

Sentencing Younger Children's Offending in Victoria

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Acknowledgement of Country

The Sentencing Advisory Council acknowledges the Traditional Owners of the lands and waters on which we live and work, and we pay our respects to them, their culture and their Elders past and present.

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Aims

The dual aims of this report are to investigate cases sentenced in Victoria involving:

- offences by children **aged 10 to 11**, to understand the types of cases that will no longer have a sentencing response once the age of criminal responsibility has been raised to 12 years old, and to inform the development of an alternative services model for those children; and
- offences by children **aged 12** and offences by children **aged 13**, to better understand offending by, and sentencing of, those who will now be in the youngest age group that can be sentenced in Victoria, and to consider how the provisions of the *Youth Justice Act 2024* (Vic) might operate in responding to their offending.

Method

We analysed court data for all cases sentenced in Victoria's criminal courts between 1 July 2011 and 30 June 2021 (10 years) where at least one charge in the case was committed when the person was aged 10 to 11, aged 12 or aged 13. The reference period ended on 30 June 2021 because later data was not available when the analysis for this project was undertaken due to some unintended consequences of the *Spent Convictions Act 2021* (Vic).

For each case, we examined children's age and gender, their offence types, their sentencing outcomes, and the time between the earliest offence in the case and sentencing. Our analysis included cases finalised in the Magistrates' Court and County Court; however, our primary focus was cases finalised in the Children's Court, where 98% of cases involving offences by younger children were sentenced or diverted. No offences by children aged 10 to 13 were sentenced in the Supreme Court in the 10-year period.

Key findings

The findings in this report are consistent with other research on younger children (aged 10 to 13) who offend. Sentenced younger children are more likely than sentenced older children to be male, most sentenced younger children are aged 13 (not younger), and Aboriginal children and children living in rural and regional Victoria are disproportionately represented among sentenced younger children.

What the findings in this report also show are that younger children make up a very small proportion of sentenced offenders (0.3%); for most children aged 10 to 13, more than half a year passes between their earliest offence and sentencing; and the group is not homogenous – 13-year-olds offend more prolifically and more seriously than 12-year-olds do. In terms of sentencing outcomes, only a very small fraction of younger children who offend ever receive a custodial sentence (0.3% of alleged offenders, and 2.6% of sentenced younger children), with the vast majority receiving less severe outcomes, such as diversion and good behaviour bonds.

This report also identified 55 cases involving offending by younger children that were sentenced in the adult jurisdiction (Magistrates' Court and County Court) years, if not decades, after the offending. In many of those cases, the court commented on the difficulty of sentencing an adult for offences committed aged 10 to 13.

Across Australia, the approach to problematic behaviour by the youngest children – those who offend aged under 14 – has been of significant interest in recent years. In the Victorian context, a suite of reforms in the new *Youth Justice Act 2024* (Vic) (the *Youth Justice Act*)¹ substantially changes the approach to this cohort of children.

Reforms in the *Youth Justice Act* include:

- raising the age of criminal responsibility from 10 (where it has remained for decades) to 12 (section 10), with an alternative services model under development for children aged 10 and aged 11; and
- reshaping the approach to children aged 12 or aged 13, including:
 - codifying the *doli incapax* test (for criminal capacity), which will continue to apply to children aged 12 or aged 13 (section 11);
 - setting out the matters to which police must have regard in deciding whether to charge a child aged 12 or aged 13 (section 12) and providing for the review of such charges by the prosecutor if a summary proceeding is commenced in the Children’s Court (section 14);
 - setting out a hierarchy of options, including pre-court diversionary options that do not lead to criminal prosecution (section 92);
 - introducing *early diversion group conferences* (sections 116–135) a ‘newly established process which aims to divert eligible children out of the criminal justice system before charges are filed’;² and
 - creating a mandatory obligation for police to refer a child aged under 14 to an early diversion group conference if satisfied that there is sufficient evidence to charge the child, and other diversionary responses further up the hierarchy (such as a police caution) are ‘clearly inappropriate in the circumstances’ (section 117).

This report is intended to contribute to the evidence base that informs the implementation of the above changes. The dual aims of this report are to:

- examine cases involving offending by children aged 10 to 11, to better understand the offending behaviour that will no longer have a sentencing response once the age of criminal responsibility is raised to 12 years old. The findings in relation to children aged 10 to 11 are intended to assist with the continued implementation of the alternative services model; and

1. *Youth Justice Act 2024* (Vic). The provisions of the Act have different commencement dates. Some provisions, including provisions relating to raising the age of criminal responsibility (section 10 and chapter 19), the presumption against criminal capacity and the codified test for rebutting the presumption (section 11), commence on 30 September 2025 unless proclaimed earlier: *Youth Justice Act 2024* (Vic) s 2(2). Most provisions do not commence until 30 September 2026 unless proclaimed earlier: *Youth Justice Act 2024* (Vic) s 2(3). In this report, the provisions of the *Youth Justice Act* are sometimes discussed in the present tense. However, these provisions have not yet come into force and will only apply once the Act has commenced.

2. Explanatory Memorandum, *Youth Justice Bill 2024* (Vic) 12. On the advantages of pre-prosecution group conferencing, see our earlier report: Sentencing Advisory Council, ‘*Crossover Kids*’: *Vulnerable Children in the Youth Justice System – Report 3: Sentencing Children Who Have Experienced Trauma* (2020) 41–43.

- examine cases involving offending by children aged 12 and aged 13, who, once section 10 of the *Youth Justice Act* commences, will comprise the youngest age group eligible to be charged, prosecuted and, if found guilty, sentenced in Victoria. Understanding the profiles of children aged 12 and aged 13 is intended to inform the implementation of the new *Youth Justice Act*, and act as a baseline for monitoring the Act's operation.

This report discusses each key age group separately, examining all cases in Victoria involving children who offended aged 10 to 11, aged 12 or aged 13 and were sentenced or diverted in the 10 years from 1 July 2011 to 30 June 2021. The report includes data from all courts – primarily the Children's Court but also some cases in the adult jurisdiction (Magistrates' Court and County Court, with no Supreme Court cases involving offences by children in these age groups).³ The reference period ended on 30 June 2021 because the Council was unable to access certain court data for a period of time (as an unintended consequence of the *Spent Convictions Act 2021* (Vic)), and as a result later data was not available when the analysis for this project was undertaken.

The report includes people who offended aged 10 to 13 but were sentenced as adults, sometimes decades after the offending. In this report, children aged 10 to 11, aged 12 or aged 13 at the time of their offending are collectively referred to as *younger children*, reflecting their status as the youngest children in the justice system during the 10-year reference period. At times we discuss findings for younger children as one group to facilitate comparison with other research, which predominantly groups children aged 10 to 13 together.

The Council has published many reports about children's interaction with the justice system, including examinations of children's sentencing outcomes,⁴ their reoffending rates,⁵ their interaction with the child protection system,⁶ and their remand experiences.⁷ On each occasion, our focus has been *age at the time of sentencing*.

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3. Most of the data used in this report was extracted from the Courtlink Case Management System (Children's Court and Magistrates' Court) and the Higher Courts Conviction Returns database (County Court and Supreme Court). Offence dates for the County Court and Supreme Court were obtained through a combination of additional data requests as well as a review of sentencing remarks, while offence dates for the Children's Court and Magistrates' Court were already present in Courtlink. Children's age at offence was then determined by calculating the difference between the relevant offence date or dates and the child's date of birth.
 4. Sentencing Advisory Council, *Sentencing Children and Young People in Victoria* (2012); Sentencing Advisory Council, *Sentencing Children in Victoria: Data Update Report* (2016).
 5. Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016).
 6. Sentencing Advisory Council, 'Crossover Kids': *Vulnerable Children in the Youth Justice System – Report 1: Children Who Are Known to Child Protection Among Sentenced and Diverted Children in the Victorian Children's Court* (2019); Sentencing Advisory Council, 'Crossover Kids': *Vulnerable Children in the Youth Justice System – Report 2: Children at the Intersection of Child Protection and Youth Justice Across Victoria* (2020); Sentencing Advisory Council (2020), above n 2.
 7. Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes* (2020).

However, we know that people sometimes are not sentenced until considerable time has passed after their offending. This can be for numerous reasons: the time to identify and charge younger children; the time to obtain legal representation and ensure other necessary legal safeguards are put in place; the time to consolidate cases when a child has multiple charges; difficulties in obtaining instructions from children, particularly those who are not living with their family of origin and/or who are experiencing instability in their home life and schooling; and the time to determine whether the child has criminal capacity (that is, whether *doli incapax* applies – see further below).

In the context of sex offences, sometimes reporting does not occur until years, or decades, after the offending. As we have previously observed, '[t]he nature and dynamics of sexual offending against children mean that the passage of considerable time between offending and its disclosure is not uncommon'.⁸ For example, the Royal Commission into Institutional Responses to Child Sexual Abuse found that victim-survivors took 23.9 years on average to disclose the abuse.⁹ From a sentencing perspective, the passage of time between offending and prosecution can make the sentencing exercise particularly difficult, especially in the handful of cases where children who offended aged 10 to 13 were not sentenced until decades after their offending, requiring their case to be heard in the adult jurisdiction. Focusing on age at sentencing risks omitting people such as these from the study of younger children's offending.

In this report, therefore, we have changed our usual focus from age at *sentencing* to age at *offence*. By focusing on the age at which children committed their offence, we have been able to produce one of the first reports in Victoria to provide a comprehensive overview of both offending by and sentencing of the youngest children in the Victorian justice system.

As a caveat to the data discussed in this report, younger children in the criminal justice system are mostly dealt with by police (for example, by police cautions), with only around 1 in 10 ultimately sentenced or diverted in court.¹⁰ This report examines the 1 in 10 cases involving offences by younger children that are prosecuted and sentenced (or diverted in court). For children who offend aged 10 to 11, understanding the nature and volume of sentenced offending will assist in designing responses to these behaviours now that the age of criminal responsibility has been raised. Similarly, the new *Youth Justice Act* makes considerable changes to the way in which children aged 12

8. Sentencing Advisory Council, *Sentencing Older Offenders in Victoria* (2021) 14.

9. Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report, Volume 4: Identifying and Disclosing Child Sexual Abuse* (2017) 9, 16.

10. Crime Statistics Agency data shows that only 9% of alleged offenders aged 10 to 13 in the six financial years to 30 June 2023 were dealt with through the sentencing process (including diversion): Sara Morris et al., *Pathways of 10 to 13 Year Old Offenders Through the Victorian Criminal Justice System*, In Fact no. 12 (2023) 1.

and aged 13 will be dealt with for alleged criminal behaviour. Examining the sentenced offending of children aged 12 and aged 13 in the period before the new *Youth Justice Act* commences operation provides an important baseline for the future examination of the effectiveness of the new measures for the youngest children who are eligible to be sentenced under the new Act.

Legal framework for sentencing younger children

Most children who face court for offending behaviour are sentenced in the Children's Court. The parameters around sentencing younger children include the following:

- **The minimum age of criminal responsibility:** during the 10-year reference period, the age of criminal responsibility was 10 years old,¹¹ with children aged 10 and older able to be prosecuted for their behaviour, subject to the principle of *doli incapax*. The age of criminal responsibility has since been raised to 12 years old.¹² Once the provision raising the age commences,¹³ children younger than 12 will no longer be able to be prosecuted.
- **Doli incapax:** *doli incapax* is a legal principle that translates as 'incapable of deceit'. Children below the age of criminal responsibility (previously 10, now 12) are deemed to be *doli incapax*; in other words, they are seen as incapable of forming the necessary criminal intent and cannot be prosecuted for their actions. Children at or above the age of criminal responsibility but aged under 14 are presumed to be *doli incapax*. That is, they are presumed to be incapable of crime unless the prosecution successfully rebuts the presumption by pointing 'to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct', as opposed to the child being naughty or mischievous.¹⁴ Particularly relevant to the youngest children in the youth justice system is the question of morality, which 'directs attention to the child's education and the environment in which the child has been raised' as well as 'the intellectual and moral development of the particular child'.¹⁵

11. Children aged under 10 are, at law, not criminally responsible for their behaviour and are ineligible for prosecution: *Children, Youth and Families Act 2005* (Vic) ss 3(1) (definition of 'child'), 344.

12. *Youth Justice Act 2024* (Vic) s 10.

13. Section 10 of the *Youth Justice Act 2024* (Vic) (which raises the age of criminal responsibility to 12) and chapter 19.1 of the Act (which sets out transitional provisions relating to the age of criminal responsibility) commence on 30 September 2025 unless proclaimed earlier: *Youth Justice Act 2024* (Vic) s 2(2).

14. *RP v The Queen* [2016] HCA 53, [8]–[9]. See further Peter Power, 'Chapter 10: Criminal – Procedure', *Children's Court Research Materials* (2024) 10.81–10.87. The test for *doli incapax* has now been codified: *Youth Justice Act 2024* (Vic) s 11.

15. *RP v The Queen* [2016] HCA 53 [8]–[9], [12].

- **Maximum age of Children's Court jurisdiction:**

to be sentenced as a 'child' in the Children's Court, a person must be aged under 18 at the time of an alleged offence and aged under 19 when the proceeding for the offence is commenced in the Children's Court.¹⁶ If the child turns 19 before the proceeding is commenced, they 'age out' of the Children's Court jurisdiction, and their matter must be heard in the adult jurisdiction (Magistrates' Court, County Court or Supreme Court).

- **Indictable (more serious) offences:** the Children's

Court has jurisdiction over indictable (more serious) offences committed by children, unless:

- the offence is murder, attempted murder, manslaughter, child homicide, arson causing death, homicide by firearm or culpable driving causing death, which must be dealt with in the Supreme Court or the County Court;¹⁷ or
- the child objects; or
- the Children's Court considers that exceptional circumstances make it unsuitable for the Children's Court to hear the charges.¹⁸

- **Alternative pathway for children who exhibit sexually abusive behaviour:**

therapeutic treatment orders are orders made in the Family Division of the Children's Court for children who exhibit sexually abusive behaviour, requiring the child to participate in a therapeutic treatment program.¹⁹ If the Family Division makes a therapeutic treatment order, the Criminal Division must adjourn the criminal proceedings to enable the child to complete the program (providing that the Criminal Division has 'not yet made a finding in the criminal proceedings').²⁰

'The rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong ... the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence.'

RP v The Queen [2016] HCA 53, [8]–[9]

16. *Children, Youth and Families Act 2005* (Vic) s 3(1) (retained in the new *Youth Justice Act 2024* (Vic) s 4).

17. *Children, Youth and Families Act 2005* (Vic) ss 356, 516(1)(b)–(c), reflected in section 156 of the *Youth Justice Act 2024* (Vic).

18. *Children, Youth and Families Act 2005* (Vic) ss 356(3)(a)–(b). Additional considerations for category A and B serious youth offences apply only to offences by children aged 16 or older, not to children aged 10 to 13: ss 356(6), (8).

19. *Children, Youth and Families Act 2005* (Vic) s 249(1). See also Trish McCluskey et al., 'The Victorian Therapeutic Treatment Board: Victoria's Response to Children and Young People Who Engage in Sexually Abusive Behaviours' (Presentation, The Australasian Institute of Judicial Administration, Sydney, 2011). The therapeutic treatment program originally applied to children up to the age of 14, but was expanded to include children up to the age of 17 from 29 March 2019. Amendments to the *Children, Youth and Families Act 2005* (Vic) came into effect in March 2019 extending the availability of therapeutic treatment orders to people aged 15 to 17: *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018* (Vic) ss 3–13. During most of the reference period for this report, the scheme applied only to children aged 10 to 14.

20. *Children, Youth and Families Act 2005* (Vic) s 352, retained in *Youth Justice Act 2024* (Vic) s 185.

Once 'satisfied that the child has attended and participated in the therapeutic treatment program', the Criminal Division must 'discharge the child without any further hearing of the criminal proceedings'.²¹ Therapeutic treatment orders were available for children up to the age of 14 before 29 March 2019 and are available for children up to the age of 17 thereafter.²² The Children's Court may also refer a matter to the Secretary to the Department of Families, Fairness and Housing for investigation.²³

- **Criminal record:** offences by children aged 10 to 13 usually do not appear on their criminal record – a conviction imposed on a person for an offence committed aged under 15 is considered 'spent'.²⁴ However, 'if a court imposes a penalty with a condition attached for the conviction', the offender must complete all conditions attached to the penalty before the conviction becomes spent, regardless of their age at the time of offending.²⁵

21. *Children, Youth and Families Act 2005* (Vic) s 354(4), retained in *Youth Justice Act 2024* (Vic) s 187(5).

22. *Children, Youth and Families Act 2005* (Vic) s 3(1)(ad) (definition of *child*), inserted by *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018* (Vic) s 3(b).

23. The power of the Children's Court to refer a matter to the Secretary to the Department of Families, Fairness and Housing for an application for a therapeutic treatment order is now provided for under section 182 of the *Youth Justice Act 2024* (Vic).

24. *Spent Convictions Act 2021* (Vic) s 7(1)(c). This applies retrospectively: s 6.

25. *Spent Convictions Act 2021* (Vic) s 7(2).

What do we know about younger children in the justice system?

There is a significant body of research in Australia about children who are alleged to have committed criminal offences. Most of that research, however, examines *all* children (aged 10 to 17). There is relatively limited research that exclusively focuses on – or even separately examines – the offending of younger children (those aged 10 to 13). Given the policy significance of this distinct age group, it is important to analyse younger children separately, as done in our previous research on youth reoffending and on ‘crossover children’ (children with dual justice system and child protection involvement).²⁶

Recent research by us and others that has focused on the youngest children in the justice system suggests that:

- younger children are **more likely to be a victim** of a serious offence (such as murder, an assault resulting in hospitalisation, or a sexual assault) than to be a perpetrator of such an offence;²⁷
- when younger children do offend, their most common offence types are **property offences** (such as theft) and **offences against the person**. For example, a study by Baidawi et al. of 1,369 children aged 10 to 13 who allegedly offended in 2017 (272 of whom ultimately came before the Children’s Court) found that property offences and offences against the person constituted 59.6% and 28.9%, respectively, of their alleged offences;²⁸

26. Sentencing Advisory Council (2016), above n 5; Sentencing Advisory Council (2019), above n 6; Sentencing Advisory Council (2020), above n 6; Sentencing Advisory Council (2020), above n 2.

27. The Australian Bureau of Statistics reported that, in 2018–19, about 5,300 children aged between 10 and 14 were victims of a sexual assault, and a further approximately 6,300 were victims of another type of physical assault: Australian Bureau of Statistics, *Data Tables: Recorded Crime – Victims, Australia, 2018* (abs.gov.au, 2018) Table 7. The Australian Institute of Health and Welfare also highlighted this victimisation of younger children, including their prevalence as victims in the context of family violence: Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story* (2019) 73–80; Australian Institute of Health and Welfare, *Australia’s Children* (2020) 307–311. Comparatively, the Australian Bureau of Statistics recorded around 2,500 younger children as committing those same offences (sexual assaults and other physical assaults) in Australia in 2018–19: Australian Bureau of Statistics, *Data Tables: Recorded Crime – Offenders, Australia, 2018–19* (abs.gov.au, 2019) Table 21.

28. Susan Baidawi et al., *Children Aged 10 to 13 in the Justice System: Characteristics, Alleged Offending and Legal Outcomes: Report to the Criminology Research Advisory Council* (2024) 16–17. These findings are broadly consistent with the findings of a recent New South Wales study: Karen Freeman and Neil Donnelly, *The Involvement of Young People Aged 10 to 13 Years in the NSW Criminal Justice System*, Bureau Brief no. 171 (2024) 8–9. In Queensland, the most common offence categories for sentenced children aged 10 to 13 were theft (52.4% of cases), unlawful entry (burglary) (35.7%), property and environment offences (28.4%) and public order offences (28.1%), with a lower proportion of children sentenced for offences against the person (15.0% were sentenced for acts intended to cause injury): Laura Hilderley et al., *Sentencing of Offences Committed by Children Aged Under 14 Years in Queensland*, Research Brief no. 2 (2023) 12. These findings may indicate that younger children in Queensland are sentenced for offences that might more readily receive a police response, such as a caution, in Victoria, resulting in a higher proportion of sentenced younger children with property offences in Queensland than in Victoria.

- younger children are **rarely perpetrators of the most serious crimes**. A recent study by Flannery et al. found that in the five years to 30 June 2022, 107 Victorian children aged 10 to 13 committed ‘serious youth offences’.²⁹ Further, in the past 25 years there hasn’t been a single child in Victoria sentenced for a murder or manslaughter charge committed when the child was aged under 14 (or at age 14 for that matter);
- younger children who offend are a particularly vulnerable group, for example, most are **known to child protection**. We previously found that 54% of children first sentenced aged 10 to 13 were the subject of at least one child protection report, 33% had experienced out-of-home care, and 26% had experienced residential care;³⁰
- many younger children who offend have **experienced or witnessed family violence**. The Baidawi et al. study of 1,369 alleged younger offenders found that 659 children (48.1%) had a prior intervention order in which they were the protected person.³¹ And our study of children with dual child protection and justice involvement found that over 80% of children with dual involvement who were first sentenced or diverted aged 10 to 13 were the subject of a report raising concerns about physical harm to them;³²
- **Aboriginal children are overrepresented** among younger children in the justice system.³³ For example, in Freeman and Donnelly’s recent study of New South Wales children aged 10 to 13 with legal proceedings against them by the New South Wales police force, the proportion of Aboriginal children among those with finalised proceedings in 2023 was six times higher than the proportion of Aboriginal children in the general population;³⁴
- **children from rural and regional Victoria are overrepresented** among justice-involved younger children. For instance, we previously found that 5% of children sentenced in metropolitan courts were aged 10 to 13, but that increased to 15% of children sentenced in regional courts;³⁵
- most younger children who offend **are 13 years old** when they commit their offence. For instance, the Baidawi et al. study of 1,369 alleged younger offenders

29. Tali Flannery et al., *Characteristics of Alleged Offending by 10 to 13 Year Olds*, In Fact no. 11 (2023) 2. Most of the alleged serious youth offenders were recorded for sex offences.

30. Sentencing Advisory Council (2019), above n 6, xxiv, 87–90; Sentencing Advisory Council (2020), above n 6, 36. See also Australian Human Rights Commission, *Review of the Age of Criminal Responsibility: Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group* (2020) 7; Chris Cunneen et al., ‘Juvenile Justice, Young People and Human Rights in Australia’ (2016) 28(2) *Current Issues in Criminal Justice* 173, 174.

31. Baidawi et al. (2024), above n 28, 18. Of these children, 207 had also been the respondent in a prior intervention order (but in their *first* intervention order, almost all those children were the protected person).

32. Sentencing Advisory Council (2020), above n 6, 33, 36.

33. See, for example, *Ibid* 31; Freeman and Donnelly (2024), above n 28, 10–11; Hilderley et al. (2023), above n 28, 5; Baidawi et al. (2024), above n 28, 11, 14, 53–54.

34. Freeman and Donnelly (2024), above n 28, 10.

35. Sentencing Advisory Council (2020), above n 6, 72. See also Freeman and Donnelly (2024), above n 28, 12.

found that 63.3% were aged 13.³⁶ Sentenced offending by children aged under 13 is particularly rare;

- like most criminal offending, offending by younger children mostly involves **males**. For example, the Baidawi et al. study of 1,369 alleged younger offenders found that 70.9% were male;³⁷
- many children who offend have one or more **diagnosable psychiatric disorders, intellectual disabilities and/or acquired brain injuries**, often in combination, and these are often undiagnosed and/or untreated. For example, Baidawi and Piquero's 2021 study of children with dual youth justice and child protection involvement found that almost 'one-half ... had a neurodisability' and that this group tended to be younger at first offence than dual-involved children without a neurodisability;³⁸
- many younger children who offend are **disengaged from education**. For instance, the Baidawi et al. study of 1,369 alleged younger offenders found that 48.8% of children aged 10 to 13 undergoing *doli incapax* assessments were not engaged in education (with one-quarter of children not enrolled);³⁹
- most younger children with alleged offences **don't go to court**. Crime Statistics Agency data shows that only 9% of alleged offenders aged 10 to 13 in the six financial years to 30 June 2023 were dealt with through the sentencing process (including Children's Court youth diversion⁴⁰) (Figure 1, page 12). And the Baidawi et al. study of 1,369 alleged younger offenders found that only 19.8% had their matter finalised in court (including cases where the matter was struck out or dismissed and cases that resulted in youth diversion);⁴¹
- for younger children who do have their charges finalised in court, often a **substantial amount of time passes between their offending and sentencing**. For example, the Baidawi et al. study examined 272 children aged 10 to 13 who appeared in

36. Baidawi et al. (2024), above n 28, 15. See also Liam Quinn et al., *Trends in Alleged Offending by 10 to 13 Year Olds*, In Fact no. 10 (2023) 1 (Figure 1). Recent research in other jurisdictions found similar proportions of 13-year-olds among justice-involved younger children, with 67.4% in Queensland and 61.1% in New South Wales: Hilderley et al. (2023), above n 28, 9; Freeman and Donnelly (2024), above n 28, 10.

37. Baidawi et al. (2024), above n 28, 14–15. Similarly, Hilderley et al. found that 73.1% of sentenced younger children in Queensland were boys: Hilderley et al. (2023), above n 28, 10. And Freeman and Donnelly found that of New South Wales children legally proceeded against by police, boys outnumbered girls in each age group, with the proportion of boys decreasing as age increased (for example, 85.9% of 10-year-old children were boys, compared with 63.4% of children aged 13): Freeman and Donnelly (2024), above n 28, 10, 23. See also Australian Institute of Health and Welfare (2020), above n 27, 317, 356.

38. Susan Baidawi and Alex Piquero, 'Neurodisability Among Children at the Nexus of the Child Welfare and Youth Justice System' (2021) 50(4) *Journal of Youth and Adolescence* 803, 809, 812, 816. See also Australian Human Rights Commission (2020), above n 30, 6–7; Cunneen et al. (2016), 176.

39. Baidawi et al. (2024), above n 28, 35–36. See also Australian Human Rights Commission (2020), above n 30, 6.

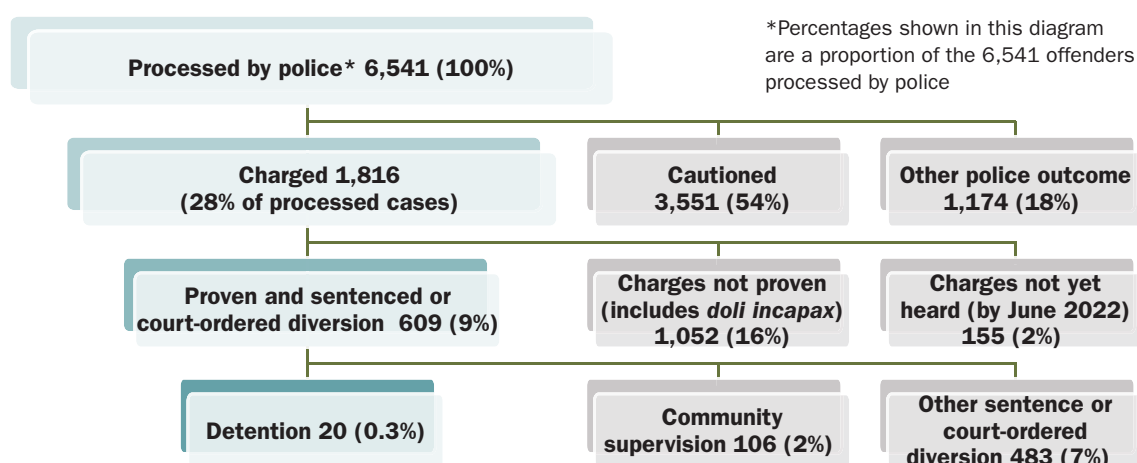
40. Children's Court youth diversion is a 'pre-plea option' that gives children an opportunity to accept responsibility for the offence and complete a diversion plan, and if they do so allows for their charges to be discharged without a criminal record. Youth diversion is provided for in *Children, Youth and Families Act 2005* (Vic) ss 356B–356I (retained in *Youth Justice Act 2024* (Vic) s 193, 198).

41. Baidawi et al. (2024), above n 28, 21.

court in 2017 for alleged offending, and found that the average time from the alleged offence to a court outcome was 406 days for children whose offence was struck out due to *doli incapax*, 337 days for children whose offence was struck out for other reasons, 255 days for children sentenced to a probation order or youth supervision order, and 249 days for children who received youth diversion;⁴²

- children sentenced for offences aged 10 to 13 are more likely than older children to **remain in the justice system**. Our youth reoffending research found that the younger children are when first sentenced or diverted in court, the more likely they are to 'reoffend generally, reoffend violently, continue offending into the adult jurisdiction, and be sentenced to an adult sentence of imprisonment before their 22nd birthday';⁴³ and
- very few younger children who offend (or who are alleged to have offended) ultimately receive a **custodial sentence** (less than 1% of alleged younger offenders – see Figure 1). Most are diverted from the justice system without the need to go to court.

Figure 1: Outcomes of cases involving alleged offenders aged 10 to 13 in Victoria, 2017–18 to 2021–22 (source: Crime Statistics Agency Victoria)⁴⁴



For the 1,052 cases where younger children's charges were not proven (Figure 1), some of the charges would have been not proven due to a finding of *doli incapax*. Data on *doli incapax* is not, however, readily available. Therefore we could not identify the number of charges withdrawn by the prosecution due to an assessment that the child's capacity could not be proven beyond reasonable doubt, or the number of charges not proven due to a finding of *doli incapax*, or the number of charges not proven for another reason. The data difficulties in this space have previously been noted by Baidawi et al., who recommended that 'police and children's courts in Australian jurisdictions clearly record ... and retain in a manner accessible to government and others ... data concerning the application of the presumption of *doli incapax*'.⁴⁵ The new *Youth Justice Act* codifies the test for *doli incapax* and offers a renewed opportunity to record and monitor *doli incapax* decisions.

42. Ibid 23.

43. Sentencing Advisory Council (2016), above n 5, 52.

44. Morris et al. (2023), above n 10, 1–2. Figure 1 above is based on Figure 1 in Morris et al.

45. Baidawi et al. (2024), above n 28, 84.

Prevalence of younger children in sentenced cases

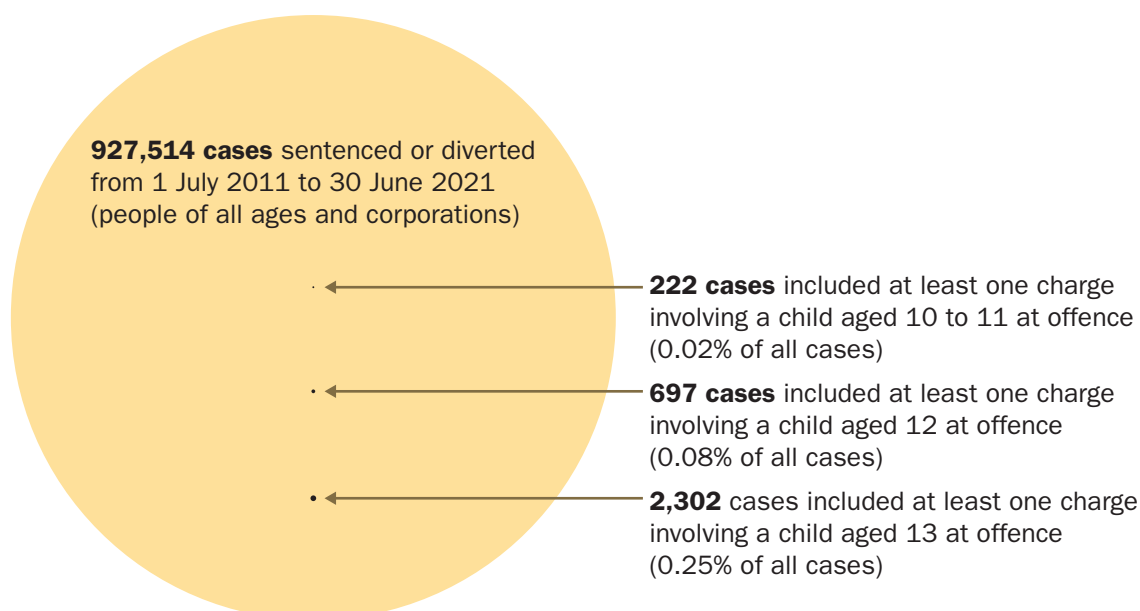
This section places offending by younger children in context, examining their cases:

- as a proportion of all sentenced or diverted cases;
- over time to see if the number of cases each year is changing; and
- by court jurisdiction.

Younger children are responsible for only 0.32% of sentenced cases

In the 10 years to 30 June 2021, almost one million cases were sentenced or diverted in Victoria, involving people of all ages (as well as corporations). Only 0.02% of all cases included at least one offence committed by a child aged 10 to 11 at their offence (222 cases across the 10 years) (Figure 2), and children aged 12 or aged 13 at their offence were responsible for only 0.08% and 0.25% of cases, respectively (697 and 2,302 cases). Overall, only 0.32% of sentenced or diverted cases in the 10 years to 30 June 2021 included an offence by a child aged 10 to 13 (2,949 of 927,514 cases).

Figure 2: Cases that included at least one sentenced or diverted charge committed by a child aged 10 to 11, aged 12 or aged 13, as a proportion (to scale) of all sentenced or diverted cases in Victoria, 1 July 2011 to 30 June 2021⁴⁶



46. The number of cases involving a child aged 10 to 11, aged 12 or aged 13 overlap, as some cases involved offences committed by the one child at different ages. For example, some cases may be included in the count of cases involving a child aged 12 and in the count of cases involving a child aged 13. Overall, 0.32% of all sentenced and diverted cases, or 2,949 of 927,514 cases, included an offence committed by a child aged 10 to 13. Of the 2,949 cases, 256 cases included offences committed by children at different ages between 10 and 13 (for example, at age 10 and at age 12).

These findings, together with other recent research and analysis, show that, as younger children progress through the justice system, they make up a progressively smaller proportion of the total justice system population. The Crime Statistics Agency Victoria found that children aged 10 to 13 were responsible for a very small proportion of *alleged offender incidents* (1% in the 10 years to 30 June 2022).⁴⁷ This is generally consistent across Australia, with younger children representing only a tiny fraction of alleged offenders.⁴⁸ By the sentencing stage, we found that younger children were responsible for only 0.32% of all sentenced or diverted cases finalised in Victorian courts in the 10 years to 30 June 2021. This decrease (from 1% of alleged offender incidents to 0.32% of all sentenced or diverted cases) most likely reflects the approach to younger children in the justice system, including the greater use of diversionary initiatives (such as cautioning) and the applicable legal framework, especially the presumption of *doli incapax*. As Figure 1 (page 12) shows, most younger children who had contact with police in Victoria do not progress into the court system. Only 28% of younger children with alleged offences were charged (1,816), and even fewer (less than 1 in 10) were ultimately sentenced in court (609 of 6,541 alleged younger offenders). Instead, more than half of children aged 10 to 13 received a police caution (54%) and 18% received another police outcome, such as a penalty infringement notice.⁴⁹

The number of sentenced cases involving younger children is decreasing

As well as amounting to a very small proportion of sentenced or diverted cases in the 10 years to 30 June 2021, the annual number of sentenced or diverted cases involving younger children decreased substantially over that time period (Figure 3, page 15).⁵⁰ In 2011–12, there were 452 sentenced or diverted cases with at least one offence by a child aged 10 to 13; this number decreased to just 93 cases in 2020–21 (a 79% decrease).

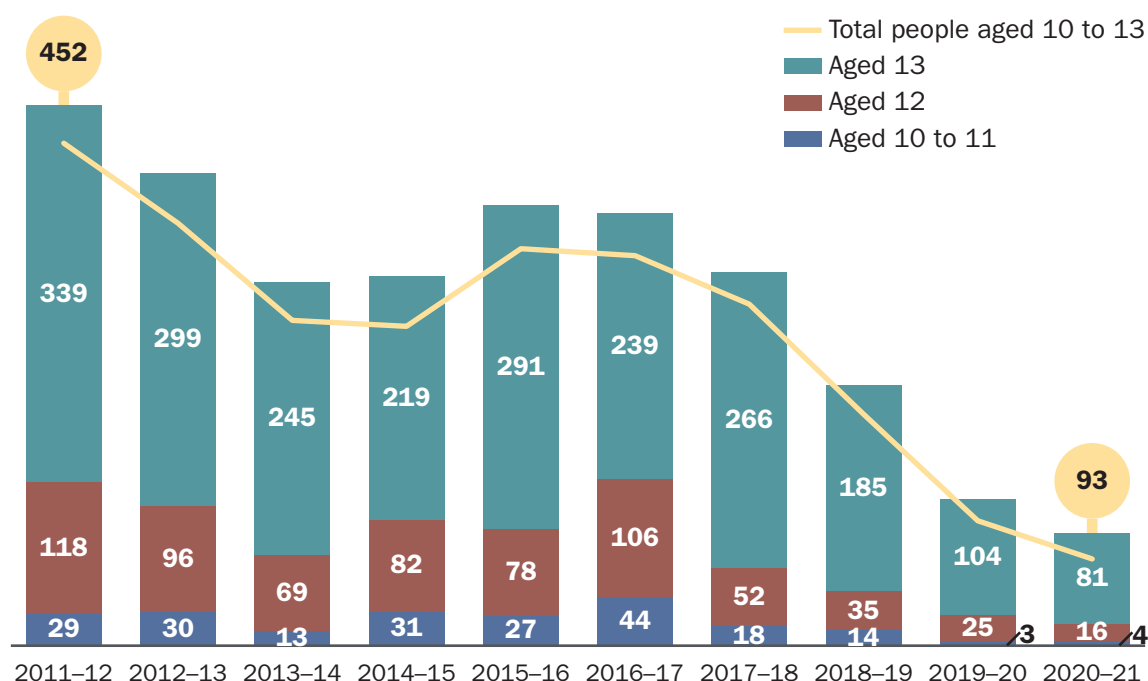
47. Quinn et al. (2023), above n 36, 2.

48. Standing Council of Attorneys-General, *Age of Criminal Responsibility Working Group Report* (2023) 17; Chris Cunneen et al., *Juvenile Justice: Youth and Crime in Australia* (2015) 65; Baidawi et al. (2024), above n 28, 9, citing Australian Bureau of Statistics, *Recorded Crime – Offenders, 2021–22* (abs. gov.au, 2023). For Queensland specifically, see Hilderley et al. (2023), above n 28, 2, 4–5. For New South Wales specifically, see Freeman and Donnelly (2024), above n 28, 7; Centre for Crime, Law and Justice, *Replacing the Youth Justice System for Children Aged 10–13 Years in NSW: A ‘Best Interests’ Response* (2021) 14.

49. Morris et al. (2023), above n 10, 1–2.

50. Figure 3 only includes Children’s Court cases; however, as discussed below, the Children’s Court finalises the overwhelming majority (98%) of cases involving children aged 10 to 13.

Figure 3: Sentenced and diverted cases in the Children's Court involving children aged 10 to 13 at the date of at least one offence in the case, by age group (aged 10 to 11, aged 12 and aged 13), 2011–12 to 2020–21⁵¹



Some of the decrease in the two most recent years of our reference period may be due to the effects of the COVID-19 pandemic on people's movements, policing practices and court operations. But even prior to the pandemic, the number of sentenced or diverted cases involving younger children more than halved between 2011–12 and 2018–19. This finding contrasts with the Queensland Sentencing Advisory Council's finding that the number of sentenced cases involving children aged 10 to 13 steadily *increased* over the same period, from 1,100 cases in 2011–12 to 1,309 in 2018–19, with a peak of 1,335 cases in 2017–18.⁵²

The decrease in *sentenced or diverted* cases involving younger children in Victoria outpaced the decline in the number of *alleged* younger offenders who came into contact with police, the latter dropping from 1,760 in 2012–13 to 1,267 in 2021–22 (a 28% decrease).⁵³ This suggests that one of the reasons for the decrease in sentenced or diverted younger children is an increase in the use of police diversionary options, such as police cautions. The use of police cautions for younger children was fairly consistent

51. The total number of cases involving children aged 10 to 13 each year in the graph is the number of cases each year with at least one charge involving a child aged 10, 11, 12 or 13. The sum of the individual age groups each year appears higher than the total because some cases involved charges committed by the one child at different ages (for example, at age 11 and at age 13) and are therefore counted once in each of those age categories.

52. Hilderley et al. (2023), above n 28, 9. The number of cases peaked at 1,335 in 2017–18 before declining to 934 cases in 2021–22.

53. Tali et al. (2023), above n 29, 1.

for most of the 10 years to 30 June 2022. However, in the last year there was a notable increase in the number of children aged 10 to 13 receiving cautions (from 53% in 2020–21 to 67% in 2021–22) and a decrease in the number of children aged 10 to 13 being charged by police (from 27% in 2020–21 to 15% in 2021–22).⁵⁴

The decrease in sentenced or diverted cases was also noticeable in each separate age category. For example, the number of sentenced or diverted cases decreased for children with at least one charge aged 13: from 339 in 2011–12 to 185 in 2018–19 and falling further to 81 in 2020–21 (during the pandemic). A downward trend was also apparent for both male and female children: an 81% decline (from 345 to 67) in the number of boys sentenced or diverted each year for offending committed when aged 10 to 13, and a 76% decline (from 107 to 26) in the number of girls.

There was a noticeable reversal of the downward trend midway through the 10-year period (in 2015–16 and 2016–17). A possible explanation for this reversal, at least in part, is that it was an unintended consequence of the introduction of Children’s Court youth diversion in 2015.⁵⁵ Although youth diversion was intended to create an alternative to sentencing for justice-involved children, it is possible that the initial use of youth diversion included children who agreed to diversion but might have otherwise had the benefit of the *doli incapax* presumption or the withdrawal of charges on another basis. Consultation for a previous project on crossover children revealed that sometimes children can agree to a diversion because they want ‘to end the court process quickly and by whatever means necessary’, rather than the court process being prolonged to have the issue of *doli incapax* determined, particularly when children don’t have family support in court to encourage them to properly consider the ramifications of their decisions.⁵⁶ Recent research found that, for children aged 10 to 13, the *doli incapax* processes take longer (406 days on average from alleged offence to court outcome) than Children’s Court youth diversion (249 days on average from alleged offence to court outcome).⁵⁷

The data in Figure 4 (page 17) supports the view that, at least in the beginning, diversion was used in cases that might have been withdrawn or not proven due to *doli incapax*. Figure 4 shows the number of sentenced or diverted cases involving children aged 10 to 13 each year, isolating the cases with a diversion outcome. While the number of sentenced cases continued to steadily decrease, the number of

54. Morris et al. (2023), above n 10, 2.

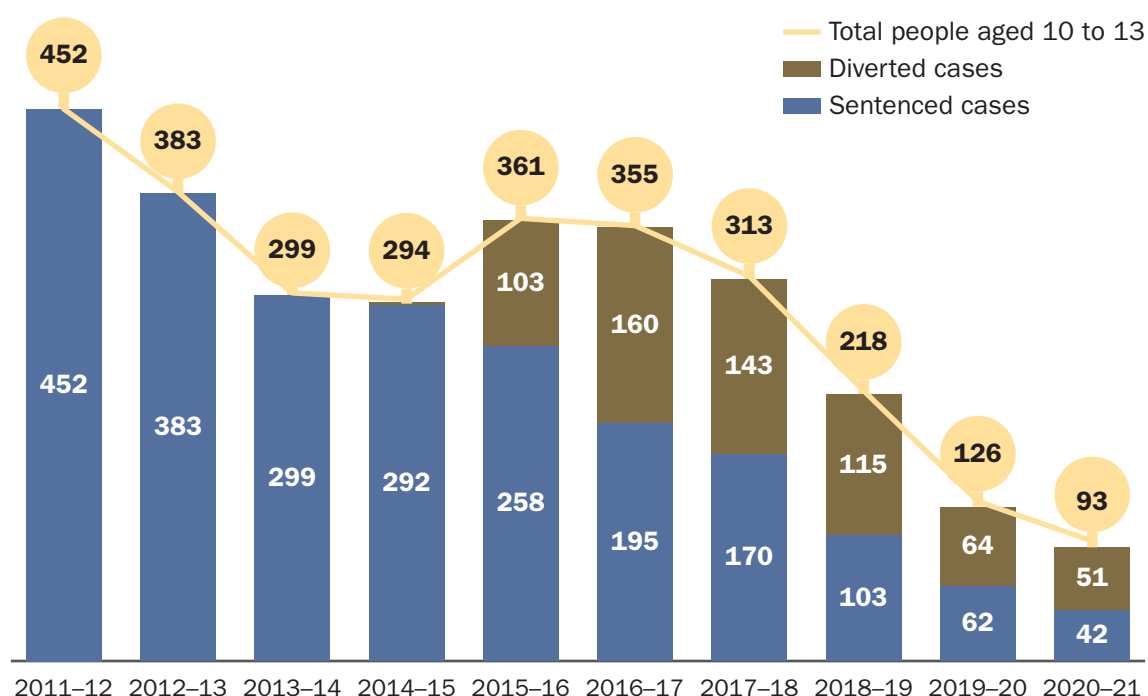
55. Children’s Court youth diversion started as a pilot in the Children’s Court on 1 June 2015, and was rolled out statewide on 1 January 2017 (see further above n 42). On the pilot, see Stuart Thomas et al., *Evaluation of the Youth Diversion Pilot Program (YDPP: Stage 3)* (2016); Sentencing Advisory Council (2016), above n 4, 9–10.

56. Sentencing Advisory Council (2019), above n 6, 32.

57. Baidawi et al. (2024), above n 28, 23.

cases surged overall in 2015–16 and 2016–17. This surge appears to be explained, primarily, by cases resulting in diversion. Participants at our stakeholder roundtable agreed that the overuse of diversion in its early years was the most likely explanation for this initial surge in cases, but they also pointed out that the diversion system has since ‘matured’, with greater awareness about whether a case should be *doli incapax* or diversion.⁵⁸ We also heard that it may be possible that, in some cases, Children’s Court youth diversion had replaced other less formal forms of diversion, like the ROPES program (police diversion).⁵⁹

Figure 4: Sentenced or diverted cases in the Children’s Court involving children aged 10 to 13 at date of offence, by outcome type (sentence or diversion), 2011–12 to 2020–21



After 2016–17, the number of cases involving children aged 10 to 13 once again started decreasing. A possible contributor to this shift could be the High Court’s 2016 judgment in *RP v The Queen*,⁶⁰ which clarified the approach to be taken in deciding whether a child is *doli incapax*. Participants at our stakeholder roundtable suggested that this decision may have caused an increase in the number of cases where the child was found to be *doli incapax* (and also the number of cases where charges were withdrawn on the basis of *doli incapax*), leading to a reduction in the conviction rate of children aged 10 to 13 in

58. Stakeholder Roundtable (11 March 2025).

59. Meeting with Victorian Aboriginal Legal Service (17 March 2025). The ROPES program is a ‘one-day interactive education program’: Department of Justice and Community Safety, ‘Children’s Court Youth Diversion Service’ (justice.vic.gov.au, 2025).

60. *RP v The Queen* [2016] HCA 53.

the years since the judgment.⁶¹ This is consistent with recent Victorian research finding that 2015–16 was a turning point that saw:

- a ‘steady downwards trend’ (after a peak in 2014–15) in the number of younger children charged by police (with an increase in the number of children cautioned); and
- for younger children who were charged and received a court outcome, an increase in the number of charges not proven in court (with a corresponding decrease in the number of proven charges).⁶²

In further support of the hypothesis that *RP v The Queen* may have contributed to a decrease in proven charges, the New South Wales Bureau of Crime Statistics and Research (BOCSAR) found a ‘dramatic decline’ in the proportion of proven court outcomes in NSW Children’s Court cases involving children aged 10 to 13 (from 76% of children ‘with a proven outcome’ in 2015–16 to 16% in 2022–23), concluding that this decline was a likely result of the High Court decision in *RP v The Queen*.⁶³ BOCSAR

‘By stipulating what is required to rebut *doli incapax*, the 2016 High Court of Australia’s decision *RP v R* likely reduced the number of young people aged 10–13 found guilty of a criminal offence.’

Jonathon Gu, *Did a High Court Decision on Doli Incapax Shift Court Outcomes for 10–13 Year Olds?* (2025) 1

also found that the trend in New South Wales was apparent nationally, finding that there was ‘a reduction in proven outcomes across Australia since [*RP v The Queen*]’, and the ‘decline across the rest of Australia ... [is] consistent with the RP decision having a national impact’.⁶⁴ BOCSAR found that the changes to proven rates varied across states, with New South Wales, Victoria and South Australia experiencing the most substantial reductions in the proportion of 10 to 13 year olds with proven cases.⁶⁵

In Queensland, the number of sentenced children aged 10 to 13 had been steadily increasing in the 10 years before the decision in *RP v The Queen*, from 999 cases in the 2005–06 financial year to 1,326 in 2015–16.⁶⁶ Although Queensland did not experience a dramatic decrease after *RP v The Queen*, the upward trend halted after 2015–16, with the number of cases involving children sentenced for offences while

61. Stakeholder Roundtable (11 March 2025).

62. Morris et al. (2023), above n 10, 1–2.

63. Jonathon Gu, *Did a High Court Decision on Doli Incapax Shift Court Outcomes for 10–13 Year Olds?* Crime and Justice Bulletin no. 268 (2025) 1, 8.

64. Ibid 9–10.

65. Ibid 11.

66. Hilderley et al. (2023), above n 28, 9.

aged 10 to 13 remaining at around 1,300 for the next three years before a ‘dramatic drop in 2019–20’, probably due to the COVID-19 pandemic.⁶⁷

In Victoria, participants at our stakeholder roundtable told us that in addition to the decision in *RP v The Queen*,⁶⁸ there have been several practical changes that may have contributed to the decrease in the number of sentenced younger children, including the introduction of specialist Children’s Court youth prosecutors; advanced education on *doli incapax* provided by Victoria Legal Aid for their lawyers and practice partners; the introduction of a diversion matrix (more recently replaced by diversion guidelines) for youth prosecutors; and, most recently, a move to ensuring that all children in metropolitan Melbourne have their cases heard in specialist Children’s Court locations, and younger children must have their matters heard in a specialist list at the Melbourne Children’s Court (with limited exceptions).⁶⁹

Offences by younger children are rarely sentenced in adult courts

The overwhelming majority of cases involving younger children were sentenced or diverted in the Children’s Court (98%, or 2,894 of 2,949 cases) (Table 1, page 20). During the 10-year reference period, only a handful of cases involving offences by younger children were sentenced in the Magistrates’ Court (23 cases, only 4 of which involved children aged 10 to 11) and in the County Court (32 cases);⁷⁰ none were sentenced in the Supreme Court. Those cases finalised in the adult jurisdiction represent just 0.003% of all cases sentenced in the Magistrates’ Court (approximately 1 per 37,935 cases) and 0.2% of cases sentenced in the County Court (approximately 1 per 534 cases). Cases involving children aged 10 to 13 comprised 7.8% of cases sentenced or diverted in the Children’s Court. This is around half the proportion (14.9%) found in similar research in Queensland.⁷¹

67. Ibid.

68. *RP v The Queen* [2016] HCA 53.

69. Stakeholder Roundtable (11 March 2025). There are now four specialist Children’s Court locations in metropolitan Melbourne (with specialist courts now operating in Broadmeadows, Dandenong and Moorabbin as well as Melbourne): Children’s Court of Victoria, *Annual Report 2022–23* (2023) 26. From 6 January 2025, children appearing in criminal cases in the Melbourne metropolitan area must have their matter heard in one of the four specialist Children’s Court locations, and younger children must have their case heard in the specialist list for children aged under 14 at the Melbourne Children’s Court (with some limited exceptions): Children’s Court of Victoria, *Practice Direction No. 2 of 2024* (2024) 1–3 (paragraphs 3, 8, and 10). These changes are consistent with a previous suggestion of this Council: Sentencing Advisory Council (2020), above n 2, 46.

70. The 32 cases in the County Court involved 31 unique offenders sentenced for offences committed when aged 10 to 13 (1 person was sentenced in 2 separate cases, both of which involved offences committed when the person was aged 10 to 13). The 23 cases in the Magistrates’ Court involved 23 unique offenders (with 1 case each).

71. Hilderley et al. (2023), above n 28, 4.

In each of the 55 cases sentenced in the adult jurisdiction, the offender's age at sentencing was 19 or older. This suggests that the cases were heard in the adult jurisdiction not because the seriousness of the offending made it unsuitable for the matter to be heard in the Children's Court, but instead because the Children's Court no longer had jurisdiction to finalise the matter.⁷² This is consistent with the policy intent that the Children's Court 'only relinquish its jurisdiction with great reluctance',⁷³ as well as with research showing that children aged 10 to 13 rarely commit serious offences.

Table 1: Number of cases involving younger children sentenced or diverted in each court jurisdiction, 1 July 2011 to 30 June 2021⁷⁴

Age at offence	Children's Court	Magistrates' Court	County Court	Supreme Court	Total number	Total percentage
At least one offence aged 10	43	2	1	0	46	1.6%
At least one offence aged 11	179	2	4	0	185	6.3%
At least one offence aged 12	677	8	12	0	697	23.6%
At least one offence aged 13	2,268	13	21	0	2,302	78.1%
Total aged 10 to 13	2,894	23	32	0	2,949	100%
Total cases (all ages and corporations)	37,093	872,499	17,101	821	927,514	
Percentage of cases with at least one offence aged 10 to 13	7.8%	0.003%	0.2%	0%	0.32%	

72. Children aged 19 by the time the case commences in the Children's Court must have their case transferred to the Magistrates' Court: *Children, Youth and Families Act 2005* (Vic) ss 3(1) (definition of *child*), 516(4)–(5).

73. *DPP v Anderson* [2013] VSCA 45, [26].

74. Cases with at least one charge committed aged 10 to 11, aged 12 or aged 13 were included in the count of that age. Therefore, some cases were counted more than once. For example, if a case included an offence committed by a child aged 10 and an offence committed by the same child at age 11, the case was counted once in the number of cases for children aged 10 and once in the number of cases for children aged 11. Therefore, the total number of cases involving offending by children aged 10 to 13 (2,949 cases) is not the sum of the total cases in each age group (3,230).

For example, since 2018, Victorian legislation has classified a group of serious offences as category A and B serious youth offences.⁷⁵ Over the next five years (2017–18 to 2021–22), only 107 unique children aged 10 to 13 were alleged to have committed a ‘serious youth offence’,⁷⁶ equating to less than 23 alleged serious offenders aged 10 to 13 per year (and less than 5 children aged 10 to 11) (Table 2). Further, children aged 10 to 13 very rarely commit homicide offences,⁷⁷ and no children aged 10 to 13 have been sentenced for a homicide offence in Victoria in the past 25 years.

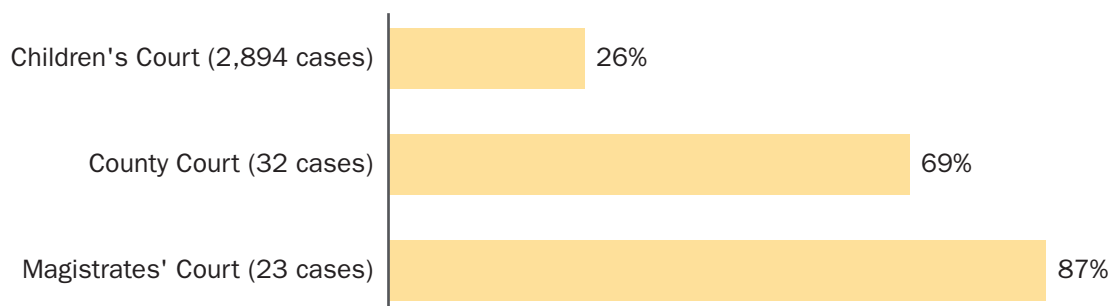
Table 2: Annual average number of children aged 10 to 13 with alleged category A or B serious youth offences, by age, 1 July 2017 to 30 June 2021⁷⁸

Age	Average number of children of that age per year
Aged 10	1.8
Aged 11	2.4
Aged 12	6.0
Aged 13	11.8

Most younger children’s cases did not include offences committed when older

In the Children’s Court, only one-quarter (26%) of cases involving offences by younger children *also* included offences committed when the child was aged 14 or older. The remaining 74% of cases only involved offences committed when the child was aged 10 to 13.

Figure 5: Percentage of younger children’s cases that also involved at least one offence committed when the child was aged 14 or older, 1 July 2011 to 30 June 2021



75. Category A offences include murder, attempted murder, manslaughter, child homicide and homicide by firearm, and category B offences include rape, home invasion, carjacking and recklessly causing serious injury in circumstances of gross violence: *Sentencing Act 1991* (Vic) s 3(1) (definitions of *category A offence* and *category B offence*).

76. Tali et al. (2023), above n 29, 2.

77. Australian Institute of Health and Welfare (2020), above n 27, 318.

78. Tali et al. (2023), above n 29, 2.

In contrast, in the Magistrates' Court and County Court, most of the 55 cases involving offences committed by children aged 10 to 13 also had at least one offence committed when the child was aged 14 or older: 87% (20 of 23 cases) in the Magistrates' Court and 69% (22 of 32 cases) in the County Court. It is possible that in some cases, a younger child's matter was heard in the adult jurisdiction because the person was brought to police attention for more recent offending committed as an older child or as an adult, and during the investigation, the police identified older offences committed when the person was aged 10 to 13.

Characteristics of younger children who offend

This section examines the characteristics of younger children who are sentenced or diverted in Victoria, including their age at offence, their gender, how many are Aboriginal children, and how many are from regional Victoria. In this section, we discuss a number of groups that are overrepresented in the justice system; our discussion is based on data available to the Council and does not represent an exhaustive account of overrepresented groups.

Number of children, cases and charges

Table 3 shows the total number of unique children sentenced or diverted in the 10 years to 30 June 2021 for at least one offence committed when the child was aged 10, aged 11, aged 12 or aged 13. The table includes the number of cases involving sentenced or diverted younger children, and the total number of charges committed at each age (the table does not include co-sentenced offences in the same case for offences committed when the person was aged 14 or older).

Table 3: Children sentenced or diverted for offences committed when aged 10 to 13, by number of unique children, charges, cases and age at offence, 1 July 2011 to 30 June 2021⁷⁹

Age at offence	Total children	Total cases	Total charges	Percentage of total charges (aged 10 to 13)	Yearly average
At least one offence by child aged 10	41	46	170	1%	4.1 children 4.6 cases 17.0 charges
At least one offence by child aged 11	128	185	701	4%	12.8 children 18.5 cases 70.1 charges
At least one offence by child aged 12	505	697	3,362	20%	50.5 children 69.7 cases 336.2 charges
At least one offence by child aged 13	1,630	2,302	12,680	75%	163.0 children 230.2 cases 1,268.0 charges
Total aged 10 to 13	1,891	2,949	16,913	100%	189.1 children 294.9 cases 1,691.3 charges

79. There is some double-counting of cases and people between the age groups because some children were sentenced or diverted for offences committed at different ages (for example, when aged 11 and when aged 12), meaning that the one child may be counted in multiple age categories. In this example, the child would be counted among children and cases with at least one offence at age 11 and among children and cases with at least one offence at age 12.

Table 3 (page 23) shows that 1,891 unique people were sentenced or diverted during the 10-year period to 30 June 2021 for offending committed aged 10 to 13. They were sentenced or diverted in 2,949 cases (an average of 1.6 cases per person) involving 16,913 charges committed when aged 10 to 13 (an average of 8.9 charges per person). They were sentenced or diverted for an additional 7,710 charges committed when aged 14 or older (not shown in Table 3).

Most younger children are aged 13 when they offend

Of the 16,913 sentenced or diverted *charges* committed by younger children, three-quarters were committed by a child aged 13 (12,680 of 16,913 charges), 20% were committed by a child aged 12 (3,362 charges), and only 5% were committed by a child aged 10 to 11 (170 charges at age 10 and 701 charges at age 11) (Table 3, page 23). These findings are consistent with research elsewhere.⁸⁰

Breaking these figures down by jurisdiction, children aged 13 at their offence date were responsible for:

- 75% of charges in the Children's Court involving children aged 10 to 13 at offence date (12,605 of 16,784 charges);
- 57% of charges in the Magistrates' Court involving children aged 10 to 13 at offence date (31 of 54 charges); and
- 59% of charges in the County Court involving children aged 10 to 13 at offence date (44 of 75 charges).

On average, less than 25 cases a year in Victoria involved offending by children aged 10 to 11 (22 cases a year). A further 70 cases per year, on average, involved offences committed by children aged 12, and 230 cases involved offences committed by children aged 13.

These results are consistent with the Crime Statistics Agency's recent findings that, in the 12 months to 30 June 2022, 61% of alleged younger offenders were aged 13 at the time of offending, 27% were aged 12, 9% were aged 11 and just 3% were aged 10.⁸¹ Our findings also suggest that there is a higher attrition rate for the youngest children (aged 10 to 12) in the justice system. The rate for children aged 10 to 12 dropped from 39% of *alleged young offenders* aged 10 to 13 (in Crime Statistics Agency data) to 29% of *sentenced or diverted* cases involving children aged 10 to 13 at offence (in court data).

80. See above n 38.

81. Quinn et al. (2023), above n 36, 1 (percentages were calculated from the data for 2021–22). Note that a unique person was counted once per age group.

This drop is most likely due to a combination of increased use of pathways out of the justice system for the youngest children and the need for the prosecution to rebut the presumption of *doli incapax* for children aged under 14, which may be especially difficult in cases involving the youngest children.

Most younger children who offend are boys

Boys were substantially overrepresented among children who were sentenced or diverted for offending committed when aged 10 to 13, comprising 74% of the 1,891 younger children in our study. The gender disparity was especially apparent for younger children who offended aged 10 to 11 – more than 90% were male. Boys were responsible for 74% of all sentenced or diverted cases involving younger children in the 10 years to 30 June 2021 (2,196 of the 2,949 cases in the Children’s Court, Magistrates’ Court and County Court).

Magistrates’ Court and County Court

In the adult jurisdiction, boys were responsible for *all* 55 sentenced cases involving offending by a child aged 10 to 13 (all 23 cases in the Magistrates’ Court and 32 cases in the County Court).

Children’s Court

In the Children’s Court (where almost all cases involving younger children are sentenced), boys were responsible for 79% of charges involving younger children (13,265 of 16,784 charges). Boys were particularly overrepresented in the youngest age categories. They were responsible for:

- 97% of sentenced or diverted offences committed by children aged 10 (160 of 165 charges);
- 93% of offences aged 11 (647 of 693 charges);
- 81% of offences aged 12 (2,699 of 3,321 charges); and
- 77% of offences aged 13 (9,759 of 12,605 charges).

In comparison, boys were responsible for 82% of offences involving children and young people aged 14 or older in the Children’s Court (152,137 of 186,063 charges).

These findings are consistent with prior research that has found that most younger children who enter the justice system are male, and the gender disparity is most pronounced for the youngest children.⁸² For instance, the Baidawi et al. study of Victorian children aged 10 to 13 who allegedly offended in 2017 found that 70.9% were male, and the proportion of males was largely consistent in police data and

82. See above n 39.

Children's Court data.⁸³ Similarly, the Queensland Sentencing Advisory Council recently found that 73.1% of children aged 10 to 13 at offence (and 83.7% of those aged 10 to 11 at offence) were boys.⁸⁴ These findings also reflect the overrepresentation of males in the justice system more broadly.⁸⁵

Aboriginal children are substantially overrepresented

Aboriginal children were not identified in court data for the reference period. However, a data linkage exercise conducted by the Crime Statistics Agency (see Table 4, page 27) shows that Aboriginal children were substantially overrepresented among children sentenced or diverted for offences committed when aged 10 to 13, comprising 22.5% of sentenced or diverted younger children. This rate was:

- more than double the rate of Aboriginal children sentenced or diverted for offending committed when aged 14 or older (10.3%); and
- 10 times the rate of Aboriginal children aged 10 to 13 in the Victorian population (2.2% as at 30 June 2021).⁸⁶

The younger children were at the time of their offence, the higher the proportion of Aboriginal children in the group. Aboriginal children comprised:

- 32.2% of children who offended aged 10 to 11 (46 of 143 children);
- 27.5% of children who offended aged 12 (122 of 444 children); and
- 21.1% of children who offended aged 13 (301 of 1,427 children).

In comparison, Aboriginal children comprised 2.2% of all children in Victoria in each of the age categories (aged 10 to 11, aged 12 and aged 13),⁸⁷ so the differences by age are not explained by the underlying distribution of Aboriginal children within the general population.

83. Baidawi et al. (2024), above n 28, 14.

84. Hilderley et al. (2023), above n 28, 10–11. See also Freeman and Donnelly (2024), above n 28, 10, 23.

85. For example, in the 10 years to 30 June 2022, males comprised 76.9% of all people sentenced in the Children's Court; 76.2% in the Magistrates' Court; 89.2% in the County Court; and 88.5% in the Supreme Court: Sentencing Advisory Council, *Sentencing in Victoria: 2012–13 to 2021–22* (2024) 3, 7, 12, 17. See also Australian Institute of Health and Welfare, *Youth Justice in Australia 2021–22* (2023) 46; Sentencing Advisory Council, *Gender Differences in Sentencing Outcomes* (2010) 3.

86. Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians*, Table 1.3 (abs.gov.au, 2023).

87. Ibid.

Table 4: Aboriginal children sentenced or diverted from 1 July 2011 to 30 June 2021, by age at earliest offence in the case⁸⁸

Children	Aged 10 to 11	Aged 12	Aged 13	Overall (aged 10 to 13)	Aged 14 or older
Aboriginal children and/ or Torres Strait Islander children	46 (32.2%)	122 (27.5%)	301 (21.1%)	386 (22.5%)	1,666 (10.3%)
Non-Indigenous children	97 (67.8%)	320 (72.1%)	1,124 (78.8%)	1,330 (77.4%)	14,305 (88.6%)
Unknown	0 (0.0%)	≤ 3 (0.5%)	≤ 3 (0.1%)	≤ 3 (0.1%)	181 (1.1%)
Total unique offenders	143 (100%)	444 (100%)	1,427 (100%)	1,718 (100%)	16,152 (100%)

These findings are consistent with numerous studies and reports showing that Aboriginal and Torres Strait Islander peoples are overrepresented in Australia's justice systems.⁸⁹ The overrepresentation extends to children:⁹⁰ Aboriginal children aged 10 to 13 are more likely than their non-Aboriginal counterparts to be arrested,⁹¹ more likely to have their case progress to court,⁹² and more likely to be in detention or subject to youth supervision.⁹³ Our findings further highlight the extent to which that overrepresentation is magnified for the youngest children sentenced or diverted in the justice system in Victoria.

88. Data provided by the Crime Statistics Agency. The data was extracted from LEAP on 18 July 2024 and is subject to change. Unique offender counts are based on unique Master Name IDs recorded by Victoria Police.

89. See, for example, Productivity Commission, *Closing the Gap Annual Data Compilation Report* (2024) 61–67; Productivity Commission, *Australia's Prison Dilemma* (2021) 19, 31–34; Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report* (2017) 20–22, 40–41, 90–91; Victorian Ombudsman, *Investigation into Healthcare Provision for Aboriginal People in Victorian Prisons* (2024); Victorian Government, *Legal and Social Issues Committee, Inquiry into Victoria's Criminal Justice System* (2022) 60–62; Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (2015) 34, 74–87; Yoorrook Justice Commission, *Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems* (2023) 50, 236, 244–245, 252; Sophie Russell and Eileen Baldrey, *The Booming Industry Continued: Australian Prisons, A 2020 Update* (2020) 5–7.

90. See, for example, Productivity Commission (2024), above n 89, 66–67; The Senate Legal and Constitutional Affairs References Committee, *Australia's Youth Justice and Incarceration System* (2025) 42; 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* (2021) 21, 33, 132, 150, 157–158; Sentencing Advisory Council (2020), above n 6, 29; Penny Armitage and James Ogloff, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending, Part 1* (2017) 172–173; Susan Baidawi et al., *Police and Children's Court Outcomes for Children Aged 10 to 13*, Trends & Issues in Crime and Criminal Justice no. 679 (2023) 1, 17; Freeman and Donnelly (2024), above n 28, 10.

91. Sophie Trevitt and Bill Browne, *Raising the Age of Criminal Responsibility* (2020) 7, citing House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing – Indigenous Youth in the Criminal Justice System* (2011) 200–205.

92. Baidawi et al. (2024), above n 28, 14.

93. In 2022–23, Aboriginal children comprised 63% of children aged 10 to 17 in detention and 55% of children aged 10 to 17 under community-based supervision in Australia: Australian Institute of Health and Welfare, *Youth Justice in Australia 2022–23* (2024).

Children in regional Victoria are overrepresented

Children's Court

Recent research, including by this Council, has found an overrepresentation of younger children sentenced in regional Victoria.⁹⁴ For example, we previously found that 15% of sentenced children in regional courts were aged 10 to 13 at sentencing, compared with just 5% in metropolitan courts.⁹⁵

Our findings in this report are consistent with past findings illustrating an overrepresentation of younger children in regional areas, with younger children involved in 11% of Children's Court cases in regional Victoria compared with 5.5% of cases in metropolitan Melbourne.

Younger children in regional Victoria were twice as prevalent in the justice system, involved in:

11% of cases in the Children's Court in **regional Victoria** (1,710 of 15,438 cases)

5.5% of cases in the Children's Court in **metropolitan Melbourne** (1,184 of 21,655 cases)

As shown in Figure 6 (pages 29–30) we also found that regional overrepresentation is especially magnified for the youngest children:

- children aged 10 to 11 at their earliest offence were involved in 1.0% of Children's Court cases in regional Victoria compared with 0.3% in metropolitan Melbourne. The highest rates of children aged 10 to 11 were in Gippsland and Loddon Mallee (1.3% each), where the proportion of children aged 10 to 11 was more than double the state average and more than quadruple the rate in metropolitan Melbourne;
- children aged 12 at their earliest offence were involved in 2.8% of Children's Court cases in regional areas compared with 0.9% in metropolitan Melbourne (especially in Gippsland, Loddon Mallee and Barwon South West); and
- children aged 13 at their earliest offence were involved in 7.4% of Children's Court cases in regional areas compared with 4.2% in metropolitan Melbourne (especially in Gippsland, Hume and Loddon Mallee).

94. Sentencing Advisory Council (2020), above n 6, 59–72; Sentencing Advisory Council (2020), above n 2, 44–46; Susan Baidawi and 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* (2019) 11, 152, 222–223.

95. Sentencing Advisory Council (2020), above n 6, 69–72.

Figure 6a: Percentage of sentenced or diverted cases in the Children's Court involving offenders aged 10 to 11 at date of earliest offence in the case, by justice region, 1 July 2011 to 30 June 2021 (213 of 37,093 cases or 0.6%)

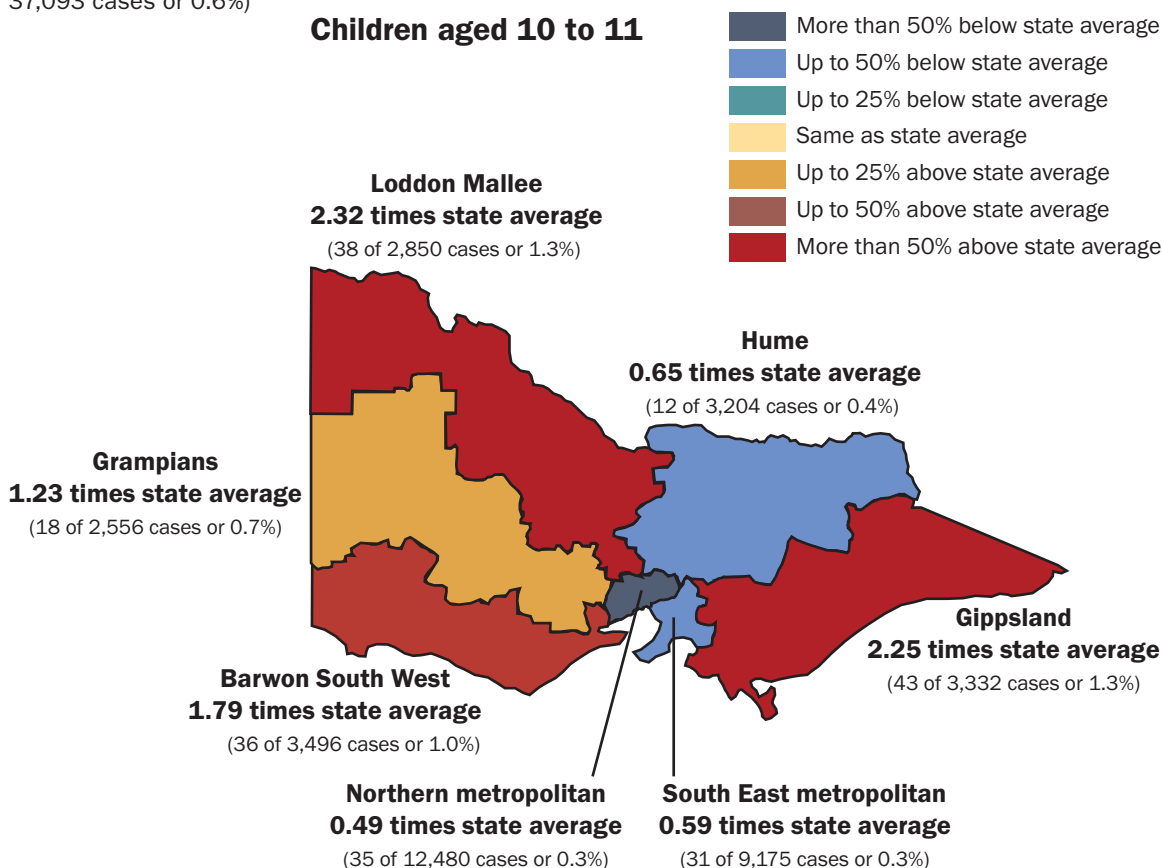


Figure 6b: Percentage of sentenced or diverted cases in the Children's Court involving offenders aged 12 at date of earliest offence in the case, by justice region, 1 July 2011 to 30 June 2021 (627 of 37,093 cases or 1.7%)

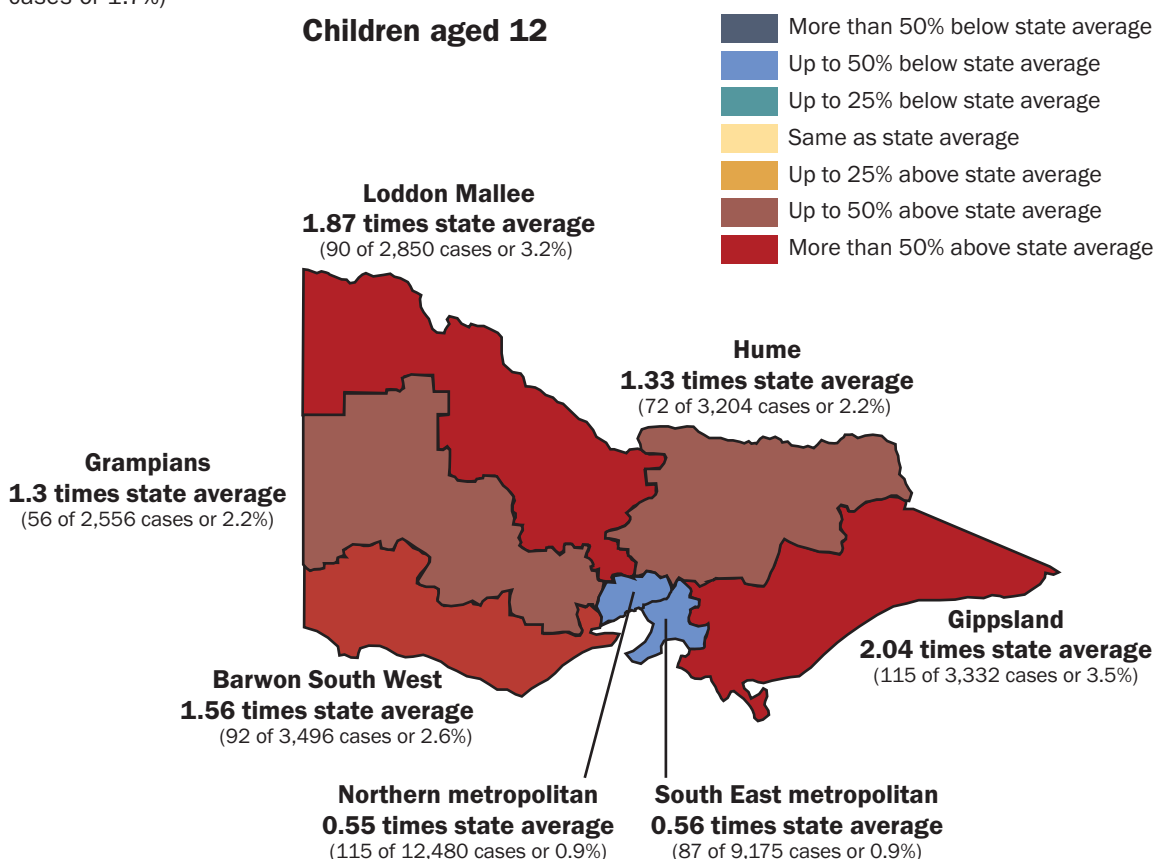
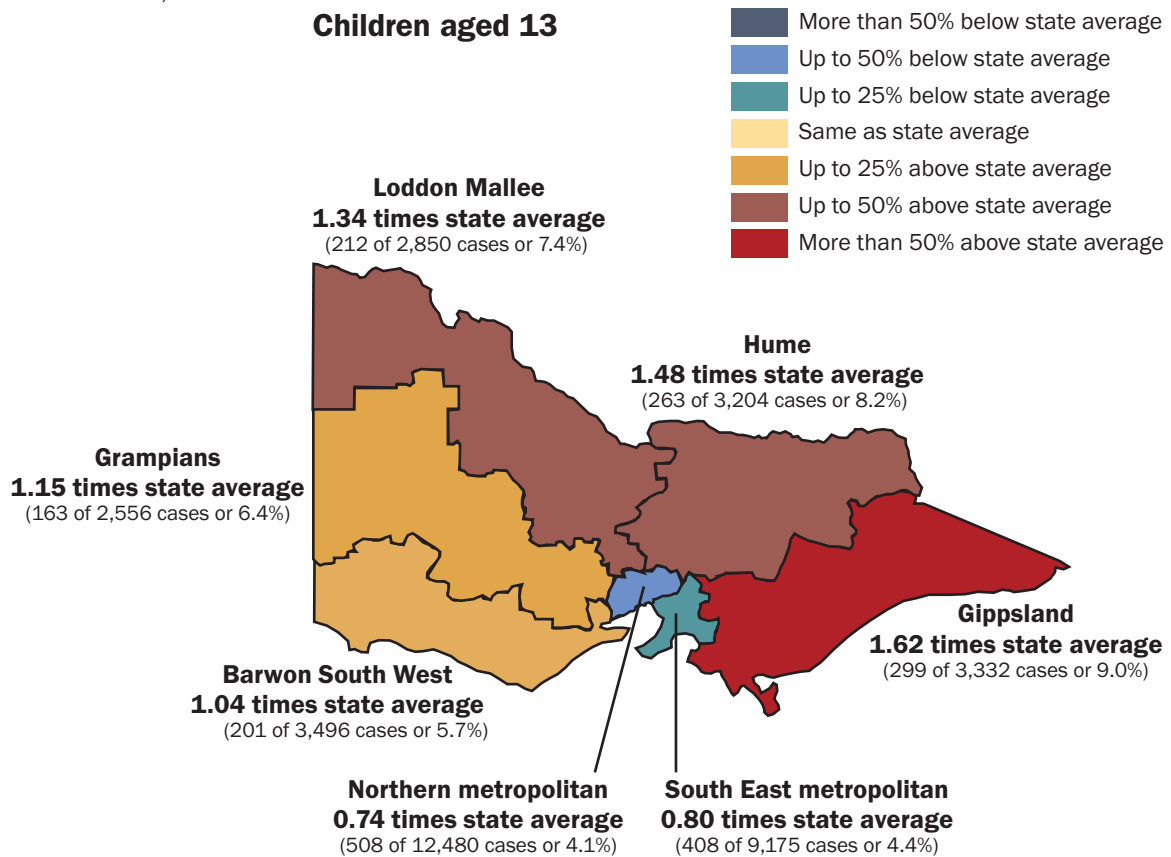


Figure 6c: Percentage of sentenced or diverted cases in the Children's Court involving offenders aged 13 at date of earliest offence in the case, by justice region, 1 July 2011 to 30 June 2021 (2,054 of 37,093 cases or 5.5%)



Looking at the relationship in reverse, of the 2,894 cases involving children who were sentenced or diverted in the Children's Court for offences committed aged 10 to 13, more than half were in regional Victoria (59%, or 1,710 cases) while the remaining 41% were in metropolitan Melbourne (1,184 cases). Focusing on each younger age group, children from regional Victoria comprised:

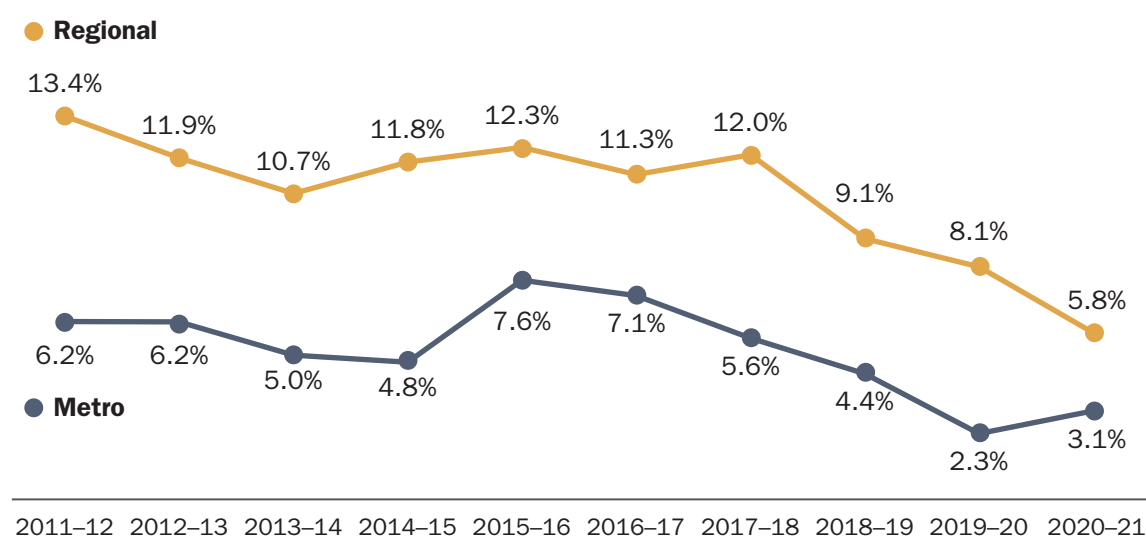
- 69% of cases involving children sentenced or diverted for offending committed when aged 10 to 11 at their earliest offence;
- 68% of cases involving children aged 12 at their earliest offence; and
- 55% of cases involving children aged 13 at their earliest offence.

In comparison, 40% of cases involving children aged 14 or older at their earliest offence were in regional Victoria.

To put these proportions in context, of all Victorian children aged 10 to 19, children aged 10 to 14 comprise 50% of children in metropolitan Melbourne (303,555 of 603,613 children aged 10 to 19) and 51% of children in regional Victoria (105,733 of 207,721 children aged 10 to 19).⁹⁶ Therefore, the higher proportions of younger children sentenced or diverted in regional Victoria do not appear to be related to the general distribution of children in those areas.

It also seems that the overall decrease in Children's Court cases involving children aged 10 to 13 at the time of offending (Figure 4, page 17) is a result of decreases in *both* regional and metropolitan courts (Figure 7). The proportion of Children's Court cases involving children aged 10 to 13 at offence halved from 6.2% to 3.1% in metropolitan Melbourne, and more than halved from 13.4% to 5.8% in regional Victoria.

Figure 7: Children's Court cases involving children sentenced or diverted for offending committed aged 10 to 13, by year and location (regional Victoria and metropolitan Melbourne), 2011–12 to 2020–2021



96. Estimates of populations in metropolitan Melbourne and regional Victoria were derived using Australian Bureau of Statistics, *Regional Population by Age and Sex* (abs.gov.au, 2023). This dataset provides estimates of the population, by age group, for each local government area in Australia. We aggregated local government areas into their corresponding justice regions. A relatively even proportion of children aged 10 to 19 were aged 10 to 14 across Victoria: Melbourne – Northern metropolitan region: 51% (136,554 of 267,206 people aged 10 to 19); Melbourne – South-Eastern metropolitan region: 50% (167,001 of 336,407); Barwon South West: 51% (27,231 of 53,799); Gippsland 51% (18,395 of 36,076); Grampians 51% (17,166 of 33,616); Hume 51% (20,426 of 40,135); Loddon Mallee 51% (22,515 of 44,095). The Australian Bureau of Statistics does not provide estimates for the *specific* age groups of interest in our study (aged 10 to 11, aged 12 and aged 13).

County Court and Magistrates' Court

Children from regional Victoria were also overrepresented in the 55 cases finalised in the adult jurisdiction. Of the 23 Magistrates' Court cases involving children aged 10 to 13 at the time of offending, 13 cases were sentenced in metropolitan Melbourne (57%) and 10 cases were sentenced in regional Victoria (43%). In comparison, 26% of all Magistrates' Court cases were finalised in regional Victoria.

The same was true for County Court cases. Of the 32 cases involving children aged 10 to 13 at the time of offending, almost half (47%, or 15 cases) were finalised in regional Victoria. In comparison, 17% of *all* County Court cases were finalised in regional Victoria.

This section examines the length of time between the earliest offence committed by younger children and the sentence imposed in the Children's Court, Magistrates' Court and County Court for their offending.

Younger children wait longer to be sentenced after offending

Figure 8 (page 34) shows that, in the Children's Court, 10-year-old children experienced the longest period between their earliest offence and sentencing (43 cases):

- half were sentenced 11.1 months or more after their earliest offence (the median);
- one-quarter were sentenced three years or more after their earliest offence date (the 75th percentile); and
- the longest time between earliest offence and sentencing for a child aged 10 was 9 years and 10 months (though this case is an outlier).

Further, the median decreased as age increased. The median period between earliest offence and sentencing fell from 11.1 months for children aged 10 at offence to 7.9 months for children aged 13 at offence (Figure 8). In comparison, the median period between earliest offence and sentencing was 7.1 months for children aged 14 at offence and 7.7 months for children aged 17 at offence.

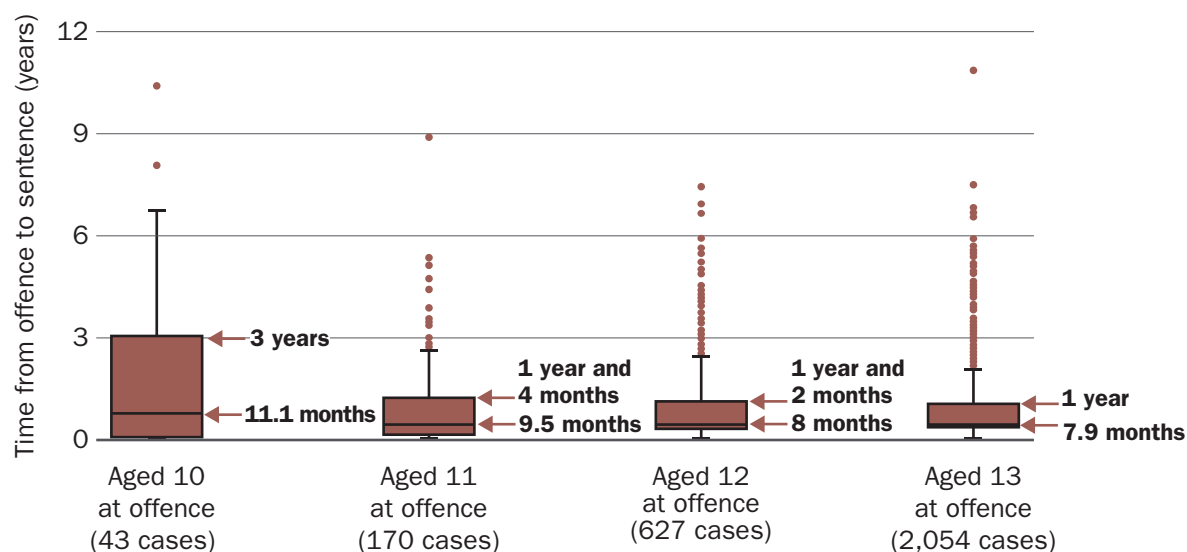
To enable comparison with other research, we looked at younger children as a combined group. Figure 9 (page 35) provides a more detailed distribution of the time from younger children's earliest offence to sentencing. Most children who offended aged 10 to 13 were sentenced or diverted six months or more after the earliest offence in their case (64%), with 9% sentenced or diverted two years or more after their earliest offence. The median time from their earliest offence to sentencing or diversion was 8 months. As children aged 13 are the largest group in our sample, however, Figure 9 largely reflects their experience.

These findings are consistent with Baidawi et al., which looked at 240 younger children who received court diversion, probation or youth supervision orders. Baidawi et al. found that the average period between an alleged offence and the end of court proceedings was approximately 8 months (249 days for diversion, and 255 days for probation and youth supervision orders).⁹⁷ In contrast, for children whose matters resolved with a finding of *doli incapax*, the period between alleged offending and the matter being finalised was over a year (406 days),⁹⁸ reflecting in part the additional time required for *doli incapax* processes.

97. Baidawi et al. (2024), above n 28, 23.

98. Ibid.

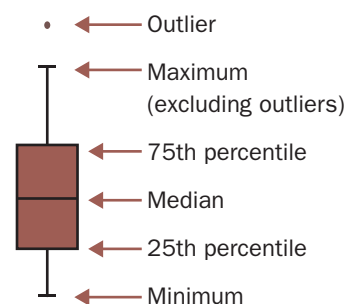
Figure 8: Children's Court sentenced and diverted cases, by shortest, longest and median time from earliest offence in the case to sentence (or diversion), by age at earliest offence in case, 1 July 2011 to 30 June 2021⁹⁹



How to read the box plots in Figure 8

The box plots use 'box and whiskers' to show key points in the amount of time between younger children's earliest offence in their case and the date of their sentence. These key points are:

- the **median** (the horizontal line midway across the box), which shows the period between offence and sentencing that half of the cases fall below and half of the cases are at or above;
- the **75th percentile** (the top line of the box), which shows the period between offence and sentencing that 75% of cases fall at or below;
- the **25th percentile** (the bottom line of the box), which shows the period between offence and sentencing that 25% of cases fall at or below;
- the **minimum** and **maximum** (the lines extending above and below the box), which show the minimum and maximum period between offence and sentencing; and
- **statistical outliers** (the dots above and below the box plot), which show the periods between offence and sentencing that were so far beyond the normal distribution of the data that they fall outside the range of the box and whiskers. The difference between younger and older children was particularly stark at the 75th percentile, which was 3 years for children who offended aged 10, compared with 1 year for children aged 13.

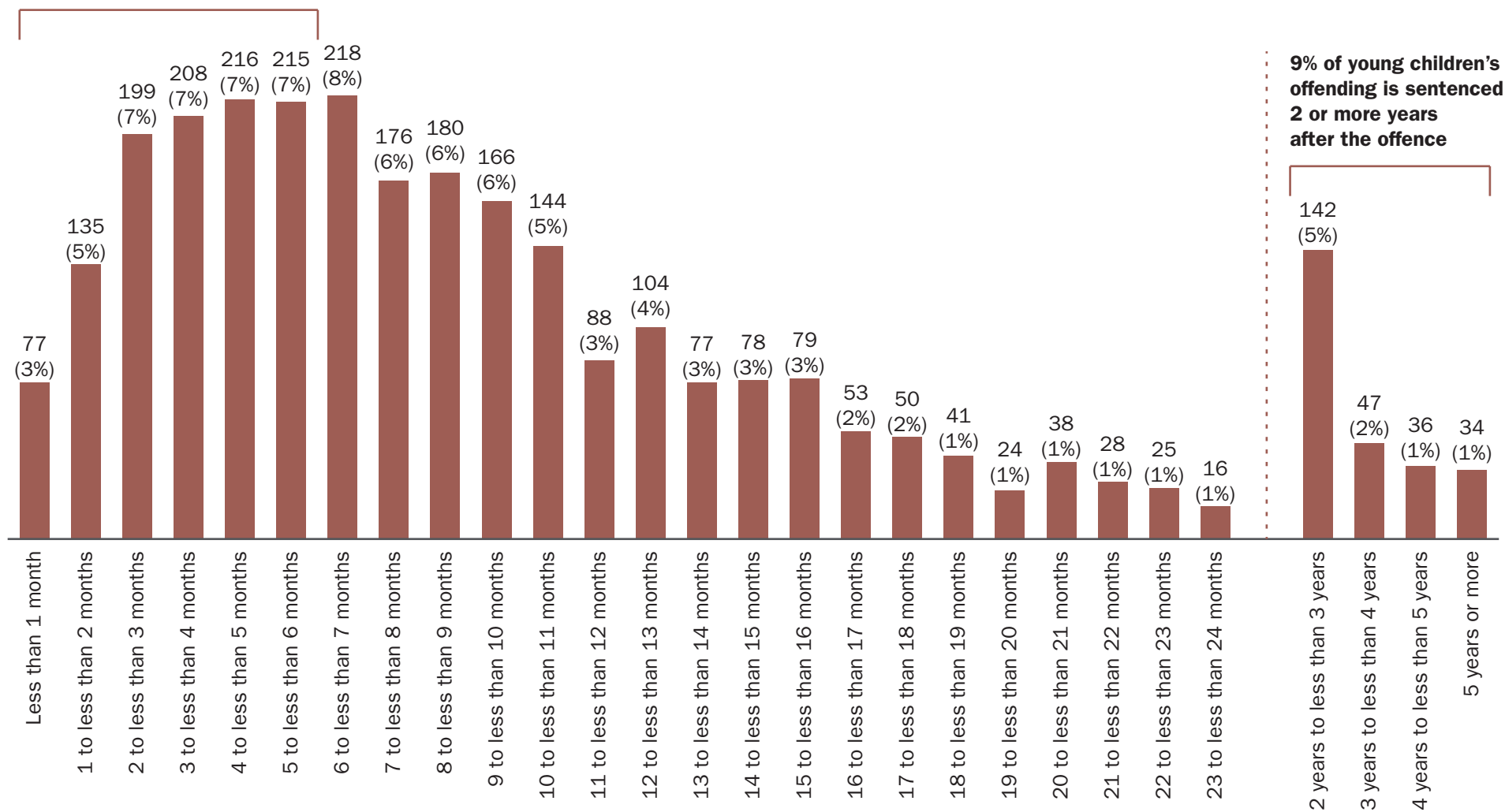


99. Cases were coded into age categories based on the youngest reliable age at offence in the case. Four cases had errors in the child's earliest offence date and were therefore coded based on the second (and more credible) earliest offence date in the case. Statistical outliers are based on a standard measure: see John Tukey, *Exploratory Data Analysis* (1977) 43–44.

Figure 9: Time from earliest offence date to sentencing in Children's Court cases involving children aged 10 to 13 at the date of at least one offence in the case, by percentage of cases for each time period, 1 July 2011 to 30 June 2021 (2,894 cases)

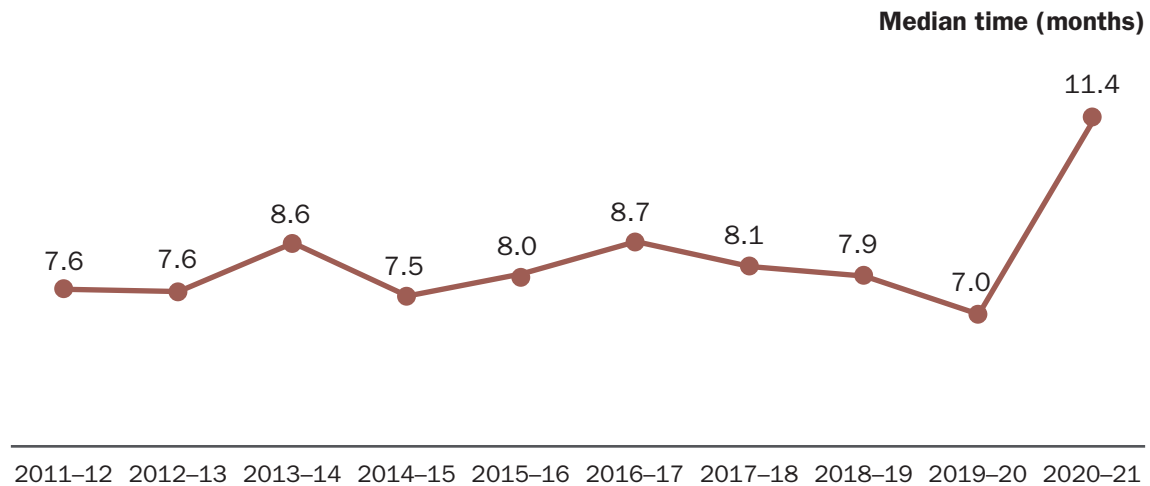
Only 36% of young children's offending is sentenced within 6 months of the offence

■ Number and percentage of cases



Our analysis further revealed that the median time from earliest offence to sentence was relatively stable over the period, with the exception of a longer median time in the final year during COVID-19 (Figure 10).

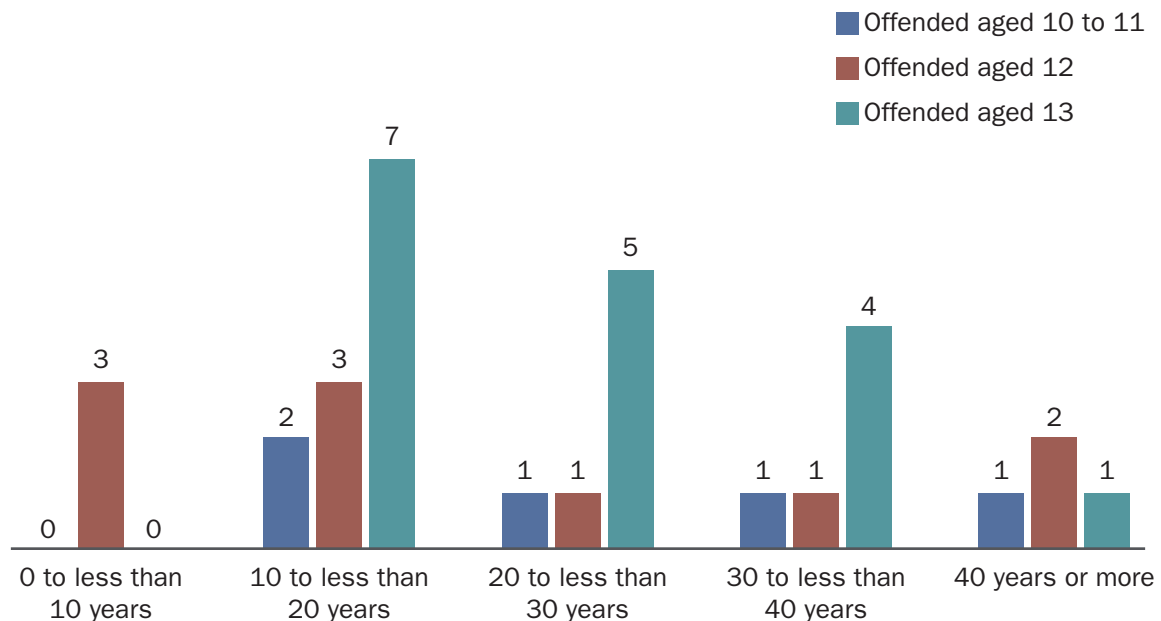
Figure 10: Median time each year from earliest offence date to sentencing in Children's Court cases involving children sentenced or diverted for offending aged 10 to 13, 2011–12 to 2020–21



In the County Court, most younger children were sentenced 20 years or more after their earliest offence

In the 32 County Court cases involving offences by younger children, the offending was not reported to police until the offender was older – in some cases it was not reported for years or even decades. As a result, the cases appear to have been sentenced in the County Court only because the offender was too old for the Children's Court jurisdiction by the time the case commenced. This was reflected in the time it took for these cases to be sentenced – most younger children were sentenced 20 years or more after their earliest offence, and only 3 were sentenced within 10 years of their earliest offence (Figure 11, page 37).

Figure 11: Number of County Court cases, by age of offender at earliest offence and length of time between earliest offence and sentencing, 1 July 2011 to 30 June 2021



In relation to the time from the earliest offence in the case to sentence in the 32 cases:

- the median time was:
 - 21 years and 4 months for children aged 10 to 11;
 - 18 years and 7 months for children aged 12; and
 - 22 years and 9 months for children aged 13;
- the shortest time was:
 - 10 years and 11 months for children aged 10 to 11;
 - 8 years and 6 months for children aged 12; and
 - 10 years and 10 months for children aged 13; and
- the longest time was:
 - 45 years and 11 months for children aged 10 to 11;
 - 54 years and 4 months for children aged 12; and
 - 46 years and 5 months for children aged 13.

Of these offenders, 9 were in their 20s at sentencing, 10 were in their 30s, 7 were in their 40s, 5 were in their 50s, and 1 person (the oldest) was aged 67.

In the Magistrates' Court, most younger children were sentenced 10 years or more after their earliest offence

As in County Court cases, Magistrates' Court cases involving younger children appear to have been sentenced in that jurisdiction only because the offender was too old for the Children's Court by the time the case commenced. In relation to time from earliest offence to sentence in the 23 Magistrates' Court cases involving younger children:

- the median time was:
 - 12 years and 11 months for children aged 10 to 11;
 - 9 years for children aged 12;
 - 11 years for children aged 13;
- the shortest time was:
 - 9 years and 2 months for children aged 10 to 11;
 - 7 years and 3 months for children aged 12;
 - 6 years and 1 month for children aged 13; and
- the longest time was:
 - 33 years and 2 months for children aged 10 to 11;
 - 37 years and 7 months for children aged 12;
 - 41 years and 5 months for children aged 13.

This section examines the nature of offending by younger children who were sentenced or diverted in the Children's Court, County Court or Magistrates' Court in the 10 years to 30 June 2021.

It begins with an analysis of all Children's Court cases that involved offending by younger children, including:

- identifying the principal (most serious) offence in the case (see below);
- determining whether younger children's most serious offences were different to older children's most serious offences;
- examining all offences in their cases (including offences that were *not* the most serious offence);
- determining whether offending varied by age and gender; and
- establishing whether offending changed over time.

This section then examines offences in the small number of Magistrates' Court and County Court cases that involved offending by younger children.

Steps to determine the principal (most serious) offence in a case

First: the principal offence is the charge in the case that received the most severe sentence type (according to the sentencing hierarchy)

Second: if two or more charges received an equally severe sentence type, the principal offence is the charge with the longest duration or largest dollar value

Third, if two or more charges received an equally severe sentence type and equally long duration or dollar amount, the principal offence is classified according to the National Offence Index (Australian Bureau of Statistics, 2023)

Fourth and finally: if two or more charges also shared an equally severe score on the National Offence Index, then the principal offence is the charge highest up on the charge-sheet (for example, charge 1 instead of charge 2).

Younger children's offences in the Children's Court

Younger children's most common principal offences

Table 5 (page 41) shows the principal offence types in all cases involving children sentenced or diverted in the Children's Court during the 10-year reference period. In the table, children are grouped by their age at the time of their principal offence: aged 10 to 11 (172 cases), aged 12 (520 cases), aged 13 (1,784 cases) and aged 14 or older (over 34,000 cases).¹⁰⁰

Because there are processes in place to reduce the number of younger children in the court system (for example, police cautions), it was expected that only younger children with more serious offences or prolific offending would be sentenced or diverted. Consistent with that expectation, the most common principal offence type for children aged 10 to 11 was assault/cause injury offences (66 cases, comprising 38% of the 172 cases involving children aged 10 to 11). Even then, the majority of those cases involved less serious assault offences under the *Summary Offences Act 1966* (Vic) (50 of the 66 assault/cause injury cases). The next 3 most common principal offence categories for children aged 10 to 11 were theft (32 cases), burglary (32 cases) and property damage (19 cases). Those four offence categories accounted for almost 90% of principal offences in the small number of cases involving children aged 10 to 11 at the time of their most serious offence.

Children who offended aged 12 had similar principal offence profiles to children who offended aged 10 to 11. The most common principal offence for children aged 12 was assault/cause injury (38%, or 198 cases) and the second most common principal offence was theft (18%, or 96 cases). Again, most of these assault/cause injury offences were under the *Summary Offences Act 1966* (Vic) rather than under the *Crimes Act 1958* (Vic) (120 cases, or 61% of 198 cases). Overall, the principal offence profiles of children aged 12 were similar to the offence profiles for children aged 10 to 11 (for example, 38% of both groups had an assault/cause injury principal offence), although there were also differences (for example, the proportion with burglary offences (13%) was more similar to children aged 13 (14%) than to children aged 10 to 11 (19%)).

100. Of the 2,894 Children's Court cases involving offending by children aged 10 to 13, 86% of cases involved a *principal offence* committed by a child aged 10 to 13 (2,476 cases). In 14% of cases (415 cases), the most serious offence in the case was committed by a child aged 14 or older, but there were also co-sentenced offences in the case that were committed when the child was aged 10 to 13. There were also 3 cases (less than 1% of cases) where the age of the person at their most serious offence was unknown or missing, but the person also had co-sentenced offences committed when aged 10 to 13.

Table 5: Cases sentenced or diverted in the Children's Court, by principal (most serious) offence and age at principal offence (number and percentage of cases in each age group), 1 July 2011 to 30 June 2021

Principal offence type	Aged 10 to 11 (172 cases)		Aged 12 (520 cases)		Aged 13 (1,784 cases)		Total aged 10 to 13 (2,476 cases)		Aged 14 or older (34,606 cases)	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
Assault/cause injury ^a	66	38%	198	38%	591	33%	855	35%	9,428	27%
Theft ^b	32	19%	96	18%	347	19%	475	19%	8,072	23%
Burglary ^c	32	19%	66	13%	244	14%	342	14%	2,589	7%
Property damage ^d	19	11%	58	11%	201	11%	278	11%	2,591	7%
Robbery ^e	4	2%	22	4%	122	7%	148	6%	2,422	7%
Public order offences ^f	3	2%	21	4%	43	2%	67	3%	1,068	3%
Weapons offences ^g	5	3%	10	2%	47	3%	62	3%	1,135	3%
Harm/endanger offences ^h	3	2%	14	3%	43	2%	60	2%	1,209	3%
Traffic/vehicle offences ⁱ	0	0%	7	1%	44	2%	51	2%	2,668	8%
Sex offences ^j	6	3%	13	3%	29	2%	48	2%	521	2%
Justice offences ^k	2	1%	7	1%	30	2%	39	2%	946	3%
Fraud offences ^l	0	0%	5	1%	23	1%	28	1%	792	2%
Drug offences ^m	0	0%	1	0%	5	0%	6	0%	803	2%
Other	0	0%	2	0%	15	1%	17	1%	362	1%
Total cases	172	100%	520	100%	1,784	100%	2,476	100%	34,606	100%

Table 5 notes:

- a. The 3 most common **assault/cause injury** offences in the 855 cases involving younger children were unlawful assault (*Summary Offences Act 1966* (Vic) s 23) (341 cases), recklessly causing injury (*Crimes Act 1958* (Vic) s 18) (239 cases) and assault with a weapon or instrument (*Summary Offences Act 1966* (Vic) s 24(2)) (83 cases).
- b. The 3 most common **theft** offences in the 475 cases were theft (*Crimes Act 1958* (Vic) s 74) (423 cases), attempted theft (*Crimes Act 1958* (Vic) ss 321M and 74) (18 cases) and handling stolen goods (*Crimes Act 1958* (Vic) s 88(1)) (18 cases).
- c. The 3 most common **burglary** offences in the 342 cases were burglary (*Crimes Act 1958* (Vic) s 76) (308 cases), aggravated burglary (*Crimes Act 1958* (Vic) s 77) (24 cases) and attempted burglary (*Crimes Act 1958* (Vic) ss 321M and 76) (10 cases).
- d. The 3 most common **property damage** offences in the 278 cases were intentionally damage/destroy property (*Crimes Act 1958* (Vic) s 197(1)) (152 cases), arson (*Crimes Act 1958* (Vic) s 197(6)) (58 cases) and wilfully damage property under \$5,000 (*Summary Offences Act 1966* (Vic) s 9(1)(c)) (38 cases).
- e. The most common **robbery** offence in the 148 cases was robbery (*Crimes Act 1958* (Vic) s 75) (86 cases).
- f. The most common **public order** offence in the 67 cases was entering a private place or scheduled public place without lawful excuse (*Summary Offences Act 1966* (Vic) s 9(1)(e)) (21 cases).
- g. The most common **weapons** offence in the 62 cases was possessing, carrying or using a controlled weapon without lawful excuse (*Control of Weapons Act 1990* (Vic) s 6(1)) (39 cases).
- h. The most common **harm/endanger** offence in the 60 cases was threatening to inflict serious injury (*Crimes Act 1958* (Vic) s 21) (14 cases).
- i. The most common **traffic/vehicle** offence in the 51 cases was unlicensed driving (*Road Safety Act 1986* (Vic) s 18(1)(a)) (21 cases).
- j. The most common **sex** offence in the 48 cases was the repealed offence of indecent act with a child aged under 16 (*Crimes Act 1958* (Vic) s 47(1)) as in operation from 1991 to 2017 (16 cases).
- k. The most common **justice** offence in the 39 cases was the repealed offence of contravening a conduct condition of bail (*Bail Act 1977* (Vic) s 30A) (12 cases).
- l. The most common **fraud** offences in the 28 cases was obtaining property by deception (*Crimes Act 1958* (Vic) s 81) (19 cases).
- m. The most common **drug** offence in the 6 cases was trafficking cannabis (*Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71AC) (3 cases).

Children who offended aged 13 had the same 4 most common principal offence categories as children aged 10 to 11 and aged 12 (assault/cause injury, theft, burglary and property damage). Offences under the *Summary Offences Act* again made up most of the assault/cause injury offences (349 cases, or 59% of the 591 cases of this offence type). Children aged 13 also had slightly more diverse offending, such as robbery (7% of cases) and traffic/vehicle offences (2%).

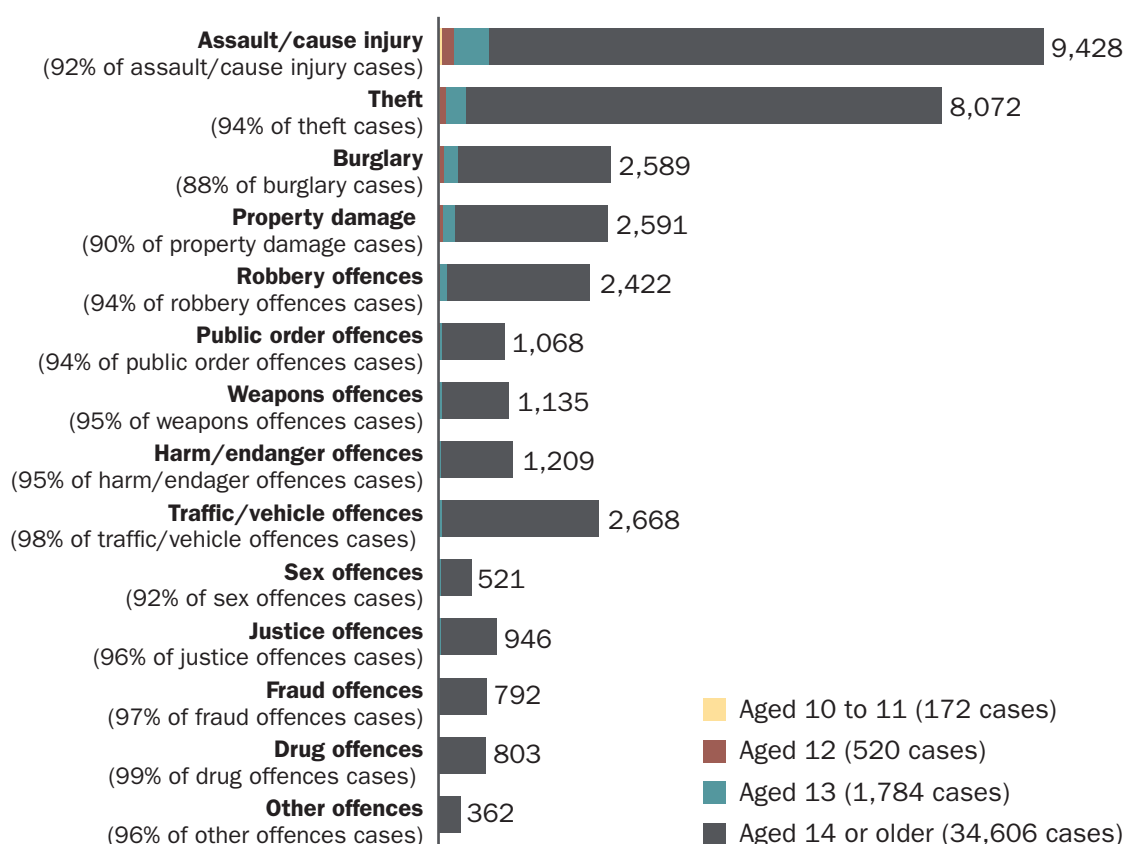
As a point of comparison, offending by children aged 14 or older was more diverse: 8% of cases involved traffic/vehicle offences and 2% (803 cases) involved drug offences (in contrast, just 6 cases (0.2%), in the entire cohort of children aged 10 to 13 involved drug offences).

There are stark differences between the volume of cases for younger children and older children. Children aged 10 to 11, aged 12 and aged 13 were responsible for only

a small proportion of Children's Court cases involving assault/cause injury offences (0.6%, 1.9% and 5.7%, respectively), while children aged 14 or older were responsible for 92% of Children's Court cases involving assault/cause injury (9,428 of 10,283 cases) (Figure 12).

There was relatively little change in younger children's principal offence types over the 10-year reference period. Assault/cause injury was the most common principal offence each year (between 31% and 40% of cases involving offending by children aged 10 to 13), followed by theft (between 13% and 26% each year).

Figure 12: Number of Children's Court cases involving children sentenced or diverted for each principal offence type, by age at principal offence, 1 July 2011 to 30 June 2021



The above findings are broadly consistent with other research in Victoria,¹⁰¹ and across Australia,¹⁰² which shows that property offences and offences against the person (assault/cause injury offences) are the two most common offence categories among children aged 10 to 13.

Participants at our stakeholder roundtable agreed that the higher concentration of assault/cause injury offences among younger children is likely to reflect measures to keep younger children out of the justice system where possible, such that only more

101. Property and deception offences and crimes against the person together made up 89% of all offences alleged to have been committed by children aged 10 to 13 in Victoria in 2021–22: Tali et al. (2023), above n 29, 1. See also Baidawi et al. (2023), above n 90, 7.

102. Standing Council of Attorneys-General (2023), above n 48, 19.

serious and/or prolific offending is dealt with in court.¹⁰³ One participant did raise a concern that *doli incapax* may be less readily applied in cases involving ‘more serious offences that evoke public concern’, such as physical assaults.¹⁰⁴ Others raised concerns about the link between out-of-home care and criminalisation.¹⁰⁵ Sometimes police are involved to manage problematic behaviour by children in care, resulting in children being charged with offences such as assault, burglary and criminal damage, whereas police most likely would not have been involved had the behaviour occurred in the child’s family home.¹⁰⁶ The Victorian Aboriginal Legal Service also observed that offences that initially look quite serious, such as burglary, could sometimes reflect behaviour such as a child entering the staff office at their residential care home without permission.¹⁰⁷

Age and gender

Table 6 (page 45) shows the most serious offence types in cases involving children aged 10 to 11, aged 12, aged 13 and aged 14 or older, separating the data for boys and girls. The table shows that an overwhelmingly small proportion of Children’s Court cases involved children aged 10 to 13, compared with children aged 14 or older. The table also shows that a higher *proportion* of girls (but a higher *number* of boys) had a principal offence of assault/cause injury, although the relatively small number of cases involving girls requires caution with interpretation. Assault/cause injury was the principal offence in:

- 42% of cases involving girls aged 10 to 11 (5 of 12 cases) compared with 38% of cases involving boys aged 10 to 11 (61 of 160 cases);
- 45% of cases involving girls aged 12 (61 of 136 cases) compared with 36% of cases involving boys aged 12 (137 of 384 cases);
- 43% of cases involving girls aged 13 (218 of 508 cases) compared with 29% of cases involving boys aged 13 (373 of 1,276 cases); and
- 34% of cases involving girls aged 14 or older (2,633 of 7,832 cases) compared with 25% of cases involving boys aged 14 or older (6,795 of 26,774 cases) (Table 6).

103. Stakeholder Roundtable (11 March 2025).

104. Stakeholder Roundtable (11 March 2025).

105. Stakeholder Roundtable (11 March 2025).

106. Stakeholder Roundtable (11 March 2025). Towards the end of the reference period for this project, the Victorian *Framework to Reduce Criminalisation of Young People in Residential Care* was released, which ‘aims to reduce the unnecessary and inappropriate contact of young people in residential care with the criminal justice system’: Department of Health and Human Services, *Framework to Reduce Criminalisation of Young People in Residential Care* (2020) 8–9. See also Sentencing Advisory Council (2020), above n 6, 46–48, 53–58; Kath McFarlane, ‘Care-Criminalisation: The Involvement of Children in Out-of-Home Care in the New South Wales Criminal Justice System’ (2018) 51(3) *Australian & New Zealand Journal of Criminology* 412; Victoria Legal Aid, *Care Not Custody: A New Approach to Keep Kids in Residential Care out of the Criminal Justice System* (2016).

107. Meeting with Victorian Aboriginal Legal Service (17 March 2025).

Table 6: Principal offence types in sentenced or diverted cases in the Children's Court, by gender, and by age at principal offence, 1 July 2011 to 30 June 2021 (37,092 cases)

Principal offence type	Aged 10 to 11		Aged 12		Aged 13		Aged 14 or older		Total cases (all children) ^a
	Boy	Girl	Boy	Girl	Boy	Girl	Boy	Girl	
Assault/cause injury	61	5	137	61	373	218	6,795	2,633	10,287
Theft	26	6	69	27	242	105	5,603	2,469	8,547
Burglary	31	1	57	9	205	39	2,292	297	2,933
Property damage	19	0	45	13	147	54	2,127	464	2,870
Robbery	4	0	16	6	95	27	2,092	330	2,570
Public order	3	0	15	6	25	18	867	201	1,135
Weapons offences	5	0	9	1	41	6	996	139	1,197
Harm/endanger	3	0	9	5	33	10	1,011	198	1,270
Traffic/vehicle	0	0	4	3	38	6	2,216	452	2,719
Sex offences	6	0	12	1	28	1	502	19	570
Justice offences	2	0	6	1	20	10	693	253	986
Fraud offences	0	0	2	3	13	10	595	197	820
Drug offences	0	0	1	0	4	1	686	117	809
Other	0	0	2	0	12	3	299	63	379
Total	160	12	384	136	1,276	508	26,774	7,832	37,092

a. This column includes 10 cases where children had a principal offence of that type but the child's age and/or gender was unknown.

Looking at *all* offences (not just the most serious in the case), theft and property damage were more common than assault/cause injury

As mentioned, there is a risk in focusing only on the most serious offence in cases involving children, because it can create a misperception that most offending by children is violent. The following analysis shows that this is unfounded.

Table 7 (page 46) examines all *charges* (rather than cases) for which younger children were sentenced or diverted in the 10 years to 30 June 2021. It shows the number of charges that children aged 10 to 11, aged 12, aged 13 and aged 14 or older were sentenced or diverted for in a particular offence type anywhere in their case. It shows that younger children's most common offence type was theft, which accounted for 23% of the charges for children aged 10 to 11 (201 of 858 charges), 29% of the charges for children

aged 12 (951 of 3,321 charges), and 31% of the charges for children aged 13 (3,870 of 12,605 charges). Looking at younger children as a group, theft accounted for 30% of their charges in the 10-year period (5,022 of 16,784 charges). The next three most common offence types were property damage, assault/cause injury and justice offences.

Table 7: All charges sentenced or diverted in the Children's Court, by number of charges for each offence type and age at offence, 1 July 2011 to 30 June 2021

Offence type (all offences)	Aged 10 to 11	Aged 12	Aged 13	Aged 14 or older
Theft	201	951	3,870	52,903
Property damage	179	697	1,786	19,409
Assault/cause injury	178	507	1,515	19,819
Justice offences	79	267	1,578	23,629
Public order offences	39	192	741	11,392
Burglary	69	263	913	10,098
Harm/endanger offences	52	131	432	5,504
Robbery	10	64	459	6,680
Traffic/vehicle offences	6	60	505	18,386
Weapons offences	12	43	199	3,787
Fraud offences	6	53	342	6,888
Drug offences	1	17	103	5,020
Sex offences	18	36	92	1,265
Other	8	40	70	1,283
Number of charges in age	858	3,321	12,605	186,063

Assault/cause injury offences

Of the 2,200 assault/cause injury charges committed by younger children, most were less serious offences under the *Summary Offences Act 1966* (Vic) rather than more serious offences under the *Crimes Act 1958* (Vic). The most common offences (1,707 of the 2,200 charges) were:

- unlawful assault (1,209 charges: *Summary Offences Act 1966* (Vic) s 23);
- recklessly causing injury (352 charges: *Crimes Act 1958* (Vic) s 18); and
- assault with a weapon or instrument (146 charges: *Summary Offences Act 1966* (Vic) s 24(2)).

Of children sentenced for assault/cause injury offences, there appeared to be an association between age at offence and the seriousness of the assault/cause injury charge. The youngest children (aged 10 to 11) were far more commonly sentenced

for assault/cause injury offences under the *Summary Offences Act 1966* (Vic), accounting for 89% of their assault/cause injury charges, with 11% of offences under the *Crimes Act 1958* (Vic). Conversely, 75% and 74% of assault/cause injury offences committed by children aged 12 and aged 13, respectively, were offences under the *Summary Offences Act 1966* (Vic). The proportion of assault/cause injury offences under the *Summary Offences Act 1966* (Vic) decreased to 67% for children aged 14 or older.

Overall, younger children committed less serious assault/cause injury offences than older children

Burglary offences

Of the 1,245 burglary charges that involved younger children, most charges involved burglary, rather than aggravated burglary.¹⁰⁸ The most common specific offences for younger children were:

- burglary (1,075 charges under *Crimes Act 1958* (Vic) s 76) and attempted burglary (51 charges under *Crimes Act 1958* (Vic) ss 321M and 76) – together accounting for 90.4% of burglary offences;
- aggravated burglary (112 charges under *Crimes Act 1958* (Vic) s 77) – 102 charges were committed by children aged 13; and
- other burglary offences, including home invasion (4 charges under *Crimes Act 1958* (Vic) s 77A) and attempted aggravated burglary (3 charges under *Crimes Act 1958* (Vic) ss 321M and 77).

Robbery offences

Relatively few armed robbery offences were among younger children's robbery charges (14%, or 74 of 533 robbery charges). The most common robbery offences for each age group of younger children were:

- **aged 10 to 11:** robbery (4 of 10 robbery charges under *Crimes Act 1958* (Vic) s 75) and attempted robbery (4 charges under *Crimes Act 1958* (Vic) ss 321M and 75). There were no charges of armed robbery, carjacking or aggravated carjacking for children aged 10 to 11.
- **aged 12:** robbery (36 of 64 robbery charges under *Crimes Act 1958* (Vic) s 75) and attempted robbery (12 charges under *Crimes Act 1958* (Vic) ss 321M and 75). There were 9 charges of armed robbery but no charges of carjacking or aggravated carjacking for children aged 12.
- **aged 13:** robbery (267 of 459 robbery charges under *Crimes Act 1958* (Vic) s 75) and armed robbery charges (65 charges under *Crimes Act 1958* (Vic) s 75A). There was one charge each of carjacking, aggravated carjacking and attempted aggravated carjacking for children aged 13.

108. Burglary is aggravated if the offender has a weapon or if someone is present during the burglary and the offender knew about or was reckless to their presence.

Sex offences

In the 10 years to 30 June 2021, the Children's Court sentenced 58 cases (involving 146 charges of sex offences) that included at least one sex offence committed by a younger child. Those 58 cases involved:

- 18 charges of sex offences committed by children aged 10 to 11 (across 8 cases);
- 36 charges of sex offences committed by children aged 12 (across 20 cases); and
- 92 charges of sex offences committed by children aged 13 (across 37 cases) (Table 7, page 46).¹⁰⁹

The principal offence in those cases

Of the 58 cases involving sex offences by younger children:

- in 48 cases, the principal offence was a sex offence committed by a younger child (the child was aged 10 to 11 in 6 cases, the child was aged 12 in 13 cases, and the child was aged 13 in 29 cases);
- in another 8 cases, the principal offence was a sex offence committed when the child was *aged 14 or older* but at least one co-sentenced sex offence was committed when the child was younger (aged 12 in 2 cases and aged 13 in 6 cases – none of these cases involved children aged 10 to 11);
- in 1 case, the principal offence was a sex offence but the age of the child was unknown, but there were co-sentenced sex offences that the child committed aged 10 to 11); and
- in 1 case, the principal offence was not a sex offence (the principal offence was recklessly causing injury), but the child had at least one sex offence in the case (committed when the child was aged 13).

Gender of children in cases where the principal offence was a sex offence

Of the 48 cases involving younger children where the principal offence was a sex offence, 46 cases involved boys and 2 cases involved girls. In the 2 cases involving girls, in 1 case the principal offence was indecent assault (the child was aged 12) and in the other case the principal offence was publishing child pornography (the child was aged 13). In the 46 cases involving boys, the principal offences were:

- for **boys aged 10 to 11** (6 cases): indecent act with a child aged under 16 (2 cases) and rape, indecent assault, sexual assault, and sexual penetration with a child aged under 16 (1 case each);
- for **boys aged 12** (12 cases): indecent act with a child aged under 16 (4 cases), sexual assault (3 cases), incest with a sibling (2 cases), and indecent assault, sexual penetration with a child aged under 16, and attempt to procure a minor for child pornography (1 case each); and

109. The number of cases in this list adds up to more than 58 because some children had charges of offences committed at different ages in the one case, and so their case was included in each relevant age group (for example, for offending aged 12 and offending aged 13).

- for **children aged 13** (28 cases): indecent act with a child aged under 16 (10 cases), indecent assault (5 cases), sexual penetration with a child aged under 16 (3 cases), incest with a sibling (3 cases), sexual assault (2 cases), and rape, assault with intent to rape, wilful and obscene exposure in public, visually capture a person's genitals (upskirting), and intentionally distribute an intimate image of another person (1 case each).

Of the 2 children aged 10 to 13 (both boys) who committed a rape offence, one child was sentenced to probation without conviction for 4 charges of rape. Two charges were committed when the child was aged 11, one charge was committed when the child was aged 12 and one was committed when the child was aged 13, with no other offences in the case. The other child was sentenced to a youth supervision order with conviction for 3 charges of rape, 3 charges of theft, 2 charges of arson, and 2 charges of dealing with suspected proceeds of crime (all committed when the child was aged 13).

What if the new *Youth Justice Act* applied?

In the 10 years to 30 June 2021, 146 Children's Court cases *solely* had offences involving children aged 10 to 11 (5% of the 2,894 cases involving younger children, and 0.4% of all 37,093 Children's Court cases). This number of children aged 10 to 11 suggests that, with the age of criminal responsibility raised to 12 years old, around 14 children per year, many of whom are likely to have experienced severe trauma and disadvantage,¹¹⁰ will no longer have a sentencing response in the Children's Court and will need to have their behaviour addressed through the alternative services model.¹¹¹

A further 1,940 cases solely had offences involving children aged 12 and aged 13 (67% of the 2,894 cases involving younger children, and 5.2% of all 37,093 Children's Court cases). While children aged 12 and aged 13 can still be sentenced or diverted in the Children's Court, the new provisions in the *Youth Justice Act* will apply. Given that the new provisions include a specified hierarchy of responses that police must consider before charging a child aged 12 to 13, it may be that the number of sentenced or diverted children aged 12 to 13 will reduce over time.

110. For example, we previously found that of 43 children first sentenced aged 10 to 11, 53% had been the subject of at least one child protection report, almost half (42%) were the subject of at least one child protection order, and over one-third (37%) had experienced out-of-home care: Sentencing Advisory Council (2019), above n 6, 86–90.

111. 'The Alternative Service Model will consider a range of early interventions and rehabilitative support services to help children and young people' who might have previously received a criminal justice response to their behaviour: Premier of Victoria, 'Experts to Guide Raising the Age of Criminal Responsibility', Media Release (30 October 2023). The provision that raises the age of criminal responsibility to 12 will commence on 30 September 2025 (unless proclaimed earlier): *Youth Justice Act 2024* (Vic) s 2(2) (see chapter 19.1 of the Act for transitional provisions relating to raising the age). Once section 10 commences (raising the minimum age of criminal responsibility to 12), the provisions in the Act specific to children aged under 14 will in effect apply to children aged 12 and 13.

The remaining 756 cases involving younger children had a combination of offences committed aged 10 to 13 and aged 14 or older (26.1% of cases involving younger children, and 2.0% of all Children's Court cases). Once the new *Youth Justice Act* comes into effect, people are still likely to face sentencing for offences committed aged 14 or older but offences committed aged 10 to 11 will not, and offences committed aged 12 to 13 might not, form part of their sentenced case.

Younger children's offences in the County Court

There were 32 County Court cases involving offences committed by younger children during the reference period. In all of those cases, the principal offence was a sex offence. And most cases also included offending beyond age 13:

All 32 County Court cases involved sex offences, and most cases also included offending beyond age 13

- 10 of the 32 cases *only* involved offences committed when the child was aged 10 to 13;
- 22 cases also included charges committed when the person was aged 14 or older:
 - in 9 cases, the principal offence was committed when the child was aged 10 to 13;
 - in 6 cases, the principal offence was committed when the person was aged 14 to 18; and
 - in the remaining 7 cases, the principal offence was committed when the person was aged 19 or older.

Looking at the specific offences in the 32 County Court cases:

- in the 19 cases where the **principal offence** was committed when the child was **aged 10 to 13** (either with or without offences committed aged 14 or older), the specific offences were sexual penetration with a child aged under 10 (8 cases),¹¹² indecent act with a child aged under 16 (6 cases),¹¹³ incest with a sibling (2 cases),¹¹⁴ indecent assault of a female (2 cases)¹¹⁵ and indecent assault of a male (1 case).¹¹⁶ Of this group, 12 children were aged 13 when they committed their

112. Four principal offences under section 45(1) *Crimes Act 1958* (Vic) (repealed by *Crimes (Amendment) Act 2000* (Vic) s 5) and four under section 47(1) of *Crimes Act 1958* (Vic) (repealed by *Crimes (Sexual Offences) Act 1991* (Vic) s 3).

113. All under section 47(1) of *Crimes Act 1958* (Vic) (repealed by *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 15).

114. All under section 44(4) of *Crimes Act 1958* (Vic) (repealed by *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 15).

115. Under section 55(1) of *Crimes Act 1958* (Vic) (repealed by *Crimes (Sexual Offences) Act 1980* (Vic) s 5).

116. Under section 68(3)(a) of *Crimes Act 1958* (Vic) (repealed by *Crimes (Amendment) Act 2000* (Vic) s 3(a)).

principal offence,¹¹⁷ 5 were aged 12,¹¹⁸ and the remaining 2 were aged 11¹¹⁹ (no children in this group were aged 10); and

- in the 13 cases where the **principal offence** was committed when the child was **aged 14 or older**, the specific offences were incest with a sibling (2 cases),¹²⁰ incest by a parent (1 case),¹²¹ sexual penetration with a child aged under 16 (2 cases),¹²² sexual penetration with a child aged under 10 (1 case),¹²³ indecent act with a child aged under 16 (3 cases),¹²⁴ buggery (1 case),¹²⁵ rape (1 case),¹²⁶ maintaining a sexual relationship with a child aged under 16 (1 case),¹²⁷ and indecent assault (1 case).¹²⁸ Although the offenders were aged 14 or older at their principal offence, each of these 13 cases also had a co-sentenced offence committed when the child was younger. The offender had a co-sentenced offence at age 13 in 8 of the 13 cases,¹²⁹ at age 12 in 6 cases,¹³⁰ at age 11 in 2 cases,¹³¹ and at age 10 in one case (the co-sentenced offence in that case was indecent assault of a male).

No sentenced charges of rape in the County Court were committed by children aged 10 to 13 at the time of the offence; all rape offences were committed by people aged 14 or older.

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117. In the 12 cases involving children aged 13 at principal offence, the specific offences were sexual penetration with a child aged under 10 (5 cases), indecent act with a child aged under 16 (3 cases), indecent assault of a female (2 cases), indecent assault of a male (1 case) and incest with a sibling (1 case).
118. In the 5 cases involving children aged 12 at principal offence, the specific offences were indecent act with a child aged under 16 (2 cases), sexual penetration with a child aged under 10 (2 cases) and incest with a sibling (1 case).
119. In the 2 cases involving children aged 11 at principal offence, the specific offences were indecent act with a child aged under 16 (1 case) and sexual penetration with a child aged under 10 (1 case).
120. Both under section 52(3) of the *Crimes Act 1958* (Vic) (repealed by *Crimes (Sexual Offences) Act 1980* (Vic) s 5).
121. Under section 44(1) of the *Crimes Act 1958* (Vic) (repealed by *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 15).
122. Under section 45(1) of the *Crimes Act 1958* (Vic) (repealed by *Crimes (Amendment) Act 2000* (Vic) s 5).
123. Under section 45(1) of the *Crimes Act 1958* (Vic) (repealed by *Crimes (Amendment) Act 2000* (Vic) s 5).
124. All under section 47(1) of the *Crimes Act 1958* (Vic) (repealed by *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 15).
125. All under section 68(1) of the *Crimes Act 1958* (Vic) (repealed by *Crimes (Amendment) Act 1967* (Vic) s 3(a)).
126. All under section 38 of the *Crimes Act 1958* (Vic).
127. All under section 47A of the *Crimes Act 1958* (Vic) (repealed by *Crimes (Sexual Offences) Act 1991* (Vic) s 3).
128. Under section 39(1) of the *Crimes Act 1958* (Vic) (repealed by *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) s 4).
129. In these 8 cases, the co-sentenced offences committed at age 13 were indecent assault (3 cases), sexual penetration with a child aged under 10 (3 cases), indecent act with a child aged under 16 (2 cases), indecent assault of a female (1 case) and incest with a sibling (1 case).
130. In these 6 cases, the co-sentenced offences committed at age 12 were indecent act with a child aged under 16 (2 cases), indecent assault of a female (2 cases), incest with a sibling (1 case), indecent assault (1 case) and procuring sexual penetration by threat (1 case).
131. In these 2 cases, the co-sentenced offences committed at age 11 were indecent act with a child aged under 16 (1 case) and sexual penetration with a child aged under 10 (1 case).

What if the new *Youth Justice Act* applied?

In the 10 years to 30 June 2021, only two people were sentenced (as adults) in the County Court *solely* for offences committed aged 10 to 11. One of these two people was aged 22 at sentencing and the other was aged 41 (see **Case Study 1**). Such cases will no longer have a sentencing response with the age of criminal responsibility raised to 12 years old. The other 30 cases involved one or more offences committed by children aged 12 or older, and would still be subject to a potential sentencing response, albeit within the new framework established by the *Youth Justice Act* (see **Case Study 2**). The latter case raises questions about how the new provisions of the *Youth Justice Act* should apply to offences committed years or decades earlier, including the difficulties in establishing (as required by section 11) that the person knew at the time – years or decades ago – that what they were doing was seriously wrong.

Case Study 1

The offender pleaded guilty to one charge of sexual penetration with a child aged under 10, representing four separate occasions on which the victim performed oral sex on the offender. The offending occurred when the victim visited a rural property where the offender lived. The prosecution was unable to specify the exact ages of the offender and victim at the time of the offending. The court sentenced the offender on the basis that he was about age 11 at the time of the offending, and that the victim was aged under 10. About 25 years after the offending, the victim, having spoken to police, phoned the offender and asked why he did ‘those things’ to her. He replied that ‘it was just, you know, we were sort of kids back then’. He said that he did not have a reason and was terribly sorry for doing it. The offender was then interviewed by police, and he admitted to the conduct.

The offender was aged 41 at sentencing, had no further convictions, had a partner and child, and was employed in a management position. It did not appear that any similar conduct had occurred since and there appeared to be no risk of reoffending. The court noted the difficulty in sentencing the offender as an adult given that if he had been sentenced at age 11, he would have been sentenced in the Children’s Court where general deterrence would not have been a sentencing purpose, and the outcome would likely have prioritised his rehabilitation rather than punishment. The court also noted, however, that the consequences to the victim were ‘dramatic and [had] been longstanding’ including post-traumatic stress disorder, feelings of guilt and blame, difficulties with intimate relationships and fears for her own children.

The court sentenced the offender to a 12-month adjourned undertaking without conviction with a special condition that he donate \$500 to a specified charity.

Sentencing remarks provided to the Council

Case Study 2

The offender pleaded guilty to one charge of sexual penetration with a child aged under 16. There was some uncertainty about the timing, but he was sentenced on the basis that he was aged 13 at the time and the victim was aged 7. The offender had not offended before or in the 15 years since. The sentencing judge found that the offending had severe and long-term consequences for the victim and the victim's family.

In the 15 years between the offence and sentence, the offender had qualified as a teacher. After being charged, the offender informed his employer, and he was suspended by the Teachers Registration Board. His suspension was posted on the Registration Board website and was able to be 'viewed by the world at large'. Because he pleaded guilty to a sex offence involving a child (even though he was a child himself at the time of the offence), his teacher's registration was automatically cancelled, and his 'chosen vocation of a teacher ... [was] now lost forever'. The principal of the school where the offender taught provided a reference to the court, stating that 'she was shocked when [the offender] told her about being charged... [and] considered that the alleged offending was totally out of character with the person that she had known in a professional context for several years'.

Considering myriad factors, including the offender's age at the time of the offence, his subsequent good character, his remorse and the loss of his teaching career, the sentencing judge did not record a conviction, placing him on an adjourned undertaking. The judge said:

'In my view the discretion to not order a conviction should be exercised in your favour. In coming to that conclusion, it is necessary to emphasise again that sexual offending against children is most serious indeed. However, I take into account your age, your character and past history and I accept the contention of your counsel ... as to the impact of the recording of a conviction.'

Sentencing remarks provided to the Council

Younger children's offences in the Magistrates' Court

In the 10 years to 30 June 2021, 23 Magistrates' Court cases included offences committed by younger children. Ten of those 23 cases included at least one sex offence committed by the child when they were aged 10 to 13.

Three cases included only offences committed at age 10 to 13. The other 20 cases included a range of offences committed both before and after the person turned 14. In 10 of those cases, the principal offence was committed when the child was aged 10 to 13; in the other 10 cases, the principal offence was committed when the child was aged 14 or older, with co-sentenced

In the Magistrates' Court, younger children were sentenced for a variety of offending, and most cases also included co-sentenced offences committed aged 14 or older

offences committed aged 10 to 13. Focusing on the principal offences:

- in the 3 cases where all offences in the case were committed at age 10 to 13, the principal offences were indecent assault of a female, burglary, and theft of a motor vehicle (in each case the child was aged 12 at the time of the principal offence);
- in the 10 cases where the principal offence was committed by children aged 10 to 13 but co-sentenced offences were committed when the children were aged 14 or older, the principal offence mainly involved sex offences – indecent act with a child aged under 16 (6 cases) and incest with a sibling (1 case). The principal offences in the remaining cases were burglary (2 cases) and criminal damage (1 case). Most of these offenders were aged 13 at the time of their principal offence (8 cases), and the rest were aged 12 (2 cases); and
- in the remaining 10 cases, the principal offence was committed by children aged 14 or older (with co-sentenced offences committed when the children were aged 10 to 13). The principal offences in those cases were burglary (5 cases), aggravated burglary (1 case), drive at a dangerous speed (1 case), possess cocaine (1 case), indecent act with a child aged under 16 (1 case), and indecent assault of a female (1 case). The most common co-sentenced offences committed by children aged 10 to 13 were theft (11 charges), indecent act with a child aged under 16 (6 charges), burglary (6 charges), and indecent assault of a female (3 charges).

What if the new *Youth Justice Act* applied?

All children involved in the 23 Magistrates' Court cases would still potentially face sentencing under the new *Youth Justice Act*:

- no children committed offences aged 10 to 11 only (below the new age of criminal responsibility);
- 13 children would still potentially face prosecution for principal offences committed aged 12 or aged 13, subject to the new provisions in the *Youth Justice Act*; and
- 10 children would still face prosecution for principal offences committed aged 14 or older, although the new provisions for children aged under 14 would apply to co-sentenced offences committed aged 12 or age 13.

Sentencing offences by younger children

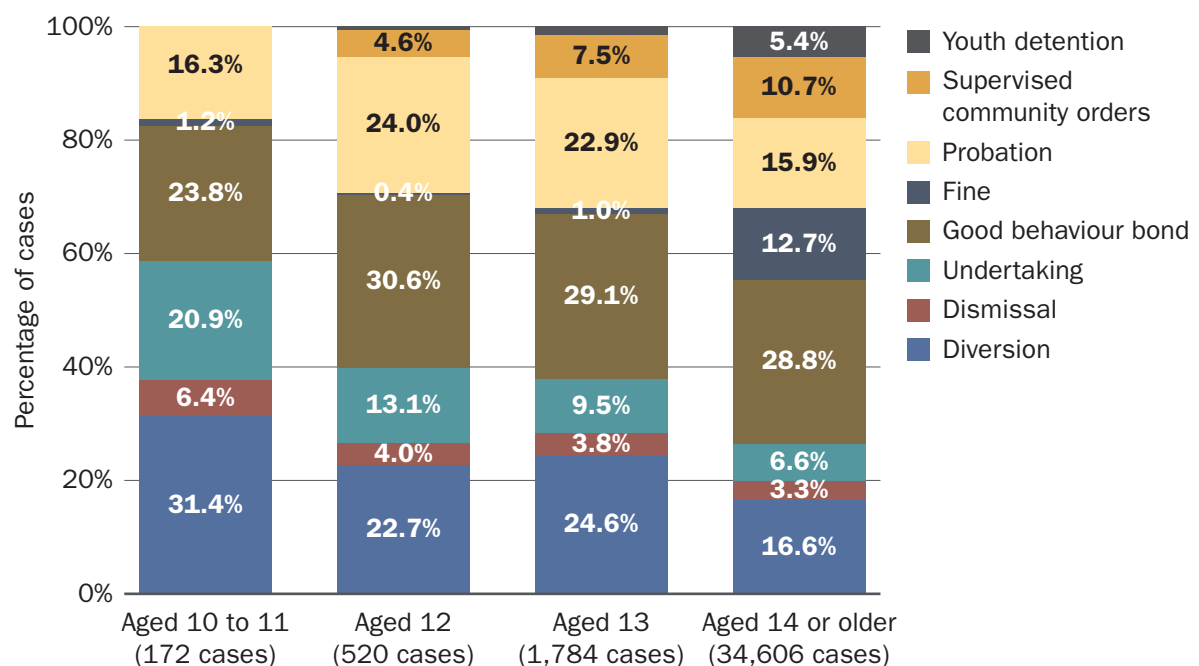
This section looks at the sentencing orders imposed in the Children's Court, County Court and Magistrates' Court in the 2,949 cases involving offences committed by younger children.

In this section, children's age is their age at the time of principal offence, whereas children may have been somewhat or significantly older at the time of sentencing. For the purposes of this report, Children's Court youth diversion is discussed as a type of sentencing order, although youth diversion is not a 'sentence'.¹³² Youth supervision orders, youth attendance orders and youth control orders have been grouped together as *supervised community orders* because they were rarely imposed on younger children. Although also a supervised order, probation is kept separate in the analysis as it was more common in sentencing cases involving offending by younger children.

Sentence severity increased as age at offence increased

Figure 13 shows the sentencing outcomes for cases sentenced or diverted in the Children's Court where the principal offence was committed by a child aged 10 to 11, aged 12, aged 13, or aged 14 or older.

Figure 13: Sentencing outcomes in the Children's Court, by age at principal offence, 1 July 2011 to 30 June 2021



132. See above n 55.

Sentence types increased in severity with age at time of principal offence. Children aged 10 to 11 at the time of principal offence tended to receive the least severe sentencing outcomes, including diversion (31.4% of cases involving children aged 10 to 11), dismissal (6.4%) and undertakings (20.9%). The most severe sentence imposed on a child aged 10 to 11 at principal offence was probation (16.3%, or 28 of 172 cases); no other supervised community orders or youth detention orders were imposed in cases involving children aged 10 to 11 at principal offence in the 10-year period. In contrast, children aged 12, aged 13 or aged 14 or older at their principal offence also received other supervised community orders (youth supervision orders, youth attendance orders or youth control orders). Supervised community orders were imposed in 4.6% of the 520 cases involving children aged 12 at principal offence, 7.5% of the 1,784 cases involving children aged 13 at principal offence, and 10.7% of the 34,606 cases involving children aged 14 or older at principal offence. Probation was also an important option for children aged 12 and aged 13 at principal offence, with almost one in four children aged 12 (24% of 520 cases) and aged 13 (22.9% of 1,784 cases) receiving probation.

Fines were also a very rare outcome for children who committed their most serious offence at a younger age, imposed in 1.2% of cases involving children aged 10 to 11 at principal offence (2 of 172 cases), 0.4% of cases involving children aged 12 (2 of 520 cases) and 1.0% of cases involving children aged 13 (18 of 1,784 cases). Participants at our stakeholder roundtable expressed surprise at the use of fines for younger children.¹³³ One person commented, 'I'm shocked by the use of fines especially for the youngest children', although the participant acknowledged that the children may have been older by the time they were sentenced.¹³⁴ Another participant also noted that the use of fines has declined significantly as a sentencing outcome for all children, including younger children.¹³⁵ The new *Youth Justice Act* now provides that courts may only impose a fine on a child aged 15 or older at sentencing (section 249) (currently fines can be imposed on children aged under 15, but the maximum fine amount is less for younger children).¹³⁶ Fines would, though, continue to be available for children who offend aged under 15 but who are aged 15 or older at sentencing.

In the 10-year period, youth detention was imposed in 30 cases involving a child aged 10 to 13 at principal offence. None of these cases involved a child aged 10 to 11 at principal offence, 3 cases involved a child aged 12 (0.6% of the 520 cases involving

133. Stakeholder Roundtable (11 March 2025).

134. Stakeholder Roundtable (11 March 2025).

135. Stakeholder Roundtable (11 March 2025).

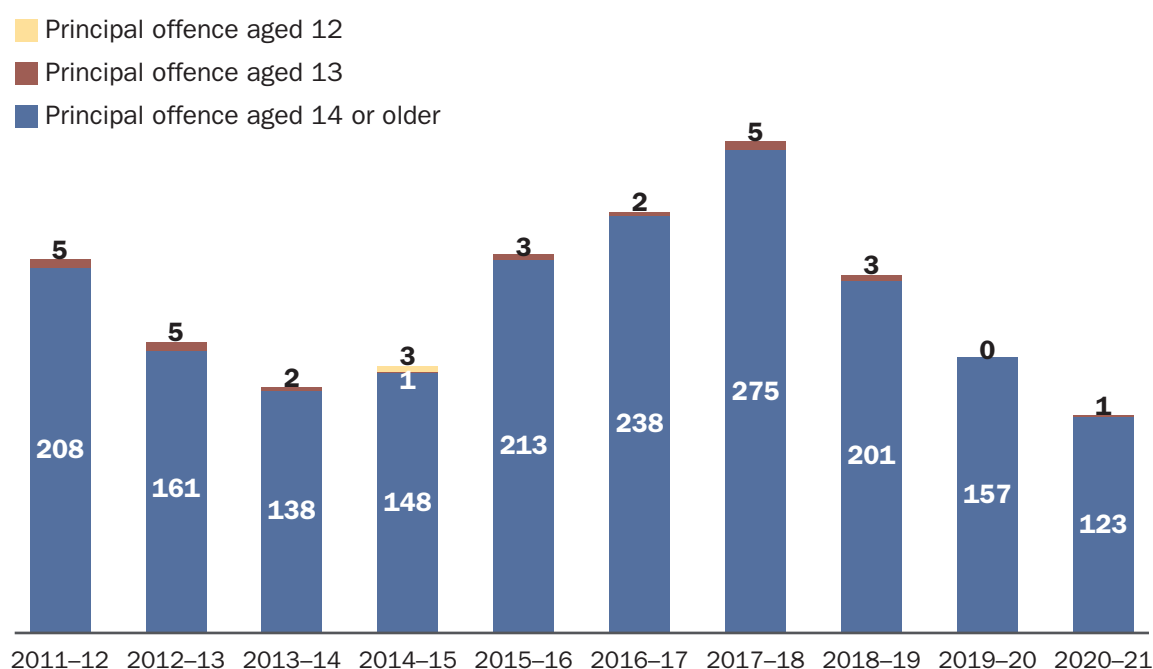
136. *Children, Youth and Families Act 2005* (Vic) s 373(a)(i).

children aged 12 at principal offence) and 27 involved a child aged 13 (1.5% of the 1,784 cases involving children aged 13 at principal offence). In the 30 cases involving children sentenced to youth detention for a principal offence aged 12 or aged 13, the principal offences were:

- intentionally causing injury and theft of a motor vehicle (4 cases each);
- recklessly causing serious injury, recklessly causing injury, and aggravated burglary (3 cases each);
- burglary, attempted armed robbery, and assault with a weapon or instrument (2 cases each); and
- criminal damage, reckless conduct endangering life, robbery, obtain financial advantage by deception, assault police, common assault, and possess a controlled weapon (1 case each).

The 30 cases receiving youth detention comprised 1.6% of the 1,892 Children's Court cases where youth detention was imposed during our 10-year reference period (Figure 14).

Figure 14: Youth detention orders imposed in the Children's Court, by age at principal offence and year of sentencing, 2011–12 to 2020–21 (1,892 cases)

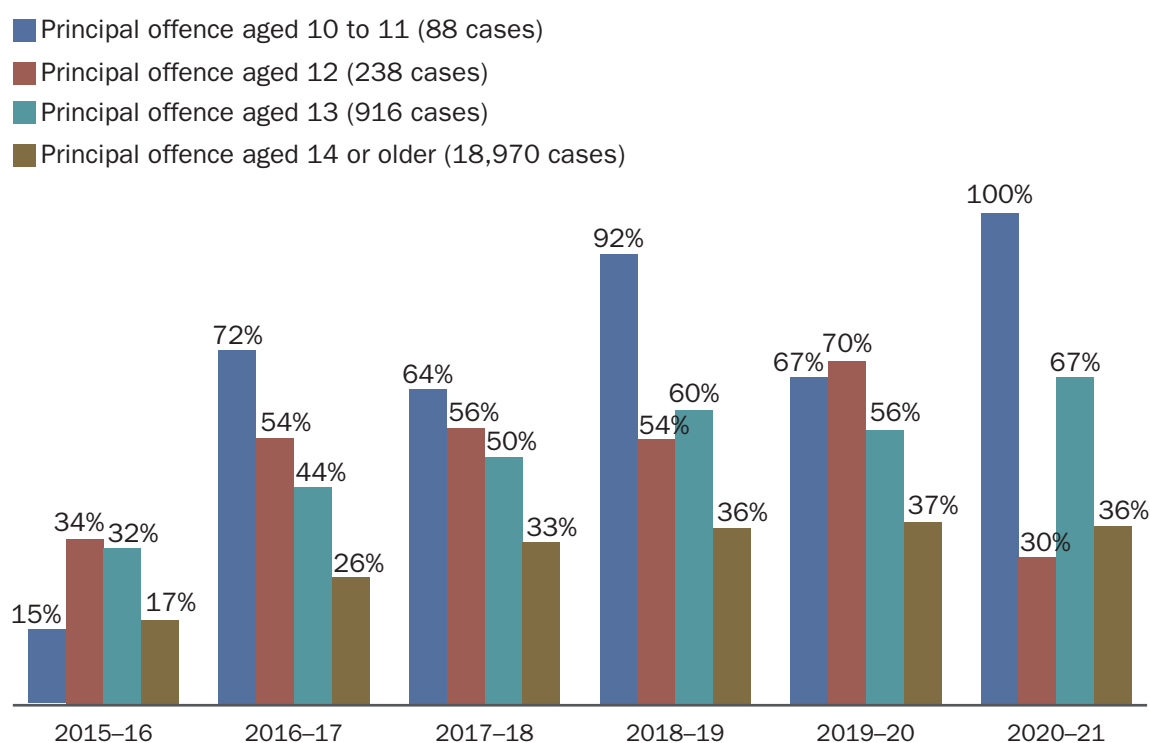


Use of Children's Court youth diversion has increased dramatically for younger children

Following a successful pilot in 2015, court-ordered diversion became available statewide in the Children's Court in 2017.¹³⁷ Since then, Children's Court youth diversion has made up an increasingly large proportion of all outcomes in the Children's Court (54% in 2022–23, or 1,215 of 2,242 cases).¹³⁸ As can be seen in Figure 15, that increase has been even starker for younger children. Overall, in the last five years of our study (2016–17 to 2020–21), diversion was imposed in:

- 75% of cases where the principal offence was committed by a child aged 10 to 11 (51 of 68 cases);
- 55% (97 of 176 cases) and 53% (362 of 685 cases) where the principal offence was committed by a child aged 12 or aged 13, respectively; and
- 33% of cases where the principal offence was committed by a child aged 14 or older (5,136 of 15,499 cases).

Figure 15: Proportion of Children's Court cases resulting in youth diversion, by age at time of principal offence, 2015–16 to 2020–21



For younger children, the use of Children's Court youth diversion appears to have largely replaced the use of probation, good behaviour bonds and undertakings, which was relatively stable until 2015 but then dramatically decreased after youth diversion was

137. Diversion started as a pilot on 1 June 2015 and was rolled out statewide on 1 January 2017 (see above n 55).

138. Sentencing Advisory Council, 'Sentencing Outcomes in the Children's Court' (sentencingcouncil.vic.gov.au, 2024).

introduced (Figure 16). In contrast, the use of other sentencing orders, such as youth detention, youth control orders, youth attendance orders, youth supervision orders and dismissals, remained relatively rare and stable. To highlight the distinct reductions in the use of the three sentencing orders for younger children:

- good behaviour bonds decreased from 42% in 2011–12 to 18% in 2020–21 of outcomes in Children’s Court cases involving offending by children aged 10 to 13;
- probation decreased from 31% to 8%; and
- undertakings (predominantly *accountable* undertakings) decreased from 16% to 1%.

Figure 16: Use of sentencing orders in Children’s Court cases involving children aged 10 to 13 at principal offence, before and after the introduction of youth diversion (in 2015), 2011–12 to 2020–21 (2,476 cases)¹³⁹

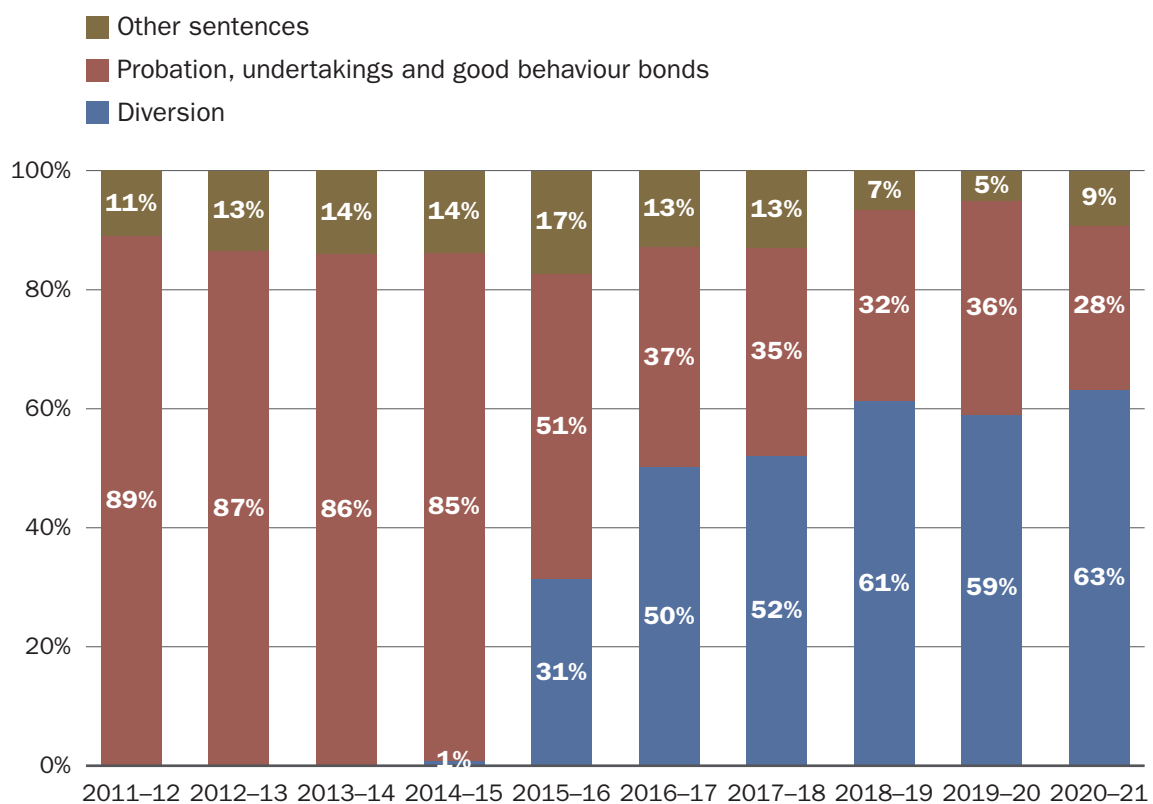
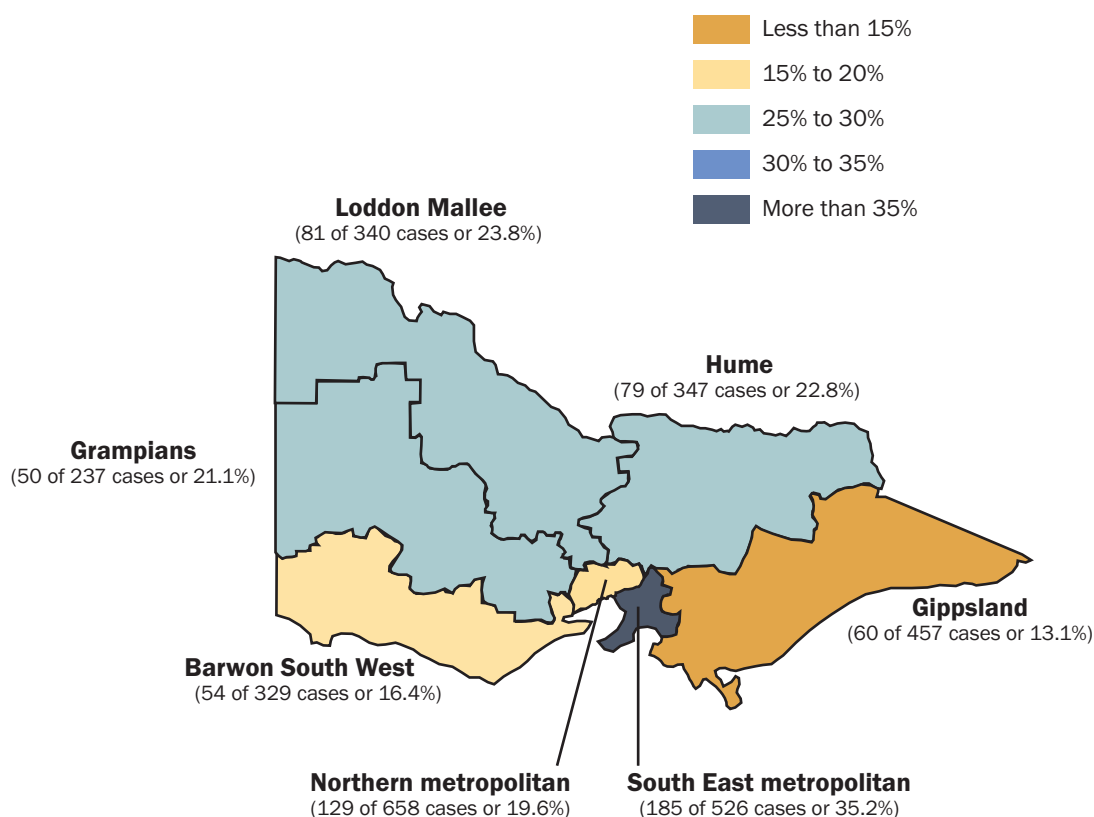


Figure 17 (page 60) shows the rate of youth diversion in each justice region in Children’s Court cases involving children sentenced or diverted for offences committed aged 10 to 13. The justice region with the lowest rate of youth diversion was Gippsland, where 13.1% of cases involving children aged 10 to 13 resulted in youth diversion. In contrast, the South Eastern metropolitan region had the highest rate, with just over 35% of cases involving children aged 10 to 13 resulting in youth diversion.

139. ‘Other sentences’ encompass youth detention orders, youth control orders, youth attendance orders, and youth supervision orders, fines and dismissal.

Figure 17: Percentage of Children's Court cases involving children aged 10 to 13 who received youth diversion, by justice region, 1 July 2011 to 30 June 2021



Sentencing outcomes in the County Court

In the 32 County Court cases involving offences by younger children (only 5 of which included offences by children aged 10 to 11), the sentences most commonly imposed were adjourned undertakings (10 cases, 7 without conviction), imprisonment (8 cases) and wholly suspended sentences (8 cases) (see Figure 18 and Table 8, page 61). The remaining outcomes were community correction orders (4 cases) and partially suspended sentences (2 cases). Suspended sentences were phased out in the higher courts but remain available for some historical offences.¹⁴⁰

As discussed above, the 32 County Court cases involved:

- 19 cases where the principal offence was committed by a child aged 10 to 13 (either with or without other offences committed when older); and
- 13 cases where the principal offence was committed by a child aged 14 or older (with at least one co-sentenced offence committed aged 10 to 13).

140. Suspended sentences are unavailable in the higher courts for 'serious offences' committed after 2011 and all offences committed after 2013: *Sentencing Amendment Act 2010* (Vic) s 12, repealing s 27(2B) *Sentencing Act 1991* (Vic); *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) part 2 div 2.

There was a noticeable difference between the most severe sentences imposed in cases involving children aged 10 to 13 at principal offence and the most severe sentences imposed in cases involving children aged 14 or older at principal offence (with co-sentenced offences aged 10 to 13). For example, all the prison sentences were imposed in cases involving children aged 14 or older at principal offence, whereas all of the adjourned undertakings were imposed in cases involving children aged 10 to 13 at principal offence (Figure 18 and Table 8).

Figure 18: Most severe sentence imposed in County Court cases involving offences committed by children aged 10 to 13, by age group at principal offence (aged 10 to 13 or aged 14 or older), 1 July 2011 to 30 June 2020 (32 cases)

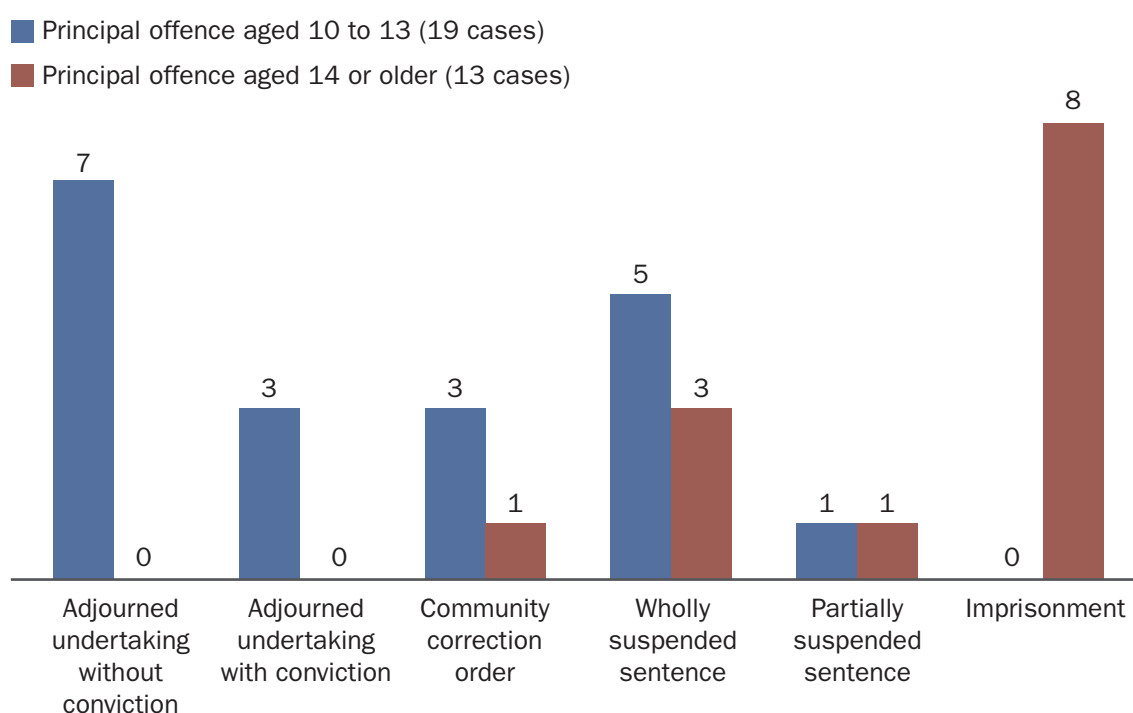


Table 8: Most severe sentence imposed in County Court cases involving offences committed by younger children, by age at principal offence in the case, 1 July 2011 to 30 June 2020 (32 cases)

Age at principal offence	Aged 10 to 11	Aged 12	Aged 13	Aged 14 or older
Adjourned undertaking without conviction	1	0	6	0
Adjourned undertaking with conviction	0	1	2	0
Community correction order	0	2	1	1
Wholly suspended sentence	1	1	3	3
Partially suspended sentence	0	1	0	1
Imprisonment	0	0	0	8

‘Had you been dealt with soon after the offending ... it is most likely ... you would have been sentenced in the Children’s Court as a child for that offending. Had that occurred, it is likely you could have expected a non-custodial disposition, having regard to sentencing principles applicable in that jurisdiction where rehabilitation of child offenders is a guiding principle.’

Sentencing remarks provided to the Council

There are several possible explanations why these County Court cases may have received less severe sentencing outcomes where the principal offence was committed by a child aged 10 to 13.

First, an offender’s age is a relevant consideration at sentencing.¹⁴¹ Had these younger children been sentenced as children in the Children’s Court, they would have been sentenced under the principles in that jurisdiction, where rehabilitation is a guiding principle, including the importance of reducing the risk of stigmatising the child.

Second, as discussed earlier, most of these cases took years or decades to reach court. For offenders who did not reoffend after their childhood offending,

there was arguably little need to give significant weight to the sentencing purposes of community protection or specific deterrence.

Third, given the significant passage of time in these cases, it would have been extremely difficult for the prosecution to rebut the presumption of *doli incapax*. As a result, the offenders’ guilty plea (in 17 of the 19 cases) arguably would have carried greater weight than usual, both as evidence of remorse and in terms of utilitarian value.

‘The offences were committed when you were aged between 12 and 13. Had there been an early complaint to police the matters would have been heard in the Children’s Court. We have a Children’s Court because we accept as a community that young offenders should be dealt with differently to adult offenders ... In assessing the nature and gravity of your offending and your moral culpability, I must take account of the fact that in relation to the charges you were a young person of immature years. If the charges had been dealt with in [the] Children’s Court, general deterrence would have played no part in the sentencing process. The court would have made orders that focused on your rehabilitation. Had these matters proceeded in the Children’s Court, it is most likely that you would have been placed on a therapeutic treatment order in the family division or been released on a supervisory order in the criminal division.’

Sentencing remarks provided to the Council

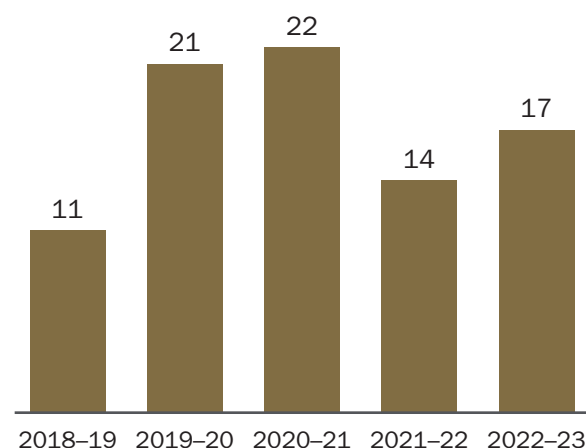
141. *R v Mills* [1998] VSC 241; [1998] VICSC 7 (26 February 1998).

Finally, there may be some recognition that had these offenders been sentenced as children, at least some of them would have been eligible for a therapeutic treatment order, an option no longer available once a child reaches adulthood.¹⁴²

Therapeutic treatment orders have been available in the Family Division of the Children's Court since 2007 as an alternative to a sentencing response for children who exhibit sexually problematic or abusive behaviour.¹⁴³ The orders provide for a child who participates in a therapeutic treatment program to be discharged from criminal proceedings (and as a result they do not receive a

criminal record).¹⁴⁴ Therapeutic treatment orders are not common, however, with less than 23 made each year in the five years to June 2023 (see Figure 19).¹⁴⁵

Figure 19: Therapeutic treatment orders made in the Children's Court, 2018–19 to 2022–23



Sentencing outcomes in the Magistrates' Court

In the 23 Magistrates' Court cases involving offending by younger children, the most severe sentence in the case was imprisonment (5 cases), a community correction order (6 cases) and an adjourned undertaking (6 cases). The most severe sentences imposed in the remaining cases were a fine (3 cases), a partially suspended sentence (2 cases) and diversion (1 case). Only 4 Magistrates' Court cases involved a child aged 10 to 11 at the time of the offending.

As with prison sentences in the County Court cases, prison sentences in Magistrates' Court cases mostly involved children who committed their principal offence aged 14 or older (and also had co-sentenced offences committed aged 10 to 13 in their case) (see Figure 20 and Table 9, page 64). The one exception was a prison sentence imposed in a case involving 2 charges of sex offences committed by a child aged 13, which were sentenced alongside 3 charges committed when the offender was aged 31 (2 charges of failing to comply with reporting obligations as a registered sex offender (*Sex Offenders Registration Act 2004* (Vic) s 46), and 1 charge of failing to answer bail).

142. *Children, Youth and Families Act 2005* (Vic) s 3(1)(ad) (definition of *child*).

143. *Children, Youth and Families Act 2005* (Vic) ss 244–258. See further pages 7–8 above.

144. *Children, Youth and Families Act 2005* (Vic) ss 352, 353–354A, reflected in section 187(5) of the *Youth Justice Act 2024* (Vic). See further pages 7–8 above.

145. Children's Court of Victoria (2023), above n 69, 11.

Figure 20: Most severe sentence imposed in Magistrates' Court cases involving offences committed by children aged 10 to 13, by age at principal offence, 1 July 2011 to 30 June 2021 (23 cases)

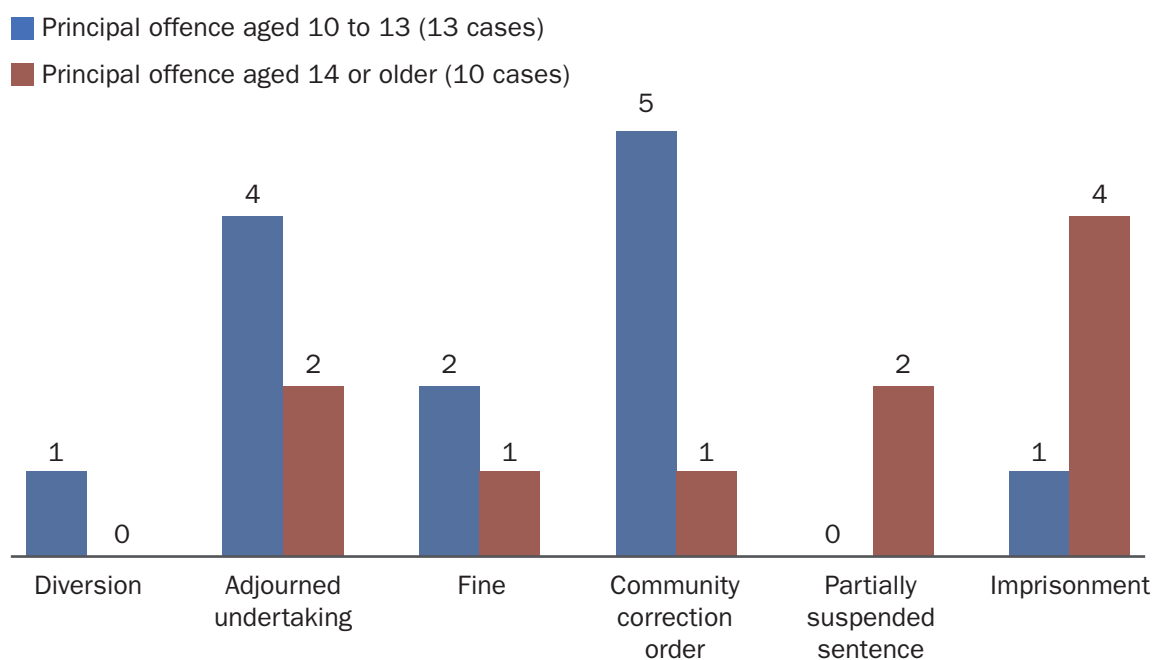


Table 9: Most severe sentence imposed in Magistrates' Court cases involving offences committed by children aged 10 to 13, by age at principal offence, 1 July 2011 to 30 June 2021 (23 cases)

Age at principal offence	Aged 10 to 11	Aged 12	Aged 13	Aged 14 or older
Diversion (adult)	0	0	1	0
Adjourned undertaking without conviction	0	2	2	2
Adjourned undertaking with conviction	0	0	0	0
Fine	0	2	0	1
Community correction order	0	1	4	1
Wholly suspended sentence	0	0	0	0
Partially suspended sentence	0	0	0	2
Imprisonment	0	0	1	4

In this report, we examined sentenced or diverted cases involving younger children (those aged 10 to 13 at the time of offending).

To contextualise our findings, it's important to note that only about 9% of alleged offences by children aged 10 to 13 are ever finalised in court; more commonly younger children are (appropriately) funnelled out of the justice system through police cautions, other diversionary initiatives, and the application of *doli incapax* (the presumption that children aged 10 to 13 are incapable of crime unless the prosecution can prove beyond reasonable doubt that the child knew that their conduct was morally wrong).¹⁴⁶

With the pending implementation of the new *Youth Justice Act 2024* (Vic), it is important to understand the profiles of children who offend aged 10 and aged 11 to inform the approach to their behaviour now that the age of criminal responsibility has risen to 12 years old, and a criminal justice response will no longer be available. Equally important is understanding the profiles of children who offend aged 12 and aged 13, to consider how the provisions of the *Youth Justice Act* might operate in responding to their offending and to provide a baseline for future comparison.

This final section discusses some of the key findings in this report and the potential implications of the new *Youth Justice Act* for these findings.

Key findings about younger children who offend

Looking first at younger children as a group,¹⁴⁷ we found that in the 10 years to 30 June 2021:

- only **0.32% of all criminal cases** sentenced or diverted in Victoria involved an offence committed by a child aged 10 to 13, and the number of cases each year declined over time;
- **1,891 people** were sentenced or diverted **in 2,949 cases** for at least one offence committed aged 10 to 13;
- most younger children were **sentenced in the Children's Court** (98%, or 2,894 of 2,949 cases). In 55 additional cases, adults were sentenced for offences committed aged 10 to 13 – 32 cases in the County Court (all involving sex offences) and 23 cases in the Magistrates' Court (10 involving sex offences);

146. *RP v The Queen* [2016] HCA 53, [8]–[9].

147. In this report, we discussed children aged 10 to 11, aged 12 and aged 13 separately, but in various sections we also examined children aged 10 to 13 as one group to better enable comparison with other research, which typically groups children aged 10 to 13 together.

- consistent with other recent Australian research, most sentenced or diverted younger children were **male** (74% of the 1,891 people), with the gender disparity especially apparent for children who offended aged 10 to 11 (more than 90% were male);
- the vast majority of sentenced or diverted younger children were **aged 13** at the time of their offence (86% of the 1,891 people had at least one sentenced charge committed at age 13), with children aged 13 responsible for three-quarters of younger children's sentenced *charges* (12,680 of 16,913 charges). In our 10-year study, children aged 10, aged 11 and aged 12 were involved in 46, 185 and 697 cases, respectively, compared with 2,302 cases for children aged 13.
- **the profiles of children aged 12 are noticeably different** to the profiles of children aged 13. Differences between children aged 12 and children aged 13 were evident in relation to gender (see page 25), the overrepresentation of Aboriginal children (see page 26), offence type (page 40) and sentencing outcomes (page 56). These important differences suggest that children aged 12 and children aged 13 should be considered as two distinct age groups in policy development;
- younger children were overrepresented in **rural and regional Victoria** – 11% of Children's Court cases sentenced or diverted in regional Victoria involved one or more offences committed by children aged 10 to 13, compared with 5.5% of Children's Court cases in metropolitan Melbourne. However, the proportion of younger children in both regional and metropolitan Melbourne Children's Court locations halved in the 10 years to 30 June 2021 (from 13.4% to 5.8% in regional Victoria);
- the overrepresentation of **Aboriginal children** in the justice system is acutely magnified for younger children – the younger children were at their offence, the higher the proportion of Aboriginal children in the group. Aboriginal children accounted for 32.2% of children who were sentenced or diverted for offences committed aged 10 to 11, compared with 27.5% of children who were sentenced or diverted for offences committed aged 12, 21.1% of children aged 13, and 10.3% of children aged 14 or older. For context, 2.2% of all Victorian children aged 10 to 13 (as at 30 June 2021) were Aboriginal children;
- the younger children were, the longer **the time from their offence to sentencing**. The median time between the earliest offence in the case and sentencing was 11.1 months for children aged 10, compared with 7.1 months for children aged 14 at their earliest offence;
- in the Children's Court, the 4 **most common principal offence** types for younger children were assault/cause injury, theft, burglary and property damage. But looking at all *charges* for which younger children were sentenced or diverted in the 10 years to 30 June 2021 (rather than just the most serious offence in each case), younger children's most common offence type was theft, which accounted

for 30% of their charges. In the 10 years to 30 June 2021, 58 of the 2,894 cases in the Children's Court involved at least one **sex offence** committed by a child aged 10 to 13;

- in 55 cases, younger children's offending was not sentenced until they were **adults** – 32 cases in the County Court and 23 cases in the Magistrates' Court. Almost all of these cases (42 cases) had at least one sex offence charge in the case;
- younger children tended to receive **less severe sentencing outcomes** than older children. Children aged 10 to 11 at the time of their offending received the highest rates of diversion, dismissals and undertakings in the Children's Court, whereas children aged 12 and then aged 13 received increasingly severe sentencing outcomes overall. This likely reflects the different offending profiles, vulnerabilities and culpability levels of the youngest children;
- younger children were **very rarely sentenced to youth detention**. No child aged 10 to 11 at the time of their principal offence received a custodial sentence – 3 children aged 12 at the time of their principal offence received a custodial sentence, as did 27 children aged 13 at the time of their principal offence; and
- since the introduction of **diversion** in the Children's Court in 2015, it has become an increasingly common outcome of criminal proceedings involving children, especially for younger children (representing 63.2% of all outcomes for younger children in 2020–21).

Children in regional Victoria

This report, like previous research,¹⁴⁸ found that children from regional Victoria were overrepresented among younger children in the justice system. This overrepresentation is not explained by a greater number of younger children in regional Victoria. The primary explanation for the overrepresentation is usually a lack of comprehensive support services for at-risk children and families in regional areas.¹⁴⁹ A participant at our stakeholder roundtable noted that 'under-serving regional areas usually goes hand-in-hand with the overrepresentation of vulnerable children'.¹⁵⁰

Other contributors to this overrepresentation may include a lack of specialist practitioners in regional courts (which, for example, can affect the consideration

148. See, for example, Freeman and Donnelly (2024), above n 28, 12.

149. Stakeholder Roundtable (11 March 2025); Sentencing Advisory Council (2020), above n 6, xxii, 59, 65; Baidawi and Sheehan (2019), above n 94, 126–127; Smart Justice for Young People, *Working Together: Action Plan to End the Over-Representation of Particular Groups of Young People in the Criminal Justice System* (2023) 19.

150. Stakeholder Roundtable (11 March 2025).

of *doli incapax*),¹⁵¹ and a lack of separation between court facilities for adults and court facilities for children, resulting in fewer magistrates who sit exclusively in the Children's Court in regional areas.¹⁵² This landscape is rapidly changing, however. In 2016, the High Court clarified the approach to *doli incapax*,¹⁵³ and since then the test has been codified in the new *Youth Justice Act 2024* (Vic). The new *Youth Justice Act* also introduces early diversion group conferences, which aim 'to divert eligible children out of the criminal justice system before charges are filed',¹⁵⁴ and creates a mandatory obligation for police to refer a child aged under 14 to an early diversion group conference.¹⁵⁵

Sentencing does not provide a 'swift' response to younger children's behaviour

Younger children sentenced in the Children's Court had a median time of 8 months between the earliest offence in their case and their sentence. The younger children were at their earliest offence, the longer their median time from earliest offence to sentencing.

The time between offence and sentencing is likely to, at least partly, reflect the operation of necessary safeguards, such as adjourning a case for a child to obtain legal representation, or to determine whether the child has criminal capacity (or whether *doli incapax* applies). In some cases, the delay may be a result of the child having offended prolifically, requiring the case to be adjourned so that cases can be consolidated. In other instances, the time taken may reflect a child's lack of a stable home and support network, for example, missing court dates because the adult responsible for the child's care and wellbeing does not ensure the child's presence in court. Other reasons for the passage of time between offending and sentencing include the time taken to identify and charge younger children and the difficulties in obtaining instructions from

151. Baidawi et al. (2024), above n 28, 2; Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 23–25; Sentencing Advisory Council (2020), above n 6, 59, 65.

152. Sentencing Advisory Council (2020), above n 6, xxii, 65, 71; Fitz-Gibbon and O'Brien (2019), above n 151, 23–24; Baidawi and Sheehan (2019), above n 94, 178–179.

153. *RP v The Queen* [2016] HCA 53.

154. Explanatory Memorandum, *Youth Justice Bill 2024* (Vic) 12. This is consistent with a suggestion that this Council made in an earlier report: Sentencing Advisory Council (2020), above n 2, 41–43.

155. *Youth Justice Act 2024* (Vic) s 117. Police must be satisfied that there is sufficient evidence to charge the child and that other diversionary responses further up the hierarchy (such as a police caution) are 'clearly inappropriate in the circumstances'. The requirement is also subject to section 118 which sets out eligibility requirements, including that there must be 'a suitable approved service provider to conduct the early diversion group conference': *Youth Justice Act 2024* (Vic) s 118(1)(a).

children, particularly those not living with their family of origin and/or experiencing instability in their home life and schooling. And in cases involving sex offences against other children, '[t]he nature and dynamics of sexual offending against children mean that the passage of considerable time between offending and its disclosure is not uncommon'.¹⁵⁶ For example, the Royal Commission into Institutional Responses to Child Sexual Abuse found that on average it took victim-survivors 23.9 years to tell someone about the abuse.¹⁵⁷

Whatever the reason, it is not ideal for a relatively young child to receive a response to their problematic behaviour months, or years, after the fact. It is well documented that for a consequence to be an effective response to a child's behaviour, that consequence must be relatively immediate. Where adults are able to view the long-term consequences of an action, children are more focused on the short-term consequences of an action (both positive and negative), and tend to discount future, longer-term consequences.¹⁵⁸ For this reason, there is a particular need to prioritise early resolution of criminal proceedings involving younger children.¹⁵⁹

The passage of time between younger children's offending and the outcome may undermine the effectiveness of the criminal justice response to their behaviour.¹⁶⁰ For example, a three-year gap between offending and sentencing for a child who offends aged 10 means that a high-school-aged child faces the consequences for actions taken when they were a primary-school-aged child. In 2017, Armytage and Ogloff made several recommendations designed to address the delay between the offending and sentencing of children and young people and increase opportunities for 'timely and certain justice for young offenders', recognising the costs of delayed consequences for children.¹⁶¹

For children aged 10 to 11, raising the age of criminal responsibility to 12 potentially will mean that their behaviour will receive a more rapid response via the alternative services model. For children aged 12 to 13, the new measures in the *Youth Justice Act*, such as early diversion group conferences, are likely to provide children with a swifter response to their behaviour. Our findings about time from offending to sentencing may provide a useful benchmark against which the new measures can be assessed.

156. Sentencing Advisory Council (2021), above n 8, 14.

157. Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (2017), above n 9, 16.

158. Chi Meng Chu and James Ogloff, 'Sentencing of Adolescent Offenders in Victoria: A Review of Empirical Evidence and Practice' (2012) 19(3) *Psychiatry, Psychology and Law* 325, 332; Mac Tuomi and Dominique Moritz, 'Criminal Responsibility of Older Children: The Failings of *Doli Incapax* in Australia' (2024) 38(2) *Children & Society* 456, 461.

159. Penny Armytage and James Ogloff, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending, Executive Summary* (2017) 14–15.

160. Ibid.

161. Ibid 14–15, 33.

What other changes may occur under the new *Youth Justice Act*?

Children aged 10 to 11

In the 10 years to 30 June 2021, only 146 of all 37,093 cases sentenced in the Children's Court, and 2 of the 55 younger offender cases sentenced in the adult jurisdiction (both in the County Court), *solely* had offences by children aged 10 to 11. The children in those cases would not have received a sentencing response had the age of criminal responsibility been 12. Therefore, an average of 15 sentenced cases per year would not have had a sentencing response available had the age of criminal responsibility been 12 during our reference period. The remaining cases all included offences committed by children aged 12 or older.

No children aged 10 to 11 were sentenced to youth detention for their principal offence. Therefore, raising the age of criminal responsibility is unlikely to substantially affect the number of sentenced children in youth detention, and our previous research suggests it is unlikely to affect the number of children held on remand.¹⁶² This finding is consistent with research in Queensland, the Australian Capital Territory and New South Wales, which also found that the youngest children are rarely sentenced to detention.¹⁶³ However, while no children were sentenced to detention in Victoria for a principal offence committed aged 10 to 11, the Queensland Sentencing Advisory Council found that children were sentenced to detention in Queensland in 11 cases involving children aged 11 at the time of the offence.¹⁶⁴ While BOCSAR did not find any children who offended aged under 12 sentenced to detention in 2023 in New South Wales,¹⁶⁵ they found that 2 children aged 10 and 8 children aged 11 were held on remand.¹⁶⁶

The most common principal offence type in cases involving children aged 10 to 11 was assault/cause injury, although most of those offences were under the *Summary Offences Act* rather than the *Crimes Act*, so were unlikely to have involved serious violence or injury. No murder or manslaughter offences were committed by a child aged 10 to 11 (or aged 12 or aged 13 for that matter). There were 8 Children's Court cases involving sex offences committed by children aged 10 to 11 (including 1 case with 2 rape charges). A further 5 people were sentenced as adults in the County Court

162. We previously found that the youngest children remanded in a single year were aged 12 (5 children) and another 19 children entered remand at age 13: Sentencing Advisory Council (2020), above n 7, 34.

163. Hilderley et al. (2023), above n 28, 2, 16; Freeman and Donnelly (2024), above n 28, 15; Morag McArthur et al., *Review of the Service System and Implementation Requirements for Raising the Minimum Age of Criminal Responsibility in the Australian Capital Territory* (2021) 28; Centre for Crime, Law and Justice (2021), above n 48, 16–17.

164. Hilderley et al. (2023), above n 28, 16.

165. Freeman and Donnelly (2024), above n 28, 15.

166. Ibid 16.

for sex offences committed aged 10 to 11, and one person was sentenced in the Magistrates' Court for one sex offence committed aged 11.

Children aged 12 or aged 13

Children aged 12 or aged 13 at their offence still potentially face a sentencing response under the new *Youth Justice Act*, subject to the test for criminal capacity. However, the additional protections and measures in the *Youth Justice Act* make a reduction likely in the number of children aged 12 or aged 13 who face sentencing under that Act.

In the 10 years to 30 June 2021, 1,940 Children's Court cases involved offences committed solely by children aged 12 or aged 13.¹⁶⁷

There were also 50 cases involving children who offended aged 12 or aged 13 but were not sentenced for those offences until they were adults: 29 cases involved people sentenced in the County Court for offences committed aged 12 or aged 13 (all sex offences), and 21 cases involved people sentenced in the Magistrates' Court for offences committed aged 12 or aged 13 (a mix of sex offences and non-sex offences). Of these 50 cases, 12 *solely* involved offences committed when the child was aged 12 or aged 13 (8 cases in the County Court and 4 cases in the Magistrates' Court).

The new *Youth Justice Act* sets out additional measures for children who offend aged 12 or aged 13. Consideration will need to be given to how these measures apply to offences committed by children aged 12 or aged 13 but not reported or prosecuted until after the child reaches adulthood. For example, the matters that the police must consider in deciding whether to charge a child aged 12 or aged 13¹⁶⁸ appear to apply even if the person is older (even an adult) by the time the offending behaviour is reported or investigated. In contrast, prosecutors are required to review a charge against a child who allegedly committed an offence aged 12 or aged 13,¹⁶⁹ but this requirement only applies to summary procedures commenced in the Children's Court and does not apply if the charge is prosecuted by the Director of Public Prosecutions (although all prosecutors have a general duty to only prosecute a person if 'there is a reasonable prospect of a conviction', having regard to matters including 'all the admissible evidence' and 'the reliability and credibility of the evidence', which would include an assessment of whether there is admissible evidence to prove criminal responsibility beyond reasonable doubt¹⁷⁰).

167. In addition to the 146 Children's Court cases that involved offending solely at age 10 to 11 and the 1,940 Children's Court cases involved offences committed solely by children aged 12 or aged 13, there were a further 756 cases with a combination of offences committed by children when they were aged 10 to 13 and when they were aged 14 or older.

168. *Youth Justice Act 2024* (Vic) s 12.

169. *Youth Justice Act 2024* (Vic) s 13(1)–(2).

170. Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (2023) 3.

In the 10 years to 30 June 2021, 30 children received youth detention in the Children's Court for a principal offence committed aged 12 (3 cases) or aged 13 (27 cases). One person received a prison sentence (at age 32) in the Magistrates' Court for a principal offence committed aged 13 – he was the only person sentenced to an immediate prison term for a principal offence committed aged 10 to 13. He was sentenced for 2 sex offences committed when he was aged 13 and an additional 3 charges committed when he was aged 31 (see page 63). He was sentenced to 6 months' imprisonment (with 173 days reckoned as time served) and a 24-month community correction order (with conviction) on all charges.

The new provisions of the *Youth Justice Act* prohibit the Children's Court from imposing a sentence of detention on a child aged under 14 at the time of the offence except in certain circumstances relating to the seriousness of the offences and the seriousness of the risk posed by the child to the community (section 324). This provision does not seem to apply where a person offends aged 12 or aged 13 but is not sentenced for the offences until adulthood. The 30 cases of youth detention identified in this report provide a baseline to assess the effect of the *Youth Justice Act* on the future sentencing of younger children in Victoria.

Younger children's offending was sentenced in adult courts because they 'aged out' of the Children's Court jurisdiction

The vast majority of younger children's cases were finalised in the Children's Court (98%, or 2,894 cases), with the remaining 55 cases finalised in the Magistrates' Court (23 cases) and County Court (32 cases). There were no cases involving offending by children aged 10 to 13 in the Supreme Court. Based on the charge type and age of the offender at sentencing, all these cases were sentenced in the adult courts because the Children's Court no longer had jurisdiction to hear the matter (that is, the offenders had reached adulthood), not because the offending was considered too severe to be dealt with in the Children's Court.

Sentencing adults for offences committed when they were younger children

The findings of this report raise questions about the circumstances in which younger children's offending is not prosecuted before those children reach adulthood and are no longer eligible for their proceedings to be heard in the Children's Court. Most of the 32 younger children sentenced in the County Court were aged 30 or older by the time they

were sentenced: 10 were in their 30s, 7 in their 40s, 5 in their 50s, and one person (the oldest) was aged 67. Participants at our stakeholder roundtable queried how the criminal capacity of the children in those cases was proven beyond reasonable doubt, one participant asking ‘how do you rebut the *doli incapax* presumption after such a long time?’¹⁷¹

In several of the County Court cases, the court commented on the difficulty of sentencing an adult for offences committed aged 10 to 13 when years, or sometimes decades, had passed since the offences. There is a difficult balancing required between acknowledging that the person being sentenced is no longer the same person that committed the offences and recognising that the offence has had long-term and significant effects on the victim.

‘Dealing with an adult who has led a good life for what they did as a child falls into a special category of difficulty in the always difficult task of sentencing. You offended once when you were 13 years of age, or an age when the law requires the prosecution not only to prove you did the acts, but that you knew the conduct was wrong. What this reveals is that the law recognises the immaturity of a child as impacting on all aspects of culpability, most importantly in this case, your moral culpability.’

Sentencing remarks provided to the Council

As discussed above, the new *Youth Justice Act* contains a range of protections for children who offend aged under 14. Section 4(1) of the Act defines a ‘child’ as ‘a person who is under 18 years of age’, but the Act does not define or limit the stage in proceedings at which the person must be under 18. And sections 4(2) and (3) add that the definition of *child* ‘includes, in the case of a person who commits an offence or is alleged to have committed an offence, a person who’ was aged under 18 ‘at the time of the commission or alleged commission of the offence’, and is aged under 19 ‘at the time of the commencement of the proceeding for the offence or alleged offence’.

Therefore, the provisions relevant to the stage before proceedings commence appear to apply regardless of the person’s age when the provisions are being applied. On this basis, the following protections *do* appear to apply to people who offend aged under 14¹⁷² but are not prosecuted for those offences until they are adults:

- the provision that raises the age of criminal responsibility to age 12 (section 10);
- the codified test for criminal capacity (section 11);
- the requirement that police have regard to particular matters (relating to criminal capacity) in deciding whether to charge a child aged 12 or aged 13 (section 12);

171. Stakeholder Roundtable (11 March 2025).

172. As noted above n 1, from 30 September 2025 (unless proclaimed earlier), section 10 of the *Youth Justice Act 2024* (Vic) will commence, raising the age of criminal responsibility from 10 to 12: *Youth Justice Act 2024* (Vic) s 2(2) (see chapter 19.1 of the Act for transitional provisions). Once section 10 commences (raising the minimum age of criminal responsibility to 12), the provisions in the Act specific to children aged under 14 will in effect apply to children aged 12 and 13.

- the hierarchy of pre-trial diversionary options under section 92;¹⁷³ and
- the mandatory requirement for a police officer to refer a child to an early diversion group conference if the child is under 14 years of age ‘at the time of the alleged offending’.¹⁷⁴

However, the timing of charging and sentencing offences committed by younger children may affect:

- the practical application of the hierarchy of pre-trial diversionary options set out in section 92 of the *Youth Justice Act 2024* (Vic). These options arguably still apply once a child is an adult; however, it is uncertain whether a police officer would consider an option such as a youth caution to be appropriate where a person is, for example, aged 30 at the time that the police officer is deciding whether to issue criminal proceedings;
- the availability of some diversionary options that provide an opportunity for a younger child to avoid a criminal record, such as the therapeutic treatment program for juvenile sex offenders¹⁷⁵ and Children’s Court youth diversion;¹⁷⁶
- the application of the test for criminal capacity, now codified in section 11 of the *Youth Justice Act*. In 17 of the 19 County Court cases, the offender pleaded guilty. In the absence of a guilty plea, however, it is difficult to envisage the circumstances in which, years or decades after an offence by a younger child, the prosecution could establish beyond reasonable doubt that the child had known that what they were doing was seriously wrong;

173. If a child is alleged to have committed an offence, a police officer may decide ‘to take no action under [the *Youth Justice Act*] or any other Act or law against the child for the alleged offence’ (section 92(1)(a)). The police officer may only move to the next option in the hierarchy (a youth warning) if taking no action against the child is ‘clearly inappropriate’. Therefore, if a child is alleged to have committed an offence, before a police officer can commence a criminal proceeding against the child, the police officer must have first determined that taking no action, giving a youth warning or a youth caution, or referring the child to an early diversion youth conference are ‘clearly inappropriate’ (section 92(1)(e)). For each pre-trial option, the Act sets out a list of matters that *do not* affect a child’s eligibility (sections 96, 104 and 118(3)), and for early diversion group conferences, the Act also sets out matters that *do* affect a child’s eligibility (section 118(1)). A child’s age at the time that the decision is being made is not included among the matters that do or don’t affect eligibility.

174. *Youth Justice Act 2024* (Vic) s 117(1)–(2). if a police officer is satisfied that there is sufficient evidence to charge a child with an offence (and decides that taking no action, giving a youth warning or a youth caution are clearly inappropriate) and ‘at the time of the alleged offending ... the child is under 14 years of age’, the police officer ‘must decide to refer the child to an early diversion group conference in respect of the alleged offence’. The requirement is also subject to section 118 which sets out eligibility requirements, including that there must be ‘a suitable approved service provider to conduct the early diversion group conference’: *Youth Justice Act 2024* (Vic) s 118(1)(a).

175. See further above n 21. Therapeutic treatment orders provide for a child to be discharged from criminal proceedings if they ‘attend and participate in a therapeutic treatment program’. The orders are available for children up to the age of 14 before 29 March 2019 and up to the age of 17 thereafter: *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018* (Vic) ss 3–13, amending *Children, Youth and Families Act 2005* (Vic) part 4.8, div 3. Therapeutic treatment orders are now provided for in Part 6.2 of the *Youth Justice Act 2024* (Vic).

176. *Youth Justice Act 2024* (Vic) ss 191–198, previously *Children, Youth and Families Act 2005* (Vic) ss 356B–356I.

- the requirement under section 13 for the prosecutor to review a charge against a child aged 12 or aged 13 to assess whether there is admissible evidence to prove beyond reasonable doubt that the child knew at the time of the alleged offence that the child's conduct was seriously wrong. This requirement only applies to prosecutions in the Children's Court. However, prosecutors in all courts have a general duty to only prosecute a person if 'there is a reasonable prospect of a conviction', having regard to matters including 'all the admissible evidence' and 'the reliability and credibility of the evidence', which would include an assessment of whether there is admissible evidence to prove criminal responsibility beyond reasonable doubt¹⁷⁷;
- the applicable sentencing principles (set out in Part 7.1 of the *Youth Justice Act* for cases heard in the Children's Court). For example, the *Youth Justice Act* provides that a 'sentence imposed on a child should give the highest priority to the rehabilitation and positive development of the child' (section 203) and that the 'common law principle of general deterrence does not apply to the sentencing of a child under this Act' (section 202(3)). If a child ages out of the Children's Court jurisdiction and is sentenced in the adult jurisdiction, the principles in the *Sentencing Act 1991* (Vic) apply instead. Under the *Sentencing Act*, general deterrence is a sentencing purpose, and rehabilitation is not elevated above the other sentencing purposes;
- the prohibition on imposing a sentence of detention on a child aged under 14 at the time of the offence, except in limited circumstances (*Youth Justice Act* (Vic) s 324);
- the available sentencing orders, which differ depending on whether the person is sentenced under the *Children, Youth and Families Act 2005* (Vic) (to be replaced by the *Youth Justice Act 2024* (Vic) once the relevant provisions commence) or the *Sentencing Act 1991* (Vic); and
- the ancillary consequences of the sentence, including the application of the spent convictions scheme, the application of the sex offender registration scheme and the appearance of a person's criminal record, for example, to a prospective employer. As a general rule, a criminal record check displays the date of the court outcome (for example, the sentence date), with the offence date not disclosed as

'I take into account that, had you been dealt with within two or three years of the offending, no court would have had the power to imprison you in relation to that charge, or to order your detention. The most likely outcome would have been for you to be placed on a bond to be of good behaviour and subjected to treatment and supervision, to ensure that no such behaviour occurred again.'

*Sentencing remarks provided to
the Council*

177. Director of Public Prosecutions (2023), above n 170, 3.

part of the check.¹⁷⁸ The criminal record also shows the court in which the person was sentenced and the sentenced offences. In cases where a younger child is not prosecuted until they are an adult, this process may create the impression that the offence was committed as an adult, rather than as a younger child. The different ancillary consequences for adults who are prosecuted for childhood offending may be significant, and may affect their ability to maintain prosocial factors in their life, such as employment.

The Spent Convictions Act

The Victorian spent convictions scheme allows convictions for certain offences to be withheld from a person's police record (spent) in certain circumstances.¹⁷⁹ The way that the scheme works depends on the type of offence, the sentence imposed and the person's age at the time of the offence. Spent convictions do not appear on a person's record, and the person is not required to disclose a spent conviction. There are, however, exemptions to non-disclosure of spent convictions, and these exceptions allow spent convictions to be disclosed to police, courts and other agencies, for example, for working with children checks.¹⁸⁰

If a child is aged under 15 at their offence, their conviction is immediately spent (unless their sentence has a condition, including to be of good behaviour) and does not appear on their police record unless there is an exemption.¹⁸¹ If a child aged under 15 receives a conditional sentence, such as a good behaviour bond, their conviction is not spent until the conditions are complete.¹⁸² In effect, this means that during the operational period of the order, the child has a disclosable criminal record.

A person's age when their charges are determined may affect the application of the spent convictions scheme, even if the person is aged under 15 at the time of the offence. For example, the broader availability of pre-trial diversionary measures in the Children's Court (such as the therapeutic treatment program) may result in a child not having a criminal record at all. If criminal proceedings are not commenced until the child is an adult, those diversionary options may no longer be available, which may result in the person having a disclosable criminal record. Even if the person is sentenced to an adjourned undertaking without a recorded conviction, their conviction will not be spent until the conditions of the adjourned undertaking are complete. Even once spent, the conviction remains disclosable for certain purposes under the exemptions.¹⁸³

178. Email from Victoria Police to Sentencing Advisory Council (14 March 2025); Stakeholder Roundtable (11 March 2025).

179. The *Spent Convictions Act 2021* (Vic) establishes the scheme and sets out its purposes, scope, exemptions and procedures.

180. *Spent Convictions Act 2021* (Vic) ss 21–22.

181. *Spent Convictions Act 2021* (Vic) ss 7(1)(c), 7(2).

182. *Spent Convictions Act 2021* (Vic) s 7(2).

183. *Spent Convictions Act 2021* (Vic) ss 21–22.

Therefore, although the provisions of the *Spent Convictions Act 2021* (Vic) refer to a child's age at the time of the offence, whether a younger child ends up with a criminal record can be directly influenced by their age when criminal proceedings commence.

Sex offender registration

The *Sex Offender Registration Act 2004* (Vic) commenced on 1 October 2004,¹⁸⁴ with the dual purposes of requiring sex offenders to keep police informed of their whereabouts and preventing registered sex offenders from working in child-related employment.¹⁸⁵ The scheme applies to both adults and children, 'albeit to a much more restricted class of juvenile offenders'.¹⁸⁶ While the scheme is mandatory for certain adult offenders sentenced for registrable offences,¹⁸⁷ the court has discretion as to the scheme's application to children.¹⁸⁸ For offences committed by a child, a court *may* order the child to comply with reporting obligations if:

- the court finds the child guilty of a class 1, class 2, class 3 or class 4 offence (sex offences listed in Schedules 1 and 2);¹⁸⁹
- the court is satisfied, beyond reasonable doubt, that the offender poses a risk to the sexual safety of one or more persons or of the community (although it is 'not necessary that the court be able to identify a risk to particular people, or to a particular class of people');¹⁹⁰ and
- the court has imposed a sentence in relation to the offence (which is defined to include a sentencing order under the *Sentencing Act 1991* (Vic) or a fine, probation, youth supervision order, youth attendance order, youth control order or detention under the *Children Youth and Families Act 2005* (Vic) or its predecessor).

For younger children, the list of applicable sentencing orders broadens once they age into the adult jurisdiction. The sex offender registration scheme does not apply in the Children's Court if a child is sentenced to a dismissal, undertaking or good behaviour bond or receives Children's Court youth diversion, whereas the scheme applies to equivalent orders in the adult jurisdiction (including diversion and adjourned undertakings).

Another potential difference between the youth and adult jurisdictions concerns the relevance of the effects of sex offender registration to sentencing. In the adult

184. *Sex Offender Registration Act 2004* (Vic) s 2.

185. *Sex Offender Registration Act 2004* (Vic) ss 1(1)(a)–(b).

186. Peter Power, 'Chapter 11: Sentencing', *Children's Court Research Materials* (2024) 11.350.

187. *Sex Offender Registration Act 2004* (Vic) ss 1(2)(b), 6.

188. *Sex Offender Registration Act 2004* (Vic) ss 1(2)(c), 7.

189. *Sex Offender Registration Act 2004* (Vic) s 11(2).

190. *Sex Offender Registration Act 2004* (Vic) s 11(3)–(4). See also Power (2024), above n 186, 11.350.

jurisdiction, a sentencing judge may not take into account the effects of sex offender registration on a person,¹⁹¹ whereas those effects could potentially be taken into account as a sentencing factor in some circumstances in the Children's Court.¹⁹²

Implications

In effect, there are a number of consequences for people who offend aged 10 to 13 but are not sentenced until they are adults: different sentencing options are available, different sentencing purposes apply, their criminal record can give the false impression that their offending was as an adult, they are less able to have their convictions spent, and they may be subject to sex offender registration in a way that they otherwise would not have been had they been sentenced closer to the time of their offending. As the new *Youth Justice Act* begins to take effect, it would be beneficial to closely monitor these consequences for this small but distinct group of people.

Conclusion

This report shows that the youngest children prosecuted in Victoria's justice system are a vanishingly small group. While the number of sentenced and diverted cases involving younger children has dramatically decreased in the last decade, for those who remain in the system, their early involvement in, and exposure to, the justice system can predict their ongoing involvement in criminal behaviour and their progression into the adult justice system.¹⁹³ In that context, it is important to monitor the extent to which the alternative services model for children who offend aged 10 and aged 11, and the additional measures in the new *Youth Justice Act* designed for children who offend aged 12 and aged 13, help to reduce problematic behaviours by these cohorts and their interactions with the justice system.

191. *Sentencing Act 1991* (Vic) s 5(2BC). See also *Chan v The Queen* [2006] VSCA 125 [17]; *Power* (2024), above n 186, 11.351.

192. *Ibid*, citing *DPP v Ellis* [2005] VSCA 105 and *Chan v The Queen* [2006] VSCA 125, [17].

193. Our 2016 reoffending study found that of children who were first sentenced aged 10 to 13, around 90% reoffended, around 75% progressed into the adult criminal jurisdiction, and just over one-third were sentenced to a term of adult imprisonment before their 22nd birthday: Sentencing Advisory Council (2016), above n 5, 30.

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