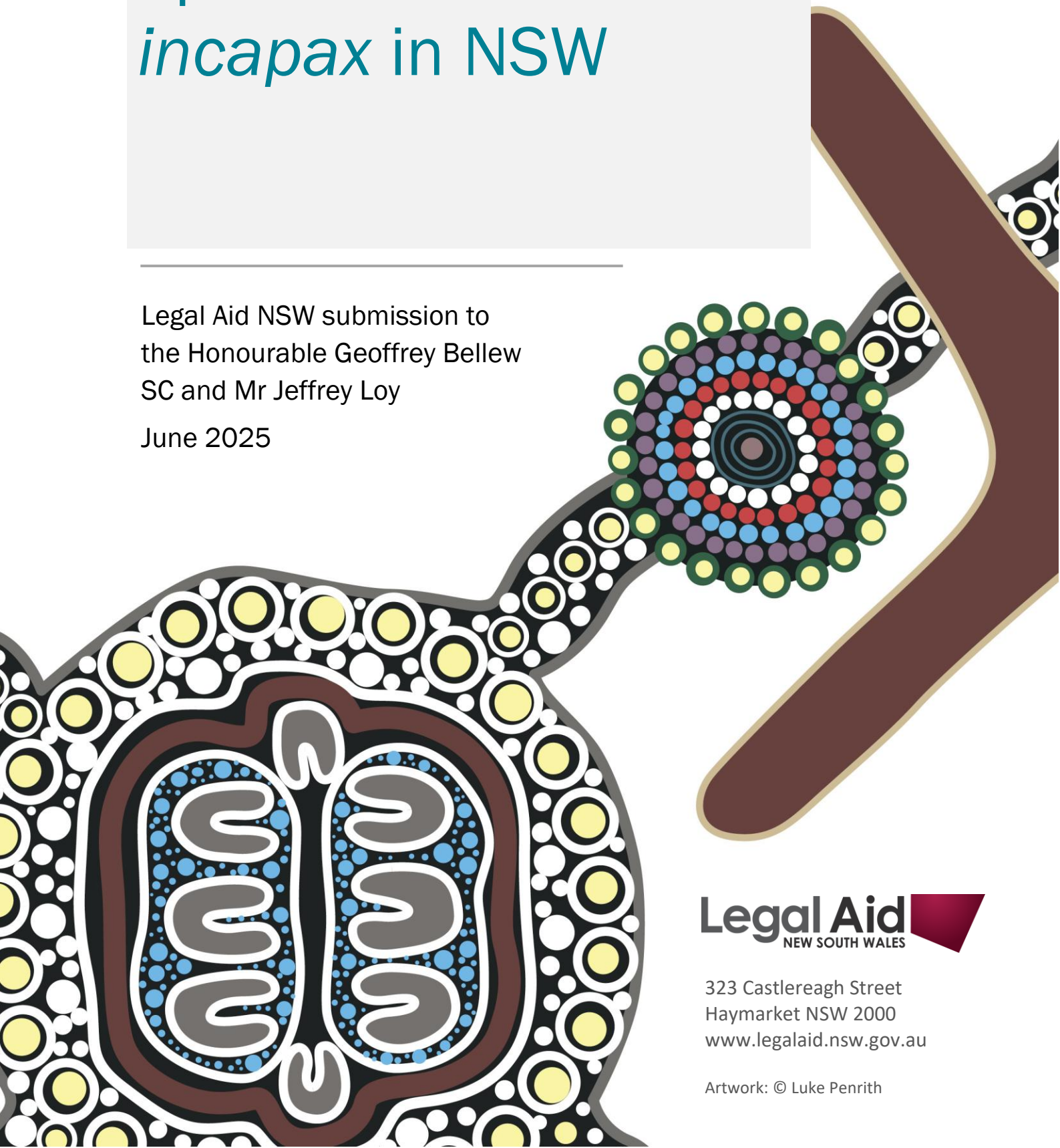
Review of the operation of *doli incapax* in NSW

Legal Aid NSW submission to the Honourable Geoffrey Bellew SC and Mr Jeffrey Loy

June 2025



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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.
We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.
Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices.
We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of family dispute resolution services, family violence services, services to Aboriginal families and the early triaging of clients with legal problems.

Legal Aid NSW provides duty services at all Family and Federal Circuit Court registries and circuit locations through the Family Advocacy and Support Services, all six specialist Children's Courts, and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdiction.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

[redacted]

2. Executive summary

Legal Aid NSW provides specialised advice and representation to children and young people involved in criminal cases in NSW, as well as in civil, care and protection and family law proceedings. Drawing on this extensive practice experience, we are uniquely positioned to contribute to law reform and policy development affecting children and young people in this State.

Based on our experience representing children in criminal proceedings across NSW, we consider the common law test established in *RP v The Queen* [2016] HCA 53 to be appropriate. We do not support legislating this or any alternative test for *doli incapax*, as the current common law framework provides the necessary flexibility and protection.

The presumption of *doli incapax* appropriately recognises the developmental immaturity of children aged 10 to 13 and their limited capacity to understand the moral wrongness of their actions. It serves as a vital safeguard, ensuring that children are not held criminally responsible before they are capable of forming the requisite intent for a criminal offence. In our view, given the vulnerability of children in this age group who come into contact with the criminal justice system—and the significant negative impacts of such involvement—the evidentiary burden must remain high.

While we support retaining the common law test, if the review concludes that legislation is necessary, we recommend adopting the model set out in the *Victorian Youth Justice Act 2024*. We would also support introducing a legislative requirement for the prosecution to consider *doli incapax* at the earliest possible stage of proceedings, to help prevent the unnecessary criminalisation of children.

This submission emphasises the importance of the review engaging meaningfully with the well-documented risk factors that contribute to youth offending. Research consistently shows that children in the justice system are disproportionately Aboriginal, have disabilities, or are involved in child protection systems.[1] Many have experienced violence, abuse, neglect, homelessness, and substance misuse, and may have family members involved in the criminal justice system. These factors frequently intersect and compound one another, increasing the likelihood of contact with the justice system.

In our view, it is critical that any review of the operation of *doli incapax* is informed by this context. A nuanced understanding of these intersecting vulnerabilities is essential to ensuring that legal responses do not further entrench disadvantage or criminalise children who are already at significant risk.

There is an urgent need for NSW to develop and implement therapeutic, community-based alternatives for children aged 10 to 13 who exhibit problematic behaviours, particularly in regional and remote areas. We strongly support investment in early intervention over

[1] Susan Baidawi & Alex R. Piquero, 'Neurodisability among children at the nexus of the child welfare and youth justice system', (2021), vol 50(4), *Journal of Youth & Adolescence*, 803-819.

punitive responses. We also recommend enhancing diversionary options to better reflect the vulnerability of this cohort and support their rehabilitation and reintegration.

The long-term impacts of criminal justice involvement must not be underestimated. Even brief contact with the system can result in social stigma, educational disruption, and community disengagement—further entrenching disadvantage. An effective response to youth crime must therefore involve strong support services and diversionary options, wherever possible.

Recommendations

Recommendation 1:

To improve the quality and appropriateness of evidence in *doli incapax* matters, the following reforms should be implemented:

- targeted training for investigators and prosecutors on the *doli incapax* presumption, including how to assess capacity and identify relevant evidence (and alternative ways to proceed where there is insufficient evidence to address the presumption)
- clear procedural guidance to ensure evidence is probative and does not compromise the child's access to education, health, or support services
- protective limits on the use of evidence from key support figures (e.g., parents, teachers, psychologists) where it may harm the child's relationships or rehabilitation, and
- trauma-informed, child-centred approaches to evidence gathering that reflect the developmental needs and vulnerabilities of children in this cohort.

Recommendation 2:

The common law test for the presumption of *doli incapax* should be retained in NSW. However, if the review determines that legislation is necessary, it should adopt the model set out in the *Victorian Youth Justice Act 2024*, ensuring the statutory test reflects the protective intent of the common law. Any legislative change should include a mandatory review within 12 months of commencement to assess its effectiveness and impact.

Recommendation 3:

Any legislative reform of *doli incapax* in NSW should include mandatory consideration of the presumption at the point of charge and require early review by both police (before charging) and prosecutors (within 21 days of charging). The Victorian model offers a practical framework that balances legal safeguards with procedural clarity and should be adopted if legislative change is pursued.

Recommendation 4:

To improve access to services without compromising the operation of *doli incapax*, the privacy rights of children under 14 should be protected by restricting police access to sensitive records, including medical and psychological reports.

Recommendation 5:

The NSW Department of Education should identify and implement measures to build the capacity of schools to provide additional adjustments[2] and more individualised learning supports to assist children at risk of disengaging from education.

Recommendation 6:

Informal diversion for children aged 10 to 13 should be prioritised and supported through expanded access to proven early intervention programs. This should include:

- broadening eligibility for Youth on Track to include children previously subject to supervised court orders
- extending Youth on Track to additional regional locations, and
- increasing investment in programs such as BackTrack, the Tracker Network, and the Elver program for children in out-of-home care with complex needs.

Recommendation 7:

The NSW Government should amend the *Young Offenders Act 1997* to:

- expand the range of offences eligible for diversion to include all matters that can be finalised in the Children's Court
- remove the cap on the number of cautions a child can receive under the Act, and
- enable a child to be diverted even if they do not deny the offence.

Recommendation 8:

Mental health diversion pathways for children in the criminal justice system should be expanded and strengthened by:

- extending the Adolescent Court and Community Team Program to all Children's Courts across NSW, ensuring every child can access a mental health assessment when needed
- increasing funding for mental health services that provide treatment and support for children subject to court-imposed treatment plans, and
- ensuring services are equipped to support children with complex needs and are resourced to deliver long-term, sustained treatment.

Recommendation 9:

The Youth Koori Court should be adequately funded to support existing locations and expanded to additional regional areas with high Aboriginal populations and youth crime rates.

Recommendation 10:

Further investment should be directed toward Aboriginal-led, non-court-based diversion programs that are available pre-sentencing and accessible to children regardless of plea. These programs must be co-designed with Aboriginal communities and tailored to local needs, with a focus on early intervention, cultural connection, and holistic support.

Recommendation 11:

The review should consider recommending the reinstatement of the NSW Youth Drug and Alcohol Court. If reinstatement is not pursued, the eligibility criteria for the Magistrates

[2] In line with the requirements of the *Disability Standards for Education 2005*

Early Referral into Treatment (MERIT) program should be expanded and adapted to ensure it is accessible to children.

Recommendation 12:

To ensure that reforms to *doli incapax* support better outcomes for Aboriginal children, the review should ensure that any recommendations:

- align with the National Agreement on Closing the Gap targets, particularly Target 11, which aims to reduce the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system
- include engagement with Aboriginal Community Controlled Organisations in the design and delivery of culturally appropriate diversion and support programs
- encourage investment in holistic, interagency approaches that address the underlying drivers of disadvantage, including poverty, education, and out-of-home care, and
- protect the rights of Aboriginal children by embedding culturally competent assessments and services throughout the justice system.

Recommendation 13:

Training and education on the *Joint Protocol to Reduce the Criminalisation of Children and Young People in Out-of-Home Care* should be strengthened for both NSW Police and out-of-home care service providers, to reduce reliance on criminal justice responses for children in care.

3. The operation of *doli incapax*

Raising the age

Although we acknowledge the review specifically states that raising the minimum age of criminal responsibility is out of scope, we believe it is important to briefly address this issue given its close relationship with the presumption of *doli incapax*.

Australia's minimum age of criminal responsibility—10 years[3]—is inconsistent with international human rights standards. The UN Committee on the Rights of the Child has repeatedly recommended that states set a minimum age of at least 14, citing strong evidence from child development and neuroscience.[4] It has cited evidence confirming children aged 12 to 13 are still developing the capacity for abstract reasoning and are unlikely to fully understand the consequences of their actions or legal proceedings. The Committee has emphasised that the frontal cortex, which governs decision-making and impulse control, continues to mature well into adolescence.

Australia has been urged to raise the age 'to an internationally acceptable level'[5] in multiple reviews by the UN Committee on the Rights of the Child (2005, 2012,[6] and 2019[7]). Additional calls have come from the UN Committee Against Torture,[8] the UN Special Rapporteur on the Rights of Indigenous Peoples,[9], the UN Committee on the Elimination of Racial Discrimination,[10] and the UN Global Study on Children Deprived of Liberty.[11]

These consistent international recommendations highlight the urgent need for reform. We urge the review to consider this broader context when evaluating the presumption of *doli incapax*.

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[3] *Crimes Act 1914* (NSW) s 4M; *Criminal Code Act 1995* (Cth) s 7.1.

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

[5] UN Committee on the Rights of the Child, *Concluding Observations on the combined fifth and sixth period reports of Australia* (30 September 2019) 48 (a).

[6] UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 44 of the Convention – Concluding observations: Australia* (28 August 2012), CRC/C/AUS/CO/4.

[7] UN Committee on the Rights of the Child, *Concluding Observations on the combined fifth and sixth period reports of Australia* (30 September 2019) 48 (a).

[8] In 2022, the UN Committee against Torture expressed serious concern over Australia's "very low" age of criminal responsibility. It recommended aligning the child justice system with the Convention on the Rights of the Child by raising the minimum age, in line with international standards (UN Committee against Torture, *Concluding Observations on the Sixth Periodic Report of Australia*, 2022, [38(a)]).

[9] During her 2017 visit to Australia, the UN Special Rapporteur on the Rights of Indigenous Peoples raised serious concerns about the high incarceration rates of Aboriginal and Torres Strait Islander people, especially children detained for minor non-violent offences. She condemned punitive detention conditions and urged Australia to raise the minimum age of criminal responsibility, aligning with recommendations from the Committee on the Rights of the Child (Victoria Tauli-Corpuz, *End of Mission Statement*, 2017, p. 10).

[10] In 2017, the UN Committee on the Elimination of Racial Discrimination expressed deep concern over the overrepresentation of Aboriginal children in the criminal justice system, including those at a very young age. It highlighted the heightened risk of family separation and poor detention conditions across Australia—not just in the Northern Territory—and urged Australia to raise the minimum age of criminal responsibility (*Concluding Observations on the 18th–20th Periodic Reports of Australia*, 8 December 2017).

[11] The 2019 UN Global Study on Children Deprived of Liberty recommended that States set a minimum age of criminal responsibility no lower than 14. It also urged prioritising restorative justice, diversion from judicial proceedings, and non-custodial measures (*Report of the Independent Expert*, 2019, p. 109).

Question 1: How is the presumption of *doli incapax* operating in practice?

In our experience, the prosecution rarely engages with the presumption of *doli incapax* early in the criminal justice process and often give it minimal attention until close to the hearing date. The typical progression for a child aged 10–13 is as follows:

Initial police contact

When police arrest or attend to speak with a child, legal representatives—via the Legal Aid NSW Youth Hotline or the Aboriginal Legal Service Custody Notification System—are contacted. They first speak with police to understand the allegations and whether police intend to divert or charge the child. Legal advice is then provided to the child, including on the strength of the case, potential diversion under the *Young Offenders Act 1997* (NSW) (*Young Offenders Act*), and the relevance of *doli incapax*.

If police agree to divert and the child admits the offence, the matter proceeds to a caution or Youth Justice Conference and is then finalised.

Proceeding to charge

If diversion is refused or the child does not admit the offence, they are formally charged and appear before the Children's Court. Legal representatives again advise on the case, including *doli incapax*, and obtain instructions regarding plea or diversion applications (e.g., under the YOA or the Mental Health and Cognitive Impairment Forensic Provisions Act).

If a not guilty plea is entered, the court orders a brief of evidence and sets the matter down for hearing. Despite this, the prosecution often does not actively engage with the presumption of *doli incapax* until the matter is close to hearing. This is often the case even where the court is put on notice that *doli incapax* is in issue.

Extended bail periods and procedural delays

Children frequently remain on bail for extended periods, during which breaches—often minor—are common. These breaches can result in repeated arrests and further system contact, including lengthy periods in custody on remand.

Our practitioners further report numerous examples where adjournments on or shortly before hearing dates have been sought by the prosecution to obtain evidence relevant to the issue of *doli incapax*.

Outcome at hearing

In many cases, charges are withdrawn on the day of the hearing or dismissed after hearing due to insufficient evidence to rebut the presumption of *doli incapax*.

Question 1(a): Do you have any comments in relation to: the nature and extent of the evidentiary burden on the prosecution

The current evidentiary burden on the prosecution to rebut the presumption of *doli incapax* beyond reasonable doubt is both appropriate and necessary. This presumption reflects a long-standing legal principle that recognises the developmental immaturity of children and their limited capacity to understand the moral wrongness of their behaviour.

It is a vital safeguard that protects children from being held criminally responsible before they are capable of forming the requisite intent.

Children aged 10 to 13 are still developing cognitively, emotionally, and socially. Neuroscience and psychological research consistently shows that children in this age group—particularly those with disabilities or psychological diagnoses—may lack the capacity for abstract moral reasoning.[12] The high threshold for rebutting *doli incapax* is therefore justified, as it ensures that only children who demonstrably understand the serious wrongness of their actions are subject to criminal prosecution.

Australia's minimum age of criminal responsibility is among the lowest in the world. Many jurisdictions do not prosecute children this young at all, recognising that criminalisation is inappropriate and counterproductive. In this context, the presumption of *doli incapax* serves as a critical protective mechanism within an otherwise outdated framework.

Given the vulnerability of this cohort and the serious consequences of criminal justice involvement, the evidentiary burden must remain high. Lowering the threshold would risk criminalising children who are not developmentally capable of understanding their actions, undermining both legal fairness and child welfare.

Queston 1(b): Do you have any comments in relation to the evidence available to the court in *doli incapax* matters, including what improvements could be made to improve the available evidence?

The nature of evidence presented in attempts to rebut *doli incapax* is varied and includes:

- statements from school staff, parents, carers, and caseworkers
- interviews with police (caution under the *Young Offenders Act* is being given)
- psychological reports and criminal history, including court alternatives
- expert evidence, and
- circumstantial evidence surrounding the alleged act, including behaviours before, during, and after the incident that may indicate consciousness of guilt.

While this range of evidence can be useful, in practice, the presumption of *doli incapax* and the evidentiary standard required to rebut it are often poorly understood by NSW Police. Investigating police are frequently unaware of the presumption and do not seek relevant evidence unless directed by police prosecutors. Even when evidence is obtained, it is often ambiguous or supports the conclusion that the child lacked the capacity to understand the moral wrongness of their actions.

A significant concern is the reliance on evidence from individuals closely connected to the child—such as parents, carers, teachers, and psychologists. These relationships are critical to the child's rehabilitation and wellbeing. When these individuals provide evidence that the child perceives as adverse, it can irreparably damage trust and engagement,

[12] United Nations Committee on the Rights of the Child (CRC), General Comment No. 24 (2019) on children's rights in the child justice system, which updates General Comment No. 10 (2007).

particularly in education and therapeutic settings. This undermines protective factors and increases the risk of further entrenchment in the criminal justice system.

Additionally, school records are often served in bulk without proper review, which can overwhelm proceedings and include irrelevant or prejudicial material.

Recommendation 1:

To improve the quality and appropriateness of evidence in *doli incapax* matters, the following reforms should be implemented:

- targeted training for investigators and prosecutors on the *doli incapax* presumption, including how to assess capacity and identify relevant evidence (and alternative ways to proceed where there is insufficient evidence to address the presumption)
- clear procedural guidance to ensure evidence is probative and does not compromise the child's access to education, health, or support services
- protective limits on the use of evidence from key support figures (e.g., parents, teachers, psychologists) where it may harm the child's relationships or rehabilitation, and
- trauma-informed, child-centred approaches to evidence gathering that reflect the developmental needs and vulnerabilities of children in this cohort.

Question 2: Are there potential evidentiary or operational reforms (for example, improved training) that should be considered to improve the evidence available to the court in *doli incapax* matters?

See recommendation 1 above.

4. Approaches to *doli incapax* in Australian jurisdictions

Question 3: How should the principle of *doli incapax* be legislated in NSW?

Legal Aid NSW strongly supports the continued application of the common law presumption of *doli incapax* in NSW. The current common law test is well-established, clear, and appropriately reflects the developmental realities of children aged 10 to 13. It places a high evidentiary burden on the prosecution to prove beyond reasonable doubt that a child understood their conduct was seriously wrong in a moral sense—an essential safeguard given the vulnerability and immaturity of this cohort.

Any move to legislate *doli incapax* must be approached with caution. Legislating without first ensuring the availability of robust, non-criminal justice alternatives—such as health, education, and child protection responses—risks entrenching children further into the criminal justice system. The principle is not merely legal; it reflects a broader social and developmental understanding of childhood and culpability.

If legislation is deemed necessary, Legal Aid NSW supports a model that mirrors the Victorian approach under the *Youth Justice Act 2024* (Vic). Although not yet commenced, section 11 of the Act codifies the presumption and retains key elements of the common law. It states:

> *Section 11 Presumption that child 12 or 13 years of age cannot commit an offence*
> *(1) It is presumed that a child who is 12 or 13 years of age cannot commit an offence.*
> *(2) The presumption in subsection (1) is rebutted only if the prosecution proves beyond reasonable doubt that the child knew at the time of the alleged commission of the offence that the child's conduct was seriously wrong.*
> *(3) Whether a child knew that their conduct was seriously wrong—*
> *(a) is a question of fact; and*
> *(b) cannot be inferred merely from the fact that the child engaged in the conduct which constituted the offence; and*
> *(c) refers to the child's knowledge that it was seriously wrong in a moral sense to engage in the conduct that constitutes the physical element or elements of the offence.*
> *(4) To avoid doubt—*
> *(a) any presumption arising by or under the common law in relation to the criminal responsibility of a child continues to apply; and*
> *(b) in the event of inconsistency between this section and a presumption referred to in paragraph (a), this section prevails to the extent of the inconsistency.* [13]

This model provides clarity while maintaining the protective intent of the common law. If NSW proceeds with legislation, adopting a similar framework with a built-in review period (e.g., 12 months post-implementation) would be a cautious and balanced approach.

[13] Youth Justice Bill 2024 (VIC), s 11.

However, if this position is inconsistent with the intention of the review, Legal Aid NSW submits that any legislated test should have regard to the subjective characteristics of the individual child as well as any other considerations. Whilst maintaining the position that the common law position is both appropriate and reflective of the state of a child's psychological and cognitive development, we appreciate that the review has been presented with the task of considering alternative ideas. We also understood the review will be hearing from a range of stakeholders.

As such, a possible alternative to the common law test could be framed in terms such as the below:

> *"(1) A child under the age of 14 years is presumed not to be criminally responsible for any act or omission.*
> *(2) This presumption may be rebutted only if the prosecution proves beyond reasonable doubt that a reasonable person in the position of the child, taking into account the child's age, background, cognitive capability, cognitive functioning, and developmental capacity, would have recognised the moral wrongness of such an act or omission."*

It is our position that this test will still require police to consider the issue of *doli incapax* but that it expands enquiries they can make. It also potentially expands the evidence they can lead to rebut the presumption, including materials relevant to the additional objective standard introduced. The burden should remain to the criminal standard, and it should be paired with a requirement of early consideration of the issue (see below).

Recommendation 2:

The common law test for the presumption of *doli incapax* should be retained in NSW. However, if the review determines that legislation is necessary, it should adopt the model set out in the *Victorian Youth Justice Act 2024*, ensuring the statutory test reflects the protective intent of the common law. Any legislative change should include a mandatory review within 12 months of commencement to assess its effectiveness and impact.

Question 4: Should legislation require consideration of *doli incapax* at early or multiple stages of the criminal justice process?

Legal Aid NSW support legislation that requires the consideration/review of the likelihood of rebutting the presumption of *doli incapax* by NSW Police at the earliest possible stage of the criminal justice process. Early engagement with the presumption is essential to prevent unnecessary criminalisation of children and to ensure that only those capable of forming criminal intent are subject to lengthy prosecution and bail conditions that are in place for months. Furthermore, early engagement should encourage early consideration of diversion, including existing diversions under the *Young Offenders Act* or a discontinuation of proceedings with, for example, a referral to an available intervention or support.

The Victorian model under the *Youth Justice Act 2024* (Vic) provides a strong example. Before charging a child aged 12 or 13, police must consider whether there is admissible

evidence to prove beyond reasonable doubt that the child understood their conduct was seriously wrong in a moral sense. [14] This includes consideration of:

- the child's age, maturity, and stage of development
- whether the child has a disability or mental illness
- any previous decisions about the child's criminal responsibility.[15]

Police must record their reasons for concluding that there is *admissible* evidence capable of rebutting the presumption.

A prosecutor is then required to conduct a similar review within 21 working days of a charge being laid. [16]

This approach promotes accountability and ensures that decisions to prosecute are made with full awareness of the child's developmental capacity and available evidence. In contrast, under current practice in NSW, police often proceed with charges without turning their mind to *doli incapax*, or knowing they lack sufficient evidence to rebut the presumption. This results in unnecessary court involvement, extended bail periods, and prolonged uncertainty for children.

Recommendation 3:

Any legislative reform of *doli incapax* in NSW should include mandatory consideration of the presumption at the point of charge and require early review by both police (before charging) and prosecutors (within 21 days of charging). The Victorian model offers a practical framework that balances legal safeguards with procedural clarity and should be adopted if legislative change is pursued.

[14] *Youth Justice Bill 2024* (VIC), s 12.
[15] *Youth Justice Bill 2024* (VIC), s 12(2)
[16] *Youth Justice Bill 2024* (VIC), s 13.

5. Impact of doli incapax

Question 5: How does the operation of the presumption of *doli incapax* impact on:

(a) criminal justice responses to offending behaviour by children aged 10 to 13, and/or

(b) the affected children themselves?

The presumption of *doli incapax* acts as a vital safeguard, ensuring that children are not criminalised before they are developmentally capable of forming criminal intent.

In practice, however, this safeguard is often undermined due to limited engagement at the early stages of the criminal justice process. Because the issue is not considered until months after charge, children regularly:

- remain on bail for extended periods (or, alternatively, are held in custody on remand for lengthy periods)
- face repeated arrests for minor breaches of bail, and
- endure lengthy delays and multiple court dates.

For the children themselves—many of them already facing considerable disadvantage—the consequences can be profound. These children are often affected by trauma, disability, educational disengagement, and unstable living environments. Being charged and drawn into the criminal justice system can be traumatic, confusing, and destabilising. It can disrupt education, damage relationships with caregivers and support services, and increase the risk of further offending.

If *doli incapax* is properly considered and applied at an early stage, it can prevent these harms by diverting children away from the justice system and toward more appropriate supports. However, when ignored or delayed, it exposes vulnerable children to processes they may not understand and consequences they should not bear.

The presumption of *doli incapax* is not just a legal technicality—it is a cornerstone of child justice. It must be actively and consistently applied from the earliest stages of police and prosecutorial decision-making to protect children from unnecessary criminalisation and to uphold the integrity of our justice system.

The harmful effects of prosecution

Children in contact with the criminal justice system experience the impact of the accumulation of co-occurring disadvantage such as unstable housing, parental incarceration, educational disengagement, experience of abuse, neglect and trauma as well as disability. Formal contact with the criminal justice system, even for a short period such as overnight remand, can significantly increase the likelihood of further offending.[17]

[17] Janet Killgallon, 'Early Intervention to Divert Children and Young People from the Criminal Justice System', in Clancey and Lulham (ed), *Youth Crime, Youth Justice and Children's Courts in NSW* (LexisNexis Australia, 2024), 41.

Children between the ages of 10 and 13 years should not be required to attend court or be at risk of being refused bail. Such exposure places them in environments with older individuals who may have significantly higher criminogenic factors, which can be detrimental to their development and increase the likelihood of reoffending.

Extensive evidence shows that prosecuting young children—even briefly—is ineffective, criminogenic,[18] and linked to poorer outcomes.[19] Any formal contact with the criminal justice system risks entrenching cycles of offending and incarceration. Short-term remand is particularly harmful. It is widely recognised to exacerbate trauma and behavioural issues.[20]

The long-term impact of contact with the criminal justice system must not be underestimated. Involvement in legal proceedings, even briefly, can lead to extended social backlash, significant time away from school and disengagement from community, further disadvantaging these already vulnerable children and compounding their vulnerability. Every effort must be made to ensure that children between the ages of 10 and 13 are prevented from contact with the criminal justice system.

To effectively reduce offending behaviour in young children, responses must focus on identifying and reducing the impact of the factors that led to the offending behaviour. The average cost for a child to be detained in a NSW youth justice centre in 2023-2024 was over $2,800.00 per night.[21] Legal Aid NSW's view is that this money would be best spent on preventing, rather than containing, offending behaviour, and Legal Aid NSW supports increasing the focus on early intervention and diversion services for all children that come to the attention of police.

We ask the review to critically examine how the current system operates, including its capacity to divert children. This includes reviewing the legislative framework governing arrest, bail, and diversion, as well as the infrastructure supporting Children's Courts and specialist services, to assess whether they are fit for purpose in reducing youth crime.

Question 6: Are there any ways to facilitate access by accused children aged 10 to 13 to relevant services or support, without undermining the operation of *doli incapax*? If so, what changes should be made to enable this?

[18] Council of Attorneys-General Age of Criminal Responsibility Working Group, *DRAFT Final Report* (2020), 72. Also see C Meurk, M Steele, L Yap, J Jones, E Heffernan, and S, Davison, *Changing direction: mental health needs of justice-involved young people in Australia* (Kirby Institute research, 2019) and Sentencing Advisory Council, *'Crossover kids': vulnerable children in the youth justice system* (Reports 2 and 3, Sentencing Advisory Council, Melbourne, 2020). Centre for Policy Development, *Partners in Crime: the relationship between disadvantage and Australia's criminal justice systems* (Report, December 2020) 6.

[19] Centre for Policy Development, *Partners in Crime: the relationship between disadvantage and Australia's criminal justice systems* (Report, December 2020) 6.

[20] See, for example, Janet Killgallon, Youth Justice NSW, Youth Crime, Youth Justice and Children's Courts in NSW (2023), chapter 3- Early Intervention to Divert Children and Young People from the Criminal Justice System. Also see Royal Australian College of Physicians, Submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility, February 2020, p. 3.

[21] Australian Government, *Productivity Commission – Report of Government Services 2025* (Report, 30 January 2025) < https://www.pc.gov.au/ongoing/report-on-government-services/2025/community-services/youth-justice>

In our experience working with children who have been charged with crimes, when these children access relevant services or support, the police will often try to obtain information from the service about the child to rebut the presumption of *doli incapax*. Unfortunately, this can mean that accessing services is not in a child's best interest legally speaking.

To remove this disincentive and to improve access to services without undermining the operation of *doli incapax*, we strongly recommend limiting police access to sensitive records, including the records of relevant support services.

Whether a child is presumed to be *doli incapax* or not does not preclude engagement with support services and should not be used as a barrier to providing timely and effective assistance from available programs, including Youth on Track and Youth Action Meetings.

Recommendation 4:

To improve access to services without compromising the operation of *doli incapax*, the privacy rights of children under 14 should be protected by restricting police access to sensitive records, including medical and psychological reports.

In our experience, the most significant barrier to accessing relevant services and support is the lack of available services for children. Access to diversionary programs and supports varies significantly across NSW.[22] Children in regional areas are less likely to be diverted than those in Greater Sydney, and Aboriginal children in custody are disproportionately from non-metropolitan regions.

We urge the review to consider the recommendations of the NSW Legislative Assembly Committee on Law and Safety's *Youth Diversion Inquiry*[23] with a view to ensuring children aged 10 to 13 are provided with meaningful, accessible, and culturally appropriate diversionary pathways and support services. Support services should be grounded in early intervention, therapeutic support, and community-led responses, particularly for Aboriginal children. Various improvements are discussed below.

Various potential improvements that could be made to support services to increase engagement are discussed below.

Increased funding and resourcing for early intervention services

When a child aged 10 and 13 years is committing criminal offences, this is usually an indication that there are issues at home, and that a child protection response may be appropriate.

The NSW Youth Diversion Inquiry explored diversionary options at all stages of a child's life and found "Early intervention is a key factor in diverting young people from the criminal justice system. Wherever possible, funds should be used to address the underlying causes of offending before it occurs rather than reacting afterwards".[24] Legal Aid NSW agrees with this finding.

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[22] The NSW Legislative Assembly Committee on Law and Safety's *Youth Diversion Inquiry*.
[23] The NSW Legislative Assembly Committee on Law and Safety's *Youth Diversion Inquiry*.
[24] NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018).

Families and children who come to the attention of DCJ for child protection concerns often have multi-layered and complex issues, including issues in relation to housing, health, education, police contact, and contact with the criminal justice system. Early intervention is key to tackling these issues before they escalate. The success of early intervention work is dependent on access to a range of quality services. In our experience, when agencies such as DCJ, NSW Health, DoE, NSW Police and Legal Aid NSW work collaboratively at an early stage, children and their families experience better outcomes.

Unfortunately, there are often inadequate resources put in place at an early stage to support children and their families.[25] Despite over a decade of reviews and inquiries recommending changes, the NSW child protection system continues to be heavily weighted towards providing a crisis driven response to child protection issues, rather than focusing on early intervention. This is particularly evident in regional areas, where DCJ is often understaffed, leading to lower rates of intervention.[26] Efforts to invest in and scale up the early intervention aspect of child protection practice, including reforms associated with Closing the Gap, need to be accelerated.

We are aware of a number of services providing early intervention, culturally appropriate, evidence-based intensive family support services that can provide appropriate support to families and children with complex needs. In our view, continued and additional investment in services targeted at supporting families in the early years of children's lives offers better value for the taxpayer, and will provide better outcomes for the child and family as a whole. Unfortunately, through our work representing children in criminal proceedings before the Children's Court, we do see many children in out of home care coming into contact with the criminal justice system. As we outline in more detail below, a significant body of research confirms that there is an overrepresentation of children with out of home care experience in contact with the criminal justice system.

Multi agency collaboration

Legal Aid NSW generally supports the use of Youth Action Meetings (YAMs). YAMS are monthly forums that are led by the NSW Police and involve government (Department of Communities and Justice (DCJ), Department of Education, NSW Health) and non-government agencies and services. The meetings identify vulnerable children who are at-risk of offending or victimisation. They develop strategies with tangible outcomes to ensure children are referred to the right services and receive the support they need to address their issues.

Legal Aid NSW has recommended the use of the multiagency YAM style model in a child protection as a way to encourage multi agency collaboration at an early stage. We consider that there would be significant benefit in adopting the YAM model to suit a child

[25] Since 2019 alternative dispute resolution (including family group conferences) become mandatory before child removal occurs (except when there are exceptional circumstances). While we support these reforms, we have little anecdotal or other evidence of the reforms' success. Information on how family group conferences are being utilised by DCJ is lacking and attendance of legal representatives is discouraged. Further, family group conferences do not include interagency collaboration. Therefore, they are unable to provide a holistic wrap around service, and should therefore be one of many tools used at an early stage to support families to remain together.

[26] Based on Legal Aid NSWs observations.

protection context where a child aged under 14 is presenting with complex behaviours and the family is considered to be at risk of child removal or in need of support. The development of an action plan with clear goals, coordination around the availability of services, and accountability of various agencies in the provision of these services, is an efficient and effective way to engage with vulnerable families at an early stage to keep them together and safe.

Ensuring there are clear referral pathways

Government agencies and support services should establish clear and consistent referral pathways between support services to ensure appropriate referrals are made. Aboriginal community service providers to ensure early and culturally appropriate support.

Increased funding for the identification and treatment of complex trauma, disabilities and mental health issues

As discussed at part 8 below, there is an overrepresentation of children with disabilities and mental health issues in the criminal justice system. Unfortunately, Legal Aid NSW has observed a significant shortage of mental health and disability diagnostic and support services for children, particularly in regional locations.

Concerningly, in our experience, there is a high prevalence of children with undiagnosed disabilities and mental health conditions being criminalised. It is common for children to be diagnosed with previously unknown mental health conditions and disabilities only once a medical report is funded by Legal Aid NSW for the purpose of criminal proceedings. The timely diagnosis and treatment of disabilities is critical as it not only enables children to receive treatment but also assists their parents, carers and teachers to provide cultural, trauma and disability informed care. Without a diagnosis, children with disability are also unable to access NDIS supports.

Increased assistance navigating the NDIS and other disability supports

In our experience, many children with significant diagnosis are either not engaged with the NDIS at all or have NDIS plans that do not reflect their level of disability. Previously, a multi-agency program known as the Integrated Service Response (ISR) assisted services to coordinate wraparound support for a person with disability and complex support needs, where local services were unable to resolve the crisis or complex situation.[27] In Legal Aid NSW's experience, there remain a critical need for a similar program to ensure children with complex needs are provided with assistance to access the supports they need and are entitled to receive.

Alternative schooling options

For children who come from disadvantaged backgrounds, education is fundamentally important to break cycles of disadvantage. Conversely, exclusion from education can be a precursor to poor future outcomes.[28] There is a strong link between disengagement

[27] The ISR was hosted by NSW Health and accepted referrals from specific government agencies including Legal Aid NSW. It operated between mid-2018 and October 2021. Funding of the ISR was discontinued despite advocacy from Legal Aid NSW and other stakeholders.

[28] The Victoria Institute, *Education at the Heart of the Children's Court Evaluation of the Education Justice Initiative* (Final Report, December 2015) 2.

from school and youth offending.[29] We regularly assist children charged with criminal offences who have been disengaged from school for multiple years.

The *NSW Youth Diversion Inquiry* found one of the factors that may be contributing to disengagement and exclusion from school is a lack of specialised and tailored learning support in schools.[30] This aligns with our experience and insights gleaned from representing our young clients. Many of our clients in youth detention do well in custodial schools, where more individualised support is available.

We recommend ensuring schools have the capacity to provide adjustments and individualised learning supports to assist children at risk of disengaging from education.

Recommendation 5:

The NSW Department of Education should identify and implement measures to build the capacity of schools to provide additional adjustments[31] and more individualised learning supports to assist children at risk of disengaging from education.

Ensuring services are culturally appropriate

Culturally appropriate responses are also critical given the high proportion of Aboriginal children in this cohort. Culturally safe diversionary pathways should be available at all stages of legal proceedings, including during bail, and not be limited to post-plea stages. Programs similar to the Youth Koori Court should be adapted for younger children and delivered outside the court environment. These programs should involve Elders and respected community members in developing cultural plans and supporting family engagement.

[29] NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018) vi, 272.
[30] NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018) vi, 272.
[31] In line with the requirements of the *Disability Standards for Education 2005*

6. The interaction between *doli incapax* and diversion schemes

Question 7: How does the operation of *doli incapax* interact with:
(a) diversion under the Young Offenders Act?
(b) diversion under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*

The presumption of *doli incapax* comfortably operates alongside the diversionary options, including under the *Young Offenders Act* and the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (which can be done at any time of the proceedings, and does not require an admission of guilt).

Question 8: Are there any ways to facilitate engagement in diversion by children aged 10 to 13 in contact with the criminal justice system? If so, what changes should be made to enable this?

There are several ways to facilitate better engagement in these diversionary options by children aged 10 to 13, though current practices and systemic limitations present significant barriers.

Age-appropriate alternatives to prosecution that do not form part of the criminal justice system

Diversion can provide an opportunity to address underlying risk factors that may cause or contribute to offending behaviour in children. Given the developmental stage of this age group, further supports should be made available as alternatives to prosecution and the use of diversion from traditional criminal justice processes should be increased. This diversion option/supports should include community-led, therapeutic, and trauma-informed diversion programs that operate outside the criminal justice system and are separate from NSW Police.

The *Young Offenders Act* and other formal diversionary options, while a good option for many, is operated by police, and often involves children being arrested before they are offered diversion. As discussed above, this contact with NSW Police can have determinant effects on young children. For this age group, we encourage informal diversion wherever possible, including to the following programs:

- Youth on Track
  Youth on Track is a voluntary early intervention program for 10–17-year-olds at medium to high risk of long-term involvement with the criminal justice system. Referrals can be made by NSW Police and local schools.

  Participants are assigned a caseworker for up to 12 months, who delivers cognitive-behavioural and family-based interventions. The program involves multi-agency collaboration to provide coordinated support and avoid service duplication.

Youth on Track is only available to children who have not been sentenced to a supervised court order and operates in limited locations across NSW. Despite its effectiveness, access is restricted due to geographic limitations, limited places, and exclusion of children with complex needs or prior supervised orders.

- BackTrack and the Tracker Network
  BackTrack began in Armidale in 2006 to support disengaged and at-risk children by building life and work skills. The program focuses on practical training, trade certification, and personal development through responsibilities such as caring for a sheep dog. It also includes literacy, numeracy, and psychological support, with mentorship from past participants contributing to its success.

  A 2014 evaluation by the National Drug and Alcohol Research Centre found that youth crime in Armidale dropped by 52% over seven years, while similar offences rose by 90 percent in nearby Tamworth. [32] The program delivered an estimated return of $6.78 for every $1 invested.

  BackTrack now mentors similar services across six NSW locations through the Tracker Network.[33] However, both programs have limited capacity, leaving many children without access.

Recommendation 6:

Informal diversion for children aged 10 to 13 should be prioritised and supported through expanded access to proven early intervention programs. This should include:

- broadening eligibility for Youth on Track to include children previously subject to supervised court orders
- extending Youth on Track to additional regional locations, and
- increasing investment in programs such as BackTrack, the Tracker Network, and the Elver program for children in out-of-home care with complex needs.

Importantly, information gathered by these support services should not be admissible in court to rebut the *doli incapax* presumption.

Criminal justice based diversionary options

Where informal diversion is not appropriate, we recommend expansion of the following programs:

Young Offenders Act

By increasing the type and number of offences that are able to be diverted under the *Young Offenders Act* to allow more children to receive police cautions and other diversionary options.

[32] UNSW Newsroom, Community-based program for troubled teens halves crime rates: Juvenile crime rates in the NSW town of Armidale have been halved over the past seven years, thanks to an innovative, community-based skills program aimed at 14- to 17-year-olds (News Article, UNSW Newsroom, 5 December 2014).

[33] Including LeaderLife in Dubbo; Down The Track in Lake Cargelligo; Making Tracks in Broken Hill; RuffTRACK in Hawkesbury River; FlatTrack in Moree; and ShoreTrack in Macksville.

In terms of diversion under the *Young Offenders Act* the experience of our Youth Hotline solicitors is that children often instruct their lawyer to admit the offence and accept diversion, even when they are provided with legal advice that the prosecution may struggle to rebut *doli incapax*. This is largely due to fear—children are scared of being charged and attending court, and when offered a way to avoid this process, they will understandably take it. Unfortunately, the limitations on what can be diverted under the *Young Offenders Act* (discussed above), the number of cautions available, as well as a police understanding and attitudes towards diversion are the most common barrier to diversion.

We consider diversion to be a necessary and appropriate response to most offending by children. While children commit a disproportionate amount of crime, most will not go on to offend throughout adulthood.[34] This general trajectory highlights the importance of a diversionary response.

The costs of community supervision[35] and detention[36] for young children is significant. Diversion provides a "swift and economically efficient response to offending…".[37] It can also minimise the criminogenic effects of formal criminal justice system contact and provide an opportunity to address underlying risk factors that may cause or contribute to offending behaviour in children.

At present, diversion options for young offenders in NSW include legislative measures such as those contained in the *Young Offenders Act*, as well as various programs provided across government and non-government organisations.

NSW Police is usually the first point of contact with the criminal justice system, for children who have offended or engaged in anti-social behaviour. The *Young Offenders Act* provides options for NSW Police (or a court) to give a warning, caution or refer a child to a youth justice conference as an alternative to court proceedings.

While Legal Aid NSW is of the view that the *Young Offender Act* provides a good legislative framework for the diversion of young offenders in NSW, we are concerned that its scope and implementation have hampered the full realisation of its objectives.

This is most apparent with respect to Aboriginal children, who are statistically less likely to receive the benefit of diversion under the *Young Offender Act*. This is despite one of the express objects of the *Young Offender Act* being to address the overrepresentation of

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[34] For example, a 2015 NSW Bureau of Crime Statistics and Research study of a subset of the young offenders' population in NSW across 10 years found that over 42 percent of the cohort had no further contact with the criminal justice system, and just over 17 percent had only one reconviction in the 10 years following their first contact. The study cautioned that "the risk, speed, and frequency of reoffending was not universal and risk factors such as gender, age of first contact, sentence at first contact and Indigenous status all influenced the likelihood of reconviction"- Jason Payne and Don Weatherburn, *Juvenile reoffending: a ten-year retrospective cohort analysis" (*Australian Journal of Social Issues 50(4), 2015) 349.

[35] In 2018-19, the average cost per day for a child subject to community-based supervision in Australia was $187- Productivity Commission, *Report on Government Services 2020*, Figure 17.9, p. 17.24.

[36] In 2018-19, the average cost per day to keep a child in youth detention in Australia was $1579- Productivity Commission, *Report on Government Services 2020*, Figure 17.10, p. 17.26.

[37] Troy Allard, Anna Stewart, April Chrzanowski, James Ogilvie, Dan Birks and Simon Little, *Police diversion of young offenders and Indigenous over-representation* (Trends and Issues in Crime and Criminal Justice No. 390, Australian Institute of Criminology March 2010), 1.

Aboriginal children in the criminal justice system through the use of youth justice conferences, cautions and warnings.

Only certain offences are eligible to be diverted under the *Young Offender Act*. Currently, there are a number of offences excluded from the *Young Offender Act*. We consider that any offence able to be dealt with summarily should be eligible to be dealt with under the *Young Offender Act*. This includes strictly indictable offences (except serious children's indictable offences), traffic offences, sexual offence matters, drug matters and graffiti offences.

On 28 August 2019, as a result of recommendations of the NSW Youth Diversion Inquiry, the NSW Government announced it would conduct a review of the *Young Offender Act*. This review was considering a number of important recommendations, including:

1. enabling a child to be diverted under the YOA if they do not deny the offence (currently they are required to admit the offence)
2. removing the caps on number of cautions a child can receive from NSW Police
3. increasing the offences eligible to be dealt with under the YOA (particularly the currently excluded drug, graffiti and domestic violence offences), and
4. improving NSW Police training and education around the use of the YOA (particularly around the importance of diverting Aboriginal children, in line with the objects of the YOA).[38]

While a significant amount of work went into this review, the results of it were never published. We recommend the results of this review be released and acted on as a matter of priority.

Recommendation 7:

The NSW Government should amend the *Young Offenders Act 1997* to:

- expand the range of offences eligible for diversion to include all matters that can be finalised in the Children's Court
- remove the cap on the number of cautions a child can receive under the Act, and
- enable a child to be diverted even if they do not deny the offence.

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

Many children appearing before the Children's Court have mental health conditions or cognitive impairments that make them eligible for diversion under section 14 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)*. This provision allows courts to divert eligible individuals from the criminal justice system into treatment.

[38] Aboriginal children are also less likely to receive the benefit of diversionary options when in contact with the criminal justice system- A recent study showed Aboriginal children are less likely to be diverted by police than non-Aboriginal children, even taking into account other relevant factors- Don Weatherburn and Brendan Thomas, *The influence of Indigenous status on the issue of police cautions* (Journal of Criminology, Vol 56 (2-3), 22 December 2022). Studies have also shown Aboriginal children are more likely to be arrested rather than to receive a court attendance notice and are more likely to have bail refused and to have their matter determined in court compared to non-Aboriginal children- Chris Cunneen, R White and K Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 2015) 154-159.

To access diversion, a child must be assessed by a qualified professional and found to have a mental health or cognitive impairment as defined in the Act. This option is available pre-plea, including for children presumed to be *doli incapax*, and is often preferred due to faster resolution of court proceedings, and avoidance of lengthy periods on bail, or in custody waiting for a hearing date.

Despite its potential, several barriers limit the use of mental health diversion:

- Limited availability of assessments: The Adolescent Court and Community Team Program, run by Justice Health, is not available in many regional courts. This makes it difficult for children to obtain the necessary evidence to support diversion.
- Service gaps in regional areas: There is a shortage of professionals and services to provide treatment to children as part of any court imposed treatment plan, particularly outside metropolitan areas.
- Complexity of cases: Some children are turned away from services due to complex needs, and some providers are unwilling to commit to the required 12-month treatment plans.

These improvements would have particular benefits for Aboriginal children given data suggests higher rates of mental health disorders among young Aboriginal offenders and lower rates of access to the Adolescent Court and Community Team Program based on the location of the courts in which they appeared.[39]

Recommendation 8:

Mental health diversion pathways for children in the criminal justice system should be expanded and strengthened by:

- extending the Adolescent Court and Community Team Program to all Children's Courts across NSW, ensuring every child can access a mental health assessment when needed
- increasing funding for mental health services that provide treatment and support for children subject to court-imposed treatment plans, and
- ensuring services are equipped to support children with complex needs and are resourced to deliver long-term, sustained treatment.

Youth Koori Court

The Youth Koori Court was established to address the significant overrepresentation of Aboriginal children in the NSW criminal justice system. Research shows Aboriginal children are more likely to be prosecuted than diverted, compared to non-Aboriginal peers. The Youth Koori Court provides a culturally responsive alternative within the Children's Court, currently operating in Parramatta, Surry Hills, and Dubbo.[40]

The Youth Koori Court works with Aboriginal elders and respected community members to identify and address underlying risk factors—such as homelessness, disengagement from education, and health issues—that contribute to offending. Children develop an

[39] NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018).
[40] Children's Court of NSW, *Practice Note No 11: Youth Koori Court*, 4.

action and support plan, which is monitored over several months. The magistrate then considers the child's progress when determining the final sentence. [41]

A 2022 BOCSAR evaluation found statistically significant reductions in sentencing and recidivism among Youth Koori Court participants, particularly those with no prior custodial history and those charged with violent or property offences. [42]

The Youth Koori Court has demonstrated success in diverting and supporting Aboriginal children, improving outcomes and enhancing community safety. However, its reach is limited. Expanding the Court to additional regional areas—particularly those with high Aboriginal populations and youth crime rates—would ensure more children benefit from culturally appropriate justice processes.

Further, the expansion of Youth Koori Court is particularly important due to recent research which found Aboriginal children are more likely to be prosecuted than diverted by police, compared with their non-Aboriginal peers.[43]

Recommendation 9:

The Youth Koori Court should be adequately funded to support existing locations and expanded to additional regional areas with high Aboriginal populations and youth crime rates.

Non court based culturally appropriate diversionary options

There is also a critical need for culturally safe, non-court-based diversionary options for Aboriginal children. These services should be co-designed and led by Aboriginal communities to ensure they are responsive to local needs and grounded in cultural knowledge.

Aboriginal-led programs are essential for engaging children and addressing the underlying causes of vulnerability, such as trauma, disconnection from culture, and systemic disadvantage. While some programs operate within youth justice centres, they must also be available as early intervention tools—before sentencing or formal court involvement—to prevent incarceration.

A culturally safe alternative process should be developed in partnership with Aboriginal communities to support these children and their families, reduce future contact with the justice system, and promote healing and accountability.

Recommendation 10:

Further investment should be directed toward Aboriginal-led, non-court-based diversion programs that are available pre-sentencing and accessible to children regardless of plea.

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[41] Children's Court of NSW, *Practice Note No 11: Youth Koori Court*, 1.3.
[42] E Ooi and S Rahman, *The impact of the NSW Youth Koori Court on sentencing and re-offending outcomes* (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No. 248, 2022).
[43] Weatherburn, D., & Thomas B. (2022) The influence of Indigenous Status on the issue of police cautions. *Journal of Criminology,* 0(0). See also Clare Ringland and Nadine Smith, "Police use of court alternatives for young persons in NSW", BOCSAR Crime and Justice Bulletin No 167 (January 2013), p10.

These programs must be co-designed with Aboriginal communities and tailored to local needs, with a focus on early intervention, cultural connection, and holistic support.

Establish a youth drug and alcohol diversionary program

Alcohol and other drug use can contribute to youth offending, including among children aged 10 to 14. Despite this, there are limited treatment-based diversion options available for this age group.

The NSW Youth Drug and Alcohol Court (YDAC) was discontinued in 2012 due to concerns about cost-effectiveness, partly driven by low participant numbers and sentencing outcomes. Unlike the NSW Drug Court, YDAC did not provide indicative sentencing, which led to some participants receiving longer sentences if they failed to complete the program. In contrast, the NSW Drug Court operates as an alternative to imprisonment and has evolved to become more cost-effective over time.

Despite its discontinuation, the NSW Youth Diversion Inquiry noted strong stakeholder support for reinstating YDAC.[44] Legal Aid NSW supports consideration of a revised, more efficient YDAC model, alongside increased investment in drug and alcohol services for children and young people.

As an alternative, the Magistrates Early Referral into Treatment (MERIT) program—currently available to adults in the Local Court—could be adapted for children. MERIT provides access to treatment services over a 12-week period while court matters are adjourned. Expanding MERIT to the Children's Court would require modifications to ensure it is developmentally appropriate and responsive to the needs of children.

Recommendation 11:

The review should consider recommending the reinstatement of the NSW Youth Drug and Alcohol Court. If reinstatement is not pursued, the eligibility criteria for the Magistrates Early Referral into Treatment (MERIT) program should be expanded and adapted to ensure it is accessible to children.

Increased funding for Youth Justice to enable them to support and supervise children who have not entered a plea of guilty

Currently, Youth Justice can only supervise and support children who have been sentenced or are on bail after entering a guilty plea. This leaves a gap in support for children before the Children's Court who have not yet entered a plea.

Legal Aid NSW recommends increased funding for Youth Justice to enable confidential support and supervision for all children before the Court, regardless of plea status. Early engagement can help address underlying issues, reduce the risk of reoffending, and improve outcomes.

[44] NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018).

7. Regional perspectives

Question 9: Are there particular issues in regional or rural areas that may affect the operation of *doli incapax*?

A lack of available services in regional and rural areas, whether it be specialist courts, diversion, medical or other, are a common challenge our practitioners often speak about and are detailed further below. Unjustifiably, children in regional or rural areas are at a disadvantaged when they come in contact with the criminal justice system.

Service availability and delays

Children in rural and regional areas do not have the same access to services as their peers in greater Sydney and surrounds. A key example is that the Children's Court of NSW has limited sittings in regional areas. This contributes to delays getting hearing dates and the finalisation of matters. Increasing specialist Children Court sitting days in rural and regional areas should be addressed as a matter of priority.

Delays in hearing dates means children spend lengthy periods on bail. While on bail, children come to attention of the police in ways that they would not if they were not on bail (for example, regular curfew checks). Lengthy periods on bail increasing the likelihood of breaching bail conditions, further charges and longer periods spent in custody.

Another cause of delay is that children in regional NSW have to wait significantly longer than their greater Sydney counterparts to obtain a Youth Justice Background Report (BGR). Our practitioners in the regions tell us they wait up to six weeks for a BGR, whilst they are received by practitioners within two weeks in greater Sydney. BGRs are required prior to sentencing in matters where the court is considering a period of control,[45] which means a child may be on bail or remand longer than is necessary before sentencing.

Further, for children from regional areas held on remand while waiting for their hearing date, they are often moved to youth justice centres far from family and friends. For Aboriginal children, this also means being taken off country. Children may be in remand for extended periods while they are waiting for their matters to be resolved. Being removed from family contact for any length of time adversely effects all children taken in custody and should be minimised as a matter of priority.

No specialist Children's Court Magistrates in some locations

Unlike in the greater Sydney areas, many regional areas do not have a specialist Children's Court to hear criminal matters.[46] Instead, matters are heard by Local Court magistrates. Specialist Children's Court Magistrates have an in-depth understanding of the different legislation that applies to children, as well as specialist skills, training and experience. They are also accustomed to carefully balancing the need to hold children responsible for their

[45] *Children (Criminal Proceedings) Act 1987*, s 25
[46] Children's Court of NSW, *Children's Court Listing and Sitting Arrangements for 2024,* (Accessed on 20 May 2024) <https://childrenscourt.nsw.gov.au/documents/sitting-arrangements/Childrens_Court_Sitting_Arrangements_from_February_2024.pdf>

actions, whilst also recognising their reduced culpability on account of their age and immaturity.

As a result, we often see children appearing before specialist Children's Court magistrates receiving very different, and in our view, more appropriate outcomes than those appearing before Local Court magistrates. Specialist Children's Court Magistrates also have a more thorough understanding of the discrete services available for children in particular areas.

While Legal Aid NSW has been involved in conversations with Local Court magistrates who are interested in understanding what services are available to children in their local areas, long court lists can limit their ability to obtain a deeper understanding of the early intervention and diversionary services available for the comparatively small number of children that come before them.[47] This is also true of lawyers and prosecutors who may not have the same training or practical experience in working with children. As a result, practitioners have observed inconsistent practices and decision making across courts that adversely impact the principles of a specialised jurisdiction put in place to recognised the vulnerability of children before the court.

Disability – Further issues with diagnosis and treatment in regional areas

As discussed above, many children coming into contact with the criminal justice system at a young age have previously undiagnosed disabilities.

Professional supports and diagnostic services are particularly scant in many regional areas. Without access to assessment, health and therapeutic services, practitioners are unable to provide the court with evidence of potential *doli incapax* evidence. Where services do exist, there is often long waiting times. It can also be difficult for families to access these services, whether it be because of distance, their own personal challenges or cultural reluctance. Our practitioners in Dubbo, for example, report that there are very few paediatricians, meaning there are significant wait times and delayed diagnosis.

Delayed access to health and therapeutic interventions can also impact a child who is on bail. Practitioners tell us it is not uncommon for children who are on bail and who have not received interventions, to breach bail and then spend lengthy time in custody.

The lack of available services to diagnose and support those with mental health and cognitive impairments also makes applications for diversion under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW))* less likely to be granted by the Children's Court.

Inconsistent use of YOA diversion across regional areas

Our casework experience suggests that there is a variation in the use of diversion by specialist Children's Magistrates and Local Court Magistrates. For example, our lawyers report that the specialist Children's Magistrates are more likely to caution children or refer them to YJCs than regional Local Court Magistrates sitting as a Children's Magistrate. This could be attributable to the different training and experience of the magistrates

[47] Legal Aid NSW, Inquiry into community safety in regional and rural communities, (Report, May 2024) p 47.

presiding in these matters (this issue is discussed above at Part 5.3) as well as lack of familiarity with the *YOA* by legal practitioners in these areas.

We have also observed significant variations in NSW Police diversion across regional Local Area Commands. Different attitudes towards youth diversion among police officers in different locations, including the attitude of the NSW Police Youth Liaison Officer, and Local Area Command management, may explain these differences.

We would encourage the Committee to obtain data and to investigate the use of *YOA* diversion across regional areas and comment on the consistency, or otherwise, of practices in particular regions.

8. Overrepresented cohorts

Question 10: Are there are other matters that you wish to raise about the appropriate response to offending behaviours by 10 to 13 year olds?

Research consistently shows that the youngest children involved in the criminal justice system are Aboriginal children, children with disability, and those involved in the child protection system. [48]

In our experience, drivers of offending for children aged 10 to 13 are complex and often interrelated. Factors such as disadvantage, trauma, disability, mental health conditions, substance use, inadequate early intervention, educational disengagement, and experience in out-of-home care (OOHC) frequently co-exist and compound one another.

Any reform must recognise the broader social context in which these children live. Responses should be multi-disciplinary—incorporating child protection, education, health, psychological, social, and cultural supports—rather than relying solely on justice-based interventions. In our experience, this approach leads to better outcomes for children and long-term cost savings for government.[49]

We urge the review to consider the needs of Aboriginal children, children with disability, and children in the child protection system when developing its recommendations, and to prioritise holistic, community-informed responses.

Children with disabilities

Concerningly, in Legal Aid NSW's experience, there is a high prevalence of children with undiagnosed disabilities being criminalised. For many children, this is likely to impact on both their capacity to understand the gravity of their crimes and their capacity to understand the criminal justice process they are subject to.

Evidence confirms that children in our criminal justice system have high rates of additional neurocognitive impairment, trauma and mental health issues.[50]

Complex or cumulative trauma in childhood can disrupt the architecture of the developing brain and the effects of this may manifest as risk factors for future contact with the criminal justice system, as well as lifelong problems in learning, behaviour, and physical and mental health. [51]

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[48] Susan Baidawi & Alex R. Piquero, 'Neurodisability among children at the nexus of the child welfare and youth justice system', (2021), vol 50 (4), *Journal of Youth & Adolescence*, pp 803-819.
[49] Ibid, page 64
[50] Commission for Children and Young People, Our youth, our way: inquiry into the over- representation of Aboriginal children and young people in the Victorian youth justice system, Summary and recommendations (2021) 151-154.
[51] Royal Commission into the Detention and Protection of Children in the Northern Territory, Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, (Report, 17 November 2017) Vol. 1, 134.

A recent study found that for 29 percent of children with intellectual disability in the youth justice system, their disability was only diagnosed after they became involved with the criminal justice system.[52] Another study, of Banksia Hill Detention Centre in WA, found that 3 percent of children in sentenced detention had been diagnosed with Fetal Alcohol Spectrum Disorder (FASD) before sentencing, but when assessed, 36 percent met the criteria for FASD.[53] The same study found that 89 percent of children in sentenced detention had severe neurodevelopmental impairment.[54]

Allen's story[55]

Allen is a 13-year-old Aboriginal boy living in residential out-of-home care (OOHC). He had recently been relocated to a placement approximately four hours away from Country and family. Allen exhibited behavioural challenges that led to criminal charges. Prior to entering residential care, Allen lived with his grandmother, who supported him in obtaining diagnoses of ADHD and PTSD.

Legal Aid NSW represented Allen in his criminal proceedings. Concerned about Allen's ability to understand and participate in the court process, Legal Aid NSW raised the possibility of a cognitive impairment. When staff contacted Allen's care providers, they were told Allen was "quite intelligent" and that he was not currently engaged with a psychologist or other treatment providers.

Due to ongoing concerns about Allen's cognitive capacity to provide legal instructions, Legal Aid NSW commissioned a report from a forensic psychologist. The assessment revealed that Allen had Fetal Alcohol Spectrum Disorder (FASD), resulting in "severe brain dysfunction." He was found to be functioning at the level of a six- to seven-year-old across most cognitive domains.

Aboriginal children

Aboriginal children remain significantly overrepresented in the NSW criminal justice system. Although they comprise only 3.4 percent of the population, they account for over 50 percent of youth in detention and 44 percent of those appearing before the Children's Court.[56] This overrepresentation is complex, related to multiple factors,[57] reflects broader systemic disadvantage, including higher rates of out-of-home care (OOHC), educational disengagement, and intergenerational trauma.

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[52] Susan Baidawi, Rosemary Sheehan, Cross-over kids: Effective responses to children and young people in the youth justice and statutory child protection systems (Report to the Criminology Research Advisory Council CRG03/15-16, December 2019).

[53] Bower C, Watkins RE, Mutch RC, et al. Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia. BMJ Open 2018;8:e019605. doi:10.1136/ bmjopen-2017-019605

[54] As above

[55] All case studies in this submission have been de-identified.

[56] NSW Bureau of Crime Statistics and Research, *NSW Criminal Justice Aboriginal Overrepresentation Quarterly Report: Aboriginal Young People* (Quarterly Report, June 2022).

[57] Philip Mendes, Bernadette Saunders and Susan Baidawi 'The experiences of Indigenous young people transitioning from out of home care in Victoria, Australia' in Varda R Mann-Feder & Martin Goyette (eds), *Leaving care and the transition to adulthood: International contributions to theory, research, and practice* (New York: Oxford University Press, 2019) 149–171;
Human Rights and Equal Opportunity Commission (HREOC) *Bringing them home: Report of the national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (HREOC Report, April 1997).

National Agreement on Closing the Gap

The National Agreement on Closing the Gap (CtG) seeks to improve the life outcomes of Aboriginal and Torres Strait Islander people, through a commitment by government(s), including the NSW Government, to meet several socio-economic targets and outcomes. Any proposed changes to the doctrine of *doli incapax* should take into consideration their likely impact on the achievement of the CtG targets, especially in light of recent findings that some of the targets are not on track to be met and that progress on others is actually declining.[58]

For example, Target 11 specifically seeks to reduce the rate of Aboriginal children in detention by at least 30 percent by 2031. In 2022–2023 26.9 percent of Aboriginal and Torres Strait Islander people in youth detention were aged between 10 and 13 at the time of first detention.[59] Therefore, a removal or amendment of the doctrine of *doli incapax* could lead to a significant increase in Aboriginal and Torres Strait Islander children being held in detention in direct contrast to this target.

Similarly, Target 5 seeks to increase the proportion of Aboriginal and Torres Strait Islander people (age 20-24) attaining year 12 or equivalent qualification to 96 per cent by 2031. Whilst this target relates to people aged between 20–24, the importance of education outcomes for children aged 10-13 cannot be understated. Legal Aid NSW has observed that children aged between 10 and 13 engaged in ongoing court proceedings, particularly those that proceed to a defended hearing, can experience significant disruptions to their schooling. On average, a child may have to attend court a minimum of three occasions. In addition, if a child is granted conditional bail, they risk being taken into custody and therefore spending more time out of school if they breach their bail conditions. Amendments to the *doli incapax* doctrine which increase child's engagement with the criminal justice system are therefore likely to come at the expense of their education, negatively impacting efforts to meet Target 5.

Cultural considerations

Any changes to the *doli incapax* principle must also consider the cultural and developmental context of Aboriginal children. The importance of cultural connection, family, and community in promoting wellbeing and rehabilitation is highlighted in a *Bugmy Bar Book* report.[60] The report identifies a strong overlap between the social determinants of offending and incarceration, and the impacts of intergenerational trauma as well as other forms of disadvantage which disproportionately affect Aboriginal communities.

The report also draws attention to the over-representation of Aboriginal and Torres Strait Islander people with cognitive or psychiatric disabilities in the criminal justice system. Yet Aboriginal and Torres Strait Islander children are particularly vulnerable to being undiagnosed despite suffering from cognitive or psychiatric disabilities.

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[58] See Productivity Commission Closing the Gap Annual Report (August 2024).
[59] Productivity Commission, Closing the Gap Dashboard, socio-economic outcome area 11 Proportion of young people first coming into youth justice system aged 10-13 - Aboriginal and Torres Strait Islander young people are not overrepresented in the criminal justice system - Dashboard | Closing the Gap Information Repository - Productivity Commission
[60] Vanessa Edwige and Dr Paul Gray, Significance of Culture to Wellbeing, Healing and Rehabilitation (Report, undated).

Instead of only focusing on the doctrine of *doli incapax*, efforts to reduce offending and recidivism should encompass greater investment in culturally grounded programs which are shown to promote wellbeing, support healing and rehabilitation, in turn, reducing recidivism. Greater investment and emphasis on culturally appropriate mental health assessments would also assist not just with diversion but identifying and addressing unmet needs.

Finally, the report advocates for trauma-informed systems, policies, and programs that recognise the importance of culture and the role of families and communities in fostering supportive relationships. These approaches can help build core capabilities in children, ultimately reducing the likelihood of offending behaviours.

Recommendation 12:

To ensure that reforms to *doli incapax* support better outcomes for Aboriginal children, the review should ensure that any recommendations:

- align with the National Agreement on Closing the Gap targets, particularly Target 11, which aims to reduce the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system
- include engagement with Aboriginal Community Controlled Organisations in the design and delivery of culturally appropriate diversion and support programs
- encourage investment in holistic, interagency approaches that address the underlying drivers of disadvantage, including poverty, education, and out-of-home care, and
- protect the rights of Aboriginal children by embedding culturally competent assessments and services throughout the justice system.

Children in Out of Home Care

A history of out of home care (OOHC), and particularly residential OOHC, features prominently among children involved in the criminal justice system. In 2021-2022, around three percent of children in Australia received child protection services.[61] However, this cohort accounted for approximately half of those appearing on criminal charges before the Children's Court.[62]

Aboriginal children across all age groups are significantly more likely to receive child protection services compared to non-Aboriginal children.[63] Children in OOHC have also typically experienced trauma,[64] are more likely to be disengaged from education, to have or have had a parent incarcerated, and to face barriers accessing support services for trauma, mental health issues, or disability.

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61 Australian Institute of Health and Welfare Child protection Australia (AIHW Report, 6 June 2023).
62 Katherine McFarlane, 'Care-criminalisation: The involvement of children in out-of-home care in the New South Wales criminal justice system' (Research Paper, 51(3) Australian and New Zealand Journal of Criminality, 2018) 412, 421.
63 Despite making up just six percent of the general Australian population, Aboriginal or Torres Strait Islander children made up 42.2 percent of children in OOHC. This was an increase of 2.2 percentage points since 2019- Australian Institute of Health and Welfare, Child Protection Australia 2020-2021, (Report, 15 June 2022) 17.
64 Australian Institute of Health and Welfare, Child protection Australia 2016–17 (AIHW Report, 9 March 2018). Also see D Shantel and Crosby et al., Examining school attachment, social support, and trauma symptomatology among court-involved, female students (Journal of Child and Family Studies 26(9)) 2539–2546 and Dr Jo Staines, Risk, adverse influence and criminalisation: Understanding the over-representation of looked after children in the youth justice system (Research Paper, 2016).

However, research shows that the experience of OOHC itself contributes to criminalisation beyond these external factors.[65] This occurs through a process of 'care-criminalisation', where children in OOHC are arrested for behaviours that would typically result in a parental or disciplinary response, rather than a criminal justice response from NSW Police. Ali's story provides an example of this.

Ali's story

Ali is a 12-year-old Aboriginal boy living in residential OOHC. He has not attended school for over a year. Ali experienced a traumatic childhood, and both of his parents are currently in custody for a serious offence.

Ali was arrested by NSW Police and charged with intimidating an OOHC carer after threatening to "kick" the worker. He spent a night in detention before being released on bail. Within hours, he was arrested again for pushing the same worker and damaging property. He was refused bail and spent 10 days in custody.

Legal Aid NSW arranged a psychological assessment, which diagnosed Ali with Fetal Alcohol Spectrum Disorder (FASD). He was assessed as having the cognitive ability of an eight-year-old.

While the *Joint Protocol to Reduce the Criminalisation of Children and Young People in Out-of-Home Care* (Joint Protocol) aims to address care-criminalisation, Legal Aid NSW staff report inconsistent adherence to its priorities and obligations by both NSW Police and residential OOHC providers. This is particularly evident in regional areas, where a significant proportion of children in OOHC are Aboriginal.

This inconsistent application highlights the need for improved training and support for both NSW Police and service providers. Strengthening understanding of the Joint Protocol's responsibilities could improve opportunities to divert children from the justice system and reduce unnecessary criminalisation.

Recommendation 13:

Training and education on the Joint Protocol to Reduce the Criminalisation of Children and Young People in Out-of-Home Care should be strengthened for both NSW Police and out-of-home care service providers, to reduce reliance on criminal justice responses for children in care.

[65] For example see N Carr & S McAlister, The double-bind: Looked after children, care leavers and criminal justice (Research paper, 2016) and P Mendes & P Snow (eds), Young people transitioning from out-of-home care: International research, policy and practice (London: Palgrave Macmillan UK) 3–21, J Shaw J, Policy, practice and perceptions: Exploring the criminalisation of children's home residents in England (Youth Justice 16(2) 2016) 147–161 and J Staines Risk, adverse influence and criminalisation: Understanding the over-representation of looked after children in the youth justice system (London: Prison Reform Trust 2016) and E Stanley. From care to custody: Trajectories of children in post-war New Zealand. (Youth Justice 17(1), 2017) 57–72.