Brief on '*doli incapax*' in NSW, the minimum age of criminal responsibility & implications for advocacy & law reform

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Introduction

The legal presumption of children as '*doli incapax*' ('incapable of crime/wrong') is frequently discussed alongside the issue of raising the minimum age of criminal responsibility (MACR). This brief sets out the context and thresholds for *doli incapax*, the differences in the law and how it is applied in practice in NSW versus other jurisdictions, and the serious concern with it being understood as a form of individualised justice or alternative to MACR, concluding with the implications for advocacy and law reform.

In all jurisdictions in Australia, there are currently two minimum ages of criminal responsibility: the legislated minimum age which is not able to be rebutted (10 everywhere other than in the ACT, where it is 12), and the presumption of *doli incapax* for children aged under 14 which is rebuttable by the prosecution. The Australian Government is a signatory to the United Nations Convention on the Rights of the Child. In 2019 the Committee on the Rights of the Child recommended that all countries increase the MACR to at least 14 years of age.[3] The Committee urged States to set one appropriate MACR, observing that applying two minimum ages of criminal responsibility although devised as a protective system has not proved protective in practice.[4] However, Australian Government reporting to the Committee has presented *doli incapax* as a protection "from the full force of the law"[5] and a safeguard which "recognizes each child's evolving capacities".[6]

The presumption of *doli incapax* is seen as both over- and under-protective by different stakeholders.[7] Discussion of problems with the presumption can often be in general terms, not always clearly distinguishing the jurisdiction to which the criticism applies.[8] Despite being raised as a major reason for not increasing the MACR, there is very little research on how *doli incapax* operates in practice in Australia.[9] **It is critically important that any advocacy and law reform efforts in NSW, as elsewhere, are informed by the specific threshold and practice of *doli incapax* in this jurisdiction.**

Contents

[3] United Nations Committee on the Rights of the Child (2019) *Concluding observations on the combined fifth and sixth periodic reports of* Australia, CRC/C/AUS/CO/5-6.
[4] United Nations Committee on the Rights of the Child (2019) *General comment No. 24 (2019) on children's rights in the child justice system CRC/C/GC/24.*
[5] Australian Government (2009) *Fourth Periodic Report. Convention on the Rights of the Child, UN Doc CRC/AUS/4.*
[6] Australian Government (2019*) Fifth and Sixth Periodic Report. Convention on the Rights of the Child, UN Doc CRC/AUS/5-6*
[7] T Crofts (2018) 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*', *Sydney Law Review*, vol 40(3): 339-366.
[8] For example, the discussion on problems with *doli incapax* e.g. reversal of onus of proof in practice, in Standing Council of Attorneys-General (2020) *Age of Criminal Responsibility Working Group Draft Report*, recommendation 3.
[9] C Cunneen (2020) *Arguments for raising the minimum age of criminal responsibility,* Comparative Youth Penalty Project Research Report, accessed 8 January 2025; Standing Council of Attorneys-General (2020) *Age of Criminal Responsibility Working Group Draft Report*, recommendation 3.

Rebutting doli incapax

The Australian Law Reform Commission's 1997 report *Seen and Heard: priority for children in the legal process* recommended that *doli incapax* should be should be applied consistently throughout Australia and established by legislation in all jurisdictions for children under 14 years.[10] Since then, there has been an authoritative High Court case affirming the common law principles of *doli incapax*[11], noting that the presumption has existed in the common law for centuries with some sources tracing it back to the seventh century.[12] Where jurisdictions have legislated in Australia, the thresholds are not as strong as the common law position.

There are currently four *doli incapax* thresholds in Australia[13] that require the prosecution to variously prove:

1. **Actual knowledge the offending conduct was 'seriously wrong'** (this is the common law test that continues to apply only in NSW, VIC and SA, as other jurisdictions have legislation that overrules the common law). This is arguably the strongest threshold. If the wording of the current legislation in other jurisdictions was adopted in NSW, it would reduce the protection for children.
2. **Actual knowledge the offending conduct was 'wrong'** (legislation - Cth, ACT, NT). There is considerable overlap with the first threshold and little guidance on the "marginal difference"[14] between them.
3. **Capacity to know the offending conduct should not occur** (legislation - QLD, TAS). This threshold:

   > *provides the smallest hurdle for prosecution to overcome because the evidence must demonstrate a 'capacity to know' that the offending conduct was wrong, rather than 'actual knowledge'; as such, children's general understanding of wrongness and whether they* should *know better is tested rather than whether they knew that they were actually offending*.[15]
4. **Capacity to know the offending conduct was 'seriously wrong'** (legislation – WA). This is the same wording as in the QLD and TAS legislation but "judicial commentary has interpreted WA's definition in a way that, arguably, creates a fourth, distinct threshold").[16]

Despite being another common law jurisdiction, articles from VIC indicate that the presumption is applied differently to NSW. In VIC, the onus has been described as more commonly located with the defence, who "bear the unofficial burden of providing a report (at their cost) to prove that the defendant is *doli incapax*",[17] meaning the presumption is reversed.

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[10] Australian Law Reform Commission (1997) *Seen and head: priority for children in the legal process*, Report 84, accessed 20 February 2025.
[11] *RP v The Queen* (2016) 259 CLR 641.
[12] T Crofts (2003) 'Doli incapax: why children deserve its protection', *Murdoch University Electronic Journal of Law*, vol 10(3).
[13] D Moritz & M Tuomi (2023) 'Four thresholds of *doli incapax* in Australia: Inconsistency or uniformity for children's criminal responsibility?', *Alternative Law Journal,* vol 48(1): 25-30, doi:10.1177/1037969X221138603.
[14] ibid, p 28.
[15] ibid, p 29.
[16] Ibid, p 30.
[17] K Fitz-Gibbon & W O'Brien (209) 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia), *International Journal for Crime Justice and Social Democracy*, vol 8(1): 18-33, doi:10.5204/ijcjsd.v8i1.1047, p 22.

The situation in NSW in practice

1. The onus of proof lies with the prosecution

Consistent with leading High Court case on *doli incapax*,[18] the onus is on the prosecution to rebut the presumption, in addition to proving each element of the offence. If no evidence or insufficient evidence is called by the prosecution to rebut the presumption beyond reasonable doubt, then the child will be found not guilty.[19] However, even though this is the strongest threshold currently available in Australia, in practice it is not consistent with government obligations under the Convention on the Rights of the Child and does not have the protective effect for children aged under 14 years that many understand it to have. This will be explored in more detail below.

2. No assessment of the child

A criminal proceeding against a child under 14 years usually *does not involve an assessment of the child*. In conceptualising *doli incapax* as a safeguard that recognises each child's evolving capacities, it is natural to imagine that there would routinely be a professional assessment of the capacity of the child either pre- or post-charge. However, most often the operation of *doli incapax* involves an assessment of the *evidence available to the court at hearing or trial* (and, to a lesser extent, evidence available to the police/prosecution pre-hearing, see further below) that is capable of rebutting *doli incapax*.

There is usually *no* expert opinion called (e.g. from a psychologist or psychiatrist) which has been specifically prepared for the court proceedings. This is because:

- The child's lawyer may often assess that it would *not* be in the child's best legal interests. The onus is not on the defence to prove anything - where there is no evidence (or insufficient evidence) about the child's understanding, the prosecution will fail. In addition, if the defence obtains an assessment and report at a time after the offence, there is "always a real risk that any subjective assessment is contaminated by the charging and court process and precludes any useful insight into the mind of the child at the time of the offence".[20] If the defence obtains a report, the prosecution is likely to request that the child also attends upon a psychiatrist or psychologist commissioned by the prosecution.[21]
- There is no power for the prosecution to compel an assessment for the child. The child defendant has the right to silence and cannot be forced to see a psychologist or psychiatrist.[22]
- There is no power for the court to compel or order an assessment for the child on *doli incapax*.[23]

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[18] *RP v The Queen* (2016) 259 CLR 641.
[19] M Johnston & R Khalilizadeh (2022) *Doli incapax - The Criminal Responsibility of Children*, accessed 31 January 2025.
[20] M Johnston & R Khalilizadeh (2022) *Doli incapax - The Criminal Responsibility of Children*, accessed 31 January 2025, p 17.
[21] ibid.
[22] ibid.
[23] Unlike in other jurisdictions, see, for example T Crofts (2016) 'Reforming the age of criminal responsibility', *South African Journal of Psychology*, vol 46(4): 436 –448, doi: 10.1177/0081246316640116.

The practice in NSW contrasts with VIC, where the defence cannot rely on the absence of evidence called for the prosecution and may be required to call positive evidence through an assessment about the child's understanding at the time of the office.[24]

The assessment of the evidence conducted by the court at the hearing or trial is directed to whether the evidence called rebuts the presumption; it is not an assessment of the child's needs and is not intended to, nor does it lead to, individualised care or referral, addressing the behaviours that brought the child to the attention of the police. Where there is an expert assessment of the child, it will be focused on the capacity of the child in relation to the *doli incapax* threshold and not directed at an assessment of the child's support and other needs. [25]

Confusion or misunderstanding about what an 'assessment' is, when it occurs, who conducts it, and what questions it is directed to, can result in confused ideas about what reform is needed. For example:

- it is hard to see how the suggestion that the "assessment as to whether a child is doli incapax must also occur at the earliest possible opportunity to avoid prolonged contact with the court system, and ideally before a child is placed on remand"[26] could be operationalised under the current system in NSW. What is the assessment that is referred to here? Is it the 'assessment' of the evidence available that, in practice, occurs at the hearing or trial? Is it the 'assessment' of the child - if so, who does this 'assessment', what tools do they use and how could it be done before the child is placed on remand (which can occur immediately after charging by police)?
- the argument that "were police better trained in identifying at the pre-charge stage whether a child is *doli incapax*, children would be less likely to be unduly remanded and criminalised"[27] does not adequately grapple with the point that police are not trained or equipped to make, nor is a police station a location suited to making, this 'assessment' for each child under 14 years. The police could be encouraged to refrain from charging a child under 14 years where they do not have sufficient evidence to rebut the presumption, however the discussion below suggests that relying on police discretion would continue to be an inadequate safeguard, especially for Aboriginal children.

An assessment of a child's needs (i.e. what support is needed to address multiple and complex trauma and disadvantage through treatment, early intervention and rehabilitation), rather than a narrow assessment of their criminal capacity, is best done *outside* of the criminal justice system and with the aim to provide appropriate supports.[28]

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[24] In the review of proposed legislation in QLD to raise the MACR, stakeholders also raised this issue of the reversal of the onus of proof in practice, see Community Support and Services Committee (2022) *Criminal law (raising the age of responsibility) Amendment Bill 2021*, Report No 16, 57th Parliament (Qld), p 19.

[25] Aboriginal Legal Service (NSW/ACT) Limited (2020) *Submission to the review of the age of criminal responsibility by the Council of Attorneys-General*, accessed 4 February 2025.

[26] Standing Council of Attorneys-General (2020) *Age of Criminal Responsibility Working Group Draft Report*, recommendation 3, p 8.

[27] K Fitz-Gibbon & W O'Brien (2019) 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia), *International Journal for Crime Justice and Social Democracy*, vol 8(1): 18-33, doi:10.5204/ijcjsd.v8i1.1047, p 25.

[28] T Crofts (2025) 'Rethinking the age of criminal responsibility' in T Crofts, L Kennefick & A Loughnan, *The Routledge international handbook of criminal responsibility*, Routledge, Taylor & Francis Group, London.

3. Doli is applied to criminal responsibility, not criminal prosecution

Doli incapax is applied only to *criminal responsibility* and determines whether a child is guilty/not guilty and whether they will be sentenced (which is decided by court at the hearing or trial stage). Although the presumption should be applied on a case-by-case basis by police to *criminal prosecution* in determining whether to commence criminal proceedings, in practice this is rarely the case.

As a result, in practice *doli incapax* does not protect children from criminalisation,[29] as it is not an impediment to police proceeding with charges. While waiting for their charges to be heard and the issue of *doli incapax* to be argued at a hearing or trial, a child under 14 years can be held in a Youth Justice Centre (a prison for children) on remand for extended periods of time or released with bail conditions and then arrested for breaching their bail and held in a Youth Justice Centre. After many months, they may then be found to be not criminally responsible due to doli incapax. This is contrary to the Australian Government reporting to the UN Committee on the Rights of the Child and is commonly incorrectly represented.

NSW Police routinely charge children without any evidence to rebut *doli incapax*, and do not consider whether there should be any prosecution at all. *In effect, they reverse the presumption at charge stage, assuming doli capax*. Police then use the extended time between charge and hearing/trial to attempt to access evidence to rebut the presumption, which may involve talking to school, parents, or subpoenaing reports. In some cases, police do not turn their minds to rebutting *doli incapax* until the date of the hearing. There may be instances of police choosing not to charge with no evidence to rebut *doli incapax*, however:

> *the high proportion of matters being withdrawn by the prosecution and the low rate of conviction suggests the presumption of doli incapax plays a key role in determining the outcome for young people aged under 14 at the time of the offence who are proceeded against to court.*[30]

The High Court decision of RP and subsequent cases affirmed the law of *doli incapax*. Despite this, it "has not translated into fewer police legal proceedings against children, even though these children are increasingly likely to have all their charges eventually withdrawn by police prosecutors".[31]

There is no incentive for police to delay charging in order to obtain evidence to rebut *doli incapax* before prosecuting a child under 14 years (and little disincentive not to do it e.g. malicious prosecution has a high threshold; and costs orders in court many months after charge are not a strong deterrent). Indeed, there is an incentive to charge early - to access the full range of controls and powers they can exercise over a child who is charged (for example, bail, remand, forensic procedures). A case study from the Aboriginal Legal Service of police

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

[30] K Freeman & N Donnelly (2024) 'The involvement of young people aged 10 to 13 years in the NSW criminal justice system', *Crime and Justice Statistics Bureau Brief*, NSW Bureau of Crime Statistics and Research, No 171, p 19. In 2023, of the 718 court appearances with known outcomes finalised in the NSW Children's Court involving defendants who were under 14 years of age at the time of the offence, **24.7% were found not guilty of any offences and 52.5% were resolved by all charges being withdrawn by the prosecution**. Only 19.6% had at least one proven offence. In contrast in the NSW Local Court in FY 23/24, 2.3% were found not guilty of all charges and 6.9% were resolved by all charges being withdrawn by the prosecution - Source: NSW Bureau of Crime Statistics and Research.

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

visiting a child on his 10th birthday to interview him to 'create evidence' to rebut the presumption of *doli incapax*[32] for future charges reinforces the police focus on getting evidence/conviction rather than careful consideration of the capacity of the child in the context of the 'protection' or 'safeguard' of *doli incapax*.

4. The experience of a '*doli incapax* child' is mostly no different to a '*doli capax* child'

For a child aged 10-14 charged with an offence, the presumption of *doli incapax* does *not* usually change their pathway through the criminal justice system until the final court hearing. In fact, defending a charge on the basis of *doli incapax* usually takes some months (and can take over six months or more) before being resolved; whereas having a matter finalised with a plea of guilty, admission of guilt or diversion can often be done in no more than six weeks. In some cases, a diversion option (caution or youth justice conference under the *Young Offenders Act 1997* (NSW)) can be applied without the need to attend court at all. This means that, in reality, relying on the 'protection' of *doli incapax* in fact usually lengthens the time that children are subject to bail, required to attend court appearances and are subject to the criminal justice system.

It is not widely understood that children aged 10-14 years are subject to largely the same bail laws as adults,[33] as well as police powers and forensic procedures.[34] They are also subject to legislation around the detention of children in Youth Justice Centres.[35]

To illustrate, this is the experience of the child who has the 'protection' of *doli incapax* in NSW. The child can be:

- arrested, searched (including strip searched), handcuffed, put in a police vehicle, detained for purposes of investigation, put in police cells in general areas used for adults (although some protections apply, like having a support person and access to legal advice), officially questioned by police, granted or refused bail by police
- transported to Youth Justice Centres in trucks, strip searched on entry, put in a cell, held in custody on remand, subject to separation, segregation and confinement, with certain uses of force (e.g. to search the child where they refuse to submit) and instruments of restraint (handcuffs, ankle cuffs, flexi cuffs, restraining belts, riot shields) in Youth Justice Centres
- appear before a court, be represented by a lawyer and be expected to listen to and understand legal advice, expected to instruct their lawyer on how to proceed in their criminal matter (the interaction with the court and the lawyer is often done by audio visual link or a telephone call from a police station or Youth Justice Centre, not in person)

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[32] Case Study of 'Jake' - Aboriginal Legal Service (NSW/ACT) Limited (2020) *Submission to the review of the age of criminal responsibility by the Council of Attorneys-General*, accessed 4 February 2025, p 7. This is not an isolated incident in the author's practice experience working as a criminal lawyer for children in NSW.
[33] C Akthar (2020) *Submission to the review of the age of criminal responsibility by the Council of Attorneys-General*, Submission 82, p 13.
[34] *Bail Act 2013* (NSW), *Law Enforcement (Powers and Responsibilities) Act 2022* (NSW), *Crimes (Forensic Procedures) Act 2000* (NSW).
[35] *Children (Detention Centres) Act 1987* (NSW), *Children (Criminal Proceedings) Act 1987* (NSW) and corresponding regulations.

- required to attend a police station and provide DNA, fingerprints and photographs to police by order of Magistrate, (which must be destroyed if the child is acquitted unless an investigation into, or a proceeding against the person for, another offence is pending)
- placed on bail which may include onerous bail conditions like residence, curfew, bail compliance checks (e.g. police coming to the residence at night, waking or disturbing the child and their family), non-association, place restrictions, reporting to police, attending school, reporting to Youth Justice offices/staff, with possible arrest and remand for non-compliance
- subject to use of force by police and Youth Justice officers in the exercise of powers listed above.

Doli incapax is *not* diversion. In reality, it more fully entrenches the child in the criminal justice system for longer, as diversionary options must be resisted for *doli incapax* to be argued.

5. Other problems with *doli incapax* in practice in NSW

Prosecutors frequently decline to lead any evidence to rebut *doli incapax*, especially in summary proceedings. Frequently, when evidence is led by the prosecution, it is piecemeal evidence which, in combination, aims to rebut *doli incapax*. This may include expert evidence produced for another purpose (e.g. job capacity assessment), evidence of carers or teachers about the child's home or school life, evidence about past criminal justice system interactions (e.g. contact with police, evidence of diversions or previous charges), statements made by the child to police (e.g. in a police interview).[36] Evidence about children that can be highly prejudicial (e.g. of criminal history or court alternatives, opinions from parents, teachers, other professionals about the child's behavioural issues) is considered by the court in a hearing or trial about guilt (i.e. not only on sentence). This highly prejudicial evidence would usually be inadmissible in a hearing or trial for an adult or a child over 14 years.

The requirement to rebut *doli incapax*, and the type of evidence obtained, can also damage a child's relationship with their key supports, when statements from school teachers, school counsellors or family members are part of the police case against the child.[37]

Doli incapax is inconsistently identified and applied across NSW arising from "difficulty in applying the presumption, a lack of understanding as to its content and even a lack of awareness as to its existence",[38] resulting in inequitable application or, in some cases, the presumption not being applied at all. This may particularly be the case in regions which are often not serviced by specialist children's courts or practitioners.[39]

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[36] T Crofts (2018) 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*', *Sydney Law Review*, vol 40(3): 339-366.

[37] Aboriginal Legal Service (NSW/ACT) Limited (2020) *Submission to the review of the age of criminal responsibility by the Council of Attorneys-General*, accessed 4 February 2025, p 20.

[38] ibid, p 18.

[39] National Legal Aid (2020) *Council of Attorneys-General - Age of Criminal Responsibility Working Group Review Submission*, accessed 20 February 2025. However, see J Gu (2025) 'Did a High Court decision on doli incapax shift court outcomes for 10-13 year olds?', *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, No 268.

The child who is *doli incapax* is required to provide instructions to their solicitor to either waive or insist upon *doli incapax*. Significant incentives for a child to waive it include: access to diversion or a 'minor' sentence, removal of bail restrictions, release from remand, and release from attendance at court. Those decisions by the child may be based on a false perception that there are 'no consequences' for accessing diversion or minor sentences. Diversions under the *Young Offenders Act 1997* (NSW) (caution and youth justice conference) have criminal consequences for children who are *doli incapax* (e.g. disclosed as criminal history for jobs including teacher, police officer, JP, prison officer, teacher's aide; disclosed in working with children check applications and NDIS worker checks; used to rebut *doli incapax* if the child appears before a court for an offence).[40] These are not well understood, including by defence solicitors.

Serious concern of seeing *doli incapax* as 'individualised justice'

There are researchers and advocates framing *doli incapax* as a form of individualised and trauma-informed justice, for example:

> *For children to meet the legal standard and have the capacity to know their behaviour is wrong, they need to have neurological, emotional and psychological maturity to form the knowledge and understanding of the criminal nature of their behaviour. The principle of doli incapax sits comfortably with both #raisetheage and trauma-informed approaches. Rather than setting a fixed age of criminal responsibility—particularly for children whose neurological and emotional development has been negatively impacted by ACEs (adverse childhood experiences) and the resulting trauma—the most trauma-informed approach would be that children (like adults) receive individualised justice… Indeed, the principle of doli incapax has been justified by the Australian Government as providing a 'gradual transition to full criminal responsibility'…*
>
> *[Doli incapax] provides a known framework for how we might 'raise the age' in practice. Doli incapax has been identified as a protective safeguard that prevents unjust convictions, incarceration and criminalisation (Fitz-Gibbon & O'Brien, 2019, p. 30).*[41]

Advocating that a "truly trauma-informed strategy to raise the age would not focus on raising the age to 12 or 14 years, or even 16 years…[t]he trauma evidence supports the broader implementation of the doctrine of doli incapax" [42] is a serious concern in the current context. There has been a retreat of support across Australian jurisdictions for raising the MACR and, for the reasons argued here, *doli incapax* is neither a trauma-informed substitute nor 'protective safeguard' for incarceration and criminalisation of children under 14 years in NSW.

'Individualised justice' relies on police discretion and "[t]he way that police discretion is wielded determines the pathway into and through the criminal justice system, affecting an individual's criminal record, access to diversionary options and likelihood of imprisonment."[43]

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[40] *Young Offenders Act 1997* (NSW), s 68.
[41] KJ McLachlan (2023) 'Using a trauma-informed practice framework to operationalise the #raisetheage campaign' *Current Issues in Criminal Justice*, 36(4): 433–450, doi:10.1080/10345329.2023.2196099, p 437.
[42] ibid, p 445.
[43] ibid.

We know that the majority of children who enter the criminal justice system in the age group relevant to *doli incapax* (10-13 years) are Aboriginal and Torres Strait Islander children,[44] for whom an 'individualised approach' and police and court discretion cannot be separated from the institutional racism in NSW that means that simply because of their Aboriginality they:[45]

- are less likely to be diverted from court by police
- are more likely to be arrested rather than receive a court attendance notice
- are more likely to be bail refused and remanded to custody
- are more likely to be sentenced to custody
- have not benefitted from the overall decline in youth prison numbers.

Any trauma informed approach that "would leverage doli incapax and focus on the developmental age of the child rather than the chronological age"[46] should only be considered in conjunction with raising MACR to at least 14 years in NSW and the removal of the problematic discretion of police and courts for children under 14 years.

Implications for advocacy and law reform

- There is very little research on how *doli incapax* operates in practice in Australian children's courts.
- Any discussion about law reform around MACR and *doli incapax* in NSW must be informed by local law and practice. Discussion from other Australian jurisdictions should be treated with caution given the different laws and practices.
- *Doli incapax* does not lead to an assessment of the child's support needs in NSW and this kind of assessment is best done outside the criminal justice system.
- *Doli incapax* does not act as a protection or safeguard from the full force of the law or avoid the negative impacts of the criminal justice system in NSW as it is not a bar to criminal prosecution.
- *Doli incapax* is not individualised justice and does not overcome the known problems with the exercise of police and court discretion; any trauma informed approach that focuses on the developmental age of the child rather than the chronological age should only be considered in conjunction with raising MACR to at least 14 years and the removal of the problematic discretion of police and courts for children under 14 years.

[44] More than half (53%) of all police proceedings against children aged 10–13 in 2022/23 were for Aboriginal children, including three quarters of proceedings to court (76%) and 44% of diversions for this age group – P MacGillivray, A Gibson, R Reeve & R McCausland (forthcoming) A System Review & Summary of an Evidence-based Approach to the Design and Delivery of Therapeutic Pathways for Children, report prepared as part of Therapeutic Pathways for Children, a partnership initiative between the Aboriginal Legal Service (NSW/ACT) Ltd and the NSW Department of Communities and Justice, p 41.

[45] C Cunneen, S Russell & M Schwartz (2021), 'Principles in diversion of Aboriginal and Torres Strait Islander young people from the criminal jurisdiction', *Current Issues in Criminal Justice*, vol 33(2): 170-190, doi:10.1080/10345329.2020.1813386, p 171, p 173.

[46] KJ McLachlan (2023) 'Using a trauma-informed practice framework to operationalise the #raisetheage campaign' *Current Issues in Criminal Justice*, 36(4): 433–450, doi:10.1080/10345329.2023.2196099, p 446.