 1–2: *n* = 3,584, 66%). Issues were led by neglect (*n* = 3,427, 51%) and physical abuse (*n* = 3,042, 45%). Offence types in this cohort with child protection system contact in the year prior to police contact cluster around assault (*n* = 1,520, 22%), malicious damage to property (*n* = 1,168, 17%) and theft (*n* = 1,074, 16%)—behaviours that can be linked to recent family contact, instability and trauma.

Child protection and justice system overlap is notable with:

- 84% with a finalised charge (*n* = 4,018)
- 95% of those who went to court (*n* = 1,075), and
- 98% of those under YJNSW supervision (*n* = 686)

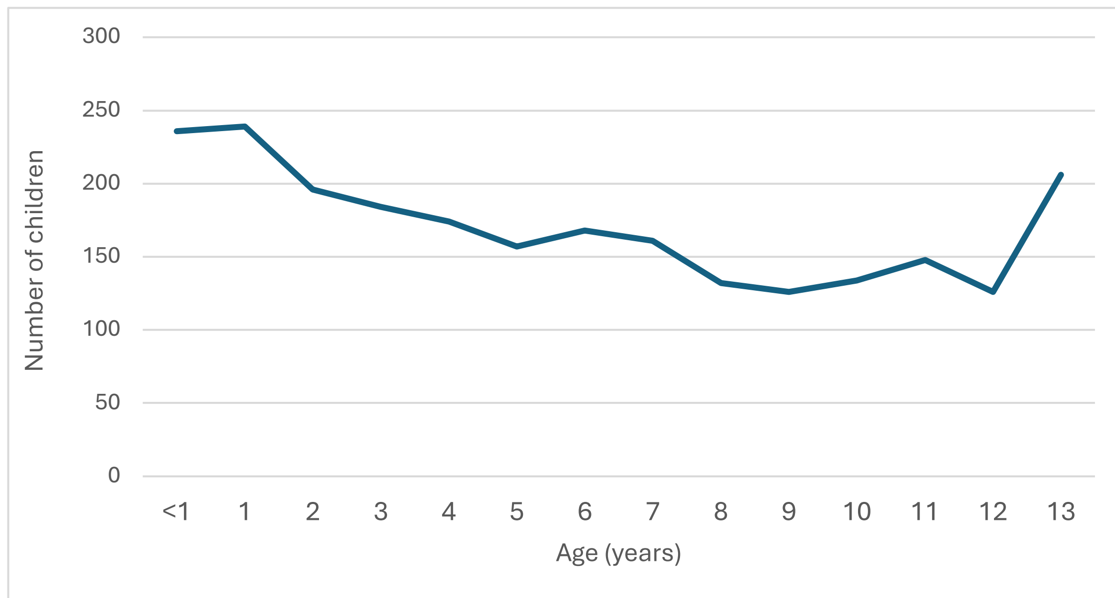
having child protection system contact before 14.

A similar pattern holds when restricting child protection contact to the year prior to police contact (51% with a finalised charge, 72% who went to court, and 78% under YJNSW supervision). Ultimately, child protection involvement among this cohort is both early and repeated, with multi-issue risk profiles.

### 5.4.2. Out-of-home care (OOHC)

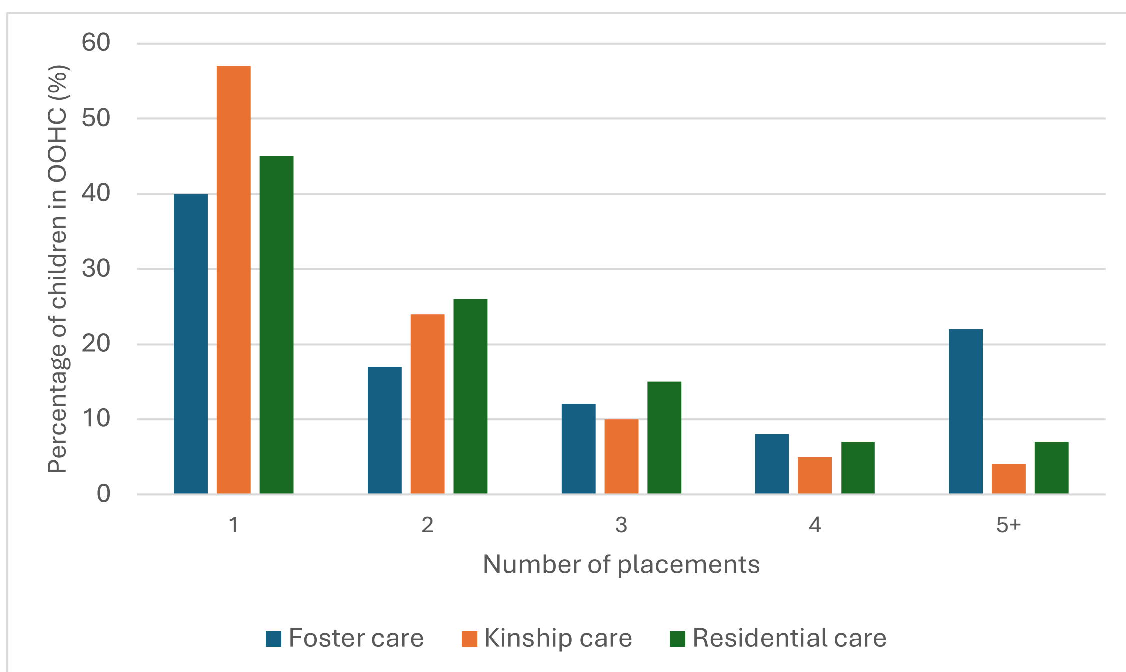
A minority (*n* = 2,387, 15%) of the cohort were placed in OOHC before 14. First placements cluster at <12 months and age 1 (*n* = 236, 10%; *n* = 239, 10% respectively) with another rise at 13 (*n* = 206, 9%), suggesting both early removal and adolescent crisis placements (see Figure 33).

Figure 33: Age at first OOHC placement before 14




The majority ($n$ = 1,950, 82%) spent more than one year in OOHC. One in five children experienced four placements before 14 ($n$ = 491, 21%). Kinship care was the most common placement type among this cohort ($n$ = 1,621, 68%) followed by foster care ($n$ = 1,324, 55%). As can be seen from Figure 34, children placed in foster care were proportionally more likely to be placed five or more times before 14.

Figure 34: Number of OOHC placements by placement type before 14



#### *5.4.2.1. Intersections with justice and co-occurring adversities*

A history of OOHC placement(s) is over-represented across justice outcomes. For example, 20% of children with a finalised charge (*n* = 947), 34% with a court appearance (*n* = 382), and 37% under YJNSW supervision (*n* = 261) were in OOHC before 14. A substantial share of this cohort (*n* = 162, 42%) had no prior diversions before appearing in court, indicating direct escalation from OOHC contexts to court for some.

Additionally, experience of OOHC overlaps heavily with victimisation (*n* = 2,045, 86%; many with 5–19 episodes, *n* = 648, 32%), school suspension (*n* = 1,967, 82%; many with 5–19 episodes, *n* = 608, 31%) and disability supports (*n* = 1,106, 46%).

#### *5.4.2.2. Year prior & middle childhood windows*

In the 12 months prior to first police contact, 1,348 children (9% of the cohort) were in OOHC. Most had 1–2 placements (*n* = 1,056, 78%) but a sizeable minority had ≥3, indicating recent instability close to justice onset (*n* = 292, 22%). Similarly, between ages 8–10, 9% of the cohort were in OOHC (*n* = 1,393).

Between ages 10–13, 1,827 children were in OOHC (11% of the cohort). In this age range, there is a notable spike in the number of placements with almost one in five experiencing between 5–9 placements (*n* = 325, 18%). Additionally, between 10–13 there is a higher overlap with formal justice outcomes such as court appearances (*n* = 320, 28%) and YJNSW supervision (*n* = 223, 32%) suggesting that instability in this period might be coupled with progression into tertiary justice outcomes.

Ultimately, involvement in OOHC—especially with multiple placements and residential care—is a signal of high, chronic system-level risk. Placement instability disrupts schooling and attachments, amplifies behavioural dysregulation, and increases surveillance exposure (see Baidawi & Sheehan 2019a, 2019b).

These findings highlight a number of recurring themes. First, cumulative risk by way of early-life child protection reports (often in infancy), repeated ROSH reports, and later OOHC placements are consistent with an ecology in which adolescent police contact occurs. Second, child protection reports, OOHC episodes, and school exclusion frequently occur in the year(s) immediately preceding first police contact suggesting these experiences may serve as triggers rather than distant background factors. Third, system entanglement for these children involves multiple agencies such that children appearing in court or under YJNSW supervision are almost universally known to child protection and many also experience suspension, victimisation, disability, and housing instability. Finally, geographic inequality persists. Very remote and regional children face higher exposure to child protection systems, mirroring higher court progression in those areas and consistent with service scarcity, heightened

surveillance, and structural disadvantage (often affecting Aboriginal and Torres Strait Islander families).

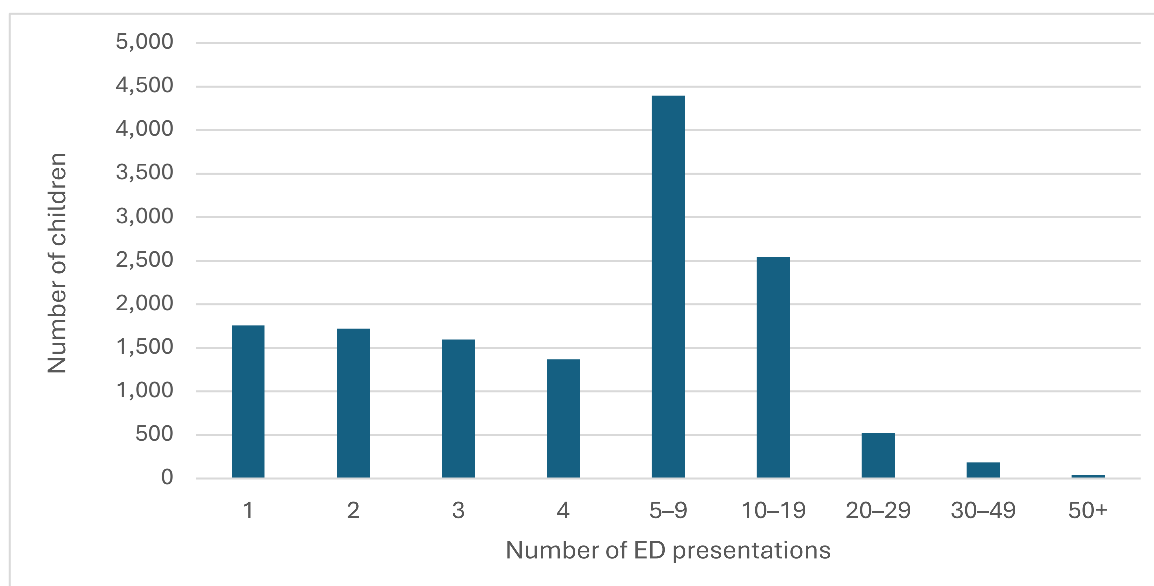
In sum, for NSW children who reach police attention at ages 10–13, child protection contact begins early, repeats often, and is frequently followed by OOHC instability. These are not parallel stories, but a cumulative trajectory where early family adversity, system churn and educational exclusion are disproportionately present among children who later appear in court and YJNSW supervision.

## 5.5. How many *doli*-aged children have presented to hospital or called for an ambulance on the basis of an acute health concern or mental health concern?

### 5.5.1. Emergency Department (ED) presentations

Presentation to an ED is common among the cohort of children with police contact between 10–13 with 89% presenting at least once before 14 (*n* = 14,122). First ED contact is front-loaded in infancy with 19% presenting at less than 12 months (*n* = 2,624) and 15% at age 1 (*n* = 2,057). Almost a third presented between 5–9 times (*n* = 4,396, 31%) and one in five had between 10–19 presentations (*n* = 2,545, 18% see Figure 35).

Figure 35: Number of presentations to ED before 14

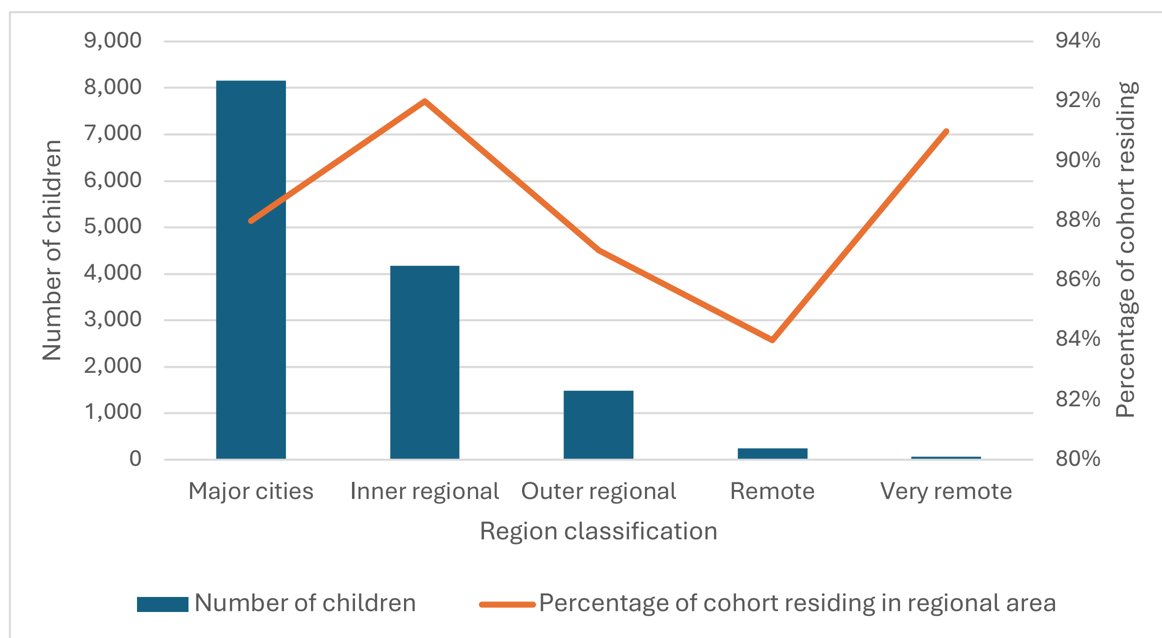



ED presentation is near-universal among those with deeper justice involvement with 90% of those with a finalised charge (*n* = 4,308), 93% of those who went to court (*n* = 1,051), and 95% of those under YJNSW supervision (*n* = 667) having had prior ED contact. When limited to ED contact between ages 10–13, similar proportions of children with formal justice

contact are evident including 82% of children who received a finalised charge (*n* = 3,496), 81% who went to court (*n* = 911), and 87% who were supervised by YJNSW (*n* = 608). ED contact between ages 8–10 is also relatively common among justice-entangled children, comprising 41% of those with a finalised charge (*n* = 1,953), 43% of those who went to court (*n* = 490) and 44% of those under YJNSW supervision (*n* = 310).

The data show proportionally high ED contact across the regions with slightly higher concentrations of the cohort presenting to ED in inner regional NSW (92%) and very remote NSW (91%, see Figure 36).

Figure 36: Number of ED presentations by region and percentage of cohort by region



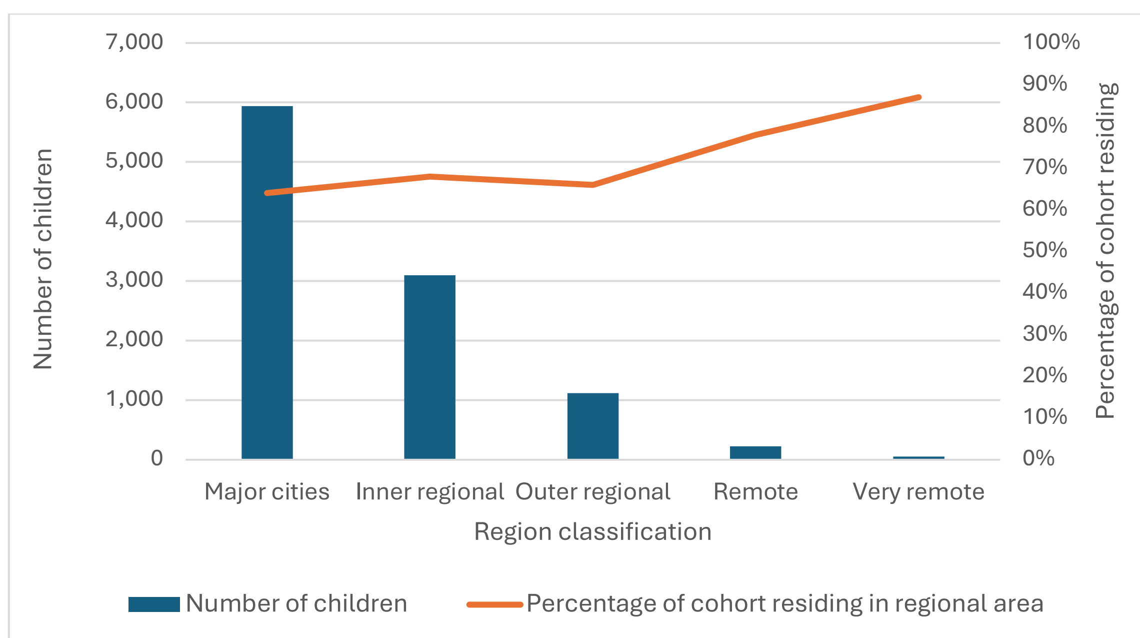

In the 12 months before first police contact, 34% attended ED (*n* = 5,441), most had 1–2 visits (*n* = 4,360, 80%) and over half were also suspended (*n* = 2,786, 51%), subject to child protection reports (*n* = 2,821, 52%), and a quarter were victimised (*n* = 1,468, 27%) in this 12-month timeframe.

### 5.5.2. Hospital admissions

A majority of the cohort of children with a police contact between 10–13 (*n* = 14,141, 89%) were admitted to hospital at least once before 14. Overwhelmingly, most were first admitted in infancy (*n* = 12,702, 90% admitted <12 months). Admissions were mostly to acute care (*n* = 10,460, 74%) and common reasons for admission ranged from ear, nose and throat concerns (ENT, *n* = 4,335, 31%) to musculoskeletal issues (*n* = 2,976, 21%) and respiratory problems (*n* = 2,913, 21%).

A majority ($n$ = 58, 87%) of the cohort of children living in very remote areas of NSW were admitted to hospital at least once, followed by 78% ($n$ = 229) living in remote areas, and 68% ($n$ = 3,103) in inner regional areas (see Figure 37).

Figure 37: Number of hospital admissions by region and percentage of cohort by region



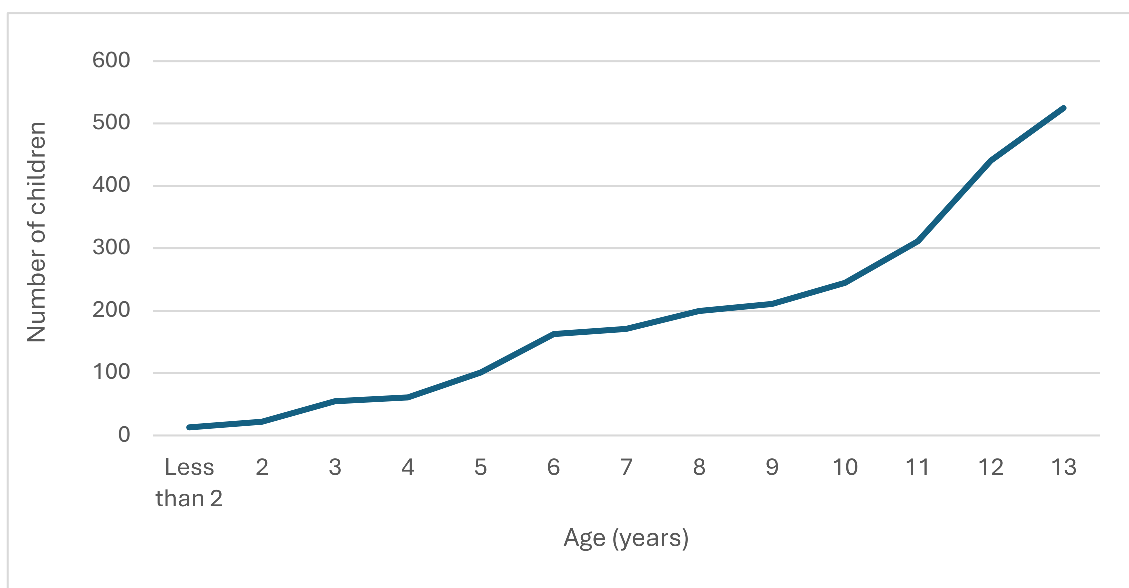

A small subset were admitted in the year prior to first police contact ($n$ = 1,323, 8%). Admissions during this timeframe were concentrated around musculoskeletal injury ($n$ = 348, 26%), injury or alcohol and other drug use ($n$ = 217, 16%) and ENT issues ($n$ = 205, 15%). In the 12 months prior to first police contact, over half of this cohort were also the subject of a child protection report ($n$ = 746, 57%), nearly half were suspended from school ($n$ = 607, 47%), and almost a third were victimised ($n$ = 401, 31%).

Between 10–13, 24% were admitted to hospital ($n$ = 3,803) chiefly for musculoskeletal injuries ($n$ = 1,162, 31%) and injuries or alcohol and other drug use ($n$ = 723, 19%) aligning with increased risk-taking and violence exposure. During this timeframe, the majority were also suspended ($n$ = 2,649, 70%) and had child protection system contact ($n$ = 2,685, 71%) and over half were victimised ($n$ = 2,036, 54%).

### 5.5.3. Mental health ambulatory care

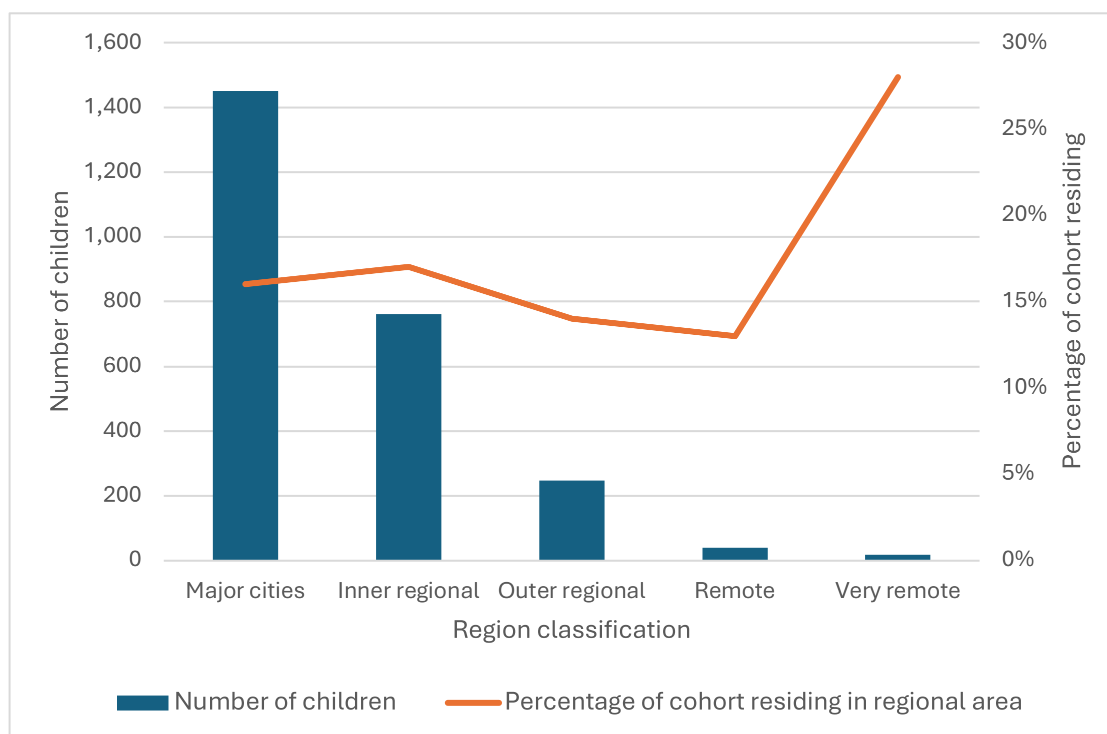
A minority of the cohort had at least one mental health ambulatory episode before 14 ($n$ = 2,519, 16%) with one in five having between 5–9 episodes ($n$ = 520, 21%) and 17% having between 10–19 episodes ($n$ = 430). First episodes cluster at age 13 ($n$ = 525, 21%), consistent with increasing psychological distress around the same age that police and justice system contact peaks (see Figure 38).

Figure 38: Age at first mental health ambulatory episode before 14




Higher proportions of children in very remote (*n* = 19, 38%) and inner regional areas (*n* = 762, 17%) had a mental health ambulatory episode before 14, hinting at unmet early intervention needs and reliance on episodic ambulatory care (see Figure 39).

Figure 39: Number of mental health ambulatory episodes before 14 by region and percentage of cohort by region



Data from the year prior to first police contact show that 968 children (6%) had a mental health ambulatory episode and a little over a quarter of this cohort had one episode (*n* = 271, 28%), while nearly a fifth had between 5–9 episodes (*n* = 173, 18%), and 10 plus episodes respectively (*n* = 178, 18%) during this 12-month timeframe. In the year prior to police contact, a majority of this cohort (*n* = 749, 77%) were also the subject of a child protection report, and were suspended from school (*n* = 555, 57%). Nearly half were victimised (*n* = 408, 42%).

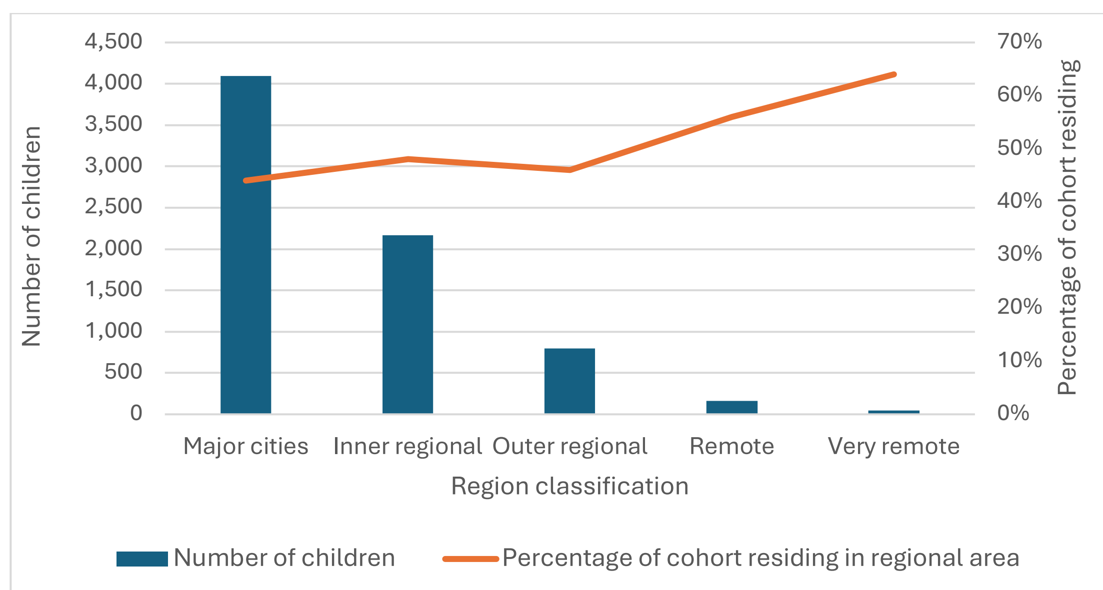
Between 10–13, 14% of the cohort (*n* = 2,159) had at least one mental health ambulatory episode. Again, frequency of episodes during this timeframe concentrates at one episode (*n* = 456, 21%), 5–9 episodes (*n* = 433, 20%), and 10+ episodes (*n* = 574, 27%). One in five children with a finalised charge had a mental health ambulatory episode between ages 10–13 (*n* = 920, 19%), a third who went to court had an episode (*n* = 384, 34%), and 39% under YJNSW supervision had at least one episode (*n* = 271).

There were notable overlaps with suspension (*n* = 1,700, 79%), victimisation (*n* = 1,480, 69%) and child protection reports (*n* = 1,937, 90%) between 10–13 indicating mental health demand sits within dense bundles of adversity rather than in isolation.

#### 5.5.4. Ambulance episodes

In terms of general ambulance episodes, 46% of the cohort (*n* = 7,276) had at least one ambulance episode before 14. Half of this cohort had a single call-out consistent with acute incidents (*n* = 3,615, 50%) while a minority had repeated call-outs (*n* = 2,096, 29% had 3+ call-outs), pointing to potentially unstable settings. Again, there is a concentration of ambulance call-outs among children residing in very remote NSW (*n* = 43, 64%) and remote NSW (*n* = 166, 56%) while 44% of children residing in major cities had an ambulance episode (*n* = 4,097, see Figure 40).

Figure 40: Number of ambulance call-outs by region and percentage of cohort by region




Just over 10% of the cohort had an ambulance episode in the year prior to first contact (*n* = 1,814, 11%), 9% between age 8–10 (*n* = 1,408), and 29% between 10–13 (*n* = 4,578).

There is a co-occurrence between ambulance call-outs and suspension between 10–13 (*n* = 3,507, 77%), victimisation (*n* = 2,836, 62%), and child protection reports (*n* = 3,710, 81%) again marking ambulance use as a potential barometer of multi-system stress. A substantive minority and in some cases majority, of children with formal justice system contact also had at least one ambulance call-out between 10–13, including 37% of children with a finalised charge (*n* = 1,788), 56% of children who went to court (*n* = 634) and 65% under YJNSW supervision (*n* = 452).

#### 5.5.5. Aggregate health burden

To assess an aggregate health burden across the cohort, we calculated the number of children in the cohort that had all four health and mental health risk indicators (including emergency department presentation, mental health ambulatory episode, hospital admission and an ambulance call-out). A minority experienced all four health/mental health risk indicators before 14 (*n* = 1,680, 11%), and 5% did so specifically between 10–13 (*n* = 719). This 'quadruple-contact' group likely represents the highest-need, highest-risk trajectory.

Overall, these data indicate that early onset and chronic health and mental health system contact can co-occur with multiple disadvantage including school suspension, victimisation, and child protection system contact. Across the cohort, health system contact tended to begin in infancy and become recurrent, suggesting cumulative disadvantage. Findings from the year prior to first police contact show that some health system contact (specifically, emergency department presentations, ambulance and mental health call-outs) can serve as a proximal warning sign for justice contact and/or an actionable touchpoint for prevention. Shifts from

ENT and respiratory concerns in early childhood to injuries and alcohol and other drug use issues between ages 10–13 mirror developmental changes and the emergence of peer-driven risk and violence that can occur in early adolescence. Finally, as has been previously seen with risk indicators across the cohort, regional inequity is sustained across health and mental health care systems with higher emergency department and ambulance reliance apparent in regional and remote areas of NSW, suggesting possible primary care shortfalls and/or limited access to community health/mental health supports and a concomitant over-use of acute services.

Ultimately, these health service data show that many of the justice-involved children were visible to health systems early and often. It is possible that emergency department, hospital, ambulance, and mental health contacts—especially in the year immediately preceding police contact—could serve as windows for intervention and coordinated, trauma-informed supports.

### 5.6. How many *doli*-aged children have a recorded disability and/or have received disability supports at school?

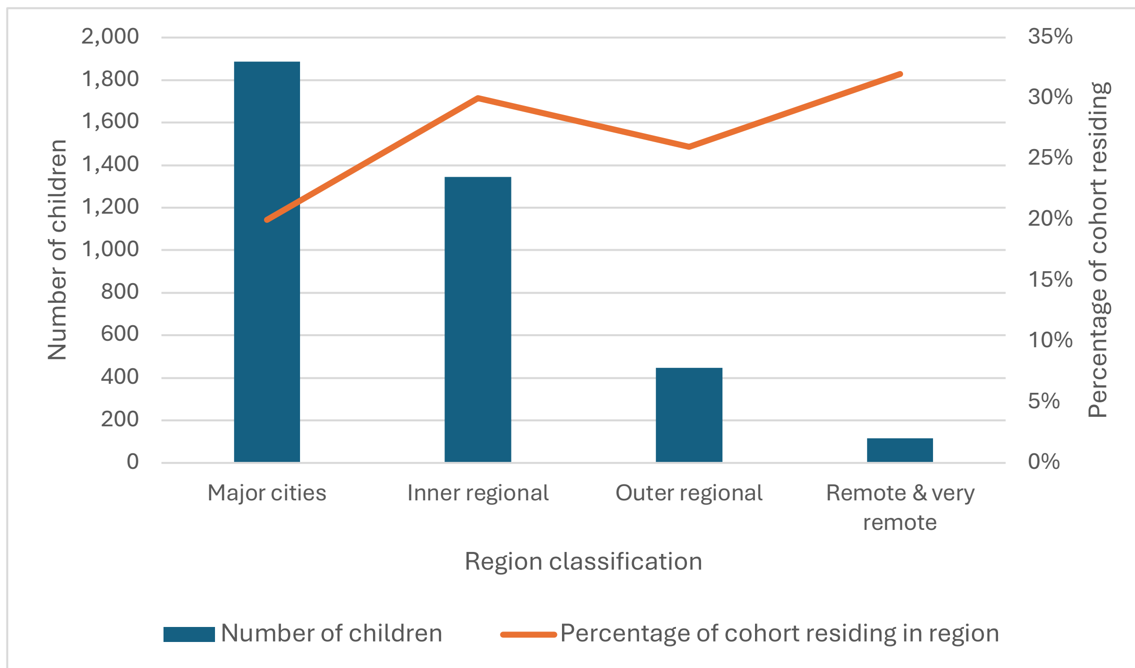
A minority of the cohort of children with a police contact between 10–13 (*n* = 999, 6%) were recorded by DCJ as having a disability, with a clear gender skew towards males (76% male, 24% female). Disability was particularly concentrated in the OOHC cohort with one in five children in OOHC before 14 having a recorded disability (*n* = 506, 21%).

#### 5.6.1. Education system supports and overlap

DoE records disability supports made available to children at NSW public schools including: Integration Funding Support (IFS-DoE) and Support Class (SCAS) Enrolment. IFS-DoE is additional funding for extra support, such as for an additional teacher or school learning support officer in a mainstream classroom, and SCAS is a process for students with moderate to high support needs to be placed in specialist classes either within a mainstream school or at a School for Specific Purposes. A much larger group (*n* = 3,794, 24% of the cohort) received one or both of these school disability supports, highlighting the gap between formal DCJ disability flags and educational recognition of needs. The two main forms of supports—SCAS (*n* = 3,303, 87%) and IFS-DoE (*n* = 1,293, 34%)—show distinct patterns: SCAS supports often involve multiple enrolments (with 33% receiving 4+ supports), while IFS-DoE supports were concentrated in single enrolments. The fact that IFS-DoE enrolments were typically singular suggests time-limited support provided within mainstream classrooms can be protective if timely and adequate, while multiple SCAS enrolments likely reflects enduring or escalating educational and behavioural needs among affected children.

Regional disparities are also evident with one-third of children in remote/very remote areas received disability supports (*n* = 115, 32%), compared with only one-fifth in major cities (*n* = 1,887, 20% see Figure 41).

Figure 41: Number of children receiving a school disability support before 14 by region and percentage of cohort by region




### 5.6.2. Intersections with other risk factors and justice outcomes

A majority of DCJ-flagged children with disability (84%), and those with school supports (78%), had been victims of crime. Victimisation was often repeated (many with 5–9 episodes). Similarly, 85% of DCJ-flagged children and 3,520 of those with school supports (93%) had been suspended, with very high frequency (a third suspended 10–19 times).

The data indicate that children with a recorded disability appear more frequently at intensive stages of system contact: 43% (*n* = 1,643) of children with a school disability support and 42% (*n* = 416) of DCJ-recorded disabled children received a finalised charge; 16% (*n* = 600) and 17% (*n* = 167) respectively of school-supported and DCJ-recorded children with a disability went to court; and 11% (*n* = 425) and 12% (*n* = 121) respectively were under YJNSW supervision (see Boiteux & Poynton, 2023).

### 5.6.3. Developmental timing

School disability supports were often in place well before first police contact, especially between ages 8–10, and in the year prior. The year prior to police contact is particularly striking: 2,279 children (14% of the cohort) received school supports, yet many also had high suspension days (*n* = 1,699, 75%) and victimisation rates (*n* = 679, 30%).

5.7. How many *doli*-aged children have been referred to and/or participated in a service or support administered by YJNSW or DCJ?

### 5.7.1. YJNSW services

A total of 579 children (4% of those with police contact between 10–13) were referred by YJNSW to an internal and/or external service, representing 12% of those with a finalised charge and more than half (51%) of those who went to court. Engagement was skewed toward boys ($n$ = 420, 73%) and concentrated at age 13 ($n$ = 411, 71%), consistent with broader findings that this is the peak age for justice involvement.

The service profile reveals significant but expected delays: 59% were referred more than a year after their first police contact ($n$ = 344). Given YJNSW's mandate applies at the tertiary end of the justice system (often after a plea of guilty or finding of guilt), services are necessarily triggered reactively after multiple interactions.

Service types reflect the multifaceted needs of this cohort. Almost all children referred to a YJNSW service had previously been suspended from school ($n$ = 535, 92%) and a majority ($n$ = 406, 70%) were referred to, or participated in, an education service consistent with evidence linking school exclusion and disengagement to offending. Almost half of the cohort ($n$ = 254, 44%) engaged in a legal service as can be expected from ongoing entanglement with justice processes and systems. A third ($n$ = 183, 32%) were referred to, or participated in, a mental health service, indicating high levels of psychological and behavioural need. Additionally, a majority ($n$ = 517, 89%) were victims of a crime before 14; the subject of a child protection report ($n$ = 568, 98%); were in unstable housing ($n$ = 413, 71%); and 63% required a disability support at school.

### 5.7.2. Brighter Futures

Brighter Futures is a secondary prevention and early intervention program delivered to families with children aged 0–9 (and occasionally up to 14) experiencing social disadvantage but who do not meet statutory child protection thresholds. 2,677 children (17% of those with police contact) engaged in Brighter Futures prior to turning 14. This group was similarly disadvantaged to the cohort receiving YJNSW services. The data show that 80% ($n$ = 2,151) were victimised before 14; 79% ($n$ = 2,117) were suspended from school at least once; 99% ($n$ = 2,670) were the subject of a child protection report; and 34% ($n$ = 920) required and received a disability support at school.

While only 10% ($n$ = 280) of Brighter Futures participants appeared in court, more than a third had a finalised charge ($n$ = 951, 36%). This suggests that while the program reaches a large group of vulnerable children, it may not fully disrupt trajectories into justice involvement, particularly where cumulative risks (victimisation, school exclusion, disability) remain unaddressed.

Only 5% (*n* = 141) of Brighter Futures participants were also referred to YJNSW services, suggesting limited integration across service systems despite overlapping target populations.

#### 5.7.3. Intensive Family Supports/Programs (IFS/IFP)

IFS/IFP are high intensity, targeted intervention programs delivered by DCJ for families where children are at imminent risk of entering OOHC or where reunification is being pursued. 301 children (2% of the cohort with police contact) accessed IFS/IFP. Nearly half of this cohort received a finalised charge (*n* = 140, 47%) and one in five appeared in court (*n* = 54, 18%). They represent a smaller but highly vulnerable group with 86% (*n* = 260) victimised before 14; 84% (*n* = 252) suspended from school; 100% the subject of a child protection report (*n* = 301); and 46% (*n* = 137) requiring and receiving a disability support at school. Additionally, over half of this cohort (*n* = 158, 52%) were in OOHC, underscoring the severity of family and structural disadvantage characteristic of this cohort.

Participation was spread across childhood, with 24% (*n* = 73) in IFS/IFP between ages 8–10, including some who engaged before their first police contact (17% participated in the year prior to their first contact). This timing shows that the program does reach children early, but its participants remain overrepresented in justice outcomes, suggesting interventions may be insufficiently intensive or disrupted by entrenched social adversity.

Again, a minority (*n* = 25, 8%) of IFS/IFP participants were also referred to a YJNSW service, indicating limited integration of YJNSW and DCJ service systems. Comparatively, a little over a third participated in both IFS/IFP and Brighter Futures (*n* = 117, 39%).

#### 5.7.4. Youth Hope

Youth Hope is a DCJ early-intervention program designed to support children and young people at risk of entering the child protection or youth justice systems and provides short- to medium-term, community-based casework supports. 398 children (2.5% of the police contact cohort) were referred to Youth Hope, with 82% of this cohort (*n* = 326) consenting to participate. Nearly half of this cohort (*n* = 143, 44%) had a finalised charge and one in five appeared in court (*n* = 60, 18%). Their needs were complex and multi-layered with a majority being victimised at least once (*n* = 288, 88%), suspended from school (*n* = 282, 87%), having contact with the child protection system (*n* = 326, 100%) and nearly half (*n* = 147, 45%) receiving a disability support at school. Almost a third were in out-of-home care (*n* = 90, 28%) before age 14.

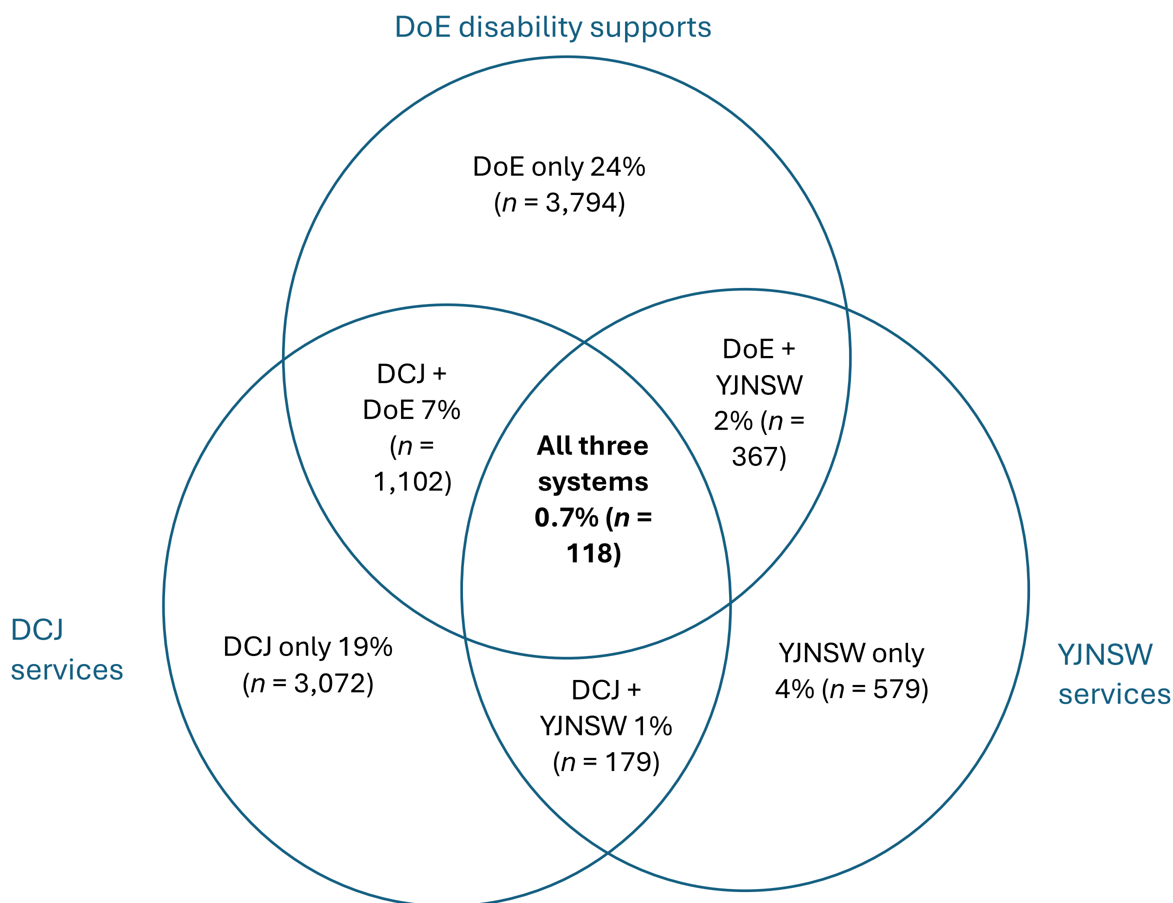
Service pathways were broad, including case coordination (*n* = 325, 82%), life skills (*n* = 231, 58% for children and children and *n* = 183, 46% for family members), therapeutic intervention (*n* = 126, 32%), parenting support (*n* = 137, 34%), and crisis support (*n* = 167, 42%). This breadth underscores the multidimensional vulnerabilities and needs of participants.

Youth Hope participants showed less overlap with YJNSW (*n* = 29, 9%) and IFS/IFP (*n* = 23, 7%) compared to Brighter Futures (*n* = 101, 25%) participants, demonstrating its focus on children at risk of child protection involvement and in need of medium-intensity casework supports compared to the high-intensity supports provided by IFS/IFP programs and the justice-focused YJNSW programs.

#### 5.7.5. Aggregate service contact

To assess the extent to which children's needs were recognised and responded to across different institutional systems, we examined contact across three distinct systems. These were: 1) YJNSW services, reflecting justice system supervision and offence-related intervention; 2) DCJ services including Brighter Futures, IFS/IFP and Youth Hope, reflecting child protection and family support responses; and 3) DoE disability-related educational adjustments including IFS-DoE and SCAS enrolments. Importantly, educational disability supports are not therapeutic or justice interventions, nor are they provided in response to offending. Rather they represent recognition of additional learning and support needs and are included here to capture system recognition of need, not as indicators of service-based risk intervention. Using this framework, a little over a third of the cohort (*n* = 5,915, 37%) of children who came to the attention of police between 10–13 were referred to *a* service (either a YJNSW service, DCJ service, or DoE disability support service) before 14 while less than 1% were referred to all three (*n* = 118, 0.7%, see Figure 42).

Figure 42: Overlap in service system contact among children with police contact between 10–13




In terms of overlap between service categories, DCJ services and disability supports are the most common dyad (*n* = 1,102, 7%), signalling some coupling between child protection concerns and school-identified additional support needs. YJNSW service contact and disability support (*n* = 367, 2%) and DCJ service contact and YJNSW service contact (*n* = 179, 1%) are comparatively smaller, implying that many justice-involved children did not concurrently receive school disability supports or child protection-related services—or that these supports arrived after justice contact.

Ultimately, these aggregates demonstrate that service coverage can be selective (contingent on eligibility thresholds, system silos, as well as incomplete capture in the HSDS) rather than universal. A majority had no recorded engagement with the services captured in the dataset despite high rates of adversity evident elsewhere in the data, and very few children appear to

be held within an integrated service net spanning welfare, justice and education-based supports.

Importantly, however, the range of services captured in the HSDS is necessarily limited to those administered through participating state agencies and does not include many community-based, localised or non-government services that children may access (see Chapter 3). As a result, the absence of recorded service contact should not be interpreted as an absence of support in children's lives, but rather as a limitation of what is visible within state-held administrative data.

Across these service systems, several common themes emerge from data captured in the HSDS:

(1) Cumulative disadvantage is pervasive among cohorts engaging in these services—victimisation, school suspension, disability and child protection involvement are prevalent across all service groups, especially among Youth Hope and IFS/IFP participants;

(2) There are missed opportunities for early intervention with many children accessing these services after multiple police contacts and with significant delays between first police contact and referral to a service. While referral to YJNSW services will occur once YJNSW supervision is engaged (i.e., post initial justice system contact), other services are able to engage children earlier and the persistence of later court outcomes for these cohorts suggest that interventions are either too late, too narrow or insufficiently integrated;

3) There is relatively little overlap between services suggesting a fragmentation of service delivery and siloed systems. This is despite the fact that these services engage children with similar profiles of risk. Fragmentation likely diminishes the efficacy of these programs and creates gaps through which vulnerable children can fall;

4) As previously seen in the data on youth offending, there are gender and cultural inequities in the children represented in these cohorts. Boys are the majority in all service cohorts, and given the over-representation of Aboriginal and Torres Strait Islander children in justice pathways, it is likely (although not reportable from these data) that they are also over-represented in these services;

5) Bifurcation of programs along lines of preventive potential vs system management is apparent in the differences between programs like Brighter Futures which aim at prevention, and YJNSW services which primarily function as system management once children are already enmeshed in the justice system. While preventive programs are needed, the persistence of high rates of justice involvement among those participants suggest structural risk factors that are perhaps going unaddressed and limiting capacity to effectively prevent escalation.

Ultimately, while NSW service systems recorded in the HSDS reach significant numbers of highly vulnerable children, their impact on preventing justice escalation appears constrained by late engagement, fragmentation, and the overwhelming weight of cumulative disadvantage.

### 5.8. To what extent do these risk and protective factors intersect among *doli*-aged children who come into contact with the police and who receive a finalised charge respectively?

#### 5.8.1. Before age 14

To better understand how risk factors intersect for children who came to police attention before age 14, we constructed a nested cumulative risk measure. Each level represents children who experienced all prior domains plus the newly added domain within the relevant time window. Starting with children who were both victimised and suspended from school (Risk Level 1), 46% met this threshold (*n* = 7,368). As further domains were added—such as being subject of a child protection report, having a health or mental health episode,[18] and housing instability[19]—the number of children meeting all included criteria decreased as follows:

- Risk Level 1 (Victimised + Suspended): 46% (*n* = 7,368)
- Risk Level 2 (+ Child Protection Report): 44% (*n* = 6,954)
- Risk Level 3 (+ Health/Mental Health Episode): 43% (*n* = 6,849)
- Risk Level 4 (+ Unstable Housing): 26% (*n* = 4,110)

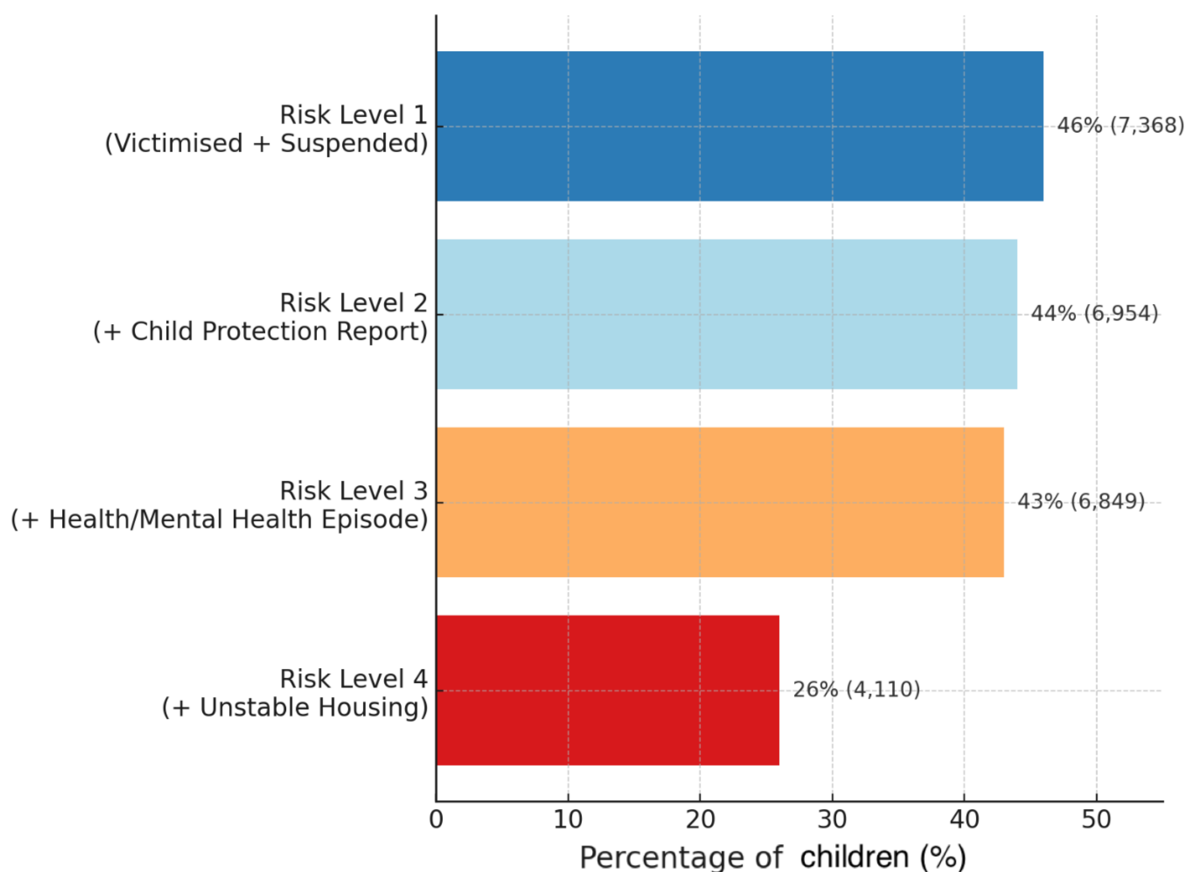
This pattern demonstrates a cumulative risk gradient whereby the size of the affected cohort decreases as additional domains of adversity are layered. Notably, the drop between Levels 3 and 4 indicates that housing instability is concentrated within a smaller, higher-complexity subset of children already experiencing victimisation, school exclusion, child protection contact, and health/mental health system contact.

Overall, almost half of the cohort are represented between Levels 1 and 3 (43–46%) indicating that almost half of children with a police contact between 10–13 had between two and four cumulative risk factors before their 14$^{th}$ birthday. This drops to a quarter of the cohort with five cumulative risk factors including unstable housing (see Figure 43).

[18] Defined as any recorded ED presentation, hospital admission, ambulance episode or mental health ambulatory contact within the window.

[19] Defined as any recorded incident of homelessness, risk of homelessness or application for, or tenancy in, social housing within the window.

Figure 43: Cumulative risk before age 14[20]




### 5.8.2. Between 8–10 years

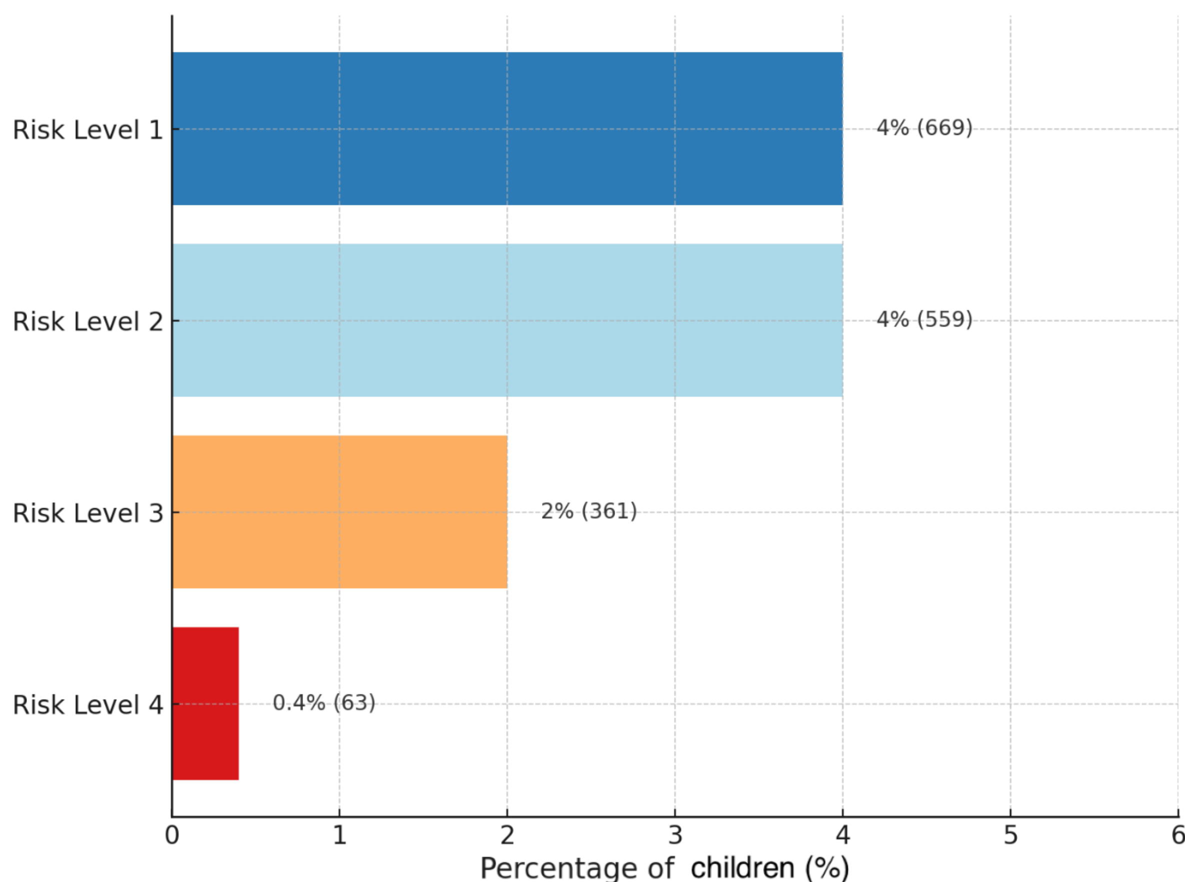
A similar pattern is present among 8–10-year-olds (see Figure 44). Beginning with children aged 8–10 who experienced victimisation and school suspension (Risk Level 1), 669 children were identified (4%). When a child protection report was also present during this timeframe (Risk Level 2), this number decreased to 559 (4%). With the added presence of a health or mental health episode (Risk Level 3), the number dropped further to 361 children (2%). Finally, at Risk Level 4—where unstable housing was included as a fifth risk factor—the number of affected children fell sharply to 63 (0.4%).

This progression illustrates a narrowing of the population as risks compound, particularly between Risk Levels 3 and 4. The drop suggests that those experiencing both mental health

[20] Risk levels are as follows: 1) victimised + suspended; 2) victimised + suspended + child protection report; 3) victimised + suspended + child protection report + health or mental health episode; 4) victimised + suspended + child protection report + health or mental health episode + unstable housing.

challenges and housing instability in addition to other adversities represent a particularly vulnerable and less common subset of the 8–10-year-old cohort.

Figure 44: Cumulative risk among children aged 8–10 years

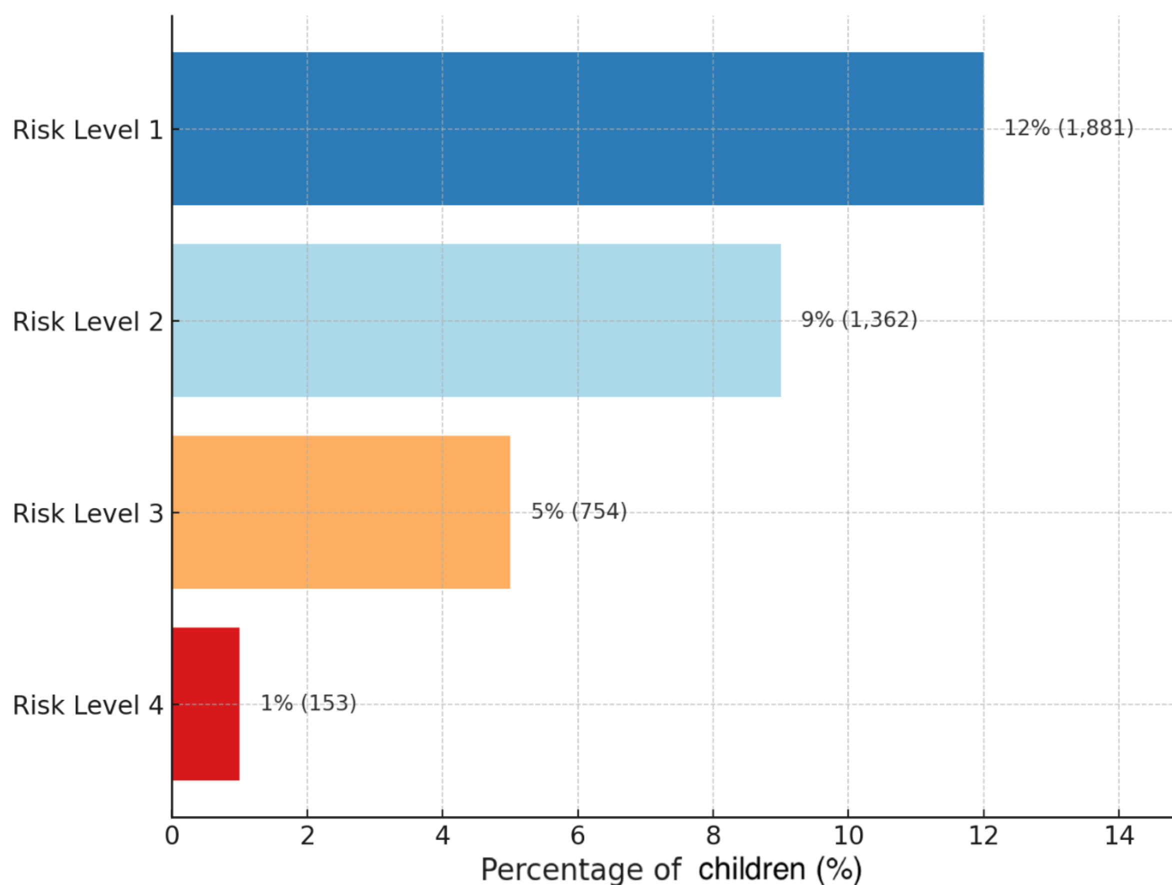



### 5.8.3. Year prior to first police contact

In the year prior to their first police contact, 1,881 children (12%) experienced both victimisation and suspension from school (Risk Level 1) (see Figure 45). As additional risk factors are considered, the number of affected children steadily declines, highlighting the cumulative nature of vulnerability. At Risk Level 2, where children were also the subject of a child protection report, the number of affected children decreases to 1,362 (9%). The inclusion of a health or mental health episode at Risk Level 3 reduces this further to 754 children (5%). Finally, when unstable housing is added as a fourth risk factor (Risk Level 4), only 153 children remain in this high-risk category (1%).

This pattern demonstrates a progressive concentration of disadvantage, with each added risk factor reducing the size of the group. The steep drop between Risk Levels 3 and 4 suggests that unstable housing, in combination with prior adversities, may be associated with particularly acute levels of vulnerability.

Figure 45: Cumulative risk in the year prior to first police contact

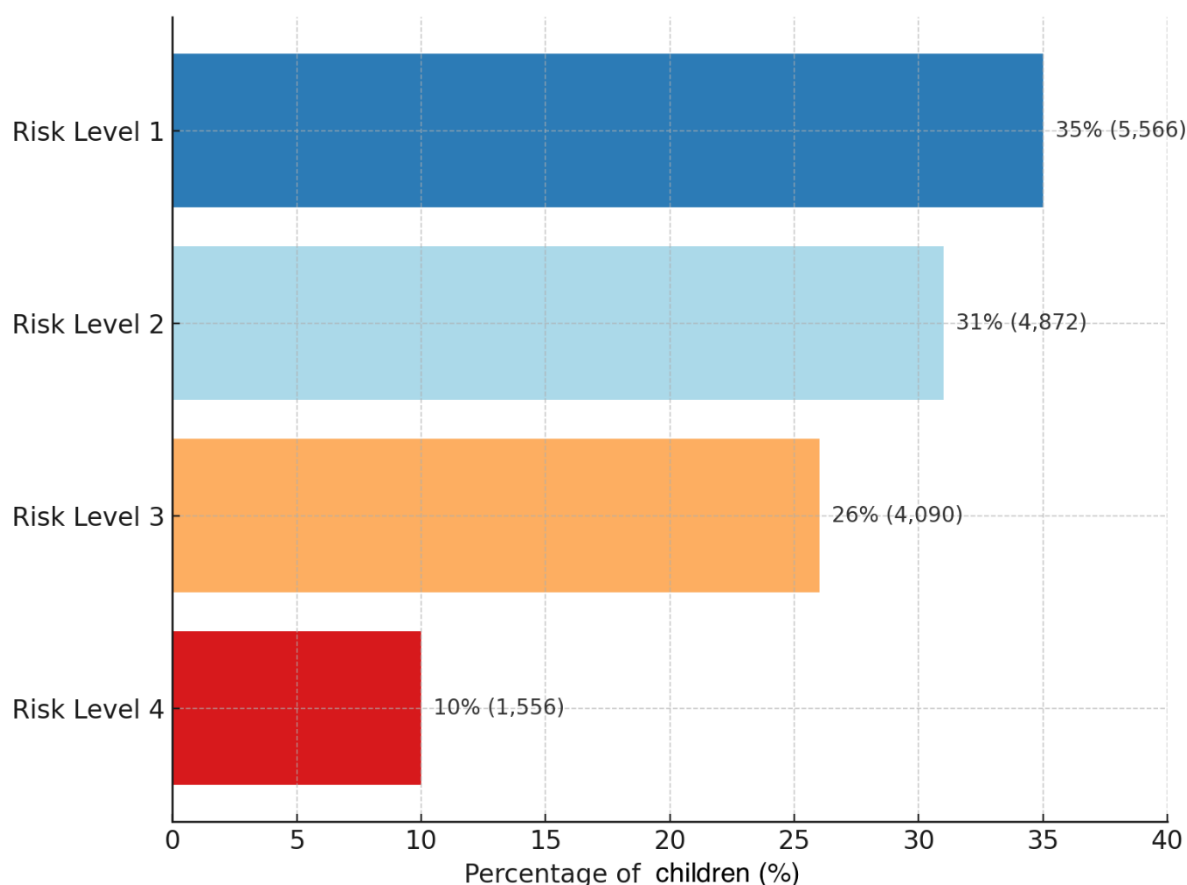



### 5.8.4. Between 10–13

Figure 46 captures the distribution of children exposed to an increasing number of cumulative risk factors between ages 10–13, beginning with those who experienced both victimisation and suspension from school (Risk Level 1, $n$ = 5,566, 35%). When a child protection report was also present (Risk Level 2), the number decreased to 4,872 children (31%). The addition of a health or mental health episode (Risk Level 3) further reduced the group to 4,090 children (26%). Finally, the inclusion of unstable housing at Risk Level 4 resulted in a substantial drop to 1,556 children (10%).

This downward trend again highlights the cumulative nature of disadvantage. While early risk factors are relatively widespread in this cohort, the population becomes progressively smaller as more severe or complex adversities—such as mental health issues and housing instability—are added. The sharp decrease from Risk Level 3 to 4 indicates a particularly vulnerable subgroup facing multiple compounding challenges.

Figure 46: Cumulative risk among children aged 10–13



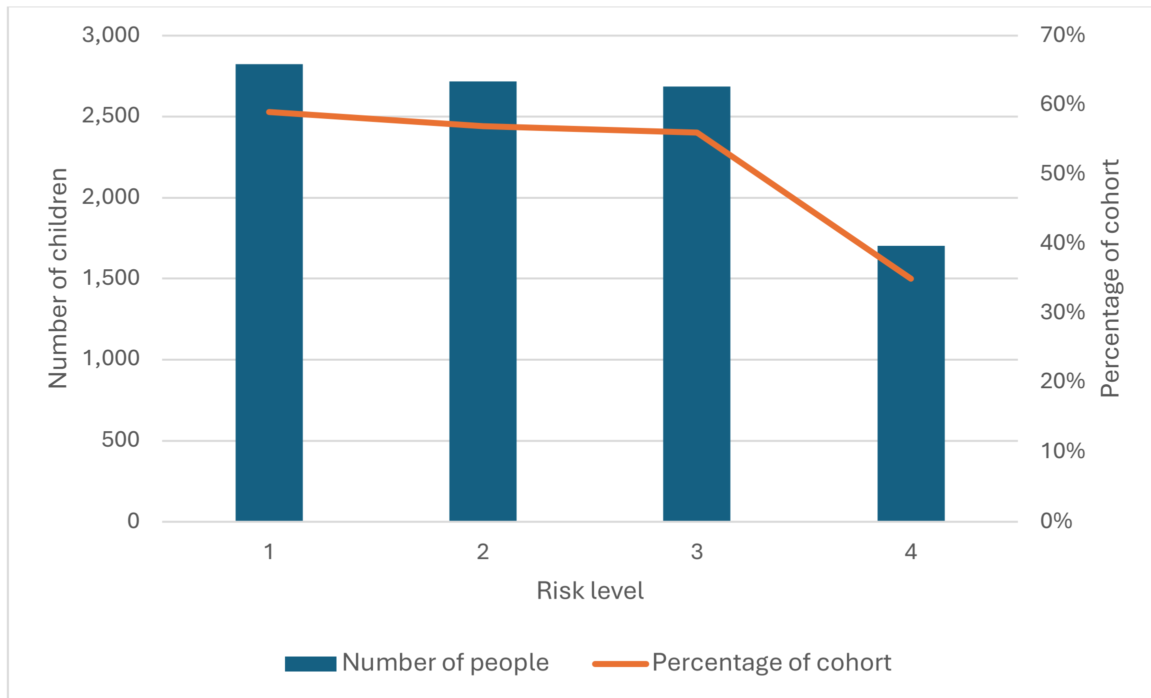

### 5.8.5. Aggregates for children with a finalised charge

We then examined cumulative risk factors among children with a finalised charge ($n$ = 4,804) between 10–13 starting with cumulative risk experienced before their 14$^{th}$ birthday. The data illustrate a clear pattern of cumulative risk, showing a progressive decline in the number of children as additional adversities are layered (see Figure 47):

- Risk Level 1: 2,823 (59%) children experienced both victimisation and school suspension before age 14
- Risk Level 2: 2,718 (57%) children additionally experienced child protection system contact
- Risk Level 3: 2,686 (56%) children additionally experienced a health or mental health episode
- Risk Level 4: 1,701 (35%) children additionally experienced housing instability. This decrease suggests that unstable housing is a more concentrated risk factor within this cohort.

Overall, the pattern reflects a cumulative risk effect whereby the number of individuals exposed to multiple intersecting disadvantages decreases as the complexity and severity of risk factors increase.

Figure 47: Cumulative risk before age 14 among children with a finalised charge between 10–13



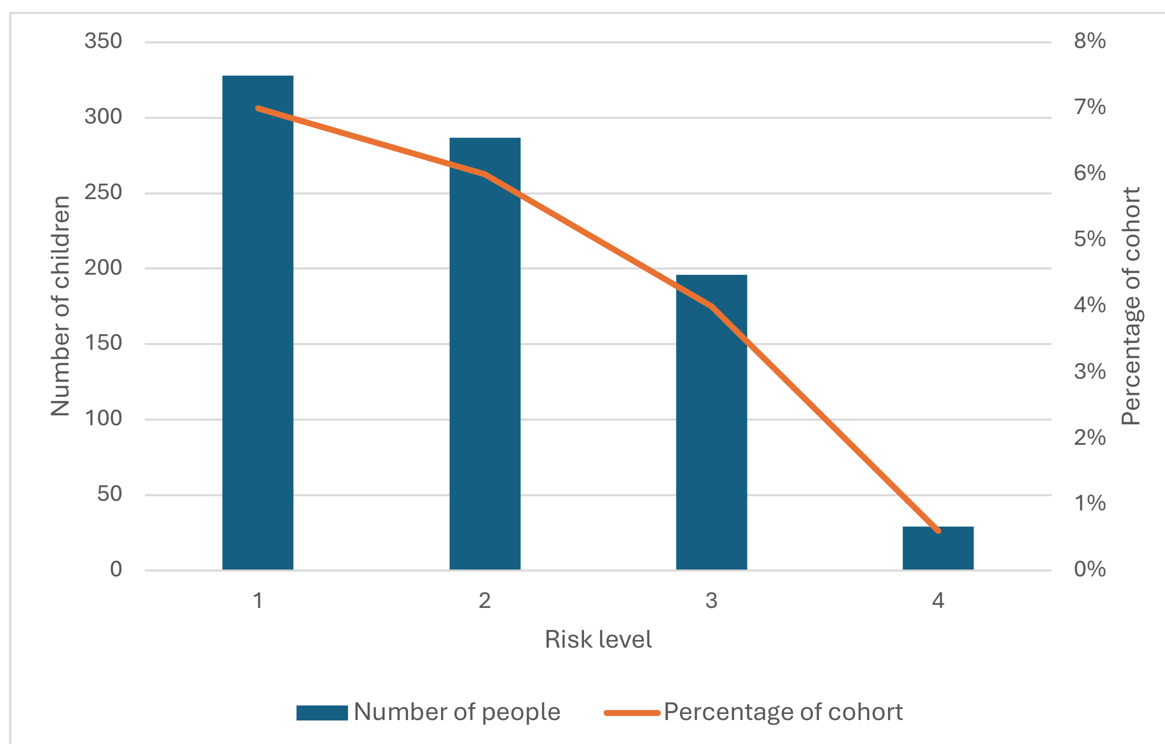

### *5.8.5.1. Between ages 8–10 among children with a finalised charge*

When risk factors experienced between ages 8–10 among the cohort with a finalised charge are examined, Figure 48 illustrates a marked cumulative decline in the number of children affected as additional risk factors are introduced:

- Risk Level 1: 328 (7%) children had experienced both victimisation and school suspension between 8–10
- Risk Level 2: 287 (6%) children additionally experienced child protection system involvement indicating a moderate reduction and suggesting that many children with victimisation and suspension histories also intersect with child welfare concerns.
- Risk Level 3: 196 (4%) children also experienced a health or mental health episode
- Risk Level 4: 29 (0.6%) children additionally experienced unstable housing. This substantial drop indicates that this group represents a small but highly vulnerable cohort facing multiple, intersecting challenges across personal, social, and structural domains.

This progression underscores a pronounced cumulative risk gradient and the steep drop between Risk Levels 3 and 4 again suggest that unstable housing is a critical tipping point that affects a more marginalised subset of the cohort.

Figure 48: Cumulative risk between 8–10 among children with a finalised charge between 10–13




*5.8.5.2. In the year prior to first police contact among children with a finalised charge*

When we look at cumulative risk experienced in the year prior to first police contact among children with a finalised charge, the data reveal a consistent pattern with the number of children decreasing steadily as additional adversities are layered:

- Risk Level 1: 775 (16%) children were identified as having experienced both victimisation and school suspension in the year prior to police contact

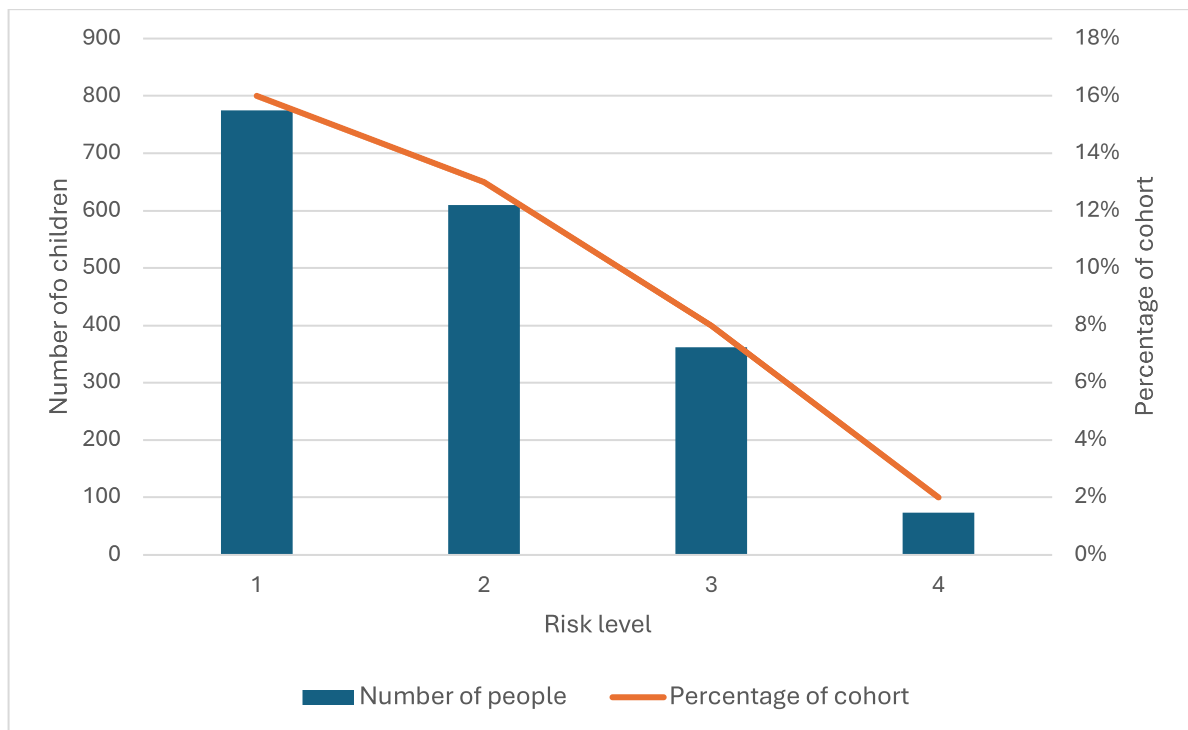
- Risk Level 2: 609 (13%) children additionally experienced child protection involvement

- Risk Level 3: 362 (8%) children also had a health or mental health episode, indicating that health-related vulnerabilities affect a distinct subgroup within the broader population already exposed to significant risk.

- Risk Level 4: 73 (2%) children also experienced unstable housing. This sharp decline highlights a highly vulnerable minority facing complex, overlapping forms of adversity (see Figure 49).

Overall, this dataset illustrates a clear gradient of cumulative adversity where each added risk factor corresponds to a narrowing of the affected cohort. The trajectory from 775 to 73 children—representing over a 90% reduction—demonstrates how intersecting disadvantages increasingly isolate a small, high-risk group temporally proximate to justice system contact. These findings reinforce the need for coordinated, multi-system interventions aimed at addressing the layered needs of children experiencing the most severe, compounded form of disadvantage.

Figure 49: Cumulative risk in the year prior to first police contact among children with a finalised charge between 10–13




#### *5.8.5.3. Between ages 10–13 among children with a finalised charge*

When we look at cumulative risk experienced between ages 10–13 among children with a finalised charge, we again see a clear and steady pattern of cumulative risk where the number of children decreases as additional adversities are introduced (see Figure 50):

- Risk Level 1: 2,271 (47%) children experienced both victimisation and school suspension between 10–13

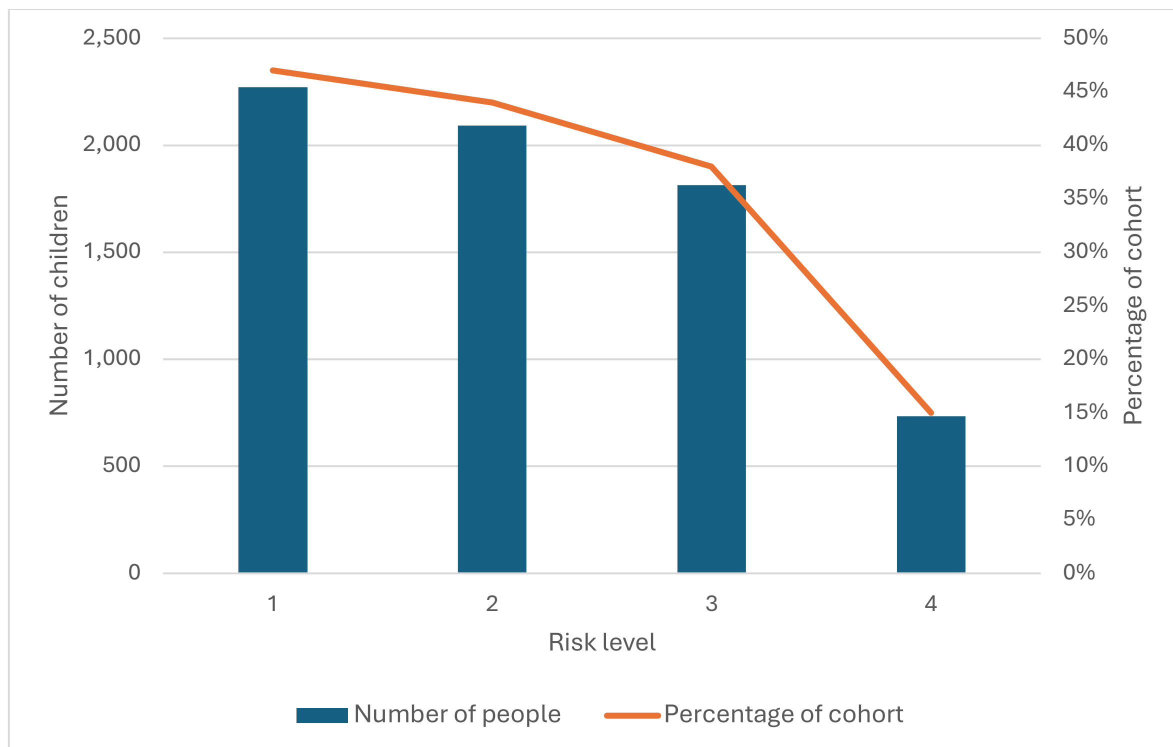
- Risk Level 2: 2,093 (44%) children also experienced child protection system involvement

- Risk Level 3: 1,813 (38%) children additionally had a health or mental health issue, suggesting that mental health concerns play a meaningful role in differentiating levels of vulnerability within this population.

- Risk Level 4: 735 (15%) children also experienced unstable housing. This marked reduction represents approximately one-third of those at Risk Level 3 and less than one-third of the original cohort at Risk Level 1.

This progression demonstrates a cumulative narrowing effect where each added risk factor filters out a portion of the cohort, leaving a smaller group faced with the most complex and entrenched challenges. The decline from 2,271 to 735 children reflects the compounded nature of these disadvantages with unstable housing emerging as a key marker of heightened vulnerability.

Figure 50: Cumulative risk between 10–13 among children with a finalised charge between 10–13



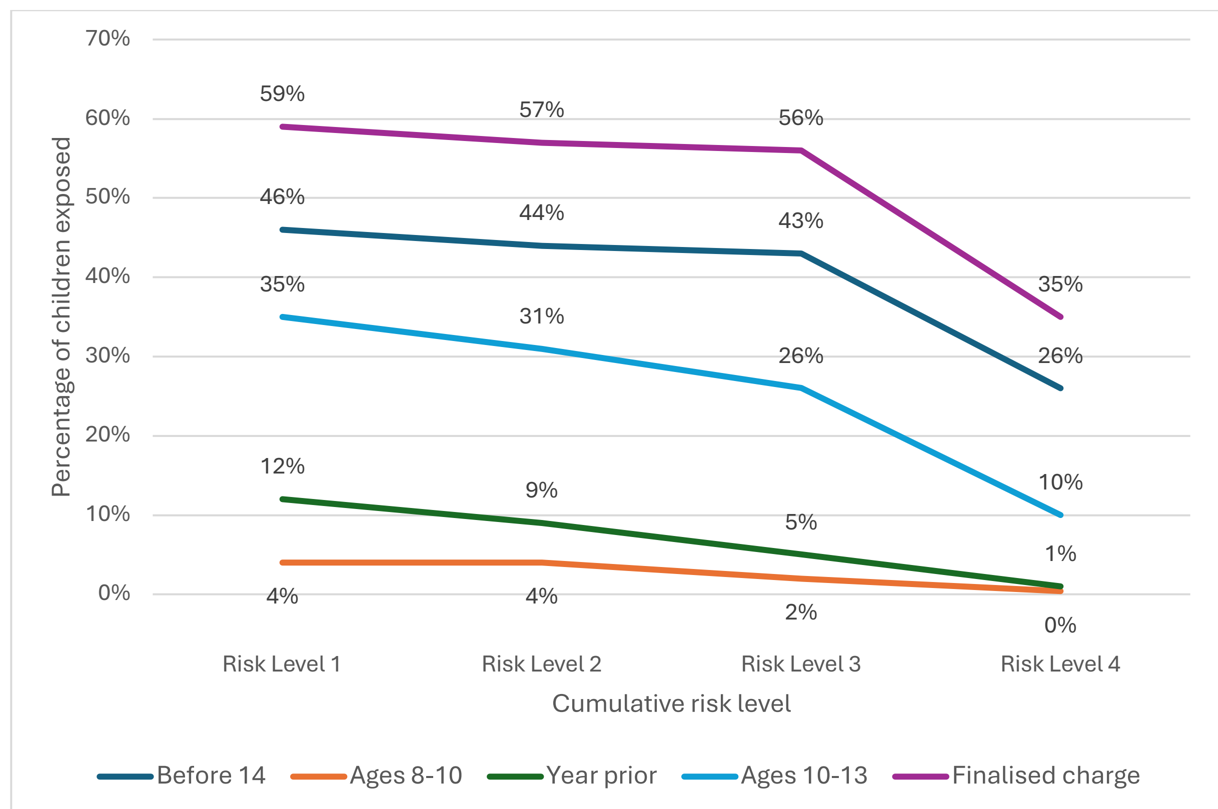

### 5.8.6. Cumulative risk: The gradient and where it steepens

Across all age windows and sub-cohorts, two regularities are evident (see Figure 51). First, the results show a consistent cumulative risk gradient with fewer children meeting criteria as

additional domains are added. Second, the largest proportional reduction occurs when housing instability is introduced (Level 4), indicating that housing precarity identifies a comparatively small subgroup carrying the most intersecting needs:

- Before age 14: 6,849 → 4,110 (-40%)
- Ages 8–10: 361 → 63 (-83%)
- Year prior: 754 → 153 (-80%)
- Ages 10–13: 4,090 → 1,556 (-62%)
- Finalised charge sub-cohort before age 14: 2,686 → 1,701 (-37%)

Figure 51: Cumulative risk exposure across age windows and justice outcomes




Ultimately, these patterns suggest that while victimisation, suspension, child protection contact, and health/mental health system contact are widespread among children with early police contact, housing instability is a key marker of intensified and concentrated multi-domain adversity, including in windows temporally proximate to first police contact.

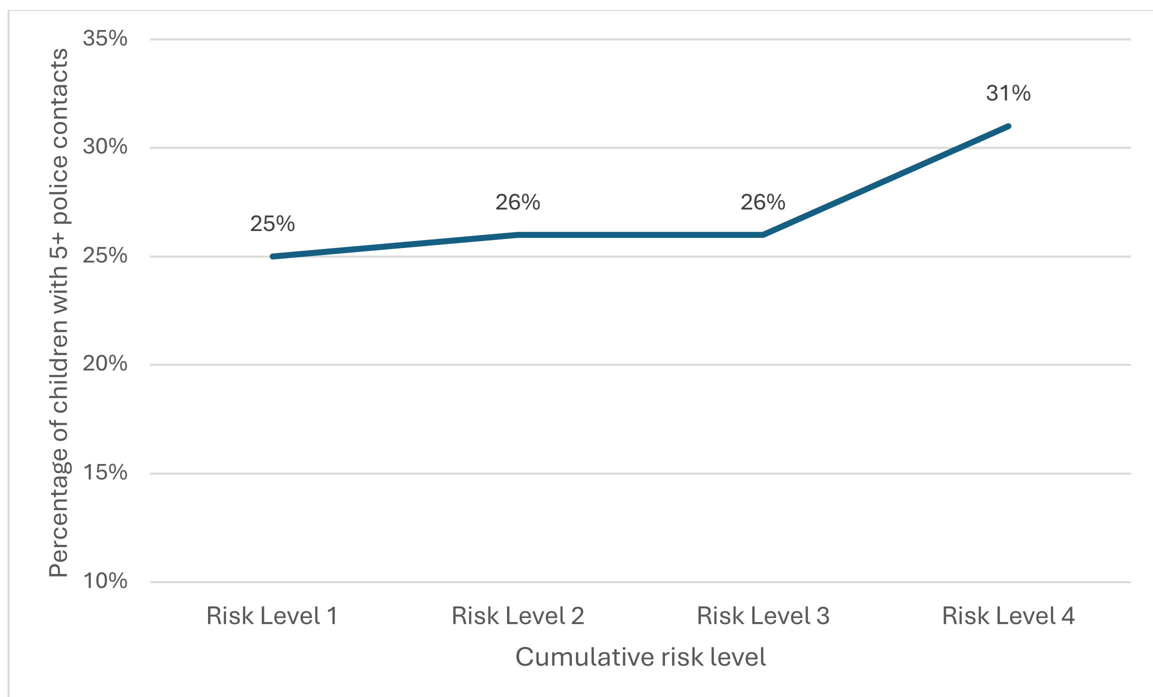
#### *5.8.6.1. Age windows and proximity to first police contact*

Between ages 8–10, the high risk stack including five risk factors is rarer but highly selective (669 → 63 at Level 4, and 328 → 29 at Level 4 for charged sub-cohort). Those few with early multi-domain risk are likely on accelerated trajectories and need earlier, more intensive prevention.

In the year prior to first police contact, the risk stack becomes a proximal trigger set (1,881 → 153 at Level 4, and 775 → 73 at Level 4 for charged sub-cohort). Housing instability in the year before first police contact functions as a critical amplifier when layered on victimisation, suspension and child protection system contact, signalling acute system stress immediately preceding justice involvement.

This concentration of risk is mirrored in patterns of police engagement intensity. As shown in Figure 52, the prevalence of higher-frequency police contact (5+ contacts) increases progressively with cumulative risk exposure. While most children at all risk levels experienced between one and four police contacts, the proportion subject to repeated contact rises cumulative adversity, increasing from approximately one-quarter at Risk Levels 1–3 to nearly one-third at Risk Level 4.

Figure 52: Escalation of police contact (5+ contacts) by cumulative risk level between ages 10–13



#### *5.8.6.2. Children with a finalised charge*

Among children with a finalised charge (*n* = 4,804), most had a history of victimisation and suspension from school (*n* = 2,823, 59%). Adding child protection system contact only slightly reduces the affected cohort (59% → 57%), showing child protection exposure is near-ubiquitous in this high-risk group. Similarly, mental health and/or health system exposure is common among this sub-cohort (*n* = 2,686, 56%) implying health needs are prevalent within charged children. The major filter is housing (*n* = 1,701, 35%) with a third of charged children carrying the full multi-domain load of five risk factors including housing instability.

#### *5.8.6.3. Implications*

These data point to a layered rather than linear pattern of early justice contact. Early school exclusion and victimisation are widespread among children with police contact before age 14; child protection involvement is close to normative within this cohort; and health and/or mental health system contact is common though not universal. Housing instability is the clearest stratifier, identifying a smaller subgroup experiencing the most concentrated multi-domain adversity across multiple time windows, including those proximate to first police contact. These patterns sit alongside evidence of limited service integration. Fewer than 1% of children had recorded contact across all three service domains (YJNSW services, DCJ services, and education disability supports), and two-way overlaps or dyads between service categories were also modest. This suggests that many children experience service contact in single-system silos, despite their needs spanning welfare, education, health and justice domains.

Chapters 4 and 5 have mapped the scale, distribution and social patterning of early justice contact among *doli*-aged children in NSW. This analysis demonstrates that while most children experience only episodic police contact, a smaller and highly disadvantaged cohort accumulates repeated interactions across policing, courts, youth justice, child protection, education, health, housing and disability systems. For these children, early police contact is not an isolated event but one moment within a broader trajectory shaped by early trauma, instability, exclusion and unmet need.

Yet quantitative mapping cannot reveal how legal doctrines operate within these institutional conditions. In particular, it cannot explain how *doli incapax* is understood, mobilised and applied in day-to-day youth justice practice when young children are charged, bailed, remanded, and often withdrawn or dismissed. The following chapter therefore introduces the qualitative component of this study and provides an empirical examination of how the presumption operates in practice in NSW. Drawing on interviews with magistrates and legal practitioners, survey responses, and courtroom observations, the chapter analyses the procedural dynamics, interpretive frameworks, and institutional logics through which *doli incapax* is negotiated in everyday youth justice decision-making. In so doing, it shifts the analytic lens from population patterns to law in action, illuminating how the trajectories

identified in the preceding chapters are produced, mediated, and sometimes disrupted within courtroom practice.

# Chapter 6: The institutional operation of *doli incapax* in NSW

Building on the population patterns mapped in the preceding chapters, this chapter examines how *doli incapax* operates in practice across NSW and what its day-to-day administration reveals about the institutional conditions under which criminal responsibility is determined for children aged 10–13. While the presumption is doctrinally framed as a protective safeguard requiring proof that a child understood their conduct to be seriously wrong, its practical application is enacted within a procedural environment shaped by evidentiary limits, uneven expertise, jurisdictional structures, and variable service infrastructures. The analysis therefore shifts attention from the formal content of the rule to the institutional work through which it is interpreted, negotiated, and applied in everyday court practice.

This chapter forms the first of a two-part qualitative examination of *doli incapax* in operation. Chapter 6 focuses on the institutional dynamics that structure decision-making—how the presumption is encountered, interpreted and operationalised by justice actors. Chapter 7 then turns to the downstream consequences of these practices, examining how children are governed through process, risk management, and service absence even where criminal responsibility remains uncertain. Read together, the chapters trace the movement from doctrine to institutional practice to lived effect.

Both chapters draw on survey and interview data from 63 magistrates and legal practitioners including 42 Local Court magistrates, 10 Children's Court magistrates and 11 legal practitioners (July 2023–November 2024), supplemented by courtroom observations of Children's and Local Court matters ($n$ = 20) involving *doli*-aged children (June 2023–May 2024). Examined together, these sources provide an empirically grounded account of how decision-makers encounter the presumption, how evidentiary thresholds are navigated, and how procedural pathways shape the trajectory of matters involving children.

The chapter proceeds from the premise that legal safeguards do not operate in institutional vacuums. Their protective force is mediated through court organisation, policing and prosecutorial practices, and access to specialist knowledge. Variation in these conditions produces uneven encounters with the presumption, raising questions about consistency, fairness, and the capacity of doctrinal protections to function as intended across diverse justice settings.

The analysis first situates *doli incapax* within contemporary court practice by examining the characteristics of the cohort to whom the presumption most often applies before turning to the frequency with which such matters arise and the geographic and jurisdictional variation, differences in specialist expertise, and perceived inconsistency in judicial approaches. It then analyses the evidentiary dynamics—including reliance on proxy material, withdrawal practices, and charging decisions—demonstrating how the presumption is operationalised through routine procedural mechanisms. Cumulatively, the findings suggest that *doli incapax*

functions less as a discrete doctrinal threshold than as an institutional process shaped by local practices, resource distribution, and professional cultures.

## 6.1. A note on analytic presentation

Interview and survey data were synthesised where appropriate to enable comparison across judicial roles while retaining jurisdictional distinctions. While the sample includes participants with substantial professional experience across metropolitan, regional and remote contexts, the findings reflect the perspectives of participating magistrates and legal practitioners and are analytically rather than statistically oriented.

Courtroom observations conducted across metropolitan and regional NSW were designed not to evaluate individual judicial decision-making but to examine how *doli incapax* operates in practice as a procedural, evidentiary, and institutional doctrine. Observations provide a direct view of courtroom dynamics that are often invisible in retrospective interviews, offering insight into: 1) the types of evidence relied upon to rebut the presumption; 2) the procedural dynamics that shape admissibility; 3) the frequency and timing of withdrawals; and 4) the lived operation of the adversarial system for children subject to *doli incapax* litigation.

Observation findings are integrated throughout the chapter where analytically relevant and are organised according to the same thematic framework that structures the interview and survey analysis. This approach enables triangulation across data sources while maintaining coherence in the presentation of institutional patterns. Observations therefore both corroborate and extend interview and survey findings by demonstrating how the presumption is operationalised through everyday courtroom practices.

## 6.2. The *doli* cohort: Concentrated vulnerability in youth justice

This section elucidates magistrates' anecdotal accounts of the children to whom the presumption applies and the nature of the offending before the courts. While not the explicit focus of interviews with magistrates, these observations emerged organically throughout the interview process and at participants' discretion when reflecting on their experience with *doli* matters.

Across interviews, magistrates ($n = 5$, 31%) emphasised that children who come before the courts within the *doli incapax* age range constitute a small but highly vulnerable cohort, rather than a broad cross-section of children. Magistrates repeatedly framed *doli* matters as involving children already embedded in multiple systems including child protection, OOHC, disability services (often absent), and school disciplines, yet paradoxically lacking meaningful early intervention before police and courts became involved. A recurring theme is that these children are not 'typical' in any demographic or developmental sense; they are described as those at the sharpest edge of disadvantage. These children were commonly

described as disproportionately Aboriginal and Torres Strait Islander and living in contexts of significant social and material disadvantage. One Children's Court magistrate (ID3) described repeatedly seeing the same families before the court, noting that "they're all cousins…and their parents are not disinterested, they come to court", but that families were often grappling with entrenched disadvantage. This observation is important because it complicates simplistic accounts that portray parents as indifferent or absent. Instead, it suggests a more complex social reality where families may show up, care, and remain engaged while still lacking the resources and supports required to prevent repeated criminal justice contact. Magistrates' accounts of a small but highly vulnerable cohort are consistent with administrative data showing that vulnerability is concentrated in a narrowing subgroup experiencing stacked adversity across suspension, victimisation, child protection, and housing instability (Chapters 4 and 5).

The most consistent institutional gap identified was education. Judicial accounts highlighted chronic disengagement from school and an apparent lack of early institutional intervention as a defining feature of this cohort. As one magistrate explained:

> *"Nobody's prosecuting them for not going to school, nobody's prosecuting their parents for them not going to school, the Department of Education is absent. I've never seen them." [Children's Court magistrate ID4, regional NSW]*

This quote should not be read literally as a call to criminalise non-attendance; rather it functions as an expression of institutional absence and frustration. The magistrate describes a governance vacuum whereby for some children, persistent non-attendance is met with neither effective supportive intervention, nor any visible accountability system, leaving the Children's Court to confront consequences that have accumulated unchecked. The education 'gap' described by magistrates aligns with evidence of widespread and repeated school exclusion among justice-involved children (Chapter 4).

Magistrates also described children's physical and emotional vulnerability in ways that underscore the mismatch between criminal proceedings and developmental needs. One magistrate characterised these children as "very, very skinny and not well looking" and expressed concern that many are already engaged in drug use by the time they come to judicial attention. These descriptions locate offending behaviour within broader contexts of neglect, trauma, and unmet health needs, reflecting findings elucidated in Chapter 5. In so doing, they reposition *doli* matters as symptomatic of cumulative adversity rather than as discrete incidents of wrongdoing.

Additionally, discussions of *doli incapax* in NSW were increasingly situated within broader concerns about emerging patterns of youth offending in regional areas. A central concern raised by magistrates is the severity and risk profile of offending even at such young ages. Magistrates interviewed for this research consistently described an apparent rise in the involvement of children—particularly those aged 10–13 years—in serious and repeat offending. As one regional Local Court magistrate (ID37) observed,

> *"Anecdotally, supported to some degree by statistics, there has been an uptake in regional youth crime…I think a sizeable portion of that is made up by kids who are* doli*".*

This quote does several things. It positions *doli* within a broader narrative about regional youth crime; it acknowledges the uncertain boundary between anecdote and statistical evidence; and it suggests that the presumption is increasingly salient in regional youth justice work. In demonstrating how *doli* matters are discursively tied to "regional youth crime" debates, which often carry heightened political and media attention, it offers insight into how magistrates and police experience their roles: not simply as neutral decision-makers but as actors under community pressure and moral scrutiny. Regional framings of youth crime and heightened visibility are consistent with patterns of disproportionate police contact and more intensive cycles of repeated contact in remote and very remote areas (Chapter 4). This chapter treats these contextual frames as analytically significant. When magistrates describe "uptakes" in regional youth crime and "*doli* kids", they are not merely reporting case frequencies, they are narrating a shifting terrain of youth justice practice marked by community anxiety, intensified policing focus, and service scarcity.

### 6.2.1. Seriousness, risk, and the moral burden of *doli* decision-making

A central tension in magistrate accounts concerns seriousness and risk. The presumption operates as a protective doctrine rooted in developmental assumptions that children under 14 may lack the moral capacity to understand conduct as seriously wrong. Yet many participants described contemporary *doli* matters as involving highly dangerous behaviour, especially dangerous driving and vehicle theft, raising immediate concerns about risk to children and the public. One regional Children's Court magistrate (ID4) articulated this dilemma:

> *"What do you do with kids who keep driving at 241 kilometres an hour on the M1 in rain in a BMW or Porsche Cayenne at 3:00 in the morning with a car full of kids? How long do you allow this to continue? How many times do you grant bail when whatever's happening out there in society is not working?"*

This quote demonstrates the lived ethical burden of decision-making. The magistrate's questions are practical. They speak to the limits of the court's tools where bail decisions are being made repeatedly, but "whatever's happening out there" is "not working". The underlying premise is that the court is being asked to manage a broader social failure through individualised criminal process. The same magistrate observed, "You grant them bail at your peril because they're starting to kill people and they're starting to get killed". This highlights the dual risk of harm to the community and to children themselves; and why bail becomes central as often the only immediate lever available to a magistrate faced with imminent risk (even where criminal responsibility is uncertain and conviction unlikely).

Participants frequently framed this tension in terms of cumulative risk. *Doli* matters were described as repeated, escalating, and embedded in ongoing patterns of harm. Magistrates and practitioners described professional discomfort with repeated bail grants in circumstances of

systemic failure and service absence. The presumption thus becomes entangled with moral and political questions about responsibility for preventing harm. Where child protection systems, education systems, health systems, and community-based supports are described as inadequate, courts and police become the institutions "left holding" the risk.

Magistrates described distinct offending patterns among *doli*-aged children, which map onto different forms of vulnerability. One pattern involved children in OOHC whose matters involve serious violence against carers and are described as being associated with complex trauma and often, neurodevelopmental conditions:

> *"It's kids in care, with violence against carers, who have unbelievably dysregulated emotional capacity and are very, very traumatised, and often have FASD and often have extraordinary diagnosis, and the level of violence is often quite high." [Children's Court magistrate ID3, regional NSW]*

Here, the conduct is framed as arising from dysregulation and trauma rather than from calculated wrongdoing. The violence is serious, but the interpretive lens is developmental and welfare-oriented. This reveals the conceptual difficulty of applying a criminal responsibility framework to behaviour that may be better understood through trauma-informed and disability-informed paradigms (Campion & Colvin, 2024; Day, Malvaso, Butcher, et al., 2023; Day, Malvaso, Boyd, et al., 2023).

A second pattern involved property and vehicle-related offending, sometimes described as 'creeping' offences. In these cases, magistrates expressed concern that younger children are being instrumentalised by older adolescents, who are perceived to have a clear understanding of *doli incapax* and its legal consequences:

> *"I think the perception I have gained is they're used by older kids because they know that they're* doli*...they sometimes get them to drive." [Children's Court magistrate ID4, regional NSW]*

This theme of recruitment is echoed by multiple participants, with one magistrate remarking that *doli incapax* has become a form of legal knowledge circulating among young people:

> *"One of my colleagues said, 'The only Latin that anyone can speak in [redacted] is* doli incapax'*...allegedly over 14-year-olds recruit younger kids and say to them, 'You can't get in trouble'." [Children's Court magistrate ID3, regional NSW]*

This points forward to later sections on legal consciousness but also underscores the seriousness dilemma: where younger children are used as instruments in group offending, the presumption may be experienced as enabling exploitation rather than protection. That perception may heighten pressure on police and courts to "do something", even when conviction is legally constrained.

#### 6.2.2. Aboriginal and Torres Strait Islander children and regional policing: *Doli* in the shadow of over-representation and local policing cultures

Magistrates described *doli*-aged children as disproportionately Aboriginal and Torres Strait Islander, and as living within contexts of entrenched disadvantage. Aboriginal and Torres Strait Islander over-representation in youth justice is a long-standing feature of Australian criminal justice systems, reflecting structural factors including socio-economic marginalisation, the legacy of colonisation, child removal, intergenerational trauma, housing and service inequities, school exclusion, and differential policing (Cunneen & Tauri, 2022). Within this context, the practical operation of the presumption becomes a mechanism through which these broader structural inequalities are reproduced.

If Aboriginal and Torres Strait Islander children are more likely to be policed, charged and brought to court in the first place, then the presumption's protective reach depends not only on adjudication but on how early and often children are exposed to criminal process. Participant accounts suggest that police "charge whether or not they're confident they've got evidence that rebuts *doli*". Where that is the prevailing practice, *doli* is less a gatekeeper and more a late-stage defence resulting in Aboriginal and Torres Strait Islander children's exposure to extended criminal process.

A key quote links rural contexts to representation and attitudes:

> *"I think it happens more in rural areas because ALS [Aboriginal Legal Service] aren't there and I think there's a lot more negativity about youth crime." (Local Court magistrate ID41, regional NSW).*

This is significant because it suggests that the operation of the presumption is shaped by local policing and court cultures where "negativity about youth crime" translates into tougher bail stances, more aggressive charging and resistance to withdrawal. The absence of ALS in some rural contexts may compound this, reducing the availability of culturally safe advocacy and specialised youth defence. Geography is thus conceptualised as producing layered disadvantage: Aboriginality intersects with regionality to shape exposure to policing and the quality of legal representation. This produces potential inconsistency not just in doctrinal application but in the child's pathways through the system.

Magistrate accounts repeatedly frame *doli* within the politics of regional youth crime involving dangerous driving, property offending, group offending and community fear. This matters because regional youth crime debates are often accompanied by heightened public pressure for visible action, intensified policing operations, and political rhetoric about accountability (Colvin & Simpson, 2025; Gu et al., 2024; Mack et al., 2018; Nelson et al., 2025). In such contexts, a doctrine that prevents conviction can be experienced as undermining "consequences" even if it is developmentally justified. This environment may drive the shift towards bail as control such that where conviction is unattainable but public pressure demands action, bail becomes the tool through which the system performs

responsiveness. The practical effect is that young children, often Aboriginal and Torres Strait Islander, are governed through conditions and enforcement rather than through therapeutic supports.

While not the focus of this chapter, these findings contextualise debate about *doli incapax* and demonstrate its intersection with regional youth crime dynamics, structural disadvantage and systemic service failures. Participants' accounts in this section reflect the institutional interpretive environment in which *doli* is practiced. Magistrates are encountering cases that feel both urgent and resistant to conventional criminal justice responses. That environment is crucial to understanding why process (especially bail) takes on such significance. For magistrates, matters involving *doli*-aged children raise acute legal and ethical challenges. As one magistrate reflected, the issue extends beyond individual cases to represent "a moral imperative for society", highlighting the limits of existing frameworks for responding to early, serious and cumulative childhood harm.

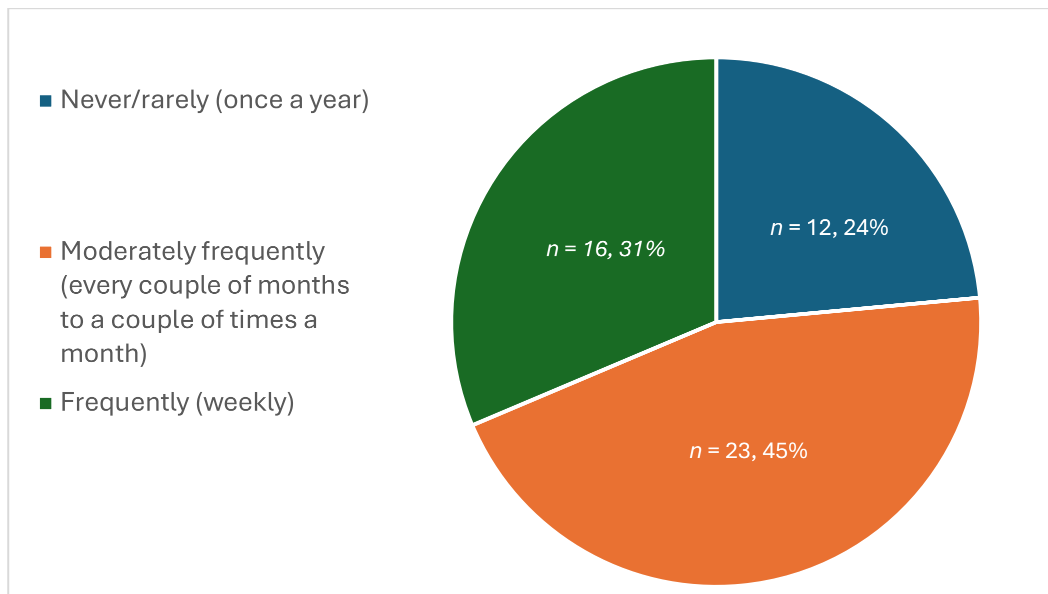
## 6.3. Operation of *doli incapax* across NSW

This section examines judicial and legal practitioners' perspectives on how *doli incapax* operates in practice across NSW, focusing on the frequency with which matters involving children aged 10–13 come before the courts, perceived changes over time, and the consistency with which the presumption is understood and applied. Together, these issues shape how often children are exposed to criminal court processes and the extent to which outcomes depend on geography, judicial expertise, or individual interpretation.

### 6.3.1. Frequency, concentration and jurisdictional variation: "A lot of matters, but not many kids"

Magistrates and legal practitioners were asked about the frequency with which they encounter matters involving *doli*-age children. Of the 52 judicial respondents, 51 (98%) commented on the frequency with which *doli* matters come before them. As shown in Figure 53, most magistrates encounter *doli incapax* matters quite frequently (*n* = 35, 69%), suggesting that these cases form a regular component of judicial work. However, exposure is uneven. While many magistrates engage with such matters routinely, a notable minority (*n* = 16, 31%) rarely preside over them, indicating that familiarity with the presumption is structured by judicial role and jurisdiction rather than uniformly developed across the bench.

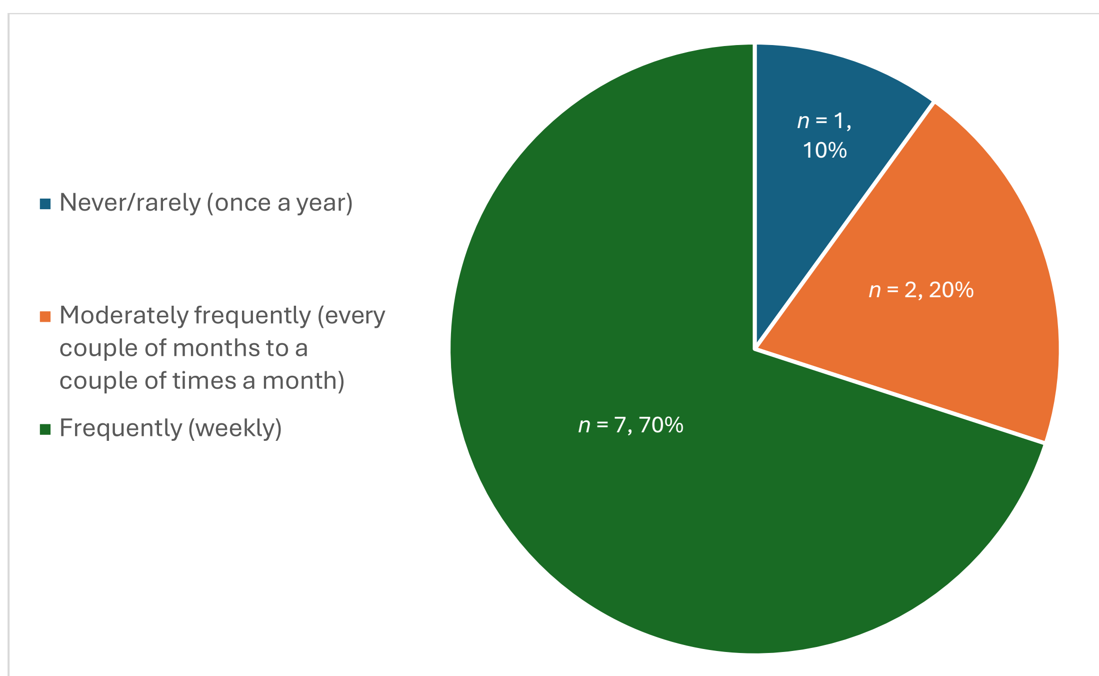
Figure 53: Frequency with which magistrates have *doli incapax* matters listed before them




This pattern is particularly evident in the divide between specialist and non-specialist courts. Most Children's Court magistrates reported hearing *doli incapax* matters weekly (*n* = 8, 80%), whereas Local Court magistrates exercising children's jurisdiction described far more variable contact: 12 Local Court magistrates (29%) reported never or rarely presiding over a *doli incapax* matter; 21 (51%) reported hearing such matters moderately frequently; and 8 (20%) reported encountering them frequently. In this sense, experience with *doli incapax* is shaped not only by individual caseload but by the institutional context in which magistrates operate. Those responsible for interpreting and applying the presumption do not encounter it with equal regularity.

Ten of the 11 legal practitioners who participated in interviews commented on the frequency with which they work with *doli*-aged children. The majority (*n* = 7, 70%) reported representing or prosecuting children aged 10–13 frequently (at least weekly, see Figure 54). The remaining interviewees reported working with *doli*-aged children infrequently (*n* = 1, 10%), and moderately frequently (*n* = 2, 20%).

Figure 54: Frequency with which legal practitioners work with *doli incapax*-age children




This higher reported frequency, relative to magistrates, likely reflects both recruitment effects and differences in points of system contact. Legal practitioners were recruited on the basis of experience and expertise in children's matters, and those who participated were therefore more likely to regularly work with children aged 10–13. In addition, practitioners often encounter *doli*-aged children earlier and more broadly than the courts, including through police hotlines, the provision of legal advice, and pre-court engagement, meaning that their work may capture a larger volume of children who come into contact with the justice system but do not ultimately appear before a magistrate.

Considered alongside the magistrate data, these findings point to a system characterised by uneven exposure to *doli* matters. While some judicial officers encounter such cases rarely, specialist practitioners and magistrates experience them as routine. This unevenness is not merely individual but structural, reflecting jurisdictional pathways, listing practices, and the geographic distribution of specialist Children's Court resources. In turn, differential exposure has implications for doctrinal familiarity, procedural competence, and consistency in the application of the presumption.

A number of magistrates emphasised that frequency of matters does not equate to large numbers of individual children, instead reflecting repeat court contact for a small cohort:

> *"There's a lot of matters, but not many kids. So, you might have one child for example…who might have 20 matters with different people and things like that." [Local Court magistrate ID36, regional NSW]*

This observation reframes the 'problem' from prevalence to concentration and repetition. The issue is not simply how many children enter the justice system, but how intensively some become embedded within it. A child with "20 matters" is not merely accused of wrongdoing; they are repeatedly processed, supervised and subjected to conditions and delays. Over time, this sustained institutional contact may become part of the child's social world, shaping their trajectory through youth justice.

##### *6.3.1.1. Perceived changes in the frequency of* doli incapax *matters*

Magistrates were also asked about perceived changes in the frequency with which *doli* matters are listed over time. A majority commented (*n* = 35, 67%) and approximately half of this group (*n* = 18, 51%) reported an increase in the numbers of matters involving *doli*-aged children in recent years:

> *"[There has been] a massive growth in the last four years of* doli *kids." [Children's Court magistrate ID4, regional NSW]*
>
> *"I've had more in the last two or three years than in the preceding six years, by a large amount." [Children's Court magistrate ID9, regional NSW]*

The remaining magistrates (*n* = 17, 49%) reported no substantive change over time:

> *"I think it's just been a consistent process. I don't think I remember it changing too much." [Children's Court magistrate ID6, regional NSW]*

This variation likely reflects geographic differences, changes in policing practice, local youth crime patterns, and broader social conditions. It suggests that *doli incapax* is not experienced as a uniform statewide phenomenon but is mediated through local institutional contexts such that changes in frequency are less indicative of a single systemic trend than of differentiated justice environments (Fitz-Gibbon & O'Brien, 2019). Frequency alone does not capture the operation of *doli incapax.* Rather, its practical application appears shaped by the interaction of concentration, jurisdictional structure, and locally situated justice practices.

#### 6.3.2. Structural sources of inconsistency in the application of *doli incapax*

While frequency varied, a more significant concern raised by participants relates to the consistency of the presumption's application, both geographically and between judicial officers.

##### *6.3.2.1. Geographic and resourcing differences: Regional disadvantage as legal disadvantage*

Several magistrates and practitioners (*n* = 7, 11%) distinguished between metropolitan and regional areas, particularly regarding access to specialist Children's Court magistrates and

experienced practitioners. Regional and remote locations were described as having fewer specialists, affecting how *doli* is raised, understood, and applied:

> *"I would say there was often…a distinction between regional areas and metro areas, noting again that you had specialist Children's magistrates in metro areas, but you didn't have them in all the regional areas." [Children's Court magistrate ID2, regional NSW]*

One Local Court magistrate also linked this to broader narratives about youth crime in rural areas and to the absence of specialist defence representation:

> *"I think it happens more in rural areas because ALS aren't there and I think there's a lot more negativity about youth crime." [Local Court magistrate ID41, regional NSW]*

This quote reflects what socio-legal researchers have described as "justice by geography", whereby legal outcomes vary systematically according to place rather than principle (Coverdale, 2011; Feld, 1991). From this perspective, the operation of the presumption is shaped by the uneven distribution of legal resources and expertise, and access to culturally safe and specialist representation functions as a critical protective mechanism within youth justice systems. Where ALS coverage is limited, Aboriginal and Torres Strait Islander children are more exposed to unspecialised advocacy and locally inflected punitive attitudes, increasing the risk that legal safeguards are interpreted or applied more narrowly.

##### *6.3.2.2. Specialist expertise and judicial role*

Differences in specialist capacity were also described as arising within court structures themselves. About half of interviewed legal practitioners (*n* = 6, 55%) identified differences between specialist Children's Court magistrates and non-specialist Local Court magistrates as a key source of inconsistency. Specialist magistrates were described as more familiar with the evidentiary requirements and case law underpinning *doli incapax*:

> *"There are a lot of matters which are dealt with in the Children's Court by specialist Children's Court magistrates and they're pretty well across the issues, but…Local Court magistrates in some areas...are less…well versed in the law on* doli incapax*." [Legal practitioner ID4, metropolitan NSW]*

Practitioners also highlighted the structural challenges faced by magistrates required to move between adult and children's jurisdictions:

> *"The Local Court magistrate[s]… are expected to bounce between the…normal adult list and then…slip into kid's court brain, which is impossible..." [Legal practitioner ID1, metropolitan NSW]*

Unlike specialist Children's Court magistrates, Local Court magistrates often lack regular immersion in youth justice matters, dedicated youth court time, or consistent access to specialised supports. Several magistrates describe the presumption as sitting 'awkwardly'

within adult-oriented court processes, requiring substantial judicial labour to manage evidentiary disputes, adjournment applications and bail considerations for young children. This identifies an institutional problem where youth justice is not simply a subject matter but requires a different orientation to procedure, child development, vulnerability, and the meaning of participation. Where magistrates are required to shift rapidly between lists, the conditions for specialist, child-attuned adjudication are undermined. This matters in *doli* cases, where the presumption requires careful assessment of moral understanding, evidentiary relevance, and fairness.

##### *6.3.2.3. Subjectivity and downstream consequences for children*

Across both metropolitan and regional contexts, several practitioners (*n* = 5, 45%) described *doli incapax* as being applied in a highly subjective manner, dependent on individual judicial interpretation of the evidence:

> *"It obviously varies depending on the judicial officer and what their interpretation of the law is…one magistrate might take one view and another take another view." [Legal practitioner ID7, regional NSW]*

This subjectivity was described as having real consequences for children, shaping legal strategy, advice, and outcomes. One practitioner described a situation where bench attitudes produce hesitation and pressure:

> *"I do think sometimes different benches will have different attitudes and that can sometimes lead to a hesitation where practitioners might say, 'I know this magistrate doesn't really get it…' and…I have to say to a kid, 'Look, you'll probably lose at this point, but then there'll be an appeal, and that will take X amount of time' and the kid might say 'I can't be on bail that long, I'm just gonna plead guilty and move on'." [Legal practitioner ID6, metropolitan NSW]*

This illustrates how inconsistency interacts with delay and bail to erode the presumption's protective purpose. Even if the law provides a safeguard, children's lived experience includes time on bail, time under conditions, time waiting for hearings. If a child experiences that time as intolerable, they may plead guilty to end the process, sacrificing a potentially valid *doli* argument. The presumption's protection is thus contingent not only on legal principle but on the system's temporal dynamics.

A detailed practitioner account illustrates how materially identical *doli* evidence can be accepted by one magistrate and rejected by another within weeks, producing divergent outcomes for the same child:

> *"He was, I think 12 or just turned 13 and the interesting thing was he had a number of matters. Some of them…were dealt with on the same day by one magistrate, and then he had another one where it was dealt with by a different magistrate. The* doli incapax *material across all matters was the same. The facts were very, very similar. It was domestic violence related offending within the*

*home against Mum…really low-end, like throwing a console or…being told to get off the phone, and kicking out and lashing out.*

*In his school reports, they disclosed…reports that had been prepared and included in those reports were things about his literacy, his understanding of maths and science - he'd had a lot of learning difficulties at school so there'd been a lot of intervention by the school to try and give him support, but then all of that support ends up being part of the case against him. There were…notes in the school reports that said he had…acted up in class, but nothing else really. I did written submissions and one magistrate was on board with and agreed with all my submissions and needed very little persuasion to find him not guilty. But another, and it was just weeks after, found that the presumption had been rebutted. And it was on the basis that, on reading all of those reports and saying, 'Look, while numeracy is low, while he's obviously got all these learning difficulties, it says that his verbal reasoning is good. And therefore, you would accept that because his verbal reasoning is good, that things that are said to him, he understands'." [Legal practitioner ID1, metropolitan NSW]*

This example highlights how "child development evidence" is often indirect and open to interpretation. It also shows the ethical discomfort of using educational support documentation as forensic proof.

Another practitioner described a regional matter in which a magistrate appeared to misunderstand the presumption, suggesting that prior charging undermines *doli*:

*"About six weeks ago, Magistrate X [redacted] was talking to the solicitor and [the solicitor] said 'it's a plea of not guilty'. And [the magistrate] said, 'Well, he's on bail for something else, so he's already been charged, so I don't know how you're going to go with this* doli *argument if he's already been charged before'. [The matter] wasn't being determined that day, but I remember that really sticking out to me as a fundamental misunderstanding about* doli*." [Legal practitioner ID11, metropolitan NSW]*

Finally, two practitioners (18%) also linked inconsistency to variable levels of practitioner training and experience, particularly in areas without a dedicated Legal Aid or ALS presence:

*"Some practitioners who don't have a lot of experience in the Children's Court don't seem to understand it. I had a practitioner who made a comment to me saying, 'Oh, that's [*doli incapax*] not even really a thing, is it?'" [Legal practitioner ID4, metropolitan NSW]*

*"The other problem is that in a lot of these locations, there's no Legal Aid and there's no ALS. And so, there's private practitioners paid for by Legal Aid, and I think the quality of those practitioners is very variable. We've seen some screamers come through where the child wasn't advised about the presumption*

*or the legal advice was erroneous." [Legal practitioner ID6, metropolitan NSW]*

These accounts support the argument that uneven training and expertise produce uneven justice (Fitz-Gibbon & O'Brien, 2019, p. 23). In this way, inconsistency emerges not merely as doctrinal uncertainty, but as an ethical burden for decision-makers, intensified by risk, media scrutiny and service absence. Participants framed this variability as a matter of fairness, predictability and practical consequence for children.

## 6.4. Professional knowledge and institutional capacity

Variation in the application of *doli incapax* cannot be understood solely as a matter of judicial discretion. Participant accounts suggest that professional knowledge operates as a structural condition shaping when the presumption is recognised, how it is interpreted, and whether it is effectively operationalised in practice. This section examines participant views on the adequacy of education, training, and guidance relating to the presumption for judicial officers, legal practitioners, and police. Both magistrates and practitioners consistently linked gaps in knowledge and training to inconsistent application of the presumption, weak evidentiary practices, and prolonged court involvement for children.

### 6.4.1. Judicial officers

Magistrates were asked whether additional education or guidance is required for judicial officers across NSW. Forty-one magistrates (5 Children's Court and 36 Local Court) commented. Just under half (*n* = 19, 46% including 3 Children's Court and 16 Local Court magistrates) expressed a view that further education or guidance is required, while 54% (*n* = 22) considered existing resources sufficient.

Those identifying a need for further guidance frequently pointed to disparities between specialist and non-specialist judicial officers, particularly in regional areas. As one Local Court magistrate observed:

> *"I think it's improved amongst specialist lawyers and specialist magistrates since* RP*, but I think that it's starting to drop off again and I don't know that it ever improved enough in the country." [Local Court magistrate ID41, regional NSW]*

Similarly, a Children's Court magistrate noted:

> *"Children's Court magistrates and practitioners have adequate understanding, non-specialist officers and practitioners tend not to." [Children's Court magistrate ID1, regional NSW]*

Some magistrates emphasised that while the law itself is settled, uncertainty remains about how the presumption is rebutted in practice, particularly following *RP:*

*"The law is clear. It is not clear as to how the presumption can be effectively rebutted." [Local Court magistrate ID32, metropolitan NSW]*

Others suggested that relevant material exists but is not readily accessible or embedded in routine judicial education, and that magistrates would benefit from specialist input from experts in child development:

*"The material is available, however it requires the judicial officer to search for it." [Local Court magistrate ID2, metropolitan NSW]*

*"Judicial officers would benefit from specific training from experts in child development." [Local Court magistrate ID22, metropolitan NSW]*

#### 6.4.2. Legal practitioners

A smaller group of magistrates (*n* = 10, 19%) commented specifically on education and guidance for legal practitioners, particularly in regional and remote areas (*n* = 7) and only three considered current legal training sufficient.

Magistrates consistently highlighted uneven practitioner expertise, with specialist Legal Aid and ALS practitioners described as generally well-trained in contrast to private or duty solicitors in regional locations:

*"There are very few Legal Aid lawyers in regional areas. What you tend to have is contract local lawyers…[who] don't have a clue about* doli *in front of a [non-specialist] magistrate." [Local Court magistrate ID41, regional NSW]*

One Children's Court magistrate recounted reviewing files in which *doli* had been raised, noting:

*"I spoke to a lawyer and he said he'd never heard of* doli *and he'd been practicing for 20 years..." [Children's Court magistrate ID2, regional NSW]*

Magistrates linked these gaps directly to missed opportunities to raise the presumption, reinforcing patterns of inconsistency and delayed resolution observed elsewhere in the findings:

*"I was looking at some files [in a regional area of NSW] and* doli *had never been raised with some of the kids…it just wasn't part of the legal advice because people hadn't done it…" [Children's Court magistrate ID3, regional NSW]*

#### 6.4.3. Police

Just over half of legal practitioners (*n* = 7, 64%) and a smaller cohort of magistrates (*n* = 11, 21%) commented on the need for additional guidance and training for police. Magistrates and practitioners repeatedly described police as poorly equipped to identify, investigate, and

evidence *doli incapax*, particularly in relation to the evidentiary threshold required to rebut the presumption:

> *"Police are not well trained in producing evidence to rebut* doli incapax *and in my experience are usually unprepared or provide limited evidence. The vast majority of matters are withdrawn because police realise very late in the process that they are unable to meet the evidentiary burden." [Local Court magistrate ID31, regional NSW]*

Participants also described widespread misunderstandings among police about what is capable of rebutting *doli*, including reliance on prior cautions or charges:

> *"I've had hotline calls where police officers have said, 'Oh well, they've had some cautions before, so* doli's *rebutted'." [Legal practitioner ID9, metropolitan NSW]*

At the same time, some magistrates acknowledged the difficult position police occupy, particularly when responding to dangerous behaviour by young children:

> *"They're encountering the same problem that I'm encountering, which is I'm trying to save lives." [Children's Court magistrate ID4, regional NSW]*

Others pointed to structural and resourcing constraints, noting limited time and capacity to obtain school records, family information or expert material, and a default approach of charging and deferring resolution to the courts:

> *"At the moment the attitude is you just charge everyone and let the courts figure it out…" [Legal practitioner ID6, metropolitan NSW]*

Cumulatively, these findings indicate that education, training, and guidance around *doli incapax* remain uneven across the criminal justice system, with particular gaps among non-specialist judicial officers, regional practitioners, and police. Participants consistently linked these gaps to the broader patterns identified elsewhere in this chapter, including inconsistent application of the presumption, weak evidentiary practices, delayed withdrawals, and reliance on bail as a mechanism of control. Improving education and guidance across these groups is widely seen as a necessary—but not sufficient—step towards a more coherent and child-appropriate response to *doli incapax* matters.

### 6.5. The post-*RP* environment: Raised evidentiary thresholds and altered prosecutorial strategy

This section examines judicial and practitioner perceptions of changes to the operation of *doli incapax* following the High Court's decision in *RP* ((2016) 259 CLR 641). Participants were asked whether they have observed changes in the application of the presumption, evidentiary requirements, and case outcomes since the decision. Their responses indicate that *RP* is

widely understood as a significant doctrinal turning point, particularly in relation to evidentiary thresholds and the likelihood of rebuttal.

### 6.5.1. Perceived changes to the application of *doli incapax*

The online survey asked Local Court magistrates if they have observed any changes in *doli incapax* practice following *RP*. Of the responding 25 magistrates, the majority (*n* = 16, 64%) reported observing changes to *doli* procedure and outcomes post-*RP.* The remaining 36% (*n* = 9) reported no observable change.

Among those who reported change, magistrates most commonly described a marked reduction in defended hearings and successful rebuttals, alongside an increase in withdrawals prior to hearing. One Local Court magistrate commented: “I have not done a defended one since 2016”. Another emphasised the heightened evidentiary threshold required to rebut the presumption: “It’s virtually impossible to overcome without expert evidence”.

These observations align with findings in the next sections, which show that rebuttals of *doli incapax* are now rare and that matters involving *doli*-aged children are more likely to be withdrawn than determined at hearing.

### 6.5.2. Changes to evidentiary standards and reasoning

Children’s Court magistrates and legal practitioners also described *RP* as fundamentally altering the types of evidence relied upon to rebut the presumption. Some participants (*n* = 4) noted that prior to *RP,* prosecutions often relied on limited or generic material, including police facts alone:

> *“Well, they used to do nothing, almost nothing, they would just hand up the facts ...” [Children’s Court magistrate ID3, regional NSW]*

Participants explained that *RP* curtailed reliance on prior system contact—such as cautions, YJCs, or earlier court appearances—as evidence of moral understanding. One Children’s Court magistrate reflected:

> *“It used to be that if they'd previously had a caution or they previously had a youth conference or they previously had a court appearance, that that was going to be an indication that therefore they must know that this is seriously wrong…And that has been eroded.” [Children’s Court magistrate ID5, regional NSW]*

Similarly, legal practitioners highlighted a shift away from inferring capacity based solely on the seriousness of the offence, a practice that had previously supported rebuttal in some cases:

> *"Back in the day before RP, the standard was the courts could look at the seriousness of the offence by itself and make inferences about whether the young person did appreciate whether their actions were really serious rather than naughty." [Legal practitioner ID8, metropolitan NSW]*

Participants described *RP* as clarifying that seriousness alone is insufficient, requiring instead specific evidence of the child's moral and cognitive understanding at the time of the alleged offending.

#### 6.5.3. Impact on rebuttals and outcomes

Several Local and Children's Court magistrates (*n* = 8) explicitly linked *RP* to a decline in successful rebuttals of *doli incapax.* One Children's Court magistrate contrasted pre- and post-*RP* practice:

> *"So in 2015, 16, 17, it was often rebutted. I found it rebutted. And now, not at all. The judiciary has raised the age." [Children's Court magistrate ID5, regional NSW]*

Although the legal age of criminal responsibility has not changed, this comment reflects a perception that *RP* has effectively raised the evidentiary bar for rebutting the presumption, particularly for younger children.

Magistrates also distinguished between knowing the law and being able to meaningfully apply it. While doctrinal clarity is high following *RP,* confidence in the system's capacity to operationalise the presumption is lower. These accounts suggest that as the presumption became evidentially demanding, this had a flow-on effect for the 'case value' for prosecution. If rebuttal is experienced as practically unattainable, the incentive to run matters to hearing diminishes, and the incentive to withdraw late, and after procedural leverage has been exerted through bail and delay, increases (Armstrong, 2019).

Cumulatively, these findings suggest that *RP* has had a substantive practical impact on the operation of *doli incapax* in NSW. While some magistrates reported no change, the dominant perception among participants is that *RP* has narrowed the circumstances in which rebuttal is possible, reshaped evidentiary expectations, and contributed to the current pattern in which matters involving *doli*-aged children are more likely to be withdrawn than resolved through defended hearings (Gu, 2025).

### 6.6. The evidentiary ecology of *doli* litigation: What is tendered, what persuades and why the gap is important

This section examines the types of evidence commonly adduced to rebut the presumption, and how magistrates and practitioners assess the probative value of that evidence in practice. Findings from the interview and survey data demonstrate a structural mismatch in the

evidentiary logic of the presumption: the evidence most capable of speaking to a child's developmental capacity is the least accessible, while the evidence most readily available is ill-suited to the legal question. Consequently, there is a persistent gap between evidence commonly tendered and evidence regarded as persuasive or probative. That gap is central to understanding why *doli* matters consume court time, generate delay, and often culminate in withdrawal rather than adjudication.

### 6.6.1. Commonly adduced evidence

Magistrates and legal practitioners were asked what forms of evidence are most commonly adduced to rebut *doli incapax*. Thirty magistrates—including 20 Local Court magistrates and 10 Children's Court magistrates—and all 11 practitioners commented.

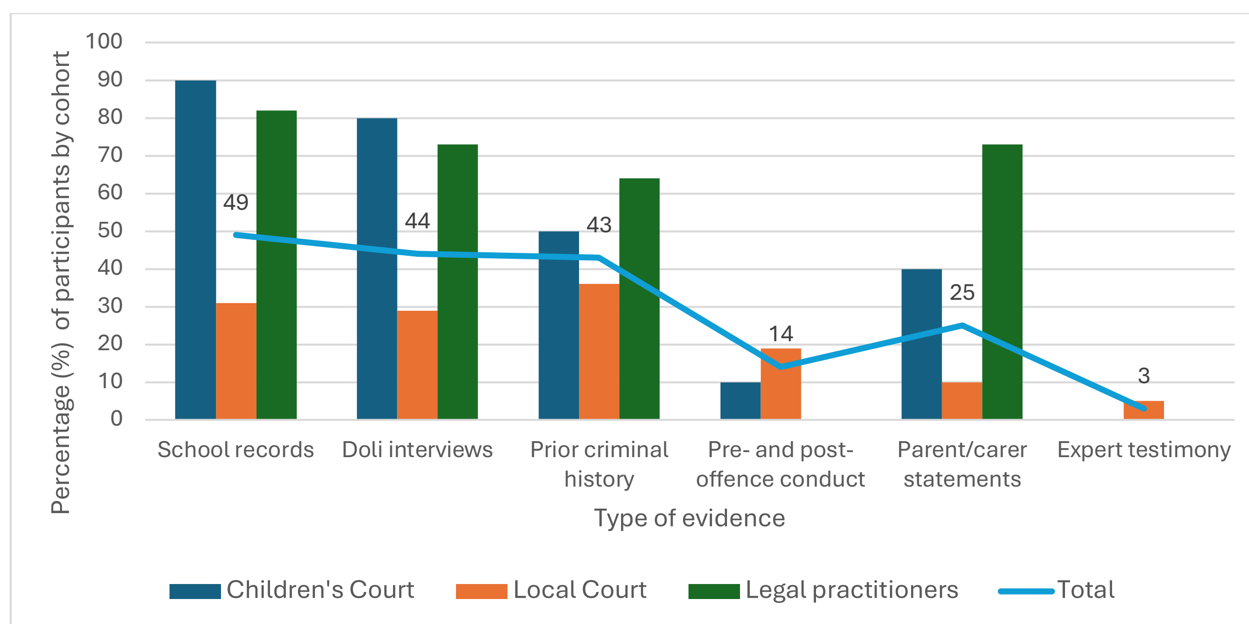
Across Local and Children's Court magistrates, the most commonly mentioned adduced evidence comprised:

- School records ($n$ = 22, 73%)
- Police-conducted *doli incapax* interviews ($n$ = 20, 67%)
- Prior criminal history ($n$ = 20, 67%)
- Pre- and post-offence conduct ($n$ = 9, 30%)
- Statements from parents or caregivers ($n$ = 8, 27%)
- Expert or psychological testimony ($n$ = 2, 7%).

Among practitioners, similar patterns were observed:

- School records ($n$ = 9, 82%)
- *Doli* interviews ($n$ = 8, 73%)
- Parent or caregiver statements ($n$ = 8, 73%)
- Prior criminal history ($n$ = 7, 64% see Figure 55).

Figure 55: Evidence commonly adduced to rebut *doli incapax*




These findings suggest that attempts to rebut *doli* typically rely on documentary or inferential material rather than expert assessments of a child's moral and cognitive development. This distribution is unsurprising in that documentary evidence is comparatively accessible, inexpensive and administratively manageable. Expert evidence, by contrast, is costly, ethically fraught, logistically difficult and often dependent on the consent and cooperation from children and families which is less likely in criminal proceedings. Prosecutors may therefore rely on what can be assembled from institutional files including school records, interview transcripts, and prior system contact.

However, magistrates repeatedly emphasised that availability does not equate to probative value. The presumption concerns a child's appreciation of serious moral wrongfulness. That appreciation is not easily inferred from poor school attendance, behavioural incidents, or prior cautions. As discussed below, the attempt to repurpose institutional documents to prove moral understanding is a recurring driver of evidentiary fragility, delay, and admissibility disputes.

### 6.6.2. Probative value of evidence: The primary of expert evidence

Magistrates were then asked to comment on the probative value they generally assign to different types of evidence. Twenty-six Local Court and three Children's Court magistrates responded. The majority (*n* = 21, 72%) identified expert or psychological evidence as holding the greatest probative value in assessing whether the presumption has been rebutted. One Local Court magistrate explained:

*"I have been assisted by psychological material…Youth Justice had organised a number of assessments…and produced reports…and that helps me in my* doli *hearing." [Local Court magistrate ID37, regional NSW]*

A Children's Court magistrate similarly emphasised the difficulty of rebutting the presumption in the absence of expert evidence:

*"Short of conclusive expert evidence, how do you ever overcome it?...There's almost always going to be a reasonable hypothesis consistent with innocence." [Children's Court magistrate ID9, regional NSW]*

By contrast, magistrates attributed significantly less probative value to other forms of evidence. Prior criminal history was identified as probative by 38% ($n$ = 11), pre- and post-offence conduct by 34% ($n$ = 10), school records by 21% ($n$ = 6), parent or caregiver statements by 10% ($n$ = 3), and police *doli* interviews by 7% ($n$ = 2).

This points to a fundamental institutional mismatch. If expert evidence is regarded as the most probative evidence but is rarely available, the system generates repeated attempts to rebut the presumption using inferior substitutes. Those substitutes may rarely persuade yet they can still prolong proceedings, particularly where further time is sought to 'complete' a brief that ultimately remains insufficient. The gap between what is tendered and what persuades thus has procedural consequences even when it has no substantive effect on guilt.

### 6.6.3. Practitioner perspectives on persuasive evidence

Practitioner views on probative value were more varied. Some practitioners considered prior criminal history involving the same offending to be persuasive, particularly where it suggests familiarity with consequences:

*"I think if you have evidence from a police officer that is admissible that they've previously got a caution for exactly the same offence, that's more likely to be persuasive, and I think magistrates are likely to be persuaded by that because the problem with the school thing is that it doesn't tell you anything about whether they understand that something's criminal." [Legal practitioner ID11, metropolitan NSW]*

Other practitioners aligned closely with magistrate views, identifying expert evidence or psychological reports as the strongest evidence capable of rebutting the presumption, while noting practical barriers to obtaining such material:

*"I find the expert evidence probably the strongest in terms of being able to convince a court…But that rarely happens because we rarely get the consent of the young person after legal advice for them to participate in that interview..." [Legal practitioner ID10, metropolitan NSW]*

This raises an ethical and practical constraint: attempts to obtain expert evidence in criminal proceedings may be resisted precisely because participation carries risk. A child may be

advised not to engage in assessment processes that could be used against them. Even where magistrates express a preference for expert material, its routine availability is structurally limited by the adversarial setting and defence incentives.

One practitioner highlighted the potential probative value of detailed, contextualised school records, particularly where teachers or principals give evidence addressing the child's understanding:

> *"School records that are filled out really clearly and in depth. If you have a principal or assistant principal or teacher who can come to court and speak to that, I think they're held to a higher standard." [Legal practitioner ID7, regional NSW]*

Similarly, some practitioners viewed parent or caregiver statements as persuasive where they directly address the child's moral reasoning, rather than behaviour alone:

> *"I think a parent statement that addresses the issues of* doli *holds quite a bit of weight in front of a magistrate…" [Legal practitioner ID3, metropolitan NSW]*

#### 6.6.4. School records: Frequent, weak and morally complicated

School records were widely tendered and widely regarded as weak indicators of moral understanding. Participants offered several reasons. First, school records often document behavioural incidents, attendance patterns, and learning needs, but do not directly evidence the child's appreciation of serious wrongfulness at the relevant time. Second, such records are generated for diverse institutional purposes, including educational management, discipline, and at times, support, rather than for forensic assessment.

Participants also raised fairness concerns about the forensic repurposing of documentation produced within relationships of trust. One practitioner described the concern that vulnerable children build rapport with school staff and disclose difficulties, only for those records to later be mobilised "as evidence against them":

> *"The concern is you might have these really vulnerable kids who are building up relationships of trust with…the school...and then that's been presented as evidence against them." [Children's Court magistrate ID2, regional NSW]*

This is a serious concern. Schools function as welfare-linked institutions where children are expected to disclose, to be assessed, and to receive support. If those disclosures and assessments can later be mobilised as evidence to rebut *doli*, children may become less willing to engage with schooling support systems. Trust can be eroded not only for the individual child but for families and communities who perceive schools as part of the surveillance apparatus. This ethical tension is also an evidentiary problem where material created to manage schooling or provide support is not designed to answer the legal question *doli* poses. Its use as proof is therefore both morally contested and epistemically fragile.

#### *6.6.4.1. What school records can and cannot show*

School records can document attendance, behaviour, suspensions, learning difficulties and support interventions. But the legal question in *doli* is not "is this child disruptive?" or "does this child understand classroom rules?" It is whether the child appreciated their conduct as seriously wrong in a moral sense at the time of the offending. School records rarely address that directly and are therefore epistemically mismatched to the legal question. This can produce two problematic outcomes. First, it can lead to over-interpretation where decision-makers infer moral understanding from literacy, discipline history or verbal reasoning. Second, it can lead to unjust burdening where children with documented support needs may be paradoxically disadvantaged because their records create a paper trail that can be used against them. A practitioner's detailed example of a child's school support interventions becoming "part of the case against him" illustrates this paradox. This is ethically unsettling because it converts evidence of vulnerability into evidence of culpability and risks punishing the child for being visible to institutions.

In the broader frame of cumulative disadvantage, this dynamic is important. Children with unstable housing, disability, trauma and behavioural issues are more likely to generate extensive institutional records. If those records can be used to rebut the presumption, then children with greater needs may face greater risk of being found capable.

### 6.6.5. *Doli incapax* interviews conducted by police

Several magistrates and legal practitioners (*n* = 7) expressed significant concern about the conduct and use of police-conducted *doli incapax* interviews. Magistrates described these interviews as involving pre-emptive questioning about "right and wrong", often conducted outside formal custody contexts:

> *"… when [the police] are giving [the child] a warning about something, they then say, 'Well, while you're here, let's just run through these things. Now, if you were to do X & Y, would that be naughty or would that be really, really wrong?' and they make a transcript of what the kid says. And then if the kid commits the crime later on, they produce this and say, 'Aha, he did know what this meant'." [Children's Court magistrate ID3, regional NSW]*

Some magistrates criticised both the substance and framing of these interviews:

> *"Whoever devised that pro forma that they fill out doesn't understand* doli *either. Questions like 'do you understand right and wrong?' That's not* doli*...what you need to demonstrate is a degree of moral sophistication." [Children's Court magistrate ID9, regional NSW]*

Concerns were also raised about admissibility, particularly where interviews are conducted without legal advice or appropriate safeguards:

> *"We've had numerous children around their 10th birthday, the police will rock up and try to do a* doli *questionnaire with them pre-emptively, and that's often not enough—that can be complicated in terms of admissibility…mileage will vary about whether or not the magistrate accepts that that's unfair." [Legal practitioner ID6, metropolitan NSW]*

These concerns align with courtroom observation data indicating that interview material can be vulnerable to exclusion on grounds including inadequate cautions, failure to confirm understanding, lack of legal advice, and confusion around protected admissions processes.

Despite these issues, participants acknowledged that such interviews can nonetheless function strategically, particularly by prolonging proceedings and increasing pressure on children to plead guilty:

> *"It would be those interviews…where there would be a legal argument about the admissibility of them because of the circumstances in which the interview occurred…We'll get a brief that'll take 4 weeks, then we come back 2 weeks after that, that's 6 weeks. Then we'll get a hearing date. We're looking at hearing dates months away and the young person says 'No, I'm pleading'. So it works [for police] to do those interviews and get those admissions when they can." [Children's Court magistrate ID2, regional NSW]*

#### 6.6.6. Prior criminal history and diversionary material

Finally, some participants (*n* = 5) discussed the contested use of prior criminal history and diversions, including cautions and YJCs. Some magistrates described police efforts to tender such material despite uncertainty around admissibility:

> *"They know that the judiciary aren't united in what they find admissible...so they just keep trying." [Children's Court magistrate ID5, regional NSW]*

Practitioners (*n* = 2) also noted ambiguity surrounding the admissibility of material arising under the YOA, particularly in relation to what police may say to a child during diversionary processes:

> *"*Young Offenders Act *disposals is an interesting one…There's generally agreement that what the child said to someone in receiving a caution or conference is not admissible but arguably what the police officer giving the caution said to the child is admissible." [Legal practitioner ID5, metropolitan NSW]*

The broader point is that *doli* litigation invites contested efforts to use prior system contact as proof of understanding, even where doctrine cautions against simplistic inference. These contests produce procedural conflict and inconsistency, and they can shape outcomes through time and pressure even where they do not produce conviction.

These findings demonstrate a disconnect between evidentiary practice and evidentiary value in *doli incapax* matters. While police and prosecutors commonly adduce school records, *doli* interviews, and prior history, magistrates overwhelmingly view expert evidence as the only material capable of reliably rebutting the presumption. In the absence of such evidence, attempts to rebut the presumption frequently rely on inference-based reasoning that falls short of the legal threshold articulated in *RP*. As a result, large volumes of evidence may be tendered in *doli* matters without materially increasing the likelihood of rebuttal, contributing to delay, withdrawal, and prolonged system involvement for children.

#### 6.6.7. Evidentiary fragility and admissibility issues: Evidence from courtroom observations

Across the observed court matters, significant court time was devoted to disputes about the admissibility of *doli* evidence. The types of evidence most commonly relied upon by the prosecution included: school records, statements from parents or carers, prior criminal history including prior police interactions or court 'business records', pre- and post-offence conduct (such as running away or attempts at concealment), and police-conducted *doli* interviews. Much of this evidence was excluded on grounds of impropriety, unfairness, or limited probative value.

Police-conducted *doli* interviews were particularly vulnerable to exclusion, often due to inadequate cautions, failure to confirm a child's understanding, absence of legal advice, or confusion surrounding the use of the Protected Admission Scheme interviews and admissions. In several matters, conflicting records as to whether and how a Protected Admission Scheme caution had been administered further undermined admissibility. Generally, observations revealed patterns of procedural drift in police responses to repeat offending, including departures from standard safeguards around cautions and interviews. These practices appeared to be driven less by disregard for legal requirements and more by systemic pressure arising from high-volume, repeat offending by young children. Nevertheless, these departures undermined the admissibility of *doli* evidence tendered by police prosecutors in these instances.

Carer statements were frequently challenged as opinion evidence, particularly where they relied on assertions that the child "knew it was wrong" based on family discussions, exposure to justice processes, or references to incarcerated family members. Magistrates consistently distinguished between a child's awareness of illegality and the higher threshold required to establish appreciation of serious moral wrongfulness. School records, while regularly tendered, were rarely decisive. Although such records could demonstrate suspensions, behavioural difficulties, and disengagement, they seldom spoke directly to the child's understanding at the time of the alleged offence.

The overall effect was that prosecutors were sometimes able to assemble a body of circumstantial material but not evidence capable of satisfying the requirements of beyond

reasonable doubt. Proceedings were frequently characterised by adjournments sought to obtain additional material, only for matters to be withdrawn once evidentiary hurdles could not be overcome. Prosecutors openly acknowledged the practical impossibility of meeting the *doli* threshold in many cases, citing time constraints, evidentiary hurdles, and the rarity of admissible admissions. This has led to strategic withdrawal practices and pre-hearing negotiations that further entrench the presumption as a procedural barrier rather than a substantively adjudicated legal principle. In practice, the presumption appears procedurally intensive even where its substantive resolution is thin.

These findings also resonate with conclusions in the Independent Review of *doli incapax* in NSW concerning evidentiary uncertainty (Bellew & Loy, 2025). The Review recognises evidentiary difficulty but frames the presumption as broadly coherent with criminal law principles governing proof of mental elements and tends towards universalising these evidentiary constraints, stating 'these difficulties arise in any prosecution' (Bellew & Loy, 2025, p. 38). The findings of this thesis identify a point of friction in the framing adopted by the Review: *doli incapax* is not simply 'mens rea by another name', but a distinct, child-specific inquiry requiring proof beyond reasonable doubt that *this* child, *at the time of the alleged offence* appreciated the *serious moral wrongfulness* of the conduct (not merely its illegality or foreseeable consequences). The approach taken by the Review risks downplaying what distinguishes *doli* from other mens rea requirements: specifically, that *doli* demands an individualised account of moral comprehension that is often difficult to access for 10–13 year olds, and unusually vulnerable to contamination by post-offence processes including police questioning, arrest and court appearances that may themselves teach 'wrongness' after the fact. The magnitude of this threshold and task are borne out in accounts from participant interviewees, survey respondents, and court observations.

## 6.7. *Doli incapax* processes and outcomes: Rebuttals, withdrawals and police practice

This section examines how *doli incapax* operates in practice once matters involving children aged 10–13 enter the court system. It focuses on three interrelated issues: the frequency with which the presumption is rebutted, the withdrawal of matters prior to, or at, hearing, and police charging practices that shape these outcomes. Together, these processes determine whether matters proceed to hearing, how long children remain subject to court processes, and the extent to which *doli incapax* functions as a substantive protection in practice.

### 6.7.1. Rebuttals of *doli incapax*

Magistrates and legal practitioners were asked how frequently *doli incapax* is rebutted. Seven magistrates (13%) and one legal practitioner (9%) did not comment. Of the remaining 45 magistrates, the majority (*n* = 27, 60%) reported that the presumption is 'never' rebutted. This included nine Children's Court magistrates (90%) and 18 Local Court magistrates (51%).

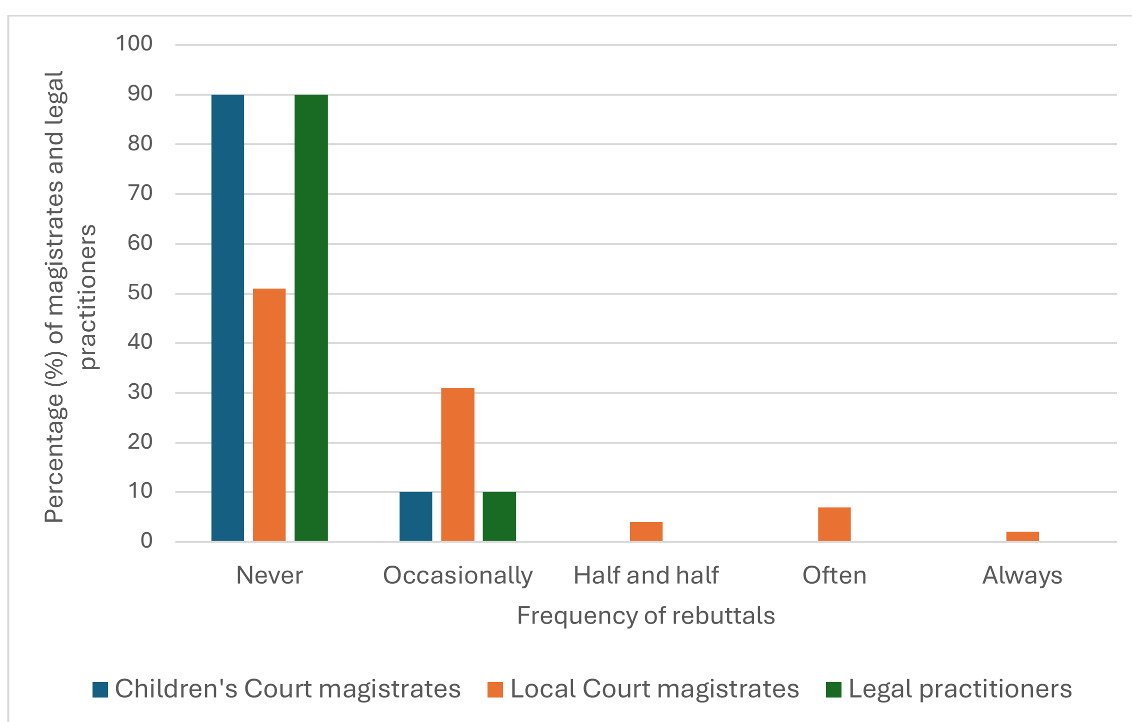
One Children's Court magistrate described their experience as follows:

> *"I've never had a single* doli*-defended hearing lead to a finding of guilt. They've never overcome the standard proof in four years." [Children's Court magistrate ID4, regional NSW]*

Similarly, most legal practitioners (*n* = 9, 82%) stated that the presumption is 'never' rebutted in their experience.

A smaller proportion of participants reported occasional rebuttals. Twelve magistrates (27%) and one legal practitioner (10%) stated that *doli incapax* is 'occasionally' rebutted. Only Local Court magistrates reported higher frequencies: two described outcomes as "half and half", three as "often", and one as "always" rebutted (see Figure 56).

Figure 56: Frequency of *doli incapax* rebuttals by percentage proportion of responding magistrate and practitioner cohorts




Overall, these findings suggest that successful rebuttal of *doli incapax* is rare, particularly in the Children's Court, and that most matters do not culminate in a judicial finding that the presumption has been overcome.

### 6.7.2. Withdrawals prior to or at hearing

In practice, the rarity of rebuttals is closely linked to the frequent withdrawal of charges involving *doli*-aged children. For clarity, 'withdrawal' refers to charges being discontinued by

police prosecutors either prior to a listed hearing date or on the day of hearing, meaning the matter does not proceed to determination of the presumption.

Magistrates and legal practitioners were asked about the frequency with which matters involving *doli*-aged children are withdrawn. Three legal practitioners, seven Local Court and two Children's Court magistrates did not comment. Among those who did, the majority of magistrates ($n$ = 27, 63%) and all legal practitioners ($n$ = 8) reported that *doli incapax* matters are frequently withdrawn prior to or on the day of hearing.

Several magistrates described having little experience of *doli* matters proceeding to hearing at all:

> *"I've never had a hearing run." [Local Court magistrate ID39, regional NSW]*

> *"Only one matter has ever proceeded to hearing (ultimately dismissed)—police have withdrawn the charges in all other matters that have come before me." [Local Court magistrate ID4, regional NSW]*

> *"Most matters are withdrawn on the morning. If the odd matter runs to hearing, it's dismissed and there's a cost made." [Children's Court magistrate ID10, regional NSW]*

Another magistrate emphasised that children's criminal records frequently reflect withdrawal rather than adjudication:

> *"Virtually all the criminal records I see of young people who have been charged between 10–14 [years] record the charges as withdrawn. Often this includes numbers of separate charges." [Local Court magistrate ID25, metropolitan NSW]*

Legal practitioners similarly described a pattern in which matters are rarely withdrawn at first mention, instead progressing through procedural stages before being discontinued:

> *"They're usually never withdrawn at first mention. They usually are withdrawn once the matter is set for hearing and police become aware that there's no evidence they can collect. So, it's within, you know, one or two months after the matter has proceeded through court." [Legal practitioner ID3, metropolitan NSW]*

### 6.7.3. Timing of withdrawals and impacts on children

A key concern raised by practitioners is the timing of withdrawals, with many noting that charges are often withdrawn on the day of hearing. This is described as prolonging the period during which children remain on bail or are bail refused, despite weak or absent evidence capable of rebutting *doli incapax*:

> *"I don't remember ever having a hearing withdrawn before the day. So, you have to go through the whole thing." [Legal practitioner ID7, metropolitan NSW]*
>
> *"What we're seeing out here is 10, 11, 12, 13-year-olds being charged, they're on bail for a really long time and often on the day, the charges either get withdrawn or the matters run to a defended* doli *hearing and the young people are found not guilty." [Legal practitioner ID6, regional NSW]*

By contrast, 16 magistrates (37%) reported that withdrawals occur only occasionally or infrequently, describing a reluctance by police to discontinue matters even where evidentiary thresholds are unlikely to be met:

> *"Even when they should be [withdrawn] and no evidence is available to adduce, the police would still go through the motions." [Local Court magistrate ID16, metropolitan NSW]*
>
> *"Prosecution seems to be very reluctant to withdraw matters…even though they don't have any evidence." [Children's Court magistrate ID6, regional NSW]*

Courtroom observations support this account. Across 20 observed matters—11 in regional courts, and 9 in metropolitan courts—all but one proceeding resulted in withdrawal or dismissal, most commonly on the basis that the prosecution was unable to adduce admissible evidence capable of rebutting the presumption. In many cases, prosecutors sought adjournments to gather *doli* evidence, despite having been on notice for weeks, if not months, that *doli incapax* would be a live issue. Magistrates frequently rejected such applications, emphasising that the prosecution bears the onus of proof and must be prepared to meet it at first instance. The result was that matters were often withdrawn following either rejection of an adjournment application or preliminary rulings on admissibility, rather than resolved through findings on the question of criminal capacity. This procedural pattern meant that the presumption was rarely determined through a full evidentiary hearing.

Withdrawals were common across matters involving both low-level offending and serious, repeated, and sometimes violent offending. The presumption, therefore, did not operate as a safeguard exclusively for marginal or exceptional cases; instead, it operates to consistently shape prosecutorial decision-making and court outcomes across all matters involving children aged 10–13. This consistency across jurisdictions and judicial officers suggests that difficulties associated with the presumption are systemic rather than idiosyncratic, and that the doctrine's practical significance lies less in substantive adjudication than in the procedural pathways it activates.

### 6.7.4. Police charging practices

Participants consistently linked patterns of rebuttal and withdrawal to police charging practices, noting that children are commonly charged regardless of whether evidence exists to rebut the presumption. One Children's Court magistrate summarised this approach succinctly:

> *"Generally, police don't not charge because of* doli incapax *and that's consistent. Police charge whether or not they're confident they've got evidence that rebuts* doli incapax*." [Children's Court magistrate ID2, regional NSW]*

Practitioners further observed that police practice varies by location and organisational culture:

> *"It's very much location based…policing by and large is a function of hierarchy…it really depends what they're being told to do." [Legal practitioner ID11, metropolitan NSW]*

Together, these findings suggest that while *doli* is rarely rebutted in court, it does not operate as an early filter within the criminal justice process. Instead, children are often charged and remain subject to criminal processes for extended periods, with matters only withdrawn once evidentiary insufficiency becomes undeniable. This is a core institutional paradox. *Doli incapax* operates as a doctrinal safeguard against conviction, but activates late, after a child has been charged, placed on bail, and required to attend repeated court events. In this sense, the presumption frequently functions less as an early filter against criminalisation than as a late-stage mechanism that prevents the final step of conviction while leaving much of the burdens of process intact.

## 6.8. Conclusion

This chapter has examined how the presumption operates in practice across NSW and what that operation reveals about the institutional conditions under which criminal responsibility is negotiated for children aged 10–13. The findings demonstrate that the presumption does not operate in isolation from the organisational realities of youth justice; rather, its meaning and effects are produced through evidentiary constraints, professional knowledge, jurisdictional structures, prosecutorial strategy, and uneven access to specialist expertise. The data suggest that *doli incapax* functions less as a discrete threshold separating responsibility from non-responsibility than as a procedural terrain through which children are governed once they enter the criminal justice system. Successful rebuttals are rare, yet charging is routine. Matters frequently progress through adjournments, evidentiary disputes, and extended bail periods before ultimately being withdrawn. In this way, the presumption often activates late—not as a barrier to criminalisation, but as a mechanism that prevents conviction after substantial institutional contact has already occurred.

This dynamic produces a central institutional paradox. A doctrine intended to shield children from the full force of criminal law simultaneously permits, and at times, prolongs, their

exposure to its processes. Children who are ultimately found not criminally responsible may nevertheless spend months subject to bail conditions, court appearances, surveillance, and procedural uncertainty. Protection, in this sense, is partial and temporally deferred.

The findings further demonstrate that the operation of the presumption is uneven. Geographic location, specialist expertise, professional training, and local policing cultures shape when *doli incapax* is recognised, how it is interpreted, and whether it is meaningfully operationalised. These variations raise questions not only about doctrinal consistency, but about the capacity of formal legal safeguards to function equitably across differentiated institutional environments.

Crucially, the presumption most often arises in matters involving a small, but highly vulnerable cohort of children already embedded within multiple systems of intervention. For these children, contact with the criminal law rarely represents an isolated event; rather, it forms part of an accumulating trajectory of institutional management. The practical significance of *doli incapax* therefore lies not only in its role in determining criminal responsibility, but in how it structures the pathways through which vulnerable children move across policing, courts, and allied service systems.

Understanding this institutional dynamic shifts the analytic lens from doctrinal protection to lived experience. It invites closer examination of how prolonged exposure to criminal process shapes children's trajectories, how risk is managed in the shadow of non-responsibility, and how legal safeguards interact with broader patterns of cumulative disadvantage. The next chapter builds on this foundation by examining these trajectories more directly. It considers how repeated procedural contact—even in the absence of conviction—may contribute to the consolidation of justice involvement over time, raising deeper questions about the protective limits of criminal responsibility doctrines within contemporary youth justice systems.

## Chapter 7: Governing children without conviction—Process, risk and cumulative disadvantage

Building on the institutional analysis developed in Chapter 6, this chapter examines what the practical operation of *doli incapax* produces for children who encounter it. Although the presumption is designed to prevent the unjust criminalisation of those lacking full moral capacity, the findings suggest that children may nonetheless become deeply embedded within criminal justice processes. This chapter therefore examines how risk is managed in the shadow of non-responsibility and how procedural mechanisms—particularly bail, adjournment and diversion—come to function as tools of governance even where conviction is uncertain or unlikely.

The analysis proceeds from the observation that criminal responsibility doctrines do not simply determine liability; they also reorganise institutional responses to children deemed risky. Where welfare systems are described as absent, fragmented, or overwhelmed, courts and police frequently become the sites at which cumulative disadvantage is managed. In this context, *doli incapax* operates simultaneously as a legal shield against conviction and as a gateway into extended supervisory processes.

Viewing the system through a longitudinal lens reveals how process itself can acquire regulatory force. Time on bail, exposure to conditions, repeated court appearances, and the anticipation of appeal may shape children's decisions in ways that render the distinction between protection and punishment increasingly blurred. The chapter argues that, under such conditions, the practical experience of *doli incapax* is mediated by the temporal and organisational dynamics of the youth justice system.

The chapter first examines how bail becomes the primary mechanism through which risk is managed for *doli*-aged children. It then analyses the emergence of a diversion paradox in which admission-based pathways operate alongside formal non-responsibility. Subsequent sections explore process effects, service absence, children's legal consciousness, and the cumulative trajectories produced through repeated system contact.

Together, these analyses suggest that the protective promise of the presumption is shaped, and at times constrained, by the governance demands placed upon institutions responsible for responding to childhood harm.

### 7.1. Bail, bail conditions and remand in *doli incapax* matters

This section examines how bail decision-making operates in matters involving *doli*-aged children and the practical consequences of bail conditions and remand for children whose criminal responsibility is in question. Magistrates and legal practitioners consistently

described bail as the primary mechanism through which control is exercised over children aged 10–13, particularly in circumstances where the underlying charges are unlikely to be proven.

### 7.1.1. Bail as the system's real response

Bail emerged in participant accounts as the primary mechanism through which control is exercised over *doli*-aged children. Practitioners and Children's and Local Court magistrates (*n* = 30, 48%) described a pattern in which children subject to the presumption are routinely charged and placed on bail, often with strict or onerous conditions, despite limited or no evidence capable of rebutting the presumption. As one Local Court magistrate observed:

> *"Children between 10 and 14 are being charged and subject to bail conditions, sometimes very strict bail conditions and there often appears to be little or no effort going into gathering evidence to rebut* doli.*" [Local Court magistrate ID34, metropolitan NSW]*

Several magistrates described bail conditions as a by-product of listing *doli* matters for hearing, even where police are aware that rebuttal is unlikely:

> *"It's one of the worst byproducts of sitting* doli *matters down for hearing…Police will put a really strict bail in place even though they know they can't rebut* doli.*" [Local Court magistrate ID41, regional NSW]*

In this context, bail is widely characterised not as a neutral procedural safeguard but as a substantive intervention imposed on children whose matters may never proceed to conviction. This pattern aligns with administrative data showing repeated police interaction and high withdrawal rates for children aged 10–13, suggesting that charging frequently precedes evidentiary viability rather than follows it (see Chapter 4).

### 7.1.2. Onerous bail conditions and cycles of breach

A dominant theme across interviews is the contradiction inherent in imposing bail conditions on children who lack the capacity or stability to comply with them. Magistrates and practitioners described bail conditions as frequently unrealistic, particularly for children moving between households or living in unstable environments:

> *"You don't want them bail refused, but once they're on bail, they're going to breach bail. And that's what happens - onerous conditions…just inevitable, setting them up to fail." [Children's Court magistrate ID10, regional NSW]*

This sits uneasily alongside the statutory framework governing bail in NSW. Section 20A of the *Bail Act 2013* (NSW) requires that bail conditions be linked to identified bail concerns and be reasonable and proportionate to the offence. The imposition of strict and often onerous conditions on children with limited capacity to comply raises questions as to whether these statutory requirements are consistently met in practice.

Participants described a recurring cycle in which children are placed on bail, breach conditions, are brought back before the courts, and may spend short periods in custody—despite the underlying matters remaining unresolved or ultimately dismissed:

> *"*Doli incapax *is a live issue, they're subject to bail, they breach their bail, they come back before the court, they go into custody, they breach their bail, it goes on and on and on. And then at the very end of it, their matter is dismissed." [Children's Court magistrate ID2, regional NSW]*

This cycle was widely regarded as counterproductive, compounding rather than reducing harm:

> *"It doesn't prevent recidivism, it compounds the problem…in a long-term sense, the community is not protected at all." [Children's Court magistrate ID2, regional NSW]*

The bail-breach-return cycle described by magistrates mirrors quantitative patterns of concentrated and repeated police contact identified in Chapter 4, where a small subgroup of children account for a disproportionate volume of interactions. On this account, bail becomes a driver of system contact and harm even without conviction. These experiences may normalise justice contact, disrupt schooling and family relationships, and intensify stigma and surveillance. Similar concerns have been identified in empirical studies of bail and remand which demonstrate that early justice contact and short-term remand are themselves disruptive, criminogenic, and disproportionately experienced by children with complex needs and extensive system contact (Bartkowiak-Theron & Colvin, 2022; Hughes et al., 2022; Snowball, 2011; Travers et al., 2020). Cumulatively, these dynamics illustrate a fundamental misalignment between the logic of bail and the protective rationale of the presumption, reinforcing critiques that the adversarial system is ill-suited to responding to very young children with complex needs and high levels of system contact (Cunneen et al., 2015; Goldson, 2013; Malvaso, Magann et al., 2024; Ngaire et al., 1990).

#### 7.1.3. Bail refusal, remand, and the limits of the Children's Court

Magistrates expressed acute discomfort with the prospect of refusing bail to children in circumstances where criminal responsibility is doubtful. One magistrate reflected:

> *"To refuse bail to a 12-year-old knowing that their matters will never be proven is distressing." [Local Court magistrate ID14, regional NSW]*

Courtroom observations also indicated that bail decisions are often made while a child's criminal capacity remains unresolved. In several matters, children faced repeat cycles of arrest, remand, release, and re-arrest while *doli* issues remained unresolved. Magistrates were required to assess bail risk in circumstances where the prosecution could not establish criminal responsibility but where the child's conduct nevertheless raised serious community safety concerns. This produces a practical disjunct in which courts are asked to assess risk

and community safety without being satisfied, even on a balance of probabilities, that the child was capable of criminal responsibility. In NSW, bail determinations under the *Bail Act 2013* (NSW, s 18) focus on unacceptable risk, including risk of reoffending, endangering the community, or failing to comply with bail conditions, rather than on criminal culpability meaning that bail can be refused even where the prosecution may ultimately be unable to rebut the presumption. Consequently, while the presumption prevents criminal liability, it does not negate the courts' responsibility to manage risk. The result is procedural churn that turns on bail decision-making where children spend time in custody and experience repeat court appearances, only for matters to be withdrawn once evidentiary deficiencies become insurmountable.

At the same time, magistrates described a perceived lack of viable alternatives. Several magistrates framed bail refusal as the only available mechanism for temporarily stabilising highly vulnerable children experiencing trauma, neglect, substance use, or disengagement from school:

> *"Ultimately it's the same with the courts - I'm going to have to refuse bail because that's the only way I'm getting these kids off the streets, off the drugs, back in school, getting fed..." [Local Court magistrate ID38, regional NSW]*

This is widely acknowledged as a problematic substitution in which detention effectively functions as a proxy welfare response:

> *"Detention suddenly becomes the place where these kids have got a roof over their head, three meals a day and they're going back to school." [Local Court magistrate ID38, regional NSW]*

This is a profound indictment. It suggests that the detention system is being used to deliver basic welfare for children who are, in law, presumptively incapable of criminal responsibility. These participants emphasised that the Children's Court has limited powers to address the underlying drivers of behaviour, leaving bail and remand as blunt instruments in cases shaped by trauma, mental health concerns, and family violence.

#### 7.1.4. Delay, prolonged bail, and coercive effects: Bail time as pressure to plead

Delays in listed hearings—particularly in regional and rural areas—were described by legal practitioners as exacerbating the effects of bail. Practitioners reported children remaining on bail for 6, 9, or even 12 months, during which time they are repeatedly arrested for breaches or further alleged offending:

> *"Children…are on bail for 6, 9, 12 months…constantly getting arrested, re-arrested…and after all that most of them get found not guilty anyway." [Legal practitioner ID6, metropolitan NSW]*

Practitioners emphasised that prolonged exposure to bail conditions and intermittent custody can have coercive effects, influencing children's willingness to defend charges:

*"To actually persuade a young person to defend their charges can be really difficult, because they just want to get it over and done with." [Legal practitioner ID2, metropolitan NSW]*

Several practitioners described bail as producing blurred or contradictory messages for children about accountability and responsibility:

*"You're arrested, you're put in these bail conditions and then you're told, 'Oh, you're not guilty'. It sends a very mixed signal." [Legal practitioner ID6, metropolitan NSW]*

In this sense, the presumption's protection can be undermined where the process becomes intolerable. Several participants were explicit that bail operates as behavioural control, describing a desire to keep children on bail "as long as possible…so they can tug the leash". Read alongside the broader account of late-stage withdrawals, these narratives position bail not merely as risk management but as a quasi-sanction imposed even when conviction is unlikely.

#### 7.1.5. Bail as a mechanism of control

Some magistrates and practitioners were explicit in characterising bail as a deliberate mechanism of behavioural control, rather than a risk-assessment tool linked with the likelihood of conviction. One Children's Court magistrate remarked:

*"When you talk to the police or the prosecutors, it's pretty apparent that they use bail as a way of controlling kids under 14 years of age." [Children's Court magistrate ID1, regional NSW]*

Another magistrate described bail conditions as a means of exerting ongoing leverage over children until matters are resolved:

*"What they want is for the kid to be on bail for as long as possible…so they can tug the leash." [Children's Court magistrate ID5, regional NSW]*

Bail was described as functioning as a substitute sanction, even where the presumption ultimately prevents conviction.

Cumulatively, comments on bail and bail decision-making suggest that these processes play a central role in shaping the lived experience of *doli incapax* for children aged 10–13. While the presumption operates as a doctrinal protection against criminal conviction, it does little to prevent prolonged exposure to restrictive bail conditions, repeated arrests, or periods of remand. For many magistrates and practitioners, bail has become the primary site at which risk, welfare concerns, and community protection are negotiated—often in the absence of effective support services or timely resolution of charges. As a result, *doli incapax* may

function less as a shield from criminalisation and more as a gateway to extended system involvement through bail and remand processes.

### 7.2. Process as punishment: How *doli* matters can criminalise without conviction

A central finding is that *doli incapax* often prevents conviction but does not prevent harm. The harm arises through process—through being charged, being placed on bail, being subject to strict conditions, being repeatedly brought back to court, experiencing delay, and sometimes spending time in custody—only for the matter to be withdrawn or dismissed. This section conceptualises this pattern as 'process as punishment' (Feeley, 1979, pp. 199-201).

Participants described children being on bail for months. During that period, children may be subject to curfews, non-association orders, place restrictions, reporting conditions, or requirements that are developmentally unrealistic. Breach becomes "inevitable", leading to re-arrest and further court appearances. The child experiences sustained control and surveillance. This process can distort substantive justice. The presumption exists to protect children lacking capacity but the burdens of process can make exercising that protection practically impossible. This is particularly concerning for children with trauma, disability and unstable living conditions for whom prolonged compliance is hardest.

Participants repeatedly described withdrawals occurring on the day of hearing. That timing matters because it maximises the period of control while minimising the prosecution's costs of proving the case. Beyond bail, the operation of *doli incapax* is shaped by the temporal organisations of criminal proceedings themselves. Participants' accounts indicate that adjournments, listing practices and prolonged intervals between mentions and hearings function as implicit negotiation mechanisms through which risk, responsibility and uncertainty are managed. Where evidentiary thresholds are high and prospects of rebuttal are weak, matters are often allowed to drift through repeated mentions while police seek further material, prosecutors reassess case viability and courts defer substantive determination. In this context, time operates as a strategic resource: it enables continued supervision through bail, creates space for withdrawal without formal adjudication, and exerts cumulative pressure on children to comply, plead or disengage.

Administrative data show that matters involving children aged 10–13 frequently culminate in withdrawal or dismissal after prolonged interaction, producing patterns consistent with what is conceptualised here as 'process as punishment' (see Chapter 4). Broadly, process as punishment has institutional effects, allowing the system to appear responsive to community concerns which in turn may reduce pressure for service reform because the appearance of action substitutes for genuine therapeutic intervention.

## 7.3. Services, supports and diversions for *doli*-age children

This section examines the availability of services, supports, and diversionary options for children aged 10–13 who come into contact with the criminal justice system. Across interviews, magistrates and legal practitioners overwhelmingly described a severe lack of appropriate services for this cohort, with particular concern about regional inequities and the interaction between *doli incapax* and existing diversionary frameworks.

### 7.3.1. Availability of services and supports

All magistrates and legal practitioners were asked about the services available for *doli*-aged children in the areas in which they practice. Thirty-two magistrates (28 Local Court magistrates and 4 Children's Court magistrates) and five practitioners commented. Almost all (*n* = 36, 97%) stated that there are insufficient services for this cohort. They consistently described a landscape in which the care and protection system is the only meaningful alternative to criminal justice intervention:

> *"There's very little for children and the only support is the care and protection system. That's really the only alternative police will look at." [Local Court magistrate ID41, regional NSW]*

Several magistrates expressed profound frustration with the absence of coordinated health, mental health, and welfare responses:

> *"I feel betrayed as a judicial officer by the health system and the social welfare system, for these young people." [Children's Court magistrate ID4, regional NSW]*
>
> *"There needs to be better coordination of the services…there's not enough." [Local Court magistrate ID38, regional NSW]*
>
> *"Services are non-existent." [Local Court magistrate ID39, metropolitan NSW]*

These participants also identified acute gaps and long waitlists for drug and alcohol treatment, mental health services, and specialist child psychiatry, with these gaps most pronounced in regional areas. These qualitative accounts of service absence sit alongside quantitative evidence of high rates of child protection reporting, school suspension, and multi-domain system contact among justice-involved children aged 10–13 (see Chapter 4), and minimal overlap between service systems (see Chapter 5).

### 7.3.2. Detention as a proxy for care

A troubling theme is the observation that juvenile detention is sometimes the first point at which children receive consistent, wraparound care. Several magistrates described detention as the first setting in which children have access to health assessments, education, and structured supports:

> *"The first time that these young people…are getting care—medical care, proper attention, psychologically, educationally—is in detention." [Children's Court magistrate ID4, regional NSW]*

While acknowledging that detention is not a desirable substitute for community-based care, magistrates described this reality as making decision-making more complex, particularly where children have previously been unable to engage with any services in the community. Given the documented concentration of educational exclusion and cumulative risk in this cohort (Chapter 4), it is perhaps unsurprising that detention is sometimes described as the first coordinated site of assessment and structured care.

#### 7.3.3. Exclusion of high-needs children

Magistrates also reported that children with the most complex needs are often excluded from community-based programs due to perceived risk and resource constraints:

> *"The more complex nature of a child's needs, the less services there are." [Local Court magistrate ID39, regional NSW]*

> *"Private organisations or the subcontracting organisations can't offer support to drug using kids or mentally ill kids because there's too much concern about risk and their responsibilities towards a child." [Local Court magistrate ID41, regional NSW]*

> *"Some services have said that some of the kids fall into that 'too hard' basket and are avoided…because they just don't have the resources to meet their needs." [Local Court magistrate ID38, regional NSW]*

This creates a structural problem whereby children most in need of support are often least likely to receive it.

#### 7.3.4. Children found not guilty and "dropped" from the system

A recurring concern was the absence of supports for children who are found not guilty by virtue of *doli incapax*. Magistrates described a pattern in which children are lost to the system once criminal proceedings end:

> *"If it's* doli*, they're always going to be advised to plead not guilty. Inevitably, they get the case withdrawn or found not guilty and then they're lost again to the system without any assistance." [Children's Court magistrate ID8, regional NSW]*

This highlights a perverse feature of current arrangements where access to services often depends on conviction or admission while children protected by *doli* may exit proceedings without any coordinated pathway to sustained intervention.

Some magistrates questioned why access to services should depend on criminal conviction:

> *"Why should I wait for a criminal conviction before someone is eligible for assistance?" [Local Court magistrate ID40, regional NSW]*

Overall, these findings suggest that in day-to-day practice *doli* can operate less as a developmental safeguard than as a mechanism that redirects children into procedural governance—producing system activity but not always the forms of support the presumption is intended to secure. Matters resolve through withdrawal rather than adjudication; responsibility is neither affirmed nor meaningfully explored; and children return to communities without coordinated supports. Magistrates and practitioners repeatedly emphasised that while the presumption prevents formal conviction, it does not trigger alternative therapeutic or welfare-based responses, leaving a vacuum beneath the raised threshold of criminal responsibility.

#### 7.3.5. Regional and metropolitan disparities

Practitioners and magistrates consistently highlighted a regional and remote disadvantage in service provision. While some metropolitan areas were described as having limited but functioning service ecosystems, rural and remote areas were characterised by near absence:

> *"None in remote and rural areas." [Local Court magistrate ID26, remote NSW]*
>
> *"I mean a lot of these programmes, they don't often reach the regions." [Legal practitioner ID11, metropolitan NSW]*

Even where services exist, they were often described as concentrated in larger regional centres and poorly adapted to local needs, particularly for Aboriginal and Torres Strait Islander children.

#### 7.3.6. *Doli incapax* and diversion under the *Young Offenders Act*

A number of magistrates and practitioners (*n* = 4) identified the interaction between *doli incapax* and diversionary mechanisms under the YOA (1997 (NSW)) as a significant structural problem. Because access to cautions and YJCs require an admission, children advised to rely on *doli incapax* are often unable to access diversion:

> *"The trigger for access…is an admission, but the difficulty with* doli *is then they're admitting the elements of the offence." [Children's Court magistrate ID5, regional NSW]*

These participants described this as producing a perverse outcome in which children who are legally protected are excluded from early intervention or diversion while their behaviour continues unaddressed:

> *"These kids...are not getting any support, any services...and then suddenly they're 14 and there's no reduction in their offending…" [Local Court magistrate ID38, regional NSW]*

One practitioner described frustration across roles: police may want to divert, defence cannot safely advise admissions, and children may receive neither conviction nor therapeutic support.

> *"Ideally you want to divert these kids but it's risky to do that when they're under 14 because they will lose one of the only three cautions for a matter that probably can't be proved. And you can't tell them hand on heart it's not going to hurt them in subsequent* doli *proceedings because it might. So, it becomes this real source of frustration for all parties where the police are saying 'Well, we want to divert but the lawyers are saying no'. And we're saying, 'We'd love to do divert but we can't advise it'." [Legal practitioner ID6, metropolitan NSW]*

Chapter 4 demonstrates that many children have prior police contact and system exposure before age 14, illustrating how diversionary pathways may already be exhausted or strategically avoided in *doli* contexts.

These findings suggest that the presumption operates within a service vacuum for children aged 10–13. While *doli incapax* protects children from criminal conviction, it limits access to diversion, particularly in the absence of legislative reform. Where early diversion is unavailable or unsuccessful, children may remain subject to bail cycles until they reach 14, at which point criminal responsibility is no longer mediated by the presumption and legal responses become more formalised and determinate. Participants described this as a missed opportunity for earlier, therapeutic intervention with potentially long-term consequences for children, families, and communities.

### 7.4. The threshold: A de facto raising of the age

Interview data indicate a growing judicial perception that the evidentiary threshold required to rebut the presumption has become so exceptionally demanding such that some magistrates regard it as operating as a de facto raising of the age of criminal responsibility ($n$ = 6, 38%).

While participants acknowledged that the statutory age has not formally changed, many expressed uncertainty about what evidence could realistically satisfy the criminal standard of proof. Several magistrates described difficulty articulating what "beyond reasonable doubt" would entail in the context of *doli incapax*. As one Local Court magistrate observed:

> *"I'm not actually sure what beyond reasonable doubt would look like for me on* doli.*" [Local Court magistrate ID39, regional NSW]*

Another similarly reflected:

*"I'm not sure what it would take to convince me as a magistrate that it has been rebutted to that very high standard of beyond reasonable doubt." [Local Court magistrate ID37, regional NSW]*

Children's Court magistrates were particularly explicit in attributing this shift to developments in case law, including *RP*:

*"In my view, the High Court has raised the bar so high it's almost by de facto raised the age of criminal responsibility." [Children's Court magistrate ID5, regional NSW]*

*"My personal view is they've raised the bar so high it's almost impossible to overcome, and government needs to catch up." [Children's Court magistrate ID7, regional NSW]*

Quantitative outcome patterns in Chapter 4—including low rates of conviction and high withdrawal rates—lend empirical weight to the perception that the presumption operates as a functional raising of the age (also see Gu, 2025).

At the same time, participants emphasised that this view is not uniformly shared, particularly among Local Court magistrates exercising children's jurisdiction. This variability mirrors earlier findings regarding inconsistency in the application of *doli incapax* and reinforces the subjective nature of assessments at the margins of the presumption.

Some magistrates also drew attention to the structural consequences of what they described as an "ad hoc" raising of the age. In the absence of legislative reform or parallel investment in child-focused services, the heightened threshold was seen as creating a gap between legal principle and institutional capacity:

*"Because they haven't raised the age, they haven't built the safety net, so that all we've got is this ad hoc raising of age with nothing coming in underneath to go 'Alright, this behaviour happened. What do we do to try and address what caused the behaviour?'" [Children's Court magistrate ID5, regional NSW]*

Under these conditions, doctrinal protection risks operating without the supportive architecture that would ordinarily accompany age-based reform. Children may be shielded from conviction yet remain subject to bail, detention, blocked diversion pathways, and fragmented services. The result is that the presumption becomes a site where institutional failure is concentrated and made visible.

One magistrate questioned whether the criminal justice system is capable of delivering meaningful accountability at such a high threshold, particularly for children with complex needs:

*"The criminal bar is an incredibly high bar that is actually preventing proper engagement and proper accountability with proper understanding of consequences." [Children's Court magistrate ID5, regional NSW]*

These findings suggest that *doli incapax* operates in a paradoxical space: on the one hand, the presumption provides strong protection against criminal conviction for children; on the other, the absence of corresponding welfare, therapeutic or supervisory responses means the system often defaults to bail, withdrawals, or repeated court contact without resolution. In this context, the heightened threshold functions less as a coherent policy choice and more as an unsettled compromise, leaving magistrates to navigate the consequences of a de facto raising of the age without the structural supports that would ordinarily accompany such reform.

### 7.5. Failings of the adversarial process for children

Courtroom observations raise significant questions about the capacity of adversarial process to accommodate children subject to *doli incapax* litigation. Across multiple matters, children appeared disengaged, fatigued, distressed, and frequently unable to follow the proceedings. Hearings often involved extended, dense legal argument concerning evidentiary rules, admissibility, and procedural fairness—matters that were developmentally inaccessible to the children in attendance.

In some instances, children requested to leave the courtroom due to distress; in others, they appeared withdrawn or inattentive. There was little observable effort to explain processes in developmentally appropriate ways or to facilitate genuine participation, and minimal evidence that children understood the nature of the proceedings, the significance of the presumption or the arguments being advanced.

These observations suggest a misalignment between the communicative demands of adversarial adjudication and the developmental capacities of the children it seeks to govern. Participation, a cornerstone of procedural fairness, risks becoming largely symbolic when children lack the practical ability to comprehend or engage with the process (Helm, 2021; Howard & Bowen, 2011). Under such conditions, *doli incapax* may operate less as a child-centred safeguard than as an adult-centric mechanism through which cases are resolved without meaningful engagement with children's lived realities or developmental needs.

### 7.6. *Doli* and children's legal consciousness: "The only Latin…is *doli incapax*"

The qualitative findings suggest that *doli* is entering the everyday legal vocabulary of justice-involved children. A Children's Court magistrate (ID3) reported:

> *"The only Latin that anyone can speak in [redacted] is* doli incapax*…"*

Court observations and informal discussions with magistrates and prosecutors similarly pointed to a growing awareness of the presumption among children. Some magistrates noted that children increasingly "taunt" police with their perceived immunity. While this knowledge

may be distorted or incomplete, it shapes behaviour and peer dynamics (Ewick & Silbey, 1998).

Participants described younger children being "used" by older youth. Whether or not this is widespread, its institutional significance is that it influences how police and courts perceive *doli incapax*. If the doctrine is experienced as enabling instrumentalisation, pressure mounts to 'counter' it through process rather than through conviction. This has implications for children's legal consciousness. If children learn that *doli* means "you can't get in trouble" but they simultaneously experience strict bail and repeated arrest, they receive contradictory lessons: "not guilty" but heavily controlled.

Practitioners described these mixed signals:

> *"You're arrested, you're put in these bail conditions and then you're told, 'Oh, you're not guilty'." (Legal practitioner ID5, metropolitan NSW).*

For children aged 10–13, these mixed signals can shape how they understand law and authority.

A broader implication is trajectory formation. If a child has "20 matters" and repeatedly experiences arrest and bail, the justice system becomes a normal part of life. The child learns procedural routines, police practices, court rhythms, and the pragmatic value of pleading. This can produce a form of institutional socialisation that shapes identity and future engagement with authority, particularly when services outside justice are scarce or absent. Patterns of repeated interaction identified in Chapter 4—including children with 20 or more police contacts before age 14—suggest that justice system exposure becomes a normalised component of socialisation for a small but intensely managed cohort. In this sense, *doli* matters are not simply about whether a child can be convicted but how a child becomes "justice-involved" through repeated procedural exposure.

## 7.7. Views on reform

> *"If we can't get this right, this is the next generation of people offending in our community in a really serious way." [Children's Court magistrate ID4, regional NSW]*

Magistrates and practitioners were asked whether the presumption requires reform and, if so, what form that reform should take. Forty participants responded including 34 magistrates and 6 practitioners. Their suggestions coalesced around four themes: reforms to the presumption's operation, raising the age of criminal responsibility, broader system reflections, and the need for mandated supports.

### 7.7.1. Reform to the presumption of *doli incapax*

Most respondents (*n* = 30, 75%) indicated that they would like to see the presumption reformed. The dominant proposal was earlier and more explicit consideration, particularly at the point of charge, rather than late-stage litigation after months of procedural delay. One Local Court magistrate proposed a structural reform that would make *doli* a threshold question:

> *"The first reform I think should be the recognition of* doli *as a stand-alone element of any offence that has to be adjudicated first and that there's some kind of responsibility on the police to believe they can rebut it before they charge…" [Local Court magistrate ID41, regional NSW]*

A similar emphasis on early decision-making recurred across accounts:

> *"I think that one of the things I would like to see more is that people are turning their minds towards it earlier in the piece, particularly at the point of charge." [Local Court magistrate ID37, regional NSW]*

Related proposals focused on operational prompts and gatekeeping mechanisms, including automated flags in police systems: "It should come up automatically on COPS" [Children's Court magistrate ID5, regional NSW] and reforms to bail practice that would require police to demonstrate a realistic prospect of rebuttal before imposing custodial or highly restrictive outcomes:

> *"I think the police should have to demonstrate that they have some capacity to rebut* doli *before they lay a charge…if the police are not able to demonstrate they've got some prospect of rebutting* doli*, then a child shouldn't be detained." [Legal practitioner ID11, metropolitan NSW]*

A minority of participants expressed more critical views of the presumption itself. Some argued that *doli incapax* is outdated or exploited, including proposals to abolish it:

> *"It is an outdated outmoded concept that is being exploited by young criminals." [Local Court magistrate ID23, remote NSW]*

> *"Children are generally far more mature and worldly as compared to 50 years ago. Some young people claim* doli *at the outset of interaction with police. They clearly know the system." [Local Court magistrate ID13, regional NSW]*

Others suggested relaxing the threshold, placing greater weight on prior system contact or a child's awareness of the principle:

> *"Prior criminal behaviour and court attendance, I think, is crucial to determining a young person's understanding of moral wrongness. Many young persons understand* doli *(they can be seen on occasions quoting* doli *to police on arrest on body worn video) so it could be considered if they understand the*

*legal principle and they perhaps understand moral wrongness." [Local Court magistrate ID30, regional NSW]*

However, such views were not dominant across the cohort, and sit in tension with earlier findings that prior contact and offence seriousness are limited indicators of the 'moral wrongfulness' required by the presumption. Moreover, the suggestion that a child's ability to reference or 'flaunt' the doctrine reflects moral understanding risks conflating legal awareness with developmental capacity. Behaviours described as 'taunting' or 'exploiting' the presumption may instead reflect immaturity, partial understanding, or attempts to navigate institutional encounters, rather than evidence of the moral reasoning required by *doli incapax*. Interpreting such conduct as indicative of culpability risks reintroducing the kinds of evidentiary shortcuts cautioned against in *RP*.

At the same time, some participants stressed that *doli incapax* is a sound principle but is being asked to do too much work within a blunt system, applying across behaviours ranging from 'mischievous' to seriously harmful:

> *"I think as a principle, it's sound but…its application is within a very broad criminal justice system that covers a whole range of behaviour. Some of its problematic, some of it's very problematic, some of it is harmful, some of it is more of a mischievous nature. And yet we're trying to apply this principle to all and not stopping and thinking, what do we want from it?" [Children's Court magistrate ID2, regional NSW]*

On this view, the core deficit is framed as structural, not doctrinal:

> *"Need early intervention services. Getting a 'not guilty' but without providing any extra support to young children sends the wrong message." [Local Court magistrate ID6, regional NSW]*

#### 7.7.2. Raising the age of criminal responsibility

Some participants expressed support for raising the age of criminal responsibility in NSW. In total, fifteen of all participating magistrates (29%) and nine practitioners (82%) expressed a view in favour of raising the age. The remaining participants did not express a view.

Support for raising the age was often framed pragmatically, emphasising the limits of criminalisation and the need for therapeutic alternatives:

> *"We know that bringing them before the court will probably not result in a conviction...The statistics speak for themselves about what we're not achieving through criminalising children under the age of 14." [Local Court magistrate ID39, regional NSW]*

Practitioners also described the current transition at age 14 as confusing and destabilising, with children experiencing several years of *doli* matters followed by a sharp change in legal consequences:

> *"What I see is 10, 11, 12, 13-year-olds do* doli incapax *for a few years, then they graduate to being a 14-year-old and the whole thing changes. It's so confusing for a 14-year-old...I think that* doli *should not be a thing and…for kids between 10 to 14, there should be some type of alternative therapeutic, restorative justice type approach." [Legal practitioner ID7, regional NSW]*

### 7.7.3. System reflections

A number of participants reflected on the current system as inefficient and misaligned with both community safety and child development. One Children's Court magistrate summarised this in terms of purpose:

> *"We should ask ourselves, what do we want from the criminal justice system? What do we want from it and what are we getting from it? What are we causing?" [Children's Court magistrate, regional NSW]*

Others described frustration with repeated processes leading to predictable outcomes—rare rebuttals, poor evidence, and withdrawals—often justified as symbolic reassurance to the community:

> *"It's rare that you find that the presumption can be rebutted…the evidence that the police put forward usually is so poor and…they say they do it because they want to send a message to the community." [Children's Court magistrate ID2, regional NSW]*

A particularly stark account described a child repeatedly charged for serious violence-related conduct, culminating in a short period on remand and eventual acquittals due to *doli*:

> *"When it happened for the 7th time, I refused bail. Was I right to do that? I don't know because I listed the hearing the next week…it was acknowledged it was* doli*…they were all acquittals…so he spent a week in. What do you make of that? I don't know what to make of it. But you know, I don't know what to do. I didn't know what to do. I don't know what to do." [Children's Court magistrate ID4, regional NSW]*

Other reflections highlighted tensions between police/community expectations and the absence of any alternative mechanism to disrupt harmful behaviour:

> *"We, as a society, haven't given anyone a different mechanism to stop that behaviour other than a criminal justice system." [Children's Court magistrate ID5, regional NSW]*

#### 7.7.4. Mandated services and supports

Finally, some participants proposed reform pathways that would allow for mandated support responses without criminal conviction, particularly where the factual elements of offending are proven or admitted but *doli incapax* prevents criminal responsibility. One magistrate suggested:

> *"The Court should be able to impose a welfare response where the elements of the offence (other than* doli*) are proven or admitted. If they walk away without mandated services then by the time they turn 14 their behaviour may be entrenched." [Local Court magistrate ID34, metropolitan NSW]*

Participants also acknowledged the limits of voluntary engagement, particularly for young children and families facing complex disadvantage, raising questions about the scope of supportive versus coercive interventions:

> *"If that fails, then what?…how do we use our coercive powers to try and bring in education orders… or health treatment orders or welfare orders…?" [Children's Court magistrate ID5, regional NSW]*

Others noted that even where services exist, engagement is not straightforward for children at this age:

> *"The thing is, when you're that young, no kid wants to talk to some stranger about what's simmering under the surface…And if they don't want to, we can't force them to." [Legal practitioner ID1, metropolitan NSW]*

Overall, judicial and practitioner views on reform reflect a shared concern that current arrangements frequently fail to deliver meaningful accountability or sustained support for children aged 10–13, while consuming substantial system resources. These proposals reflect the reality that *doli* matters often involve children whose needs are severe and whose families may struggle to engage with fragmented services. The reform question is not simply legal, it is institutional: how to build a system where supportive intervention is available early, culturally safe, developmentally appropriate, and not contingent on criminalisation. While there is variation in preferred solutions—ranging from procedural reforms to the presumption, to raising the age—participants consistently emphasised the need for earlier decision-making, clearer thresholds, and service pathways that do not depend on conviction.

### 7.8. Conclusion: *Doli* as a window into cumulative disadvantage and system-produced trajectories

The material in this chapter shows that the practical effects of *doli incapax* are produced less by the moment of adjudication than by what happens around it. For the small cohort of children who repeatedly come before the courts at ages 10–13, the presumption rarely culminates in a contested finding that capacity has been rebutted. Instead, it reorganises the

case into a set of institutional responses that manage uncertainty, risk, and community pressure through procedure.

Three patterns stand out. First, bail becomes the system's default lever. Even where prospects of rebuttal are low, children are commonly charged and governed through conditions that are difficult to meet in contexts of instability. Breach, re-arrest, and short periods of remand then operate as predictable features of a cycle that is formally pre-trial but experienced as punitive and disruptive.

Second, time functions as a mechanism of governance. Adjournments, delays and late withdrawals prolong supervision while deferring—sometimes indefinitely—the moment at which responsibility is resolved. In this sense, the presumption can prevent conviction while still enabling a prolonged regulatory relationship between child and state.

Third, the chapter reveals a service vacuum beneath the raised threshold. Children may exit proceedings through withdrawal or acquittal without any coordinated pathway to support, while admission-based diversion simultaneously becomes harder to access for those advised to rely on *doli*. The result is not merely non-responsibility but institutional drift where cases move, children churn, and underlying harms remain largely untouched.

The quantitative findings in Chapter 4 corroborate this account, demonstrating that children who come before the courts within the *doli* age range are characterised by concentrated disadvantage, high rates of educational exclusion and child protection reporting, and frequent withdrawal of charges, patterns consistent with procedural governance rather than substantive resolution.

Read together, these findings suggest that the presumption currently operates as an unstable compromise between a developmental commitment not to criminalise young children and an institutional imperative to 'do something' in response to repeated and sometimes dangerous behaviour. Where therapeutic and welfare systems are fragmented and under-resourced, particularly in regional contexts, the criminal process is used to absorb and contain risk, even when liability is unlikely to be established. The presumption therefore exposes a deeper structural problem: the system is well-equipped to avoid convicting children, but poorly equipped to provide timely, developmentally appropriate responses in lieu of conviction.

# Chapter 8: Conclusion—From protection to process—*Doli incapax* and youth justice governance in NSW

This chapter interprets the empirical findings presented in the preceding chapters to examine how children under the age of 14 in NSW come into contact with police, courts and youth justice systems; how these interactions are patterned by cumulative and intersecting disadvantage; and what these dynamics reveal about the operation of youth justice policy and legal doctrine in practice. This discussion situates children's trajectories within a broader ecology of institutional engagement spanning child protection, education, housing, health and disability systems. In so doing, it interrogates the extent to which existing legal and policy frameworks operate as protective mechanisms for *doli*-aged children, or instead function as sites of classification, surveillance and containment.

A central contribution of this study is its efforts to empirically map children's early justice involvement across multiple systems over time. The findings demonstrate that while only a small proportion of children in NSW come into contact with police before age 14, those who do are overwhelmingly characterised by dense bundles of disadvantage that pre-date justice involvement by many years. For most children, early police contact is episodic and limited; however, a smaller and highly vulnerable subgroup experiences repeated contact, early escalation to formal proceedings, and prolonged engagement with youth justice supervision. These trajectories display systematic variation across age, gender, geography, and by prior exposure to victimisation, school exclusion, child protection intervention, health and mental health crises, housing instability and disability-related need. The discussion proceeds from the premise that these findings cannot be adequately explained through individualised models of risk, behavioural deficit or criminal propensity; rather, they demand a systemic interpretation that foregrounds how institutions interact over time to shape children's pathways into and through justice systems.

While these patterns are deeply relevant to longstanding concerns about the over-representation of Aboriginal and Torres Strait Islander children in youth justice systems, this discussion remains deliberately focused on institutional processes rather than population-level comparison. As outlined earlier in the thesis, this research is conducted by a non-Indigenous researcher and does not seek to produce Indigenous-led explanations of justice involvement. Instead, the analysis foregrounds how police, courts, and welfare systems interact over time to allocate surveillance, intervention and control. This framing reflects an interpretive choice to locate responsibility at the level of system design and governance, rather than within children, families or communities, and to avoid reproducing deficit-based accounts that administrative data alone cannot responsibly sustain. Additionally, given the descriptive design of this study, the findings should be interpreted as identifying patterned association rather than causal relationships.

The chapter advances three interrelated arguments. First, early police contact can be understood as operating in ways that resemble a sorting mechanism that differentiates children into pathways of diversion, escalation or entrenchment long before questions of criminal responsibility are formally resolved. Although most children receive cautions and do not progress to court, early age of first contact (particularly before age 12) is associated with more formal outcomes, higher intensity police engagement, and increased likelihood of YJNSW supervision. These dynamics are amplified in regional and remote contexts, where children experience earlier onset contact, more frequent police interactions and higher rates of court progression.

Second, the findings challenge the assumption that diversionary frameworks currently operate as robust safeguards for *doli*-aged children. While diversion remains the dominant response in numerical terms, the data reveal cycling between cautions, YJCs and court proceedings, particularly among children experiencing cumulative disadvantage. Importantly, diversion under the YOA is contingent on admissions and participation and may be precluded where a child declines to be interviewed or does not admit the alleged conduct. As the qualitative findings demonstrate, *doli*-aged children are frequently advised not to participate in interviews or make admissions, given the availability of an automatic legal safeguard in the presumption. In this context, court involvement may occur not because diversion is unavailable in principle, but because its procedural prerequisites are incompatible with legal advice designed to protect children's interests. This raises broader questions about the coherence and equity of discretionary decision-making at the intersection of diversion and *doli incapax.* Moreover, diversion under the YOA is not designed to provide integrated or sustained support, reflecting a deliberate policy choice to avoid net-widening and unnecessary system intervention. While this restraint serves an important protective function, it also limits the capacity of diversion alone to disrupt underlying trajectories of harm for children experiencing cumulative disadvantage. For a small cohort of children experiencing entrenched and intersecting disadvantage, diversion operates less as a pathway to coordinated support than as a time-limited response that may delay, rather than avert, subsequent court involvement.

Third, the chapter demonstrates that cumulative disadvantage, rather than offence seriousness alone, is strongly associated with early justice system contact and entrenchment. Across all stages of the system, children who progress to court and YJNSW supervision are distinguished by the accumulation and co-occurrence of multiple adversities. Victimisation and school suspension are near universal among justice-involved children; child protection contact is normative; health and mental health system engagement is widespread; and housing instability functions as a critical tipping point that identifies a smaller, but profoundly vulnerable subgroup. These risks do not simply add up, instead they interact over time producing a narrowing funnel through which only the most disadvantaged children progress to the tertiary end of justice intervention. Importantly, the timing of these adversities matter. Many children experience child protection involvement in infancy, school exclusion in middle childhood, and acute health or housing crises in the year immediately preceding

police contact. These proximal exposures suggest that early justice involvement is frequently observed in periods of heightened system stress. Yet the system responses documented in this study are overwhelmingly reactive and fragmented. Service engagement frequently occurs after multiple police contacts, or following court involvement, and very few children receive coordinated support across justice, welfare and education systems simultaneously. While findings in relation to service engagement should be interpreted with caution owing to the limited representation of non-government services captured in the HSDS, it is apparent that institutional recognition of need does not necessarily translate into coherent intervention.

Cumulatively, these findings have profound implications for debates about the age of criminal responsibility, and the role of *doli incapax* in protecting children. They suggest that doctrinal safeguards cannot compensate for systemic shortcomings that expose children to repeated surveillance and formalisation long before questions of culpability are resolved. Moreover, they caution against reform strategies that focus narrowly on legal thresholds or diversionary expansion without addressing the structural conditions that shape children's early system trajectories.

The remainder of this chapter develops these arguments in more detail. Section 8.1 examines early police contact as a form of institutional sorting and its uneven distribution across age and geography. Section 8.2 interrogates diversion and escalation, highlighting the limits of discretionary safeguards, especially in the context of *doli*-aged children. Section 8.3 places cumulative disadvantage at the centre of the analysis, mapping how intersecting adversities across child protection, education, health and housing systems structure children's trajectories into justice involvement. Section 8.4 examines the limits of legal doctrine and discretionary safeguards, focusing on the practical operation of *doli incapax,* police gatekeeping and the mismatch between adversarial processes and children's developmental capacity. Section 8.5 draws these strands together to interrogate what the presumption reveals about contemporary youth justice governance, particularly the displacement of welfare responsibility into criminal process and the management of uncertainty through bail and procedural control. The chapter concludes by drawing out implications for law reform, policy design and the governance of *doli*-aged children.

While the analysis focuses on institutional patterns, understanding how these elements intersect requires attention to the child's experience as it unfolds over time. The vignette of "Fred" is therefore introduced as a composite narrative device that draws together recurring themes across the research components to illustrate how legal rules, discretionary practices and service gaps are experienced cumulatively by a child moving through the system. It does not represent any single child but reflects a trajectory commonly experienced by a small cohort of highly vulnerable children aged 10–13 in NSW.

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Fred is 11 and lives in a regional town where "everyone knows everyone". He is living between his grandmother's house and temporary arrangements with relatives after his mother's housing became unstable. School records show repeated absences, a short period in learning support, and multiple suspensions linked to conflict and "refusal to follow instructions". Child protection contact appears intermittently in earlier years, including reports in infancy and again during late primary school, but without sustained involvement. Emergency department presentations are linked to injury, anxiety and nights where he has nowhere to sleep. None of these contacts add up to a single coordinated response. They sit in separate files, held by different agencies.

Fred's first police contact is not dramatic. He and other boys are alleged to have damaged property near the showgrounds after dark. Police attend, identify the children, and speak to his mum. Fred is given a warning. The event becomes one more entry across systems that already hold fragments of his history. In the months that follow, he remains sporadically engaged at school and continues to move between households. No agency initiates a coordinated response, and the incident does not trigger a structured referral pathway.

## 8.1. Early police contact and systematic sorting

Early police contact before age 14 is often framed in policy and political discourse as an indicator of 'youth offending', and by extension, individual culpability. The findings in this study support a different framing. Police contact in this age group appears less as a neutral response to criminal behaviour and more as an opportunity to differentiate children into pathways of diversion, escalation, and entrenchment on the basis of age-at-entry, geography, and the density of pre-existing disadvantage.

### 8.1.1. Scale and concentration: Episodic contact with a small, high-contact subgroup

In a regional town, visibility accumulates quickly. Police patrol the same streets and attend the same handful of hotspots—the skate park, the service station, the showgrounds. Within months, Fred's name appears again. On one occasion, a group of children gather in a park near the shopping centre after school. Police are called for "anti-social behaviour" and arrive while the children are still present. Names are taken and recorded. On another occasion, Fred is present when an older child is alleged to have damaged property at a station. He denies involvement, but his name is again recorded as part of the incident narrative. These events do not always produce formal outcomes, but they accumulate as an institutional record.

By 13, Fred is now familiar to local police. The offences are mixed—petty theft, property damage, occasional assaults—but a distinctive feature is the emergence of transport-related offences: being in a car with older teens, riding unregistered bikes, being present near a reported stolen vehicle. In a small community, these events are especially legible as "risk": the roads are familiar, the danger feels immediate, and police and courts sit under pressure to be seen to be acting.

His pathway illustrates both the "long tail" described in the data where a minority of children experience repeated interactions that create more opportunities for escalation; and how geography can operate as an amplifier, changing how quickly behaviour becomes visible, recorded, and interpreted as part of a pattern.

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At the population level, police contact before age 14 is uncommon: only 3% of children in the NSW birth cohort (2001–2006) came to police attention for alleged offending at least once before age 14. Yet within this relatively small cohort, contact is distributed unevenly. Most children experienced 1 to 4 interactions (85%), while a smaller subgroup (15%) had 5+ interactions, indicating a 'long tail' of repeat contact. This pattern is consistent with long-standing criminological observations that a relatively small cohort accounts for a disproportionate share of youth justice contact and recorded offending (though the contribution of this study is to show that this concentration emerges at the earliest points of system entry, not only later in adolescence; Freeman & Donnelly, 2024; Gu, 2025; Skardhamar, 2009).

The policy significance of this distribution is twofold. First, it cautions against treating 'children with police contact' as a homogeneous group. A large majority appears to be drawn into police attention in a limited or episodic way; a minority experiences repeat surveillance and repeated opportunities for escalation. Second, it suggests that the early years of police contact are a critical period of institutional visibility and sorting. The longer children remain visible to police (particularly where contacts accumulate), the more likely they are to move from informal resolution to formalisation, including charges, court appearance, and YJNSW supervision.

#### 8.1.2. Age 13 is a threshold

Age is a central axis of system sorting in this dataset. Age 13 is the modal point for first police contact among children with contact between ages 10–13 (60%). This aligns with national patterns indicating that 13-year-olds comprise the majority of children aged 10–13 proceeded against by police (ABS, 2021–22; Baidawi et al., 2024b, p. 9; Freeman & Donnelly, 2024, p. 19). These data suggest not only that police contact increases with age, but that the system appears to 'switch on' in a qualitatively different way at age 13. Age 13 is not only the most common point of first police contact, but also the dominant age for first

finalised charge and entry into YJNSW supervision. In other words, the same age at which children become most visible to police is also when the system most frequently transitions from contact to intervention and containment.

There are at least four plausible mechanisms at play here. One is developmental: early adolescence is a period of heightened peer influence, risk-taking and conflict, and the offence types most commonly associated with police contact in this cohort (assault, theft and malicious damage to property) map onto these dynamics (Furby & Beyth-Marom, 1992; Gardner & Steinberg, 2005). A second is educational and transitional: age 13 commonly coincides with the transition from primary to high school, a period associated with disruption to peer networks, reduced supervision, increased exposure to older adolescents, and elevated risks of disengagement, behavioural conflict and school exclusion (Cherney, 2020; Waters et al., 2014). A third is institutional: age 13 may operate as a practical threshold for discretionary escalation or a point at which police, prosecutors, or courts may be more inclined to formalise, or less inclined to interpret behaviour as 'immaturity' (Lacey, 2016; Mahoney & Thelen, 2010). A fourth is structural and contextual: the high prevalence of traffic and transport regulatory offences at age 13 suggests distinct forms of policing and opportunity (particularly in regional contexts) and supports the possibility that 'threshold' offending is partly generated through environment and surveillance rather than propensity alone (McAra & McVie, 2005).

Importantly, this age pattern also intersects with the presumption of *doli incapax.* In principle, ages 10–13 are precisely the period in which the presumption should operate as a substantial safeguard. In practice, however, the fact that age 13 emerges as the peak point of system activation suggests that doctrinal protections may be least effective at the very moment when children are most likely to be formally processed. This inference is partially qualified by the qualitative research findings of this study, which indicate that, since *RP,* the presumption is rarely, if ever, rebutted in contemporary court practice. The apparent tension reflects a temporal limitation in the data: the qualitative material primarily captures court practice over the past 5–10 years, whereas the administrative data (HSDS) record children's system contacts between 2001–2019. As a result, inferences about post-*RP* outcomes drawn from the administrative data are necessarily limited to the 2016–2019 period and may not fully reflect more recent shifts in the operation of the presumption following the High Court's re-articulation.

#### 8.1.3. Gendered visibility: Early adolescence and "doing masculinity"

The cohort is consistently gendered, with males comprising around two-thirds of children with police contact (67%), a pattern that holds across the major offence categories. Such distributions are consistent with longstanding youth justice data (see ABS, 2023–24b; Freeman & Donnelly, 2024, p. 10) and invite interpretation about the social and institutional production of 'risk'. In early adolescence, offending can operate as a resource for status, belonging and identity through practices that align with dominant expectations of risk-taking,

peer performance and toughness (Messerschmidt, 1993). The offence profile in this cohort is compatible with this framing, with assault and property damage constituting key categories through which adolescent conflict, peer status and visibility are enacted. A socio-legal reading of this gendered pattern adds an institutional dimension. Boys may be more readily interpreted as threatening, more likely to attract police attention, and more likely to be processed for behaviours that might be treated differently in other contexts. In this sense, gendered patterns of police contact reflect not only differences in behaviour, but differential institutional responses to similar conduct.

#### 8.1.4. Early onset (ages 8–10) as a marker of intensified sorting

The small subgroup of children whose first police contact occurs between ages 8–10 (approximately 10% of those with contact before age 14) is analytically important because it signals accelerated system entry. Contact for this group is dominated by property damage or arson, assault and theft. In life-course criminology, early onset, particularly when paired with violence or serious property damage, is strongly associated with elevated risk of persistent involvement (Moffitt, 1993; Patterson et al., 1998; Thornberry, 2005). For this cohort, early onset contact does not simply indicate 'earlier offending', rather it reflects earlier exposure to family and system stressors, intensified institutional escalation and prolonged surveillance. This distinction matters because children who attract police attention at ages 8–10 are more likely to be sorted into intensive pathways by ages 10–13. The findings later in this chapter support this interpretation: earlier age of first contact is associated with higher likelihood of court pathways, greater police contact volume and deeper system penetration. Early onset thus appears to function as an administrative signal that is associated with a higher likelihood of escalation, even within a system that formally purports to treat criminal responsibility as developmentally constrained.

#### 8.1.5. Geography as an amplifier

A consistent feature of the data is the relationship between geography and system entrenchment. Numerically, most children with police contact reside in major cities, reflecting population distribution. However, when expressed proportionally, children in remote and very remote areas are markedly over-represented (see also Freeman & Donnelly, 2024). This pattern persists and intensifies for more formal outcomes where children in remote and very remote locations are proportionally more likely to receive finalised charges and to appear in court.

Importantly, in the NSW context, remoteness is not a neutral spatial category. It is closely intertwined with the demographic and historical distribution of Aboriginal and Torres Strait Islander communities (Freeman & Donnelly, 2024, p. 11; Hogg & Carrington, 2003, p. 299). While geography should not be treated as a proxy for Indigeneity, the over-representation of Aboriginal and Torres Strait Islander children in remote and very remote areas means that place-based patterns of system entrenchment are likely to intersect with, and in part reflect,

the enduring effects of colonial governance and service withdrawal (Blagg, 2008; Carrington & Scott, 2008; Cunneen, 2006). This is consistent with scholarship on rurality, remoteness and concentrated disadvantage which emphasises how structural inequality is intensified by service scarcity, limited opportunities and institutional density in smaller communities (Allard et al., 2017; Carrington et al., 2013; Carrington & Scott, 2008; Vison et al., 2007).

These findings show that remoteness is not merely correlated with disadvantage, but is associated with earlier onset of police contact, more frequent interactions, and greater escalation (Fergusson et al., 2000; Fergusson & Horwood, 2002). These features are consistent with intensified surveillance and reduced capacity for informal resolution or diversion. The implication is that geography shapes institutional practice. In remote settings, police may be more visible, services may be thinner, and diversionary programs may be less accessible or less consistently applied.

### 8.1.6. Offence clustering and the production of 'seriousness'

Among children aged 10 to 13 with police contact, offending is clustered primarily around assault, theft, malicious damage or arson, and traffic or transport regulatory offences. This clustering supports an interpretation that early contact is shaped by interpersonal conflict, acquisitive opportunities and risk-taking behaviour typical of early adolescence. It also highlights how institutional responses may be driven by offence categories readily legible to police and easily chargeable, particularly property damage.

The prominence of traffic and transport offences is especially significant. These offences are often shaped by context including access to vehicles, regional mobility, peer dynamics, and the policing of public spaces. As a category, they can intensify system involvement not necessarily because they reflect criminal capacity but because they generate repeatable and visible points of contact between police and children. The risk is that offence types produced through surveillance, opportunity and environment are later treated as evidence of individual criminality, and ultimately, as evidence of criminal capacity.

### 8.1.7. From police contact to finalisation

Around 30% of children with police contact aged 10–13 had legal proceedings initiated (finalised charge), with the majority of these resulting in cautions. However, the pathways to finalisation are patterned. Court appearance and conferencing are more common among children whose first police contact occurs earlier (10–12), while cautions cluster more strongly around first contact at age 13. In other words, the timing of system entry appears to shape the probability of escalation.

This pattern reinforces the idea that police contact is not a discrete event but an accumulating institutional record. The earlier a child enters the system, the longer they remain visible; the

longer they remain visible, the greater the opportunity for formalisation, the more likely the system is to frame the child through lenses of risk and manageability rather than development and support. While this dynamic resonates with developmental taxonomies that distinguish adolescence-limited offending from life-course persistent pathways (Moffitt, 1993), the data also show how institutional processes themselves participate in sorting children into these categories through contact volume, discretionary decision-making and geographical constraints.

#### 8.1.8. Interim implications

Cumulatively, these findings support a shift in analytic emphasis from 'what kinds of children offend early?' to 'how does early contact with police allocate children into different justice pathways?' The data show that:

- The system is activated most strongly at age 13, a peak point of contact and formalisation
- A small subgroup is subjected to repeated contact, creating conditions for escalation
- Early onset contact between 8–10 marks a pathway of heightened intensity and early formalisation
- Geography amplifies system entrenchment, particularly in remote areas
- Offence categories are clustered in ways that are developmentally typical but institutionally consequential.

These population-level patterns contextualise the courtroom dynamics analysed in the preceding chapters, demonstrating that the presumption is engaged primarily in relation to a small, highly concentrated subgroup.

### 8.2. Diversion and the limits of protective responses

> Several months later, police allege Fred was one of a group involved in the theft of a car from a residential street. The car is later driven at speed on local roads and abandoned near a paddock. No one is injured, but the allegation carries a different institutional weight in this town.
>
> At the station, police indicate they are considering diversion under the *Young Offenders Act.* Fred is advised not to participate in an interview and not to make admissions. In principle, diversion remains available; in practice, admission is its gateway. Without an admission, police proceed to charge.
>
> At this point, the structure of diversion and the logic of legal protection come into tension. From a legal perspective, the decision not to admit is framed as appropriate, particularly given Fred's age and the availability of a presumption designed to protect children whose criminal capacity is uncertain. From a

policing perspective, the absence of admissions forecloses a diversionary outcome and makes a formal charge appear to be the only available pathway.

The case progresses to court, not because diversion is assessed as unsuitable, but because its procedural prerequisites are incompatible with the advice given to protect a *doli*-aged child. The result is that a framework designed to minimise formalisation can, for a small subgroup, operate in ways that funnel matters toward the very setting diversion is intended to avoid.

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If early police contact sorts children into differentiated justice pathways, diversion is the primary institutional tool through which that sorting is enacted. In principle, diversion occupies a central place in youth justice policy in NSW. In practice, it operates as a discretionary, conditional and uneven mechanism that both mitigates and reproduces inequality. In this section, diversion in the context of children aged 10–13 is conceptualised not simply as an alternative to court, but as a filtering device that differentiates children according to perceived risk, manageability and institutional capacity (Allard et al., 2010). While most children in this cohort are diverted, the conditions under which diversion is granted, repeated, or withheld are patterned by age, geography, offence type and cumulative disadvantage. Diversion therefore coexists with, and in some cases facilitates, deeper system involvement for a smaller but highly vulnerable subgroup.

### 8.2.1. Diversion as the dominant response

At an aggregate level, diversion remains the dominant response to alleged offending by children aged 10–13 in NSW. Of the children who had legal proceedings initiated before age 14, the vast majority received a police caution (88%), while smaller proportions were referred to a YJC (10%) or appeared in court (24%). These figures align with the stated objectives of the YOA, international norms emphasising diversion and minimal intervention, and recent findings from BOCSAR analyses showing that diversionary outcomes continue to account for most justice responses to children under 14 (Freeman & Donnelly, 2024; UNCRC, 2019; *YOA 1997* (NSW), ss 7-8).

For many children, diversion appears to function as intended. Most children (76%) who received a caution had only one finalised charge and did not escalate to more formal outcomes within this age range. However, aggregate diversion rates obscure substantial variation in who is diverted, how often, and with what downstream effects. When diversion is disaggregated by age at first police contact, offence type, region and cumulative risk, a more stratified picture emerges.

### 8.2.2. Timing matters

The timing of first police contact appears to shape diversionary pathways in important ways. Children whose first police contact occurred at age 13 were more likely to receive a caution and less likely to appear in court. By contrast, children who first came to police attention at ages 10–12 were disproportionately represented among those referred to YJCs or progressing to court. This pattern does not suggest a uniform escalation in behaviour. Rather, it reflects how earlier system entry interacts with the operation of diversionary frameworks.

For *doli*-aged children, diversion may be precluded at the outset where children decline to be interviewed or do not make admissions, either because of developmental capacity or because legal advice appropriately encourages reliance on the presumption. In other cases, repeated early contact may progressively exhaust the available scope for diversion under the YOA, such that later matters are treated as part of an accumulated pattern rather than as isolated incidents. Earlier entry into police contact is associated with subsequent interactions being read through a risk-based or pattern-based lens, even where the underlying behaviour remains developmentally typical. In this way, early contact may contribute to cumulative institutional visibility whereby the longer the child remains visible to police, the more limited their access to informal resolution or diversionary options becomes (Carrington & Schulenberg, 2003; McAra & McVie, 2007).

### 8.2.3. Geography and discretion

Geographic location further shapes diversionary pathways. Children in remote and very remote areas were proportionally more likely than their urban counterparts to appear in court, despite the YOA applying uniformly across NSW. This suggests that diversion is mediated not only by offence characteristics and age, but by local institutional capacity, policing context, and the practical operation of *doli* processes (Green et al., 2019; Pearce, 2025; Richards, 2014; Ringland & Smith, 2013; Stephens, 2012; Stewart & Smith, 2004). In regional and remote communities, limited availability of community-based supports and YJC infrastructure may constrain discretionary options for diversion (see Carrington et al., 2013; Colvin, 2019). At the same time, closer surveillance in smaller communities can increase the visibility of children's behaviour and reduce opportunities for informal resolution. Socio-legal scholarship has long noted that discretion operates differently in resource-constrained environments, where decision-makers must balance policy ideals against institutional feasibility (Anleu & Mack, 2007; Lacey, 1993). The findings from this study are consistent with a pattern in which these constraints are associated with earlier and more frequent formalisation for children living outside metropolitan areas.

### 8.2.4. Cycling through diversion

Although most children aged 10–13 experienced only one finalised charge (90%), a notable minority cycled through multiple diversionary and formal responses. A substantial number of

children who were cautioned and later went to court received multiple cautions before escalation (*n* = 363, 53%), while others moved between cautions, conferences, and court proceedings (*n* = 171, 4%). This cycling highlights both the strengths and limits of diversion.

On the one hand, repeated use of diversion reflects a sustained reluctance to criminalise children and an ongoing effort to resolve matters without court intervention. On the other hand, repeated diversion without accompanying support risks becoming procedural rather than transformative. Where underlying drivers such as trauma, housing instability, or school exclusion remain unaddressed, diversion alone may do little to alter trajectories. In these contexts, diversion can function as a holding mechanism that delays, but does not prevent, escalation.

This dynamic is particularly evident among children who eventually appear in court. Nearly half of those who went to court had no prior diversion (*n* = 530, 47%),[21] suggesting uneven access at the front end. Others had extensive diversionary histories, indicating that informal responses may have been insufficient to disrupt entrenched patterns of disadvantage and system contact.

#### 8.2.5. Interim implications

These findings point to a bifurcated operation of diversion under the YOA. For the majority of children, diversion appears to function as intended, resolving alleged offending without recourse to court and limiting deeper justice system involvement. For a smaller, highly disadvantaged subgroup, however, diversion appears either less accessible or less capable of diverting system progression and entrenchment. In this respect, diversion does not operate as a uniform safeguard but as a discretionary pathway shaped by institutional context, resource availability and assessments of risk.

The operation of *doli incapax* further complicates this picture. For some *doli*-aged children, particularly those at the younger end of the age spectrum, legal advice to avoid interviews or admissions can preclude eligibility for diversionary options that require admission of the alleged conduct. As a result, a legal doctrine designed to protect children from criminalisation may, in practice, narrow access to diversion for a minority of children already experiencing cumulative disadvantage.

### 8.3. Cumulative disadvantage, system entanglement and the production of high-risk childhoods

The findings presented in Chapter 5 demonstrate that early justice contact among children aged 10–13 in NSW does not occur in isolation. Rather, it is embedded within dense,

[21] Note, these data do not include incidence of warnings.

overlapping histories of victimisation, school exclusion, child protection involvement, health and mental health system contact, disability-related need, and housing instability. Justice involvement at this age is therefore best understood as occurring within broader trajectories of cumulative disadvantage and multi-system entanglement.

Drawing on life-course criminology, developmental research and critical socio-legal scholarship, this section shows that risk factors appear not simply to accumulate additively but interact across time and institutional domains. While many children experience one or two forms of adversity, a smaller, more marginalised subgroup is exposed to multiple, intersecting and temporally proximate risks. These children are disproportionately likely to progress from police contact to court and YJNSW supervision, underscoring the limits of systems that respond sequentially rather than holistically.

### 8.3.1. Limits of measurement and visibility

While the linked administrative data used in this study provide rich insight into children's trajectories across justice, education, child protection, health and housing systems, they necessarily capture only those forms of adversity that generate formal system contact. Important dimensions of children's lived experience, including informal care arrangements, unreported victimisation, family violence, community-based supports, cultural connection, and everyday experiences of trauma and instability, remain largely invisible in administrative records. As a result, patterns of cumulative disadvantage identified here should be understood as conservative estimates. The absence of a recorded indicator does not imply the absence of harm; rather, it reflects the limits of institutional legibility. This limitation reinforces, rather than weakens, the central argument: children who come into early contact with police are already embedded in dense ecologies of disadvantage that exceed the observational and intervention capacity of any single system.

### 8.3.2. Cumulative risk as a structuring feature

Across the cohort of children who came into contact with police between ages 10–13, cumulative risk exposure was the norm. Nearly half (46%) experienced both victimisation and school suspension before age 14, while large proportions also intersected with child protection systems (44%) and health or mental health services (43%). These findings align with extensive criminological evidence demonstrating that early adversity clusters across domains and that exposure to multiple risks is a stronger predictor of persistent justice involvement than any single factor alone (Farrington, 2012; Homel et al., 1999).

What is particularly striking is the consistency of the cumulative risk gradient across age windows. Whether measured before age 14, between ages 8–10, between 10–13, or in the year immediately preceding first police contact, the same pattern emerges whereby, as additional risk factors are layered, the number of affected children decreases, revealing a narrowing but increasingly vulnerable subgroup. This pattern reflects a process of

‘cumulative continuity’ whereby early disadvantage constrains later opportunities and amplifies exposure to further risks over time (Sampson & Laub, 1995).

#### 8.3.3. The ‘housing cliff’ and concentration of vulnerability

While cumulative risk is evident across multiple domains, the addition of housing instability consistently produces the steepest drop in cohort size. Across all temporal windows and sub-cohorts, the transition from Risk Level 3 (victimisation, suspension, child protection involvement, and health or mental health contact) to Risk Level 4 (the addition of housing instability) marks a sharp contraction in numbers. This recurring ‘housing cliff’ is analytically significant because it suggests that housing instability intensifies a highly concentrated subset of children experiencing the most acute and entrenched disadvantage.

Housing instability is not only disruptive in its own right, it can destabilise schooling, exacerbate trauma, increase surveillance and police visibility, and limit families’ capacity to engage consistently with services (Flatau et al., 2018). In this sense, housing instability is associated with higher levels of cumulative adversity and deeper justice involvement. Its disproportionate presence among children who go to court or enter YJNSW supervision highlights the limits of justice-led responses to what are fundamentally social and economic problems.

#### 8.3.4. Timing, proximity and escalation

The temporal distribution of risk exposure provides further insight into how cumulative disadvantage translates into justice involvement. Across multiple domains—child protection reports, school suspension, victimisation, health and mental health contacts, housing instability—a substantial proportion of children experienced these adversities in the year immediately preceding their first police contact. This proximity is consistent with justice contact occurring during periods of heightened instability and crisis. Police contact therefore appears as a late-stage response within a long trajectory of system involvement.

From a policy perspective, this pattern highlights missed opportunities for earlier, coordinated intervention. Many children were already highly visible to schools, child protection agencies, and health services yet these systems were unable or insufficiently resourced to stabilise their circumstances. What is missing is not identification of vulnerability, but the existence of a system capable of holding it. Coordinated intervention would require institutional architecture that sustains responsibility for children whose lives do not fit neatly within programmatic timeframes or agency boundaries. This means moving beyond short-term, eligibility-driven service responses towards a model of continuous, cross-system stewardship in which supports are coordinated over time. Absent such a structure, children become known to multiple systems but supported by none in an integrated way.

#### 8.3.5. Child protection, care and justice

Child protection involvement is near-universal among children who progress to court or YJNSW supervision (95–98% respectively). Just over a third of children with child protection involvement (*n* = 12,504) were subject to reports in infancy (*n* = 4,411, 35%), and most experienced repeated ROSH reports (*n* = 10,204, 82%) and multiple OOHC placements (84% of children in OOHC). This pattern reflects longstanding concerns about the convergence of child welfare and youth justice systems and the phenomenon of 'crossover' or 'dual system' children (Baidawi & Sheehan, 2019a, 2019b; Davis, 2019; Schofield et al., 2012; Stewart et al., 2008; Tzoumakis et al., 2025).

While child protection intervention is intended to safeguard children from harm, repeated reporting, placement instability and residential care exposure can inadvertently increase surveillance and institutional contact. Placement changes can disrupt schooling and attachments, heighten behavioural dysregulation and place children in environments with increased police presence (McFarlane, 2018). The high rates of school suspension, victimisation and health system contact among children in OOHC underscore the extent to which care experiences are embedded within broader ecologies of disadvantage (Thompson et al., 2025).

The progression from care to court among a subset of children points to systemic limits in addressing entrenched adversity. As critical scholars have argued, welfare systems under conditions of scarcity can slide from protective intervention into risk management (McGillivray, 1997; Munro, 2009; O'Malley, 2004). Under these conditions, institutions can reorient from meeting need to managing exposure by prioritising organisational safety and risk containment over long-term developmental repair for children. Children with complex needs become administratively reclassified as sources of risk rather than children needing care. Framing behaviour in this way rationalises escalation, and justice intervention becomes a continuation of governance by other means, absorbing children whose difficulties have exceeded the capacity of welfare systems. The pathway from care to 'crime' court therefore reflects not simply a breakdown in child protection, but its transformation under conditions of structural scarcity.

#### 8.3.6. Education as a site of exclusion

School suspension emerges as one of the most prevalent risk factors in this cohort (see also Kim & Cheng, 2025). Most children with police contact had been suspended at least once before age 14 with repeated and prolonged exclusions concentrated among those who later appeared in court or entered YJNSW supervision. Importantly, suspensions often preceded police contact, suggesting that educational exclusion often precedes justice involvement (Armstrong, 2018; Hemphill et al., 2017; Kupchik, 2010). Where school exclusion intersects with housing instability, child protection involvement and disability, the loss of education as a

stabilising institution may further intensify disengagement and increase exposure to policing (Thomas & Hand, 2025).

#### 8.3.7. Health, mental health and crisis-driven intervention

Near-universal contact with health systems among justice-involved children represents another dimension of cumulative disadvantage. Emergency department presentations, hospital admissions, mental health ambulatory episodes and ambulance call-outs often began in infancy and intensified in middle childhood and early adolescence. While some contacts reflect routine health needs, others—particularly injuries, mental health crises and substance-related presentations—signal escalating distress and crisis (Fougere et al., 2020). The concentration of health and mental health contacts in the year preceding first police contact suggests that acute service use may represent a critical but underutilised intervention point.

#### 8.3.8. Fragmentation and the absence of an integrated safety net

Despite dense system contact, only a very small proportion of children were engaged across multiple service systems simultaneously. Less than 1% received support from YJNSW services, DCJ services and education-based disability supports. This lack of overlap points to a fragmented service landscape in which children move between systems without continuity or coordination. This fragmentation is particularly problematic for children with the highest cumulative risk. These children are visible to multiple agencies over time, yet no single system holds responsibility for addressing the full complexity of their needs. As a result, interventions tend to be delayed, episodic or narrowly targeted, leaving structural drivers of disadvantage intact.

#### 8.3.9. Reframing responsibility

Cumulatively, these findings challenge individualised explanations of early justice contact and call for a reframing of responsibility. Children aged 10–13 who come into contact with police, and especially those who progress to court or supervision, are not simply ‘early offenders’, they are children whose lives are shaped by intersecting forms of harm, exclusion and instability. From this perspective, justice involvement can be understood as emerging within a long chain of system interactions. The accumulation of risk underscores the need to shift toward earlier, integrated and structurally informed interventions.

This concentration of cumulative disadvantage should not be read as evidence of individual or community deficit. Rather, it illustrates how structural conditions and institutional responses converge over time and are associated with heightened visibility and intervention for a small, highly vulnerable subgroup of children.

### 8.4. Rethinking early intervention, *doli incapax* and system design

> At first mention in the Children's Court, defence raises *doli incapax* and identifies capacity as a live issue. The prosecution seeks an adjournment to obtain material said to go to rebuttal. The matter is listed for another mention and then allocated a hearing date—several months away because the regional list is congested and circuit sittings are limited.
>
> During this period, Fred is granted bail with conditions including curfew, residence requirements, school attendance and non-association.
>
> Over the following months, the case does not move in a straight line. Fred misses school on days when transport arrangements fall through or where his living arrangements change at short notice. A breach is recorded. A missed curfew becomes another breach. He is re-arrested and spends short periods in custody while the proceedings remain unresolved. Each court appearance becomes an additional point of institutional contact: the court monitors compliance and police monitor conditions.
>
> In this setting, *doli incapax* does not operate as a discrete capacity determination resolved at the outset. It operates through process: adjournment, bail, compliance monitoring, and repeated returns to court. The presumption limits the likelihood of conviction, but it does not necessarily limit exposure to criminal procedure while responsibility remains contested.

***

The preceding sections demonstrate that children who come into contact with the NSW youth justice system before the age of 14 do so against a backdrop of extensive, overlapping and often long-standing disadvantage. This section argues that current justice responses, particularly the reliance on adversarial court processes, appear poorly calibrated to both the developmental realities and structural conditions shaping these children's lives. Persistent early justice involvement is therefore usefully understood through the lens of institutional design rather being explained solely in terms of individual or familial factors.

This section proceeds in three parts. First, it considers the implications of the findings for the operation of *doli incapax* and the age of criminal responsibility. Second, it analyses the mismatch between adversarial legal processes and children's developmental capacity. Third, it draws together these strands to argue for a reorientation of system design away from criminal responsibility and toward coordinated, welfare-led responses.

#### 8.4.1. Early justice contact and the limits of *doli incapax*

The findings underscore the fragility of relying on the presumption as a primary safeguard for children aged 10–13. *Doli incapax* is experienced less as a neat doctrinal safeguard than as an uneven, resource-intensive process shaped by evidentiary fragility, local legal cultures, and

the service vacuum surrounding young children. In practice, the presumption rarely culminates in a contested judicial determination of criminal capacity. Instead, participant accounts and courtroom observations suggest a recurring sequence: a child is charged; the matter proceeds through multiple mentions; bail is imposed (often with strict conditions); police and prosecutors assemble material in an attempt to rebut the presumption; admissibility and probative value are disputed; and the matter is withdrawn prior to, or on the day of, hearing.

While *doli incapax* is intended to protect children who lack capacity to understand the serious wrongfulness of their conduct, its operation sits uneasily alongside the empirical realities of cumulative disadvantage and early system entanglement. A non-trivial proportion of children in this cohort progressed to court and were found guilty at least once, including in matters where not guilty pleas were entered. This necessarily implies rebuttal of the presumption. Yet the offence profiles of these matters (concentrated around theft, traffic and transport regulatory offences, and offences against justice procedures) raise concerns about how criminal capacity is being inferred. As Crofts (2018) has observed, certain forms of rule-breaking are routinely treated as evidence of criminal understanding despite being closely linked to immaturity, peer influence or structural constraint.

The data also indicate that children whose matters progress to court typically have extensive prior contact with police, child protection, education and health systems. In such contexts, rebuttal risks conflating system familiarity with criminal capacity. Repeated exposure to police or court processes may be taken as evidence that a child 'knows better', even where that exposure reflects intensified surveillance rather than genuine moral development (Boulten, 2022). This concern is amplified for children with cognitive disability, trauma histories or mental health needs—groups that are overrepresented in this cohort (Boiteux & Poynton, 2023).

Developmental and neuroscientific research consistently demonstrates that children in early adolescence have limited impulse control, heightened susceptibility to peer influence, and reduced capacity for foresight and risk evaluation (Scott & Steinberg, 2008). When layered with trauma, instability and disability, these limitations are likely to be more pronounced (van der Kolk, 2003). Continued reliance on criminal responsibility as a response to such children therefore risks undermining the protective rationale of the presumption itself.

However, because proven matters were not disaggregated by year, it is not possible to determine when these guilty outcomes were finalised. In light of recent BOCSAR data (Gu, 2025) and this study's qualitative findings documenting high rates of withdrawal following *RP,* it is likely that many proven matters in the HSDS predate the High Court's clarification in 2016. It is also possible that some reflect the inconsistent application of the presumption identified in the qualitative data. These uncertainties further underscore the instability of relying on doctrinal protection alone.

### 8.4.2. Adversarial processes and children’s participatory capacity

For the minority of children whose matters proceed to court, the findings of this study raise significant questions about the appropriateness of adversarial legal processes. Children aged 10–13 face significant cognitive, emotional and psychosocial barriers to meaningful participation in criminal proceedings. These challenges are magnified for children with trauma histories, mental health needs, disability, or unstable living arrangements, all of which are prevalent in this cohort.

Adversarial processes require children to understand charges, instruct lawyers, make decisions about pleas, comply with bail conditions, and engage with abstract legal concepts such as culpability and deterrence. Developmental research suggests that many children in this age group lack the capacity to perform these tasks reliably, particularly under stress (Pillay, 2019, p. 229; Steinberg & Icenogle, 2019). Empirically, this mismatch is reflected in high rates of non-pleas, withdrawn matters, repeated remand episodes and dismissals without penalty. These outcomes signal systemic friction rather than effective adjudication.

Repeated remand episodes for some children are particularly troubling. Remand is a disruptive and often traumatic experience that can entrench disengagement from education and family life (Goldson, 2013). For children whose behaviour is closely linked to instability and unmet need, remand may exacerbate the very risks it purports to manage. Conversely, as noted by magistrates in this study, detention can also function as a substitute for basic welfare, offering meals, school and structure in contexts of instability and scarcity. Both dynamics point to the inadequacy of criminal process as a vehicle for responding to children’s needs.

Additionally, the findings illustrate how the presumption reshapes the social meaning of criminal responsibility for children and adults. Participants describe *doli incapax* increasingly circulating as “legal knowledge” among justice-involved children, sometimes associated with “taunting” police, recruitment of younger children by older peers, and the perception that young children “can’t get in trouble”. These accounts suggest that the presumption operates as a cultural object that can alter children’s legal consciousness and the strategies of peers, police and practitioners.

### 8.4.3. System design and fragmentation

The cumulative risk and service overlap analyses point to system fragmentation. Children in this cohort are visible to multiple institutions over long periods yet very few receive coordinated or sustained support across systems. Instead, responsibility shifts between education, child protection, health and justice agencies, with each responding to discrete manifestations of harm.

Preventive programs like Brighter Futures and Youth Hope engage many vulnerable children but often without sufficient intensity, duration or integration to counteract cumulative disadvantage. Conversely, justice-based interventions arrive late, once patterns of instability are entrenched. The consequence is a bifurcated system in which early intervention often appears under-powered and under-resourced, and late intervention is over-reliant on criminalisation. Children with the highest needs are the most likely to fall through the gaps between systems, only to be recaptured by the justice system at a later stage.

### 8.5. What *doli incapax* reveals about contemporary youth justice governance

> When the matter returns, the prosecution tenders school material to support rebuttal including suspension letters, wellbeing notes, records of being told behaviour was "wrong", restorative conversations after classroom incidents, and comments suggesting Fred "understands consequences". Defence objects, arguing that institutional discipline and support documentation should not be treated as proof of a child's appreciation of serious moral wrongfulness.
>
> The magistrate admits some material but expresses doubt about its probative value. Ultimately, the prosecution withdraws. By that point, more than seven months have elapsed since Fred was first charged. Fred is not convicted, yet the effects of the proceedings are not limited to the formal outcome. Over the months of delay, he has been subject to conditions, surveillance, and repeated contact with police and court staff, he has missed school due to court dates and disruptions, and he has spent short periods in custody despite the unresolved question of responsibility. Fred returns home.
>
> At home, Fred continues socialising with peers he met in detention and begins to learn the language of the system. "*Doli*" becomes shorthand for not getting convicted.
>
> Fred is not exceptional. The trajectory described here reflects a common pathway for a small group of children who are repeatedly drawn into the youth justice system despite the operation of *doli incapax*. The presumption protects them from conviction but not from prolonged exposure to criminal process. Fred's trajectory illustrates how cumulative disadvantage is translated into cumulative justice contact.

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Cumulatively, the findings across both qualitative and quantitative research components of this study illustrate that outcomes for *doli*-aged children appear to be shaped less by legal doctrine than by how uncertainty is managed across institutions and over time. *Doli incapax* operates as a lens through which broader features of youth justice governance become visible, consistent with a displacement of responsibility from welfare systems to criminal process, the centrality of risk management over adjudication, and the tendency for protective doctrines to stabilise rather than disrupt structurally inadequate responses to vulnerable children.

#### 8.5.1. *Doli incapax* and the management of uncertainty

Formally, the presumption is an adjudicative doctrine concerned with proof of criminal capacity beyond reasonable doubt. Empirically, however, its observable effects are often governance effects. The presumption rarely culminates in a definitive judicial ruling on responsibility. Instead, it generates prolonged periods of procedural uncertainty during which children are governed through bail, supervision, delay and withdrawal.

This reflects a broader shift in youth justice systems for *doli*-aged children. Contemporary youth justice increasingly operates not as a forum for determining guilt and imposing proportionate punishment but as a site for managing risk, visibility and institutional liability (Hannah-Moffat, 2005). Where criminal responsibility is uncertain, the system does not withdraw; rather it reorients towards bail conditions, reporting requirements, non-association orders and remand decisions as the tools through which risk is regulated in the absence of conviction. The presumption is particularly revealing in this regard because it creates a class of children simultaneously too young to be reliably convicted and too risky to be ignored. The governance response to this dilemma appears to be an intensification of procedural control within the criminal justice system itself.

#### 8.5.2. Displacement of welfare responsibility into criminal process

Across magistrate interviews, practitioner accounts and courtroom observation, *doli* matters consistently arise in contexts of institutional absence. Children appearing before the courts are often already known to child protection, education and health systems, yet participants consistently described a lack of effective early intervention, particularly in regional areas. When other systems fail to stabilise children's circumstances, police and courts become the default institutions tasked with responding to harm, risk and disorder. *Doli incapax* exposes this displacement. The presumption formally recognises that children aged 10–13 may lack criminal capacity, yet the justice system remains the site at which unmet welfare needs are confronted. In this context, bail refusal is sometimes rationalised as a means of securing safety, routine or access to services; detention is described as the only environment in which some children receive consistent food, shelter or schooling; and criminal proceedings are used as leverage to compel engagement with fragmented support systems.

This dynamic may reflect broader limits in welfare governance. Protective doctrines such as *doli incapax* cannot compensate for the absence of a robust welfare infrastructure capable of responding to children with complex needs. Instead, criminal process can function as a substitute form of regulation, allowing the state to manage risk without addressing the structural conditions that give rise to harm. The result is a system in which children are formally exempt from responsibility yet materially governed as if they were responsible.

### 8.5.3. Risk, visibility and the politics of youth crime

The operation of the presumption is also shaped by the political and cultural context in which youth justice is situated. Participants' accounts—particularly from regional jurisdictions—demonstrate how *doli* matters are embedded within heightened concern about youth crime, dangerous driving and public safety. These narratives can exert pressure on police and courts to be seen to be acting, even where legal responsibility is uncertain. Within this environment, *doli incapax* can be experienced by practitioners as an obstacle to responsiveness and helps explain why governance is displaced into process. Where conviction is unattainable, bail and procedural supervision become the means through which the system performs accountability. This dynamic has uneven effects. Children more visible to police are more likely to be drawn into this form of governance (Allard, 2010, p. 1); and geographic concentration of policing, limited access to programs, and reduced availability of specialist representation amplify the likelihood that *doli incapax* will operate as a late-stage protection rather than an early barrier to criminalisation.

### 8.5.4. Protective doctrine and system stabilisation

One of the most counterintuitive findings is that the strength of *doli incapax* as a doctrinal safeguard may contribute to system stability. By preventing conviction while allowing extensive procedural intervention, the presumption may enable the system to continue operating without resolving its underlying contradictions. Children are not convicted which allows the system to maintain its claim to developmental sensitivity, but at the same time, they remain subject to control (and less visible harms of prolonged process and bail churn), which allows the system to be seen to respond to risk and community concern. This reflects the limits of relying on doctrinal solutions to address systemic problems.

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> 'Fred' is not presented as an exception, but as a composite of these recurring dynamics. His trajectory illustrates how disadvantage becomes legible to institutions through compliance failures, how care needs are reframed as bail risk, and how repeated procedural contact can become a formative experience in itself. The central implication is that *doli incapax* should not be evaluated only by whether it prevents wrongful conviction, but by the pathways it produces: the forms of control it legitimates, the supports it fails to trigger, and the long-term trajectories it helps to stabilise.

## 8.6. Implications: Reframing the reform task

These findings have important implications for contemporary reform debates, particularly those surrounding the minimum age and recent legislative changes in NSW. They suggest that reforms focused narrowly on legal thresholds—whether through codification of the

presumption or incremental age increases—are unlikely to transform children's lived experiences unless accompanied by structural investment in welfare, education, health and housing systems.

Raising the age of criminal responsibility may reduce convictions, but without alternative pathways it risks reproducing the pattern observed in this study: children protected from liability yet governed through intensified surveillance, procedural control and service displacement. If the age were raised so that police could not initiate criminal proceedings until 14, the governance task would not disappear; it would be redistributed—either toward schools, child protection, health and community services, or into new civil and regulatory powers. This shifts the policy question from whether children should be criminalised to whether the non-criminal systems to which responsibility is displaced are adequately resourced, coordinated and authorised to respond without recreating control dynamics through different legal forms. Conversely, strengthening rebuttal mechanisms, as seen in recent NSW reforms, risks diluting doctrinal protection without addressing the conditions that make criminalisation an attractive governance response in the first place.

What remains unresolved in current reform debates is not whether children under 14 should be criminalised, but how systems should respond to a very small cohort of children whose lives are characterised by extreme and cumulative institutional involvement. The findings of this study suggest that early police contact is concentrated among a numerically small group of children experiencing intersecting disadvantage across multiple domains. This concentration has direct implications for how responsibility should be organised within the youth justice governance framework. The policy challenge is not one of detection (these children are already highly visible to multiple agencies), but of institutional holding. The longitudinal trajectories documented in this study show repeated system contact without stabilising effect. Children circulate across agencies without any institution assuming sustained responsibility for their developmental trajectory, and police contact functions as a mechanism of last resort governance in the face of service system incapacity. If criminal law is to be displaced as the default governing system for *doli*-aged children, alternative systems must be capable of performing the same risk-management function in a more legitimate and supportive form. This requires service arrangements that can hold uncertainty over time—maintaining engagement with children whose behaviour is volatile, whose families are under strain, whose lives do not conform to linear program logic, and who are unlikely to want to engage. Time-limited, eligibility-bound and compliance-oriented service models are misaligned with the needs of this cohort. Disengagement, mobility and crisis are defining features of their circumstances. Systems designed around episodic intervention therefore reproduce the very instability they are intended to resolve. Because the affected cohort is small but highly complex, this study points toward the need for intensive, long-horizon, multi-system responsibility for a narrowly defined group of children, rather than the diffuse expansion of mainstream services.

It is important to be explicit about the limits of what this study can and cannot claim. In addition to methodological limitations set out in Chapter 3, this study was conducted by a non-Indigenous researcher and grounded in institutional data and professional accounts. Consequently, the thesis does not seek to explain the over-representation of Aboriginal and Torres Strait Islander children in the youth justice system, nor to evaluate the cultural or community dimensions of children's experiences. That work is already being undertaken, and must continue to be led, by Indigenous scholars and communities (Anthony, 2020; Behrendt, 2019; Cripps & Davis, 2012; Cunneen & Tauri, 2022; McGlade, 2019; Sherwood & Kendall, 2013). The contribution of this study lies elsewhere: in demonstrating how legal doctrine, discretion and fragmented service systems operate together to govern children in conditions of uncertainty and scarcity. By locating responsibility within institutional design rather than individual capacity, the findings invite reform approaches that move beyond doctrinal adjustment toward structural investment, Indigenous-led solutions and genuinely preventative responses. Without such shifts, legal safeguards such as *doli incapax* risk continuing to function as symbolic protections within systems that remain structurally incapable of supporting the children most in need.

What this study reveals is that youth justice governance for *doli*-aged children is less about resolving responsibility than about managing uncertainty in a context of structural scarcity. Any meaningful reform must therefore engage not only with doctrine but with the institutional arrangements through which uncertainty is translated into practice. The extreme concentration of early police contact indicates that meaningful reform requires precision investment in a very small group of children whose lives already absorb disproportionate institutional resources. This is not an argument for expansion of intervention, but for reconfiguration of responsibility. The point of *doli incapax* should be to prevent criminalisation *and* trigger a welfare-based holding response, not simply to terminate liability while leaving police and courts as the de facto coordinators of risk. By bringing together doctrinal analysis, qualitative accounts of courtroom practice, and longitudinal administrative data on children's system trajectories, this thesis makes three contributions to current debate on the age, *doli incapax* and youth justice more broadly. First, it provides an empirical account of how *doli incapax* operates in practice in NSW, demonstrating that its primary effects are procedural rather than adjudicative. Second, it shows how children's outcomes are shaped by cumulative disadvantage and early system entanglement, challenging individualised accounts of early offending and responsibility. Third, it reframes debates about the age and the presumption by locating them within broader questions of youth justice governance; questions about where responsibility for vulnerable children is located, how risk is managed in the absence of conviction, and why criminal justice continues to function as a default response to social harm.

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**Legislation**

*Bail Act 2013* (NSW)

*Children (Criminal Proceedings) Act 1987* (NSW)

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

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

*Crime and Disorder Act 1998* (UK)

*Crimes Act 1914* (Cth)

*Criminal Code 2002* (ACT)

*Criminal Code Act 1899* (Qld)

*Criminal Code Act 1924* (Tas)

*Criminal Code Act 1983* (NT)

*Criminal Code Act 1995* (Cth)

*Criminal Code Act Compilation Act 1913* (WA)

*Criminal Code Amendment Bill (No 3) 2003* (WA)

*Young Offenders Act 1993* (SA)

*Young Offenders Act 1997* (NSW)

*Youth Justice Act 2024* (Vic)

# Appendix: Supplementary methods materials

This appendix provides supporting materials for the study's empirical methods. Section 9.1 reproduces the semi-structured interview protocols used with magistrates and practitioners. Section 9.2 reproduces the magistrate survey instrument. Section 9.3 provides additional technical detail on the Human Services Dataset (HSDS), including governance arrangements, included agencies, and key data cleaning and variable construction steps used in the quantitative analyses. These materials are provided to support transparency and replicability; the core methodological approach and analytic strategy are described in Chapter 3.

## 9.1. Interview protocol

All interview responses were de-identified, and participants were directed that any identifying details about individual matters would be redacted and deleted from the data.

### 9.1.1. For magistrates

*Professional background and experience*

1. Introduction to you and your current role?
    a) How long have you been in that role? What were you doing previously?
    b) Do you primarily work in metropolitan NSW or rural/regional NSW, or a mixture of both?

*The operation of* doli incapax

2. [Frequency] How frequently do you encounter the presumption of *doli incapax* in your role?
    a) Has this changed over time?
3. [Regionality & availability] In your experience, are there differences between regional and metropolitan areas in terms of frequency/availability of the presumption?
    a) [Regionality & consistency] Have you noted any differences in application between regional or metropolitan areas?
4. [Outcomes] In your experience, is *doli incapax* more often rebutted or not rebutted?
    a) Are matters frequently withdrawn for lack of *doli incapax* evidence prior to hearing?
5. [Example case(s)] Can you think of a matter where you thought *doli incapax* was well-applied or conversely, where it was poorly applied?

Doli incapax *evidence*

6. [Common types] In your experience, are any particular types of evidence more commonly adduced to rebut the presumption?
    a) [Probative value] Do you consider any 'types of evidence' to hold more probative value than others?

*Views on* doli incapax

7. [Threshold to rebut] There are criticisms of the presumption both on grounds that it is too easily rebutted and conversely, too difficult to rebut. What are your thoughts on the presumption more broadly, and the threshold to rebut?
8. [Confusion around its application] Do you think there is sufficient clarity around the underlying policy intentions of the doctrine and its test?
9. [Impact on timeliness] In your experience, do *doli incapax* matters take more time?
    a) If there are delays, are there concerns about young people being on remand while awaiting their hearing?

*Services and system responses*

10. [Services for *doli*-aged children] What's needed? Where are the gaps?
    a) When a child is found to be *doli incapax*, what happens? Are there suitable programs and supports available to reorient the child's trajectory away from repeat offending?

*Options for reform*

11. [*Doli incapax* reform] If the age were to be raised to 12 or 14, what do you think should happen to the presumption?
12. [Implications of losing *doli*] If we were to lose *doli*, do you think the law sufficiently accounts for children's cognitive development and maturation over time in relation to their capacity to understand the seriousness of their offending behaviour?
13. [ACR reform] What are your views on the minimum age and options for reform?

#### 9.1.2. For practitioners

*Professional background and experience*

1. Introduction to you and your current role?
    a) How long have you been in that role? What were you doing previously?
    b) Do you primarily work in metropolitan NSW or rural/regional NSW, or a mixture of both?
2. Could you speak a little to your clientele? How would you describe the demographic characteristics of your clients?

*The operation of* doli incapax

3. [Frequency] How frequently do you encounter *doli incapax* in your role?
    a) Has this changed over time?
4. [Availability] In your experience, are there any differences in availability of the presumption between regional/metropolitan areas or to different cohorts of children?
5. [Consistent application] In your experience, is the presumption applied consistently?

    a) If you have experience working in rural/regional NSW and metropolitan NSW, are there any differences in application across different regions?
6. [Outcomes] In your experience, is *doli incapax* more often rebutted or not rebutted?
    a) Are many matters withdrawn for lack of *doli incapax* evidence prior to hearing?
7. [Example case(s)] Can you think of a matter where you were concerned about the application of *doli incapax* or conversely, where it was dealt with well?

Doli incapax *evidence*

8. [Comon types] In your experience, are any particular types of evidence more commonly adduced to rebut the presumption?
    a) [Probative value] In your experience, does any 'type' of evidence hold more probative value for the courts?
9. [Reversal of onus (for defence practitioners)] Have you ever felt pressure to adduce *doli incapax* evidence?

*Views on* doli incapax

10. [Threshold to rebut] There are criticisms of the presumption both on grounds that it is too easily rebutted and conversely, too difficult to rebut. What are your thoughts on the presumption more broadly, and the threshold to rebut?
11. [Confusion around its application] Do you think there is sufficient clarity around the underlying policy intentions of the doctrine and its test for lawyers, and separately, for police?
12. [Impact on timeliness] In your experience, do *doli incapax* matters take more time?
    a) If there are delays, are there concerns about young people being on remand while awaiting their hearing?

*Services and system responses*

13. [Services for *doli*-aged children] Are there particular programs or services in your local area or surrounding areas that you commonly refer children to?
    a. Are there gaps in the services available for these children?
    b. When a child is found to be *doli incapax*, what typically happens? Are there suitable programs and supports available to reorient the child away from repeat offending?

*Options for reform*

14. [ACR reform] Do you support raising the age? If so, to what age/why?
    c. In your view, are there any issues with raising the age, or reform needed to support the age being raised?
15. [*Doli incapax* reform] If the age were to be raised to 12 or 14, what do you think should happen to the presumption?
    d. In your view, is the *doli incapax* presumption in need of reform?

i. If so, what aspects of the presumption are needing reform?

16. [Implications of losing *doli incapax*] If we were to lose *doli incapax*, do you think the law sufficiently accounts for children's cognitive development and maturation over time in relation to their capacity to understand the seriousness of their offending behaviour?

9.2. Survey protocol

All survey responses were de-identified, and participants were directed that any identifying details about individual matters would be redacted and deleted from the data.

*A bit about you*

1. How long have you been a Local Court magistrate?
   a. Less than a year
   b. 1–2 years
   c. 3–4 years
   d. 5+ years
   e. Other, please explain [text box]

2. Which area classification best describes where you are currently based?
   a. Metropolitan Sydney
   b. Regional NSW
   c. Remote NSW
   d. Other, please explain [text box]

3. As a magistrate, were you previously based elsewhere?
   a. Yes
   b. No

4. [*Display if Q3 answer is yes*] If so, what area best describes where you were previously based?
   a. Metropolitan Sydney
   b. Regional NSW
   c. Remote NSW
   d. Other, please explain [text box]

*The operation of* doli incapax

5. On average, how frequently do you encounter *doli incapax* matters?
   a. More than once a week
   b. About once a week
   c. A couple of times a month
   d. Once a month

e. Once every couple of months
f. Once a year
*g.* Never *[skip to end of survey]*
h. Other, please explain [text box]

6. Has the frequency with which you hear *doli incapax* matters changed over time? If so, how? [text box]

7. [*Display if Q3 answer is yes*] In your experience, are there any notable differences between areas or jurisdictions in terms of the frequency with which *doli* matters arise? [text box]

8. Has the High Court's decision in *RP v R* [2016] HCA 53 changed the manner in which you approach *doli incapax* matters, or the nature of submissions made to you by the parties? [text box]

<u>*Evidence adduced to rebut* doli incapax</u>

9. In your experience, which of the following types of evidence are more commonly adduced to rebut *doli incapax*?
   *Sliding scale from 1 – never adduced to 10 – always adduced.*

- Expert or psychological testimony
- School reports
- Pre- and post-offence conduct
- Prior criminal offending
- Parent/caregiver statements
- Police-led *'doli incapax'* interviews
- Other, please specify [text box]

10. Of the above categories of evidence, which do you consider to hold more probative value in consideration of *doli incapax*?
   *Sliding scale from 1 – no value to 10 – very helpful*

- Expert or psychological testimony
- School reports
- Pre- and post-offence conduct
- Prior criminal offending
- Parent/caregiver statements
- Police-led '*doli incapax'* interviews
- Other, please specify [text box]

11. Is there anything you'd like to say about evidence commonly adduced to rebut *doli incapax*? [text box]

*Outcomes of* doli incapax *matters*

12. In your experience, is *doli incapax* more often rebutted or not rebutted?
    a. Never rebutted
    b. Occasionally rebutted
    c. Half and half
    d. Often rebutted
    e. Almost always rebutted
    f. Other, please explain [text box]

13. [*Display if Q12 answer was occasionally, half and half, often or almost always*] Can you describe an example matter in which you found *doli incapax* to be rebutted and the evidence adduced that was persuasive in its rebuttal of the presumption? *Please note, all responses are de-identified and no identifying material relating to any particular matter will be used* [text box]

14. In your experience, are *doli incapax* matters frequently withdrawn either prior to hearing or on the day of hearing?
    a. Yes
    b. No
    c. Other, please explain [text box]

*Education and training for judicial officers and legal practitioners*

15. Do you think there is sufficient clarity around the presumption and its test?
    a. Yes
    b. No
    c. Other, please explain [text box]

16. [*Display if Q15 answer is no*] In your view, what is needed to ensure greater clarity around the presumption? [text box]

17. In your view, is there sufficient guidance and resources **for judicial officers** around the presumption and its operation?
    a. Yes
    b. No
    c. Other, please explain [text box]

18. [*Display if Q17 answer is no*] In your view, what guidance or resources are needed? [text box]

19. In your view, is there sufficient guidance and resources for **legal practitioners** around the presumption and its operation?
    a. Yes

    b. No
    c. Other, please explain [text box]

20. [*Display if Q19 answer is no*] In your view, what guidance or resources are needed? [text box]

<u>*Overall views on doli incapax in NSW*</u>

21. In your view, what are the strengths and limitations of the presumption and the way it operates in NSW? [text box]

22. In your view, is the presumption in need of reform? If so, what aspects of the presumption are needing reform? [text box]

23. Do you have any final comments on *doli incapax*? [text box]

<u>*Age of criminal responsibility and available services and supports*</u>

24. What are your views on the services and supports currently available for children and young people in the *doli incapax* age bracket? Are there any particular services that stand out in your jurisdiction? [text box]

25. What is your view on the age of criminal responsibility and options for reform in NSW? [text box]

*End of survey*

26. Would you like to receive results from this research?
    a. Yes
    b. No

27. [*Display if Q26 answer is yes*] Please type your email address in the text box below. Please note, this email address will be used only for the purposes of communicating the results of this research project at its completion.

You've completed the survey. Thank you for your time and valuable insights. To submit your responses, please click the arrow at the bottom of the page.

### 9.3. The Human Services Dataset (HSDS): Additional information

The administrative data contained within the HSDS are supplied by the following government departments and agencies:

- Department of Communities and Justice (DCJ), including the NSW Bureau of Crime Statistics and Research (BOCSAR) and Youth Justice NSW (YJNSW)
- NSW Registry of Births Deaths and Marriages
- Legal Aid NSW
- NSW Police Force
- NSW Ministry of Health
- NSW Ambulance
- NSW Department of Education
- NSW Education Standards Authority
- NSW Department of Customer Services (Revenue NSW)
- NSW Department of Industry.

#### 9.3.1. Data governance

The HSDS has strong existing governance arrangements to guard privacy and to ensure data are secure and used appropriately. Family and Community Services Insights Analysis and Research (FACSIAR), which operates within DCJ, is the centre that coordinates data access and governance. The creation and use of the HSDS is enabled by the Public Interest Direction and Health Public Interest Direction (PIDs) relating to the HSDS made by the Privacy Commissioner under the *Privacy and Personal Information Protection Act 1998* NSW and the *Health Records and Information Privacy Act 2002* NSW.

According to the HSDS PIDs, the purposes for the data collected and used (Section 6) include to:

1. Provide specific identification of trends and gaps in government service usage and delivery.
2. Facilitate services that are better tailored to the needs of vulnerable children or young persons and their families both now and in the future.
3. Deliver clear evidence on service, support, and program effectiveness and a detailed view of resource allocation and gaps.

This project received approval on the basis of meeting these and other requirements.

#### 9.3.2. Data cleaning and organisation procedures by dataset

The following sections provide further details about each data source and how the outcome variables for this study were selected and/or created. These details are included to document how key measures were constructed from administrative sources and to allow readers to assess validity and limitations.

#### *9.3.2.1. Date of birth (DOB) data*

To maximise accurate and comprehensive DOB information for all children, DOB variables were consolidated from four distinct datasets: NSW Registry of Births, Deaths and Marriages (RBDM); DCJ cohort demographics; Juvenile Justice (i.e. YJNSW) admissions; and BOCSAR adult contacts. All DOB variables across these datasets were reformatted for consistency and then merged into a central DOB file with individual child identifiers. A DOB variable was then created for this study by taking the first available DOB for each individual from: RBDM, BOCSAR adult contacts, DCJ cohort demographics, and then JJ admissions. This order was selected according to most complete records across the datasets for DOB information.

#### *9.3.2.2. Police data*

The DOB variable was merged into the police contacts dataset to isolate the birth cohort in focus: all children born between 2001–2006 inclusive.

*Dates of police contact*

There were two distinct dates recorded for police contact per observation: an incident status date and an event reported date. Both were reformatted and then consolidated into one 'police contact date' which took the date that the event was reported if the incident status date was missing. All police contact dates prior to a child's 14$^{th}$ birthday were retained.

*Incident classifications*

Alleged offending or 'incidents' were classified across two variables in the police dataset: 'incident category' and 'incident further classification'. The 'incident further classification' variable offered more detailed information about the alleged offending behaviour or incident and was chosen for reclassification and cleaning.

First, police contacts linked to 'adjacent purpose policing' were isolated and removed. These included accidents, public or entertainment events, applications and administrative processes, compliance and routine checks. The remaining incident categories were consolidated into offence classifications informed by Australian Bureau of Statistics (ABS) and Bureau of Crime Statistics and Research (BOCSAR) classifications (ABS, 2023; BOCSAR, 2022, pp. 50-57). These included:

- Assault and other offences against the person
- Sexual and pornography offences
- Intimidation, stalking and harassment
- Robbery
- Break and enter
- Theft
- Fraud
- Arson and malicious damage to property

- Disorderly conduct
- Offences against justice procedures
- Drug offences
- Prohibited and regulated weapons offences
- Terrorism offences
- Traffic and transport regulatory offences
- Other offences

Analyses were run to determine how many children had a police contact for each given offence category, and the number of police contacts for each offence category. These analyses were repeated across two distinct cohorts: children aged 8–10 with a police contact, and children aged 10–14 with a police contact.

*Victims data*

NSW Police additionally record all persons identified as a victim of a crime in the 'Police Victims' dataset. The following variables were extracted for cleaning and analysis:

- Event reported date
- Incident category

Event reported dates were reformatted and limited to victimisation events that occurred prior to a child's 14th birthday and across developmental and time windows. Incident categories were reclassified into four categories of victimisation:

1. Non-violent offending
2. Violent offending
3. Domestic and family violence (DFV)
4. Sexual offending

*9.3.2.3. Postcode, SA2, regionality and SEIFA data*

Information about where each child lived was provided at the postcode level in the police dataset. Where there were multiple postcodes for one child, the postcode recorded closest in time to the most recent police contact date was retained. These postcodes were correlated with SA2 level locations, region classifications (metropolitan, outer regional, inner regional, remote, and very remote) and SEIFA scores according to the Australian Statistical Geography Standard, Geographic Correspondences (ABS, 2016). Where a postcode was classified under two or more SA2 levels, a decision was made to take the highest percentage SA2 level canvassing that postcode as the postcode's corresponding SA2.[22] The same rule was adopted where a SA2 area was classified under two or more region classifications. For example, if the SA2 area, Yass, is 75% inner regional and 25% outer regional, it was considered inner regional. Regionality was determined only where SA2 information was available.

[22] Note, because the researcher did not have access to address-level data, it was not possible to confirm which SA2 corresponded with which postcode where multiple SA2 levels were linked with one postcode.

Postcode information was available for 15,888 children (99.95%) in our cohort. Corresponding SA2 level data were available for 15,887 children. Regionality data were available for 15,887 children. SEIFA score data were available for 15,886 children.

#### *9.3.2.4. BOCSAR data*

Two BOCSAR datasets, 'Adult contacts' and 'Adult finalised charges', were used in this analysis. The 'Adult contacts' dataset contains data for all persons involved in NSW court finalisations, juvenile cautions and YJCs from 1994 to the present. The 'Finalised charges' dataset contains information on persons whose NSW charges were finalised from 1994 to the present, including details of the charges. There is a degree of redundancy between the two datasets such that variables of the same name are the same data. The following variables of interest were extracted, cleaned and analysed from the 'Adult contacts' dataset:

- BOCSAR recorded finalisation date
- BOCSAR recorded appearance type (disaggregated into YJC, court or caution)
- BOCSAR recorded proven flags (whether charge was proven or not)

The 'Finalised charges' dataset was primarily used to extract additional information for children whose finalised charge resulted in a court appearance. Duplicate records for all finalised charges involving cautions and YJCs were removed and records for finalised charges involving court appearances retained. The following variables of interest were extracted, cleaned and analysed:

- BOCSAR recorded finalisation date (delimited to court appearances)
- BOCSAR recorded bail variable (children remanded in custody are separated in the data into 'bail refused', 'in custody for a prior offence' or 'warrant executed – police custody'. For the purposes of this analysis, these three variables were collapsed into a 'Remand/Custody' variable. Those not in these groups were 'on bail' or 'bail dispensed with')
- BOCSAR recorded plea variable (disaggregated into 'Guilty plea', 'Not guilty plea' or 'No plea entered/Other')
- BOCSAR recorded outcome variable (disaggregated into 'Guilty', 'Not guilty', 'Withdrawn', or 'Mental health dismissal')
- BOCSAR recorded proven offence variable: (disaggregated into 'All offences proven', 'No offences proven', or 'Some offences proven'. For the purposes of this analysis, 'All offences proven' and 'Some offences proven' were collapsed into one variable; 'All or some offences proven')
- BOCSAR recorded penalty variable: (penalties recorded include: 'Bond with supervision', 'Bond without conviction with supervision', 'Bond without conviction without supervision', 'Bond without supervision', 'Conviction only', 'Fine', 'Imprisonment', 'Juvenile control order', 'Juvenile dismissals', 'Juvenile probation order', 'No action taken on a breach of bond', 'No penalty', 'Pre-reform or Children's Community Service Order', or 'Suspended sentence with supervision'. For the purposes of this analysis, the following variables were collapsed into 'Non control

order including bonds with and without conviction and with and without supervision, probation orders, suspended sentences, community service orders and fines': 'Bond with supervision', 'Bond without conviction with supervision', 'Bond without conviction without supervision', 'Bond without supervision', 'Fine', 'Juvenile probation order', 'Pre-reform or Children's Community Service Order', and 'Suspended sentence with supervision'. The following variables were collapsed into 'Dismissal or no penalty order': 'Conviction only', 'Juvenile dismissals', 'No action taken on a breach of bond', and 'No penalty'. And the remaining variables, 'Imprisonment' and 'Juvenile control order' were collapsed into a 'Control order' variable)

##### *9.3.2.5. Youth Justice NSW data*

The Youth Justice (formerly Juvenile Justice) Admissions dataset within HSDS contains juvenile justice records from 2000–2018. The following variables of interest were extracted, cleaned and analysed:

- Admission to YJNSW date
- Discharge from YJNSW date
- Legal status (whether child is supervised in the community, on remand or on a control order)
- Control start date (date at which child was placed on a control order)
- Most serious offence (MSO): the following offence categories (aligning with offence categories developed from police data) were used to consolidate MSO data:
    - Assault, sexual offences, and other offences against the person
    - Robbery
    - Break and enter
    - Theft
    - Arson and malicious damage to property
    - Fraud and disorderly conduct
    - Offences against justice procedures
    - Drug, prohibited weapons offences, traffic and transport offences
    - Other offences

Youth Justice NSW (YJNSW) additionally record demographic information about their clients in the 'JJ clients dataset'. The following variables of interest were extracted, cleaned and analysed:

- Ethnic origin variable: ethnic origin data were consolidated into the following categories for analysis:
    - Australian peoples including Aboriginal and Torres Strait Islander peoples
    - Asian
    - African and Middle Eastern
    - South and Eastern European
    - North-West European

- Pacific Islands
  - New Zealand peoples
  - Other and unknown

Ethnic origin data were available for 2,724 children from our cohort (17%).

YJNSW administer a number of service referral datasets including: ‘JJ referrals other services’, ‘JJ referrals’ and ‘JJ program referrals’ (hereafter referred to as YJNSW referrals etc.). These datasets were separately cleaned and then consolidated into one ‘JJ services’ dataset for analyses.

YJNSW referrals other services*:* This dataset contains information on referrals made by YJNSW to services provided by service providers other than YJNSW.
The following variables of interest were extracted, cleaned and analysed:

- Referral date
- Referral outcome (disaggregated into referral accepted or not accepted)
- Referral type: containing data on service providers including:
  - ALS
  - Ageing, Disability and Home Care
  - Centrelink
  - Community Services
  - DOE
  - Department of Health
  - Housing NSW
  - Justice Health
  - Legal Aid NSW
  - NDIS
  - NGO
  - PCYC
  - State Debt Recovery Office

These data were consolidated into program categories for consistency across datasets. The program categories were developed from additional information gleaned from a ‘referral reason’ variable as well as research and analyses of programs offered by these service providers. The final program categories include:

- Accommodation
- Casework support
- Employment and training
- Mental health and counselling
- Post release
- Education and skill-building
- Work development order
- Legal services
- Health services

- Targeted offender program
- Other services
- Family and relationship supports

Data for service referrals were retained if the referral was recorded as ‘accepted’. 309 children had an accepted referral to one of the above external service provider programs between 10–13.

YJNSW referrals: This dataset contains information on all referrals to ‘specialist’ services including Mental health, and Alcohol and other drug programs and services. The following variables of interest were extracted, cleaned and analysed:

- Referral date
- Referral type: containing one category of referral, ‘Psychologist’ which was collapsed into the existing program category, ‘Mental health and counselling’
- Referral status: containing four statuses; ‘Approved’, ‘Draft’, ‘Rejected’, ‘Submitted’. These were consolidated into ‘Accepted’ (‘Approved’) and ‘Not accepted’ (‘Draft’, ‘Rejected’, ‘Submitted’).

Data for service referrals were retained if the referral was recorded as ‘accepted’. 158 children had an accepted referral to a Mental health and counselling service.

YJNSW program referrals: This dataset contains information on referrals to YJNSW funded programs and services including Alcohol and other drugs services, Casework support, Crisis accommodation, Local offender programs, Mentoring and Post release programs. The following variables of interest were extracted, cleaned and analysed:

- Referral date
- Funded service type: containing categories of funded services which were consolidated into the aforementioned program categories noting that a substantial proportion of these funded services were classified as ‘null’. These ‘null’ services were explored via additional information gleaned from a corresponding ‘program name’ variable. Research into these individual program names were conducted to recode ‘null’ service types into their corresponding program category.
- Referral outcome: containing four outcomes, ‘Accepted’, ‘Null’, ‘Rejected’, and ‘Withdrawn’. These were consolidated into ‘Accepted’ (‘Accepted’) and ‘Not accepted’ (‘Rejected’, ‘Withdrawn’). ‘Null’ referral outcome records were dropped.
- Program outcome: containing six outcomes, ‘Completed’, ‘Did not complete’, ‘Did not start’, ‘In progress’, ‘Null’, ‘Suspended’. These were consolidated into ‘Completed’ (‘Completed’) and ‘Not completed’ (‘Did not complete’, ‘Did not start’, ‘Suspended’). ‘In progress’ and ‘null’ outcome records were dropped.

Data for service referrals were retained if the referral was recorded as 'accepted'. 228 children had an accepted referral to a YJNSW-funded service or program. 116 children completed a program they were referred to (51%).

Consolidated YJNSW services file: The 'YJNSW referrals other service', 'YJNSW referrals', and 'YJNSW program referrals' files were merged into one consolidated YJNSW services file. 579 children had at least one accepted referral from YJNSW to a service or program between 10–13 inclusive.

#### *9.3.2.6. Child protection and out-of-home care (OOHC) data*

The child protection and OOHC data are extracted from administrative data collected by Department of Communities and Justice NSW (DCJ) in the provision of services to clients. It relies on the office-based recording of information about children collected by caseworkers. Data quality can depend on where in the child protection process the information was recorded, verified or remediated. For example, data can be more accurate when collected in a face-to-face assessment compared to a Helpline assessment. It should also be noted that DCJ's new client information system (ChildStory) was introduced during 2017/18, which resulted in changes to the recording of reported and assessed issues for child protection data, as well as how OOHC placements are counted. Based on the researchers' own experiences with analysing data extracts from ChildStory, it is known that there were some data quality issues with the recording of field assessments and substantiations during the introduction of ChildStory. For this study, a decision was made to focus on concerns reported at Helpline as the data were most complete at this stage and could provide a broad overview of key issues experienced by children and children.

In the child protection data, each row represents a report for a single subject child only. If a reporter contacts the Helpline about three children in a family, three separate rows (one per child) are created. When a report is made to the Helpline, an assessment is carried out using a screening tool to determine whether the report meets the ROSH threshold. Details about the case, including Helpline-assessed issues, are recorded.

The following variables of interest were extracted, cleaned and analysed from the Child Protection dataset:

- Contact start date
- ROSH flag
- Helpline assessed issues

In the OOHC data, each line represents a "Care Event" for a single child in OOHC. A "Care Event" is generated when there is a change in the particulars of the child's arrangements such as a change in caregiver, placement provider, placement purpose or legal order. Hence, a child may have multiple care events within the same care period (defined as when a child's placements overlap or have a gap of less than 30 days between the end of one placement and the start of

another) or within the same placement. For the purpose of this study, only OOHC placements with a duration of at least seven days were included for analysis.

The following variables of interest were extracted, cleaned and analysed from the OOHC dataset:

- Actual placement start date
- Actual placement end date
- Care category end date
- Priority placement end date
- Case history start date
- Actual placement type (grouped): includes the following types of placements; 'Foster care', 'Independent living', 'Non-related person', 'Others', 'Parents', 'Relative and Aboriginal kinship care', 'Residential care', and 'Supported accommodation'. These types were recategorized into 1) Foster care ('Foster care'), 2) Kinship care ('Relative and Aboriginal kinship care'), 3) Residential care ('Residential care') and 4) Other ('Independent living', 'Non-related person', 'Others', 'Parents', and 'Supported accommodation').

DCJ record client demographic information in their 'Cohort demographics dataset'. The following variables of interest were extracted, cleaned and analysed:

- Disability flag: disaggregated into a binary 'yes' or 'no' for disability status

##### *9.3.2.7. Participation in services and supports*

*Brighter Futures (DCJ)*

Brighter Futures is a voluntary targeted intervention program designed to minimise ROSH for families with a child aged under nine years who show issues that increase a risk of escalation within the child protection system (NSW Family and Community Services, 2017). Priority is given for families with children aged under 3 years with parental vulnerability due to DFV, AOD use, MH issues or intellectual disability. Services provided include structured home visiting, parenting programs, quality childcare and brokerage funds for 18 months with a possible 6-month extension. Most referrals (90%) come through DCJ following a ROSH report (NSW Family and Community Services, 2017). Families are ineligible when the number of ROSH reports is very high; where restoration is the care plan goal; if criminal proceedings are underway; or a threat to worker safety exists.

The dataset consists of unit record data for all children in the Brighter Futures program with one row per person. There are two distinct Brighter Futures datasets in the HSDS; a dataset containing records up to 2016–2017, and a subsequent dataset containing records up to 2019–2021.

The following variables of interest were extracted, cleaned and analysed from the 2016–2017 dataset:

- Umbrella start date: this start date was reformatted for consistency and then retained for subsequent appending onto the later dataset (2019–2021)

The following variables of interest were extracted, cleaned and analysed from the 2019–2021 dataset:

- First contact date: this start date was reformatted for consistency and retained for subsequent appending of the datasets

*Intensive Family Support/Intensive Family Preservation (IFS-IFP)*
Data on usage of other child and family services such as Intensive Family Support/Intensive Family Preservation (IFS-IFP) are available in the IFS/IFP dataset.

The following variables of interest were extracted, cleaned and analysed:

- Start/receive date

*Youth Hope*
Youth Hope is a NSW government-funded initiative seeking to provide supports to children aged 9–15 considered highly vulnerable. Youth Hope receives referrals of children aged 9–15 screened as ROSH, and children aged 9–15 not currently screened as ROSH but at risk of escalation into the child protection system. Parents, carers and siblings of eligible children are also supported.

The following variables of interest were extracted, cleaned and analysed:

- First contact date
- Consent date for parent/caregiver
- Consent date for child or young person
- Service type: includes ‘Case coordination’, ‘Life skills to child/young person’, ‘Life skills to other family members’, ‘Intervention to child/young person’, ‘Therapeutic intervention’, ‘Parenting support’, ‘Family practical support’, ‘Crisis intervention’.

##### *9.3.2.8. Health and mental health*

*NSW Emergency Department Data Collection*
The primary purpose of collecting Emergency Department data in NSW is to monitor patient presentations to, and activity undertaken in, the emergency departments (EDs) of public hospitals and in scope contracted private hospitals in NSW. Each record represents a presentation to an ED. An emergency presentation is where a person presents to the ED for emergency care and treatment. This includes patients that are transferred from another unit or ward within the facility or another facility’s ED for treatment within the ED. Presentations to an ED include, but are not limited to, patients who:

- Register to be seen for an ED service but did not wait for the service to be delivered;

- Are triaged and advised to seek alternate services, and then depart the ED;
- Are dead on arrival if an ED clinician certifies the death; and
- Are provided with clinical assessment and advice via telehealth. Such services must be identified as being provided via telehealth

Limitations of EDDC

- Personal identifiers were included in the data collection from 1 Jan 2005 onwards
- The number of hospitals participating in the EDDC has increased over time from approx. 52 in 1996–97 to 184 in 2016–17. The number of hospitals participating has been lower in rural Local Health Districts.
- Only public hospital EDs are available for record linkage
- Records from Northern Beaches Hospital were not yet available for linkage at the time of cleaning and analysis

The EDDC has diagnosis recorded by medical, nursing or clerical personnel at the point of care. These personnel are not trained in clinical coding. The diagnoses are selected by keyword searching or tables of a limited set of diagnoses. The codes are assigned to the chosen diagnosis using tables built into the computer database program. Additionally, there are different computer programs used in EDs. Different programs use different classifications to record the diagnosis, including ICD-9-CM, ICD-10-AM or SNOMED CT. Variation in computer programs may lead to variation in diagnosis coding practices.

Due to limitations in diagnostic codes noted above, we limited our analysis of ED presentations to the fact of a child having presented to an ED prior to their $14^{th}$ birthday and across developmental and time windows. Consequently, the following variables of interest were extracted, cleaned and analysed:

- Arrival date

*NSW Admitted Patient Data Collection (APDC)*

Collection records all admitted patient services provided by NSW Public Hospitals, Public Psychiatric Hospitals, Public Multi-Purpose Services, Private Hospitals and Private Day Procedures Centres. The APDC records all inpatient separations (discharges, transfers and deaths). Approximately 400 facilities contribute to the data collection which includes patient demographic information, diagnoses, procedures and administrative information such as dates of admission and separation, source of referral to the service, service referred to on separation and patient health insurance status.

Public hospital APDC data are recorded in terms of episodes of care (EOC). An EOC ends with the patient ending a period of stay in hospital (e.g. discharge, transfer, death) or by becoming a different ‘type’ of patient within the same period of stay. For private hospitals, each APDC record represents a complete hospital stay.

Diagnosis information is classified according to the International Statistical Classification of Diseases and Related Health Problems, 10th Revision, Australian Modification (ICD-10-AM). Note, records from Northern Beaches hospital are not yet available for linkage (opened in 2018).

The following variables of interest were extracted, cleaned and analysed:

- Episode start date
- Episode of care type: retained ‘Acute care’ episodes and removed ‘Rehabilitation care’, ‘Palliative care’, ‘Maintenance care’, ‘Newborn care’, ‘Other care’, ‘Geriatric evaluation and management’, ‘Psychogeriatric care’, ‘Organ procurement – posthumous’, and ‘Hospital boarder’.
- Major diagnostic category: reclassified into the following consolidated diagnostic categories
    - Blood diseases and cancer
    - Circulatory system diseases and disorders
    - Endocrine, nutritional and metabolic diseases and disorders
    - Eye, ears, nose and throat diseases and disorders
    - Gastrointestinal system diseases and disorders
    - Infectious and parasitic diseases
    - Injuries, poisoning and toxic effect of drugs and burns
    - Kidney and urinary tract diseases and disorders
    - Mental health disorders
    - Nervous system diseases and disorders
    - Pregnancy/newborns
    - Reproductive tract diseases and disorders
    - Respiratory system diseases and disorders
    - Other

*NSW Ambulance Data Collections*

NSW Ambulance data collections contain operational information from the Computer Aided Dispatch (CAD) system, and also data documented by clinicians in the paper-based Patient Health Care Record (PHCR) and electronic medical record (eMR). Clinical information includes patient vital signs. NSW Ambulance datasets capture information for emergency and urgent episodes of care for NSW Ambulance patients who: were transported to a hospital; were left at a scene following clinician assessment; or, who died at the scene. NSW Ambulance clinicians respond to more than 1 million emergency and non-emergency cases every year.

Data collected during the patient care episode are recorded by paramedics in either the PHCR or eMR. This includes information about the incident, patient information, treatment details and outcomes. Since its staged introduction in 2011, the eMR is the preferred clinical record and the PHCR is completed by paramedics only in the absence of an eMR. PHCR data are available from April 2001 and eMR data are available from 2011.

For the purposes of this research, we explored patient records contained in the PHCR and eMR datasets to account for potential overlap in records across our period of study. To avoid duplication of records, we appended dates of contact from the PHCR dataset onto the eMR dataset for our cohort of YP. We then calculated number and frequency of incidents involving paramedics.

The following variables of interest were extracted, cleaned and analysed:

- PHCR transport date
- eMR case date

*NSW MHAMB data*

NSW Mental Health Ambulatory Data Collection is dedicated to assessment, treatment, rehabilitation or care of non-admitted patients. Includes mental health day programs, psychiatric outpatients and outreach services (e.g. home visits). Also included is care provided by hospital-based consultation-liaison services to admitted patients in non-psychiatric and hospital emergency settings; care provided by community workers to admitted patients and clients in staffed community residential settings and mental health promotion and prevention services. The data records ‘contacts’ as opposed to episodes of care by clinicians to a patient.

It is noted that there was significant under-reporting of community mental health activity/contacts in the early stages of the community mental health data collection (prior to 2005/06). Additionally, a very high proportion of records and individuals have no recorded diagnosis, or non-specific codes. This is partly due to the high number of very short episodes of community care.

For the purposes of this analysis, only contacts where the client was recorded as present, had a service duration of 60 minutes or more and the activity code was related to seeking mental health support (i.e. excluding records where the clinician was undertaking training sessions, supervision or travel) were included as indicators of mental health service usage.

Specifically, activities that were for administrative, non-treatment purposes including: ‘activity unspecified’, ‘administration’, ‘discharge client’, ‘participation in staff training in learning role’, ‘missed appointment’, ‘documentation and report writing’, ‘clinical review’, ‘participation in staff training in teaching role’, and ‘transport or accompany client’ were dropped.

Diagnoses that represented 2% or greater of the sample including:

- Anxiety disorder, unspecified
- Atypical parenting situation
- Conduct disorders

- Emotional disorders with onset specific to childhood
- Mental diagnosis yet to be allocated
- Mental disorder, not otherwise specified
- Neglect or abandonment
- Oppositional defiant disorder
- Post traumatic stress disorder
- Reaction to severe stress and adjustment disorders
- Reactive attachment disorder of childhood onset
- Suicidal ideation

were retained.

These were then reconsolidated into the following diagnostic categories:

- Anxiety disorders
- Neglect, abandonment or atypical parenting
- Conduct and oppositional defiant disorders
- Reactive attachment or emotional disorders with childhood onset
- Mental health disorder to be diagnosed or not specified
- Post traumatic stress disorder
- Reaction to severe stress and adjustment disorders
- Suicidal ideation

In summary, the following variables of interest were extracted, cleaned and analysed:

- Service contact date
- Client present status
- Activity duration
- Activity code
- Diagnosis description

MH issues were also recorded based on the NSW Admitted Patient Data Collection (APDC). For this analysis, admissions where the MDC was categorised as ‘Mental health disorders’ were used.

Use of information contained within the NSW Drug and Alcohol Treatment services dataset, containing treatment episodes associated with NSW funded drug and alcohol services, was not possible because the data did not have sufficient representation of our cohort to report.

##### *9.3.2.9. DCJ NSW homelessness and social housing data*

The DCJ NSW homelessness client YTD dataset records all incidence of individuals experiencing or at risk of homelessness who sought assistance from a specialist homelessness service in NSW. It includes details on client demographics, the type of support received and the reasons for homelessness. From the DCJ NSW homelessness client YTD dataset, the following variables were extracted, cleaned and analysed:

- Start date
- Homeless or at risk FR (disaggregated into 'Homeless' or 'At risk of homelessness' binary flags)

These were used to create flags for homelessness and risk of homelessness respectively prior to age 14 and across developmental and time windows.

The DCJ social housing dataset contains records of public housing and AHO tenancies managed by Homes NSW and the NSW Housing Register. The following variables were extracted, cleaned and analysed:

- Status created date

A binary flag for application to social housing was created and limited to applications prior to a child's 14th birthday and across developmental and time windows.

A note on social housing data and aggregate housing instability variable: In constructing the aggregate housing instability measure, social housing was retained alongside homelessness and risk of homelessness as an indicator of housing system precarity. Inclusion of social housing reflects its role as a marker of sustained economic disadvantage and constrained housing security rather than an assumption of causal association with justice involvement. This approach recognises that while social housing can provide stability, it often co-occurs with prior homelessness, repeat relocations, and broader structural adversity that shape children's trajectories.

###### *9.3.2.10. Department of Education (DoE) suspensions and disability supports data*

The DoE records suspensions and expulsions across NSW government schools. Where suspensions were associated with a 'Historical data' reason for suspension category, these were removed from the data.

Dates indicating suspension start and end were extracted and cleaned and then limited to suspensions occurring prior to a child's 14th birthday and across developmental and time windows.

Reasons for suspension were reclassified into:

1. Aggressive behaviour
2. Persistent disobedience or serious misbehaviour
3. Physical violence or criminal behaviour
4. Possession or use of a weapon or illegal substance

Additionally, DoE records disability supports made available to children at NSW public school including: Integration Funding Support (IFS-DoE) and Support Class (SCAS) Enrolment. IFS-DoE is additional funding for extra support, such as for an additional teacher or school learning support officer in a mainstream classroom, and SCAS is a process for students with moderate to high support needs to be placed in specialist classes either within a mainstream school or at a School for Specific Purposes. This dataset was primarily used to understand the proportion of children with a DoE-recorded disability.

The calendar year of the received support was cleaned to identify supports received by children before their $14^{th}$ birthday and across developmental and time windows. Flags were created for support received by support type (IFS-DoE or SCAS).

#### 9.3.3. Datasets received and not used

- BOCSAR custody data
- YJNSW YLSI data
- DCJ Target early intervention datasets
- DCJ housing; Private tenants data & private rental assistance data
- DCS Revenue datasets
- Police DVSAT data
- Police alcohol data
- DoE attendance datasets
- DoE NESA datasets
- DoE school enrolment datasets
- DoE Vocational education and training datasets
- Legal Aid datasets
- Health NSW Drug and Alcohol Treatment services dataset
- Health Perinatal Datasets
- Health NSW Controlled Drugs Datasets