

CRIME AND JUSTICE BULLETIN

NUMBER 268 | MAY 2025

Did a High Court decision on *doli incapax* shift court outcomes for 10-13 year olds?

Jonathan Gu**AIM**

Between 2016 and 2023, the number of young people aged 10 to 13 years found guilty of an offence fell markedly. This paper examines if this decline and other trends can be explained by the 2016 High Court of Australia decision (*RP v R (RP)*), which clarified the application of *doli incapax*. We examine trends in: (1) the volume of court appearances for 10-13 year olds, (2) whether these court appearances resulted in a proven offence, (3) for proven matters, the severity of the penalty, (4) the extent to which prosecutors withdrew all charges, and (5) the extent of guilty pleas.

METHOD

We analyse NSW and national data on outcomes from Children's Court cases involving 10-17 year olds, finalised between 2010 and 2023. Using these data, we investigate whether and why the five outcomes have changed over time for 10-13 year olds. Possibilities examined include: the *RP* decision; trends in the nature of the offence children have been accused of; the increased use of specialist Magistrates in the NSW Children's Court; and demographics of defendants.

RESULTS

There is little evidence to suggest that the *RP* decision had any impact on the volume of court appearances involving a 10-13 year old. However, among 10-13 year olds that NSW Police proceeded against to court, there has been a dramatic decline in the proportion with a proven court outcome; the percent proven fell from 76% in the 2015-16 financial year to 16% in 2022-23, which temporally coincides with the *RP* decision. Among the proven matters, the *RP* decision had no clear impact on the penalty imposed. The decrease in the proportion of proven charges cannot be explained by changes in the types of offences committed by 10-13 year olds (i.e., they are not increasingly committing types of crimes that are harder to prosecute), nor by specialist Magistrates, or the demographic characteristics of individuals proceeded against. The drop in proven matters is, however, linked with prosecutors increasingly withdrawing all charges (growing from 12% to 53% from 2015-16 to 2022-23) and 10-13 year olds pleading guilty less frequently (falling from 54% to 14% from 2015-16 to 2022-23). Similar shifts occurred in Victoria and South Australia.

CONCLUSION

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.

KEYWORDS

Young offenders

Courts

Conviction rates

Minimum age of criminal responsibility

Doli incapax

INTRODUCTION

Since 2016, Australia has seen a renewed debate about the age at which children should be held criminally responsible for their actions. This debate was reignited by the ABC investigative program *Four Corners*, which aired the episode *Australia's Shame* in July 2016 and exposed graphic details about the violent mistreatment of 10-17 year olds in the Don Dale Youth Detention Centre in the Northern Territory (NT) (Clancey et al., 2020; Crofts, 2019). Amid this renewed debate, two Australian jurisdictions — Victoria and the Australian Capital Territory (ACT) — have raised their minimum age of criminal responsibility (MACR) to 12 years,¹ while the others have kept the age at 10 years, or in the case of the NT, lowered the MACR back to 10 years after previously increasing it to 12 years.²

Despite the national focus on the legislated MACR, there has been little discussion about how the criminal justice system currently handles cases involving children aged under 14 years. For example, how many young children have had proven outcomes after being found guilty of committing crimes or pleading guilty? And have trends in proven outcomes for young children changed over time? Understanding how the criminal justice system currently deals with very young offenders is crucial for designing and assessing potential reforms, including those that change the MACR.

The presumption of *doli incapax* in NSW and the High Court's RP decision

For criminal matters in New South Wales (NSW), children aged under 10 years are below the MACR, which means they cannot be found guilty of an offence.³ Children aged 10-13 years can be found guilty of an offence, but are protected by the common law presumption of *doli incapax*, which presumes that these children cannot be criminally responsible because they do not sufficiently understand the difference between right and wrong.⁴ A 10 to 13 year old can only be found guilty of an offence if the prosecution successfully rebuts the *doli incapax* presumption by proving that the young person knew what they did was seriously wrong. Young people who are aged 14-17 years are not protected by *doli incapax* and can be held responsible for criminal offences.

Although *doli incapax* is a crucial gateway that can determine whether children aged 10-13 years enter the criminal justice system, it has previously been mired in a lack of clarity (Crofts, 2018; 2019). For example, throughout the 2000s and 2010s, some criticised the principle as being too protective of children (by shielding them from prosecution), while others suggested it was not protective enough (by being too easily rebutted) (Crofts, 2019). These diametrically opposed critiques reflected confusion among legal practitioners about what the prosecution needed to prove to rebut *doli incapax* (Crofts, 2019). The confusion was furthered by a lack of empirical research and lack of administrative data on the operation of *doli incapax* in NSW, and qualitative research indicating that among Victorian legal practitioners, the burdens of *doli incapax* had been reversed from the prosecution and onto the defence who were expected to self-procure expert reports to raise *doli incapax* as an issue in court (O'Brien & Fitz-Gibbon, 2017).

The High Court of Australia sought to resolve the confusion about *doli incapax* through their decision *RP v R*⁵ ('RP') in December 2016. *RP* was an appeal case brought by the accused, who sought to overturn two convictions for child sex offences allegedly committed when he was aged under 14 years, which had been upheld in a previous appeal to the NSW Court of Criminal Appeal.⁶ The accused was represented by NSW Legal Aid, with the prosecution represented by the NSW Office of the Director of Public Prosecutions (ODPP). In the *RP* case, the High Court clarified that to rebut *doli incapax* under common

1 *Youth Justice Act 2024* (Vic), s. 10; *Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023* (ACT), Pt 6.

2 The Northern Territory Government previously raised their MACR to 12 years (*Criminal Code Amendment (Age of Criminal Responsibility) Act 2022* (NT), Pt 2) but has since lowered it back to 10 years (*Criminal Code Amendment Act 2024* (NT), Pt 2).

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

4 In *RP v R* [2016] HCA 53, the High Court majority (Kiefel, Bell, Keane and Gordon JJ) described the rationale of *doli incapax* as "the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea" [8].

5 [2016] HCA 53.

6 *RP v R* [2015] NSWCCA 215.

law, the prosecution must prove, beyond a reasonable doubt, that the child understood that what they were doing was “seriously wrong” not just “naughty” (Crofts, 2018). The High Court further clarified that the prosecution cannot assume that the child knew their actions were “seriously wrong” based on how their actions were “obviously wrong”, and that the prosecution must provide proof that goes beyond merely showing that the child committed the offence. This clarification was significant because previous cases had suggested that *doli incapax* was easier to rebut when the actions of the accused were more “obviously wrong” (Crofts, 2018),⁷ and because the prosecution in *RP* had assumed that the accused knew that his actions were “seriously wrong” based on the circumstances surrounding the accused’s alleged offending.⁸ The High Court allowed the appeal and quashed the two convictions of the appellant, overturning part of the decision by the NSW Court of Criminal Appeal.

By preventing the prosecution from relying on assumptions about how some actions are “obviously wrong” and by emphasising that it is the prosecution’s responsibility to bring evidence to rebut *doli incapax*,⁹ the High Court may have had the practical effect of making it harder for the prosecution to rebut *doli incapax* and convict younger children of criminal offences. A shift of this nature could have gradually¹⁰ influenced the subsequent actions of justice decision makers involved in criminal proceedings against children aged 10-13 years (Table 1). This includes not only Children’s Court magistrates (who determine whether children aged 10-13 years who come to court are guilty of a criminal offence), but also police officers (who determine whether to charge children with a criminal offence), prosecutors (who decide whether to proceed with or withdraw charges against children), and defence lawyers (who advise child clients on whether to plead guilty or not guilty).

Table 1. Decision makers involved in court proceedings against children aged 10-13 years

	Decisions by key people involved in court proceedings against children aged 10-13 years
Police officers	Determine whether to initiate court proceedings against a 10-13 year old
Prosecutor	Determine whether to proceed to Children’s Court or whether to withdraw charges
Defence lawyers	Advise their clients on whether to enter a plea of: <ul style="list-style-type: none"> • Not guilty, and proceed to a defended hearing, or • Guilty, and proceed to sentencing
Magistrate	At a defended hearing, determining whether the prosecution has: <ul style="list-style-type: none"> • Rebutted the presumption of <i>doli incapax</i>, and • Proven the criminal guilt of the defendant <p>If the defendant is guilty of a criminal offence, determining the penalty to issue at a sentencing hearing</p>

⁷ One view expressed in the Supreme Court of Victoria’s decision *R v ALH* [2003] VSCA 129 was that some offences may be so “serious, harmful or wrong” that proving that the acts happened could be enough to rebut the presumption of *doli incapax* [74]. This view was explicitly rejected in *RP* when the High Court clarified that *doli incapax* cannot be rebutted by referring to how the acts in question were “obviously wrong”. It is beyond the scope of this study to examine the extent to which legal practitioners in NSW were applying reasons similar to *R v ALH* as a shortcut to rebut *doli incapax* prior to *RP*. See also, Crofts (2019).

⁸ *RP v R* [2016] HCA 53, [35].

⁹ According to Crofts (2018, p. 78), one of the most significant aspects of *RP* is “the subtle, yet pointed, comment that the prosecution’s submissions were ‘apt to overlook’ the fact that the starting point is the presumption that children lack sufficient intellectual and moral development to be found *doli incapax*”. This counters the legal culture in Victoria identified by O’Brien and Fitz-Gibbon (2017), where the onus had been informally reversed onto the defence, who were expected to raise *doli incapax* through self-procured expert reports.

¹⁰ New High Court decisions may not have an immediate effect on state-level justice outcomes. Legal practitioners take time to fully understand how to apply new decisions. When new principles are applied in lower courts, there is often uncertainty about what is the correct approach, which may not be clarified until higher appellate courts (such as the NSW Court of Criminal Appeal) examine those principles many years later. In criminal cases, the delay in applying new High Court principles varies among prosecutors, defence lawyers, and magistrates, contributing to different impacts over time.

The *RP* decision was published amid a renewed national debate about the MACR brought about by the Four Corners episode *Australia's Shame*. The resulting public outcry led to multiple inquiries (including a Commonwealth Royal Commission), many of which recommended that the MACR be raised from 10 years, along with systemic changes to the use of youth detention (Clancey et al., 2020). These recommendations were based on scientific research indicating that children aged under 12 years have not reached a level of developmental maturity required to be legally responsible for offending, and a General Comment by the United Nations Committee on the Rights of the Child that the lowest internationally acceptable MACR is 12 years (Atkinson 2018; Crofts 2023; Royal Commission 2017). The Children's Court of NSW (2018) supported several of these recommendations, including raising the MACR to 12 years and limiting the use of youth detention. Eventually, the Standing Council of Attorneys General (SCAG) also recommended the MACR be raised to 14 years in a draft report¹¹ (Council of Attorneys-General Age of Criminal Responsibility Working Group, 2022), and while not all jurisdictions supported the recommendations of the SCAG, the governments of Victoria and the ACT have since raised their MACR from 10 to 12 years.¹² The MACR remains at 10 years for children charged with an offence in all other Australian jurisdictions, including NSW.¹³

Prior research

Despite the potential impacts of *RP* and the surrounding debates on the MACR and youth detention, there are currently no studies that examine recent trends in outcomes from the Children's Court of NSW and penalties for children aged 10-13 years. Previous NSW research has examined the number of criminal proceedings¹⁴ initiated against children aged 10-13 years (Freeman & Donnelly, 2024) between 2010 and 2023, finding that while proceedings decreased by 27% from 2010 to 2016 (i.e., a decrease from 4,638 to 3,396), they have since reached a new peak after increasing by 37% between 2016 and 2023 (i.e., an increase from 3,396 to 4,662). While the authors did not discuss the impact of the *RP* decision, these findings suggest that *RP* may have had little influence on decisions by the NSW Police Force to commence legal proceedings against children aged 10-13 years. However, Freeman and Donnelly (2024) also found that in 2023, the prosecution withdrew all charges in more than 50% of these cases; and among the 20% of cases where a child aged 10-13 years was found guilty of an offence, one half received a caution or dismissal. Taken together, these figures indicate that in 2023, less than 10% of children aged 10-13 years who were charged by the NSW Police Force faced legal sanctions, compared to 55% of 14-17 year olds.¹⁵

Victoria is the only other Australian jurisdiction with recently published data on court outcomes for defendants aged 10-13 years. Baidawi et al. (2024) analysed 2017 data from the Victorian Children's Court to examine the support and needs of defendants aged 10-13 years in the Victorian Children's Court, and to better understand how *doli incapax* was being applied to this group. Similar to NSW, they found that very few children aged 10-13 years who had been charged with an offence by the Victorian Police received any legal sanction. About 82% of index matters (i.e., the first matter for which children came before the Victorian Children's Court in 2017) in their sample resulted in a diversion,¹⁶ therapeutic treatment order,¹⁷ or were struck out. Where the index matter was struck out by the magistrate, the authors found that only 23% were due to the child being found *doli incapax* by magistrates. However, this does not include index matters where Victoria Police had withdrawn matters due to their own assessment of *doli incapax* before consideration by a Magistrate. Due to the study's focus on a sample of Children's Court index matters in 2017, it did not examine the potential impacts of *RP* on court outcomes.

11 Despite being completed by the SACG in 2020, the draft report was not released publicly until 2022. In 2023, the SACG released a substantially different final report, which moved away from issuing the findings and recommendations of the draft report (such as raising the MACR to 14), and instead offered principles that could inform reforms to the MACR (Council of Attorneys-General Age of Criminal Responsibility Working Group, 2023).

12 *Youth Justice Act 2024* (Vic), s. 10; *Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023* (ACT), Pt 6.

13 There was an unsuccessful attempt to raise the MACR to 12 in NSW through the Children (Criminal Proceedings) Amendment (Age of Criminal Responsibility) Bill 2021.

14 Freeman and Donnelly (2024) define legal proceedings commenced by the NSW Police Force as including court proceedings and formal court diversions (i.e., warnings, cautions, and Youth Justice Conference referrals).

15 Author's calculations using unpublished data from the Reoffending Database (ROD) (May 2024) for finalised Children's Court appearances in 2023.

16 Diversions refer to the Victorian Children's Court Youth Diversion Service, which is a pre-plea option available to young people. It aims to reduce reoffending through the completion of a diversion plan intended to strengthen protective factors and increase understanding of harms caused by offending (Children's Court of Victoria, 2021).

17 Therapeutic treatment orders (TTO) are issued by the Family Division of the Children's Court of Victoria on application by Child Protection, if they are satisfied on reasonable grounds that sexually abusive behaviours have occurred (Victorian Government, 2022).

The Freeman and Donnelly (2024) and Baidawi et al. (2024) studies indicate that in NSW and Victoria, most children aged 10-13 years charged with an offence do not receive any legal sanction from the Children's Court. However, neither study examined the impact of the *RP* decision, focussing instead on cross-sectional results that consider the criminal justice system response at one point in time. Further work by Morris et al. (2023) examined legal pathways of defendants aged 10-13 years through the Victorian criminal justice system from 2012-13 to 2021-22 financial years. They found that over the four-year period from 2015-16 to 2018-19, the proportion of proven court appearances (i.e., matters where the defendant was found guilty of at least one charge) decreased by almost 30%, in contrast to a slight increase in proven court appearances between 2012-13 and 2015-16. There was also a shift in the proportion of unproven court appearances (i.e., matters where the defendant was not guilty of any charge), which increased by almost 50% between 2015-16 and 2018-19. While the report did not explain these trends, the decrease in proven and increase in unproven court appearances started in 2016-17, coinciding with the *RP* decision in December 2016. The trends could therefore suggest that *RP* influenced decisions by the Victorian Children's Court.

The current study

This paper aims to examine whether recent trends in criminal proceedings at the Children's Court of NSW involving defendants aged 10-13 years have been influenced by the *RP* decision. More specifically, we examine whether *RP* has coincided with fewer children aged 10-13 years being found guilty of a criminal offence, whether by fewer legal proceedings, more court acquittals, or more finalised court appearances with all charges withdrawn. We do this by presenting recent data on the volume of finalised court appearances and the outcome of those court appearances (i.e., proven, not proven, and withdrawn by the prosecution), and comparing trends for 10-13 and 14-17 year old defendants. We also verify whether the NSW trends are consistent with trends in other jurisdictions by examining court appearance outcomes from Children's Courts across Australia. This allows us to investigate whether there have been any national changes in court appearance outcomes for children aged 10-13 years following the release of *RP* in late 2016. In addition, we explore other possible influences on court appearance outcomes in NSW for children aged 10-13 years, including shifts in the types of offences child defendants are charged with, the expansion of the Specialist Magistrate program in the Children's Court of NSW, and disruptions from COVID-19 public health measures. Lastly, we examine whether trends in penalties issued by the Children's Court of NSW are similar for 10-13 and 14-17 year old defendants who are found guilty of their offences.

The remainder of this paper is organised around the following questions:

- Have recent trends in court proceedings and outcomes for 10-13 year olds in the Children's Court of NSW been influenced by the *RP* decision?
- How do the NSW trends compare to the rest of Australia, and can national trends be explained by the *RP* decision?
- Are the NSW trends in court outcomes explained by shifts in the offending profile of defendants aged 10-13 years appearing in the Children's Court of NSW?
- Are the NSW trends in court outcomes explained by the increased prevalence of specialist Children's Court Magistrates?
- What are the NSW trends in court penalties imposed on children aged 10-13 years, and how do they compare to trends in penalties for those aged 14-17 years?

METHOD

Data

We utilise two datasets in this study. The first dataset is an extract from the Reoffending Database (ROD), which is maintained by the NSW Bureau of Crime Statistics and Research (BOCSAR). The second dataset is an extract from the Combined Criminal Court Statistics database collated and maintained by the Australian Bureau of Statistics (ABS). Each of these datasets is described in further detail below.

- 1. BOCSAR's Reoffending Database (ROD):** ROD contains information on all legal proceedings finalised in a NSW criminal court from 1994. The extract used for this study contains information from all finalised court appearances in the Children's Court of NSW between January 2010 and December 2023 which involved children aged 10-17 years (where age is defined as age at the earliest offence date). This timeframe aligns the study with prior work by Freeman and Donnelly (2024). For these court appearances, we can observe court outcomes (i.e., proven, not proven, or all charges withdrawn by the prosecution) and penalties (i.e., juvenile dismissals,¹⁸ community sentences (supervised and unsupervised), custodial penalties, fines, no penalty, and no conviction recorded). ROD also contains other variables of interest, including the age of the defendant at the date of the earliest offence in the finalised court appearance, the Australian and New Zealand Standard Offence Classification (ANZSOC) offence divisions¹⁹ of the most serious offence in the finalised court appearance (i.e., the offence with the most serious penalty based on past sentencing patterns), and whether the court appearance was overseen by a specialist Children's Magistrate.²⁰ ROD also includes demographic characteristics including Aboriginality, gender, and remoteness area of the defendant.²¹ A young person is counted as Aboriginal if they had ever identified as Aboriginal during legal proceedings initiated by the NSW Police Force. Data from ROD has been aggregated by calendar year for the analysis of trends over consecutive years.
- 2. ABS's Criminal Courts, Australia:** The ABS's national criminal courts dataset contains annual data collected from all Australian jurisdictions between the financial years 2013-14 to 2022-23. For this study, the ABS provided BOCSAR with a customised data extract containing the number of finalised defendants in Children's Courts, by jurisdiction, finalised case outcomes, and age at the finalisation of the case. Finalisation refers to cases that have been concluded by the court, resulting in a settled outcome and penalty (if there is a conviction or admission of guilt) for a given charge (or collection of charges). Case outcomes include whether the charge(s) were proven,²² not proven, or whether the charge(s) were withdrawn by the prosecution (i.e., Police, Director of Public Prosecutions, or another initiating agency). For this study, we limited our sample to children who were aged 10-17 years when their case was finalised and calculated the percentage of defendants with the outcomes of interest. Appendix A outlines limitations and caveats to the ABS criminal courts data, including inconsistencies in how diversions were recorded across jurisdictions (sometimes recorded as a proven outcome), state-level changes in data collection and policies that may affect the accuracy of the measures.

18 Juvenile dismissals include court appearances that are dismissed after a youth justice conference, dismissed with caution, dismissed under the *Children (Criminal Proceedings) Act 1987* (NSW), caution under the *Young Offenders Act 1997* (NSW), or an unspecified type of dismissal. Youth justice conferences (YJCs) are a non-court diversionary measure available under the *Young Offenders Act 1997* (NSW). YJCs can be ordered by a Magistrate when certain conditions are met (s 36).

19 All references to ANZSOC in this study refer to the 2011 ANZSOC classifications, which were the most recent classifications available in the datasets used by the study. For further details on 2011 ANZSOC offence categories, see ABS (2011).

20 In NSW, specialist Children's Magistrates preside over cases exclusively in the Children's Court, unlike generalist Magistrates who primarily oversee Local Court cases but may also sit over Children's Court matters if required (Johnstone, 2021). Specialist Children's Magistrates also receive different training focused on young offenders, network frequently with other specialist Children's Magistrates, and have been selected from a general pool of Magistrates based on their experiences, qualifications and skills in managing matters involving children and young people.

21 Derived from the Australian Bureau of Statistics (ABS) Accessibility and Remoteness Index of Australia (ARIA+), remoteness area is organised into five categories based on relative access to services in each area (see ABS (2016)). Categories include "Major cities", "Inner regional", "Outer regional", and "Remote" or "Very remote". This study has condensed these categories into "Major cities", "Regional" and "Remote". In NSW, "major cities" includes Greater Sydney, as well as Newcastle, Maitland, Wollongong, Tweed Heads and more.

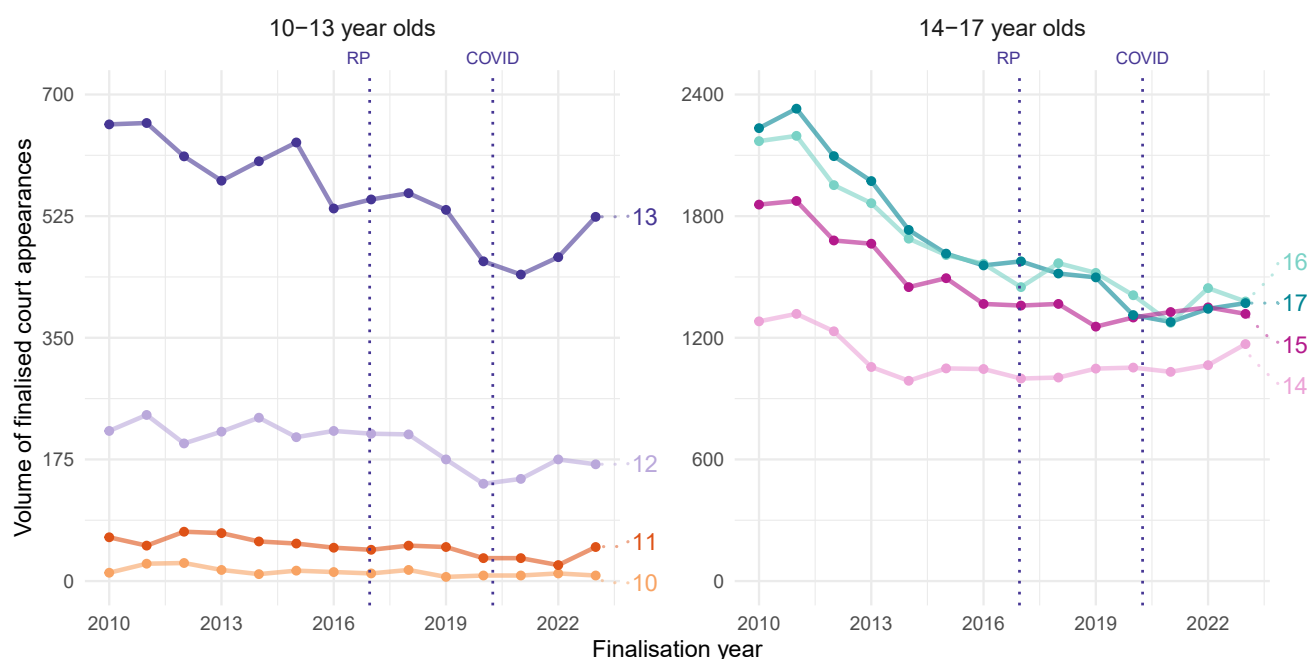
22 In this study, "proven" is used interchangeably with "guilty outcomes". Both refer to cases where the offence(s) were found to have been committed by the defendant. However, we do not use the term "convictions" due to the relatively higher likelihood for children with proven charges to receive no recorded convictions for an offence (e.g., through pre-court youth diversion programs). Unlike proven offences with convictions, proven offences without convictions do not appear on a standard criminal record check.

FINDINGS

Have recent trends in court proceedings and outcomes for 10-13 year olds in the Children's Court of NSW been influenced by the RP decision?

This section examines how trends in Children's Court of NSW outcomes have changed from 2010 to 2023, against the backdrop of the High Court's *RP* decision. All figures in this section contain two vertical dotted lines that indicate when the *RP* decision was issued (i.e. December 2016) and the first COVID stay-at-home order in NSW (i.e. March 2020).

Figure 1. Volume of finalised court appearances in the Children's Court of NSW, by age of defendant



We begin by examining the volume of finalised court appearances in the Children's Court of NSW by age at earliest offence date²³ (see Figure 1). If *RP* had made it harder to prosecute 10-13 year olds, we might expect to see a decline in the volume of finalised court appearances for 10-13 year olds since 2016, possibly as a result of fewer court proceedings initiated from charges issued by police officers. Figure 1 shows that this is not the case, with finalised court appearances mostly stable for all age groups after 2016. The exception is 13 year olds, who have had the highest growth in court appearances since 2020, and comprise two-thirds of finalised court appearances from the 10-13 age group. In addition, prior to 2016, finalised court appearances declined across all age groups. Further, reading across the panels, we can also see that the decline in finalisations was steeper for defendants aged 15-17 years than it was for those aged 10-13 years. Taken together, these trends suggest that finalised court appearances for 10-13 year olds have not fallen significantly following the *RP* decision, and that most of the sustained declines in finalised court appearances for 13 year olds preceded *RP*.²⁴

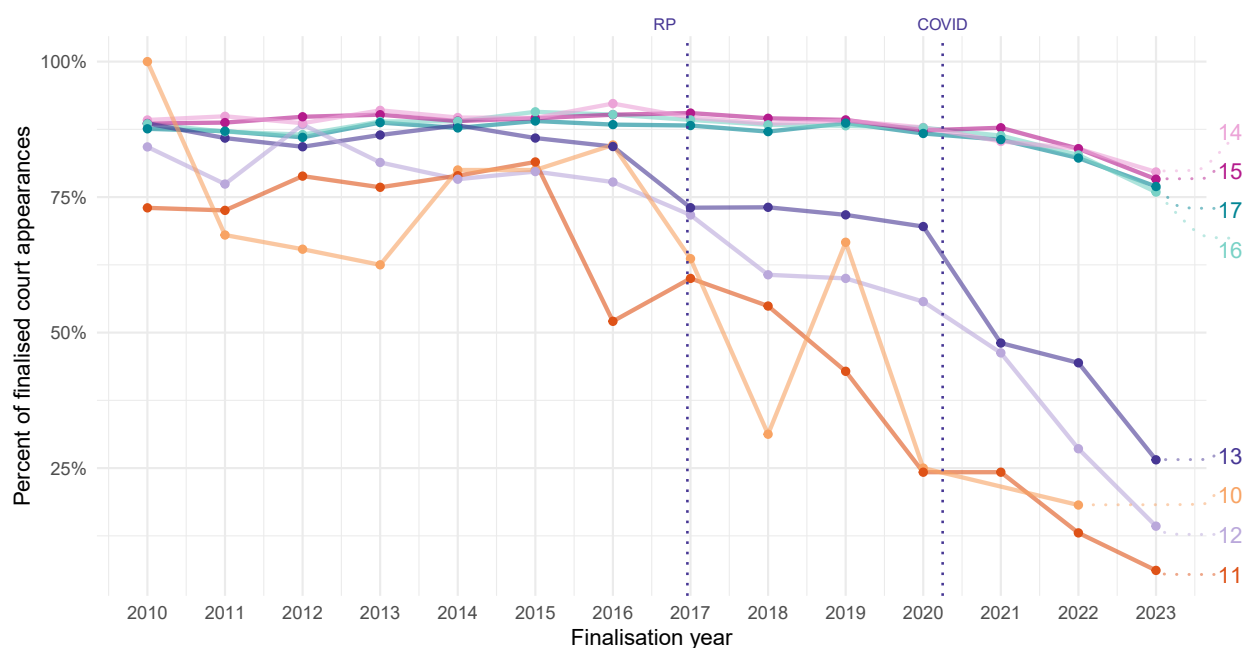
²³ For the remainder of this paper, age refers to the age of the defendant at the date of the earliest offence in their finalised court proceeding, rather than age at finalisation, unless otherwise specified. Using age at earliest offence date rather than age at finalisation helps to prevent spillover across the 10-13 and 14-17 age groups. This is because in some cases, the time to finalise a case may be long enough that a child who allegedly committed an offence at the age of 13 may be aged 14 by the time their case is finalised. This would hide the extent to which they were protected by the presumption of *doli incapax*, which only applies to children aged 10 to 13 at the time of their alleged offending.

²⁴ In addition, there is no evidence of a clear drop in legal actions taken by police against 10-13 year olds since *RP*. On the contrary, Appendix Figures B1, B2 and B3 show that there has been an increase in overall legal actions initiated against young people since *RP*, particularly for violent offences. This increase has occurred predominantly after the COVID-19 pandemic. See also Freeman and Donnelly (2024), which shows that the population rate of legal proceedings against 10-13 year olds has increased by 21% from 2016 to 2023.

We now turn to trends in the proportion of finalised court appearances in the Children's Court of NSW with proven outcomes. If the *RP* decision has impacted trends in proven outcomes, we should expect to see at least two features in these data. First, there should be a decline from 2016 onwards in the percentage of court appearances that are proven for the 10-13 age group. This is because the *RP* decision may have made it harder for the prosecution to secure a proven outcome for defendants aged 10-13 years. Second, there should be a clear difference between trends among the 10-13 and 14-17 age groups, because *doli incapax* (which was clarified by *RP*) only applies to the younger age group. More specifically, there should be a clear split in the trends for defendants aged 13 (who were protected by *doli incapax* at the time of the alleged offence) and those aged 14 (who were not protected by *doli incapax*).

We see both features in Figure 2. There is a clear drop in the proportion of proven court appearances for defendants aged 10-13 years starting from 2016. This coincides with the handing down of the *RP* decision and is consistent with the suggestion that *RP* may have made it harder to prosecute children aged 10-13 years. We also see a clear difference in trends across age groups, which is most obvious when comparing the trends for children aged 13 and 14 years. From 2010 to 2016, court outcomes for 13 year olds followed a similar trend to outcomes for those aged 14 years (and those aged 15-17 years). This changed after the *RP* decision, with the proportion of 13 year olds with a proven outcome decreasing while the trend for the 14-17 year olds remained relatively stable.

Figure 2. Trends in the proportion of finalised court appearances in the Children's Court of NSW with a proven outcome, by age of defendant, 2010-2023



One notable feature of Figure 2 is the accelerated decline in the proportion of proven court appearances for defendants aged 10-13 years from 2020 onwards. While the timing of this decline coincided with court disruptions from COVID-19 public health measures, the decrease has persisted well into the post-COVID era. Another potential factor that could explain the accelerated decline is the influential *BC v R*²⁵ decision from the NSW Court of Criminal Appeal issued in June 2019, in which the Court applied principles from *RP* and reiterated that the prosecution cannot rebut the presumption by assuming that the accused knew that their actions were “seriously wrong” based on the accused’s actions.²⁶ *BC v R* was the first case after *RP* where the NSW Court of Criminal Appeal rejected the prosecution’s approach to rebutting *doli incapax*.

²⁵ [2019] NSWCCA 111.

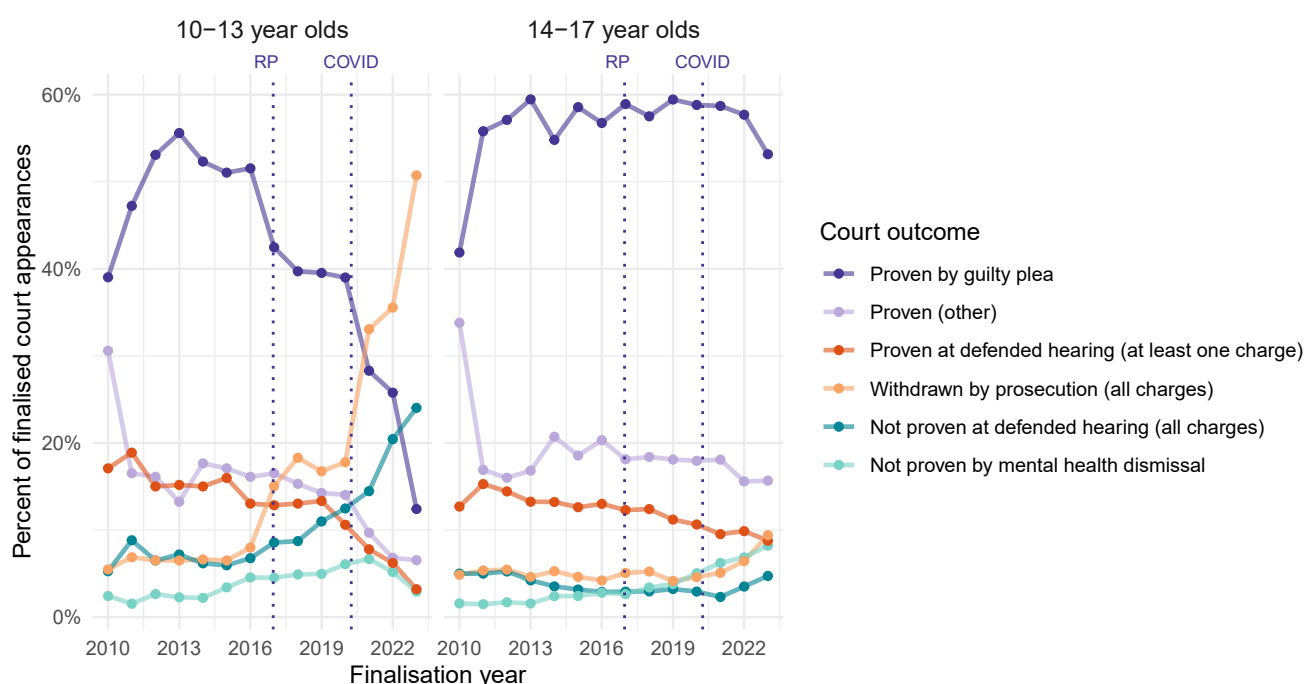
²⁶ *BC* quashed the sexual assault convictions of an accused, who was aged 12 at the time of the alleged offences, because the prosecution had failed to present evidence of the accused’s maturity or intelligence at the time of the incident. The Court found that the prosecution’s reference to the circumstances surrounding the alleged offending — specifically the age gap between the complainant and accused, and that the accused had shown some fear about his activities being discovered — were not capable of rebutting the *doli incapax* presumption. The difference in the age of the complainant and defendant was described as having “little to no weight in rebutting the presumption” of *doli incapax* [50]. Similarly, the evidence that the defendant had shown some fear about the activity being discovered by adults was insufficient to showing that he knew his conduct was “seriously wrong” rather than “naughty” [55]-[57].

Because the case examined how *doli incapax* should be applied in the NSW criminal justice system, it could have been a key stage for how NSW courts adjusted their approach to *doli incapax* after *RP*.

Focusing on the more general decline in the proportion of proven court appearances since 2016, if *RP* is having an influence, there are three channels through which this influence could occur: (1) a decrease in the share of defendants entering a guilty plea; (2) an increase in the fraction of defendants who pleaded not guilty and were found not guilty (i.e., court appearances where the defendant was acquitted at a defended hearing); and (3) an increase in the share of court appearances where the prosecution withdrew all charges. The rest of this section examines the possible influence of *RP* on guilty pleas, acquittals, and court appearances where all charges were withdrawn.

Figure 3 plots the proportion of court appearances with at least one proven charge (including those arising from a guilty plea), where no charges were proven after a defended hearing, or where all charges were withdrawn by the prosecution. Before 2016, guilty pleas were the most common way that the prosecution secured a conviction for both the 10-13 and 14-17 age groups. However, after the *RP* decision in 2016, guilty pleas in the 10-13 age group dropped significantly, while guilty pleas by defendants aged 14-17 years remained mostly stable. The decline in guilty pleas among 10-13 year olds was met with a surge in the proportion of finalised court appearances where children aged 10-13 years pleaded not guilty (to the principal offence),²⁷ tripling from about 20% of finalised court appearances to 64% between 2016 and 2023 (Appendix Figure B4). This shift in pleas suggests that children, perhaps at the advice of their legal representatives, became more willing to defend charges in court after the *RP* decision was released.

Figure 3. Trends in the outcome of finalised court appearances in the Children's Court of NSW, by age of defendant



The increase in children pleading not guilty coincided with a rise in the proportion of court appearances where the child was found not guilty of all charges, which grew from 5% to 24% between 2010 and 2023 (Figure 3). More specifically, within defended hearings for defendants aged 10-13 years, the proportion of court appearances where the child was found not guilty of all charges grew from 24% to 88% between 2010 and 2023 (Appendix Figure B5). In contrast, the proportion of 14-17 year olds found not guilty of all charges in defended hearings grew from 28% in 2010 to 35% in 2023 (Appendix Figure B5).

²⁷ Principal offence refers to the offence charged which received the most serious penalty at the finalised court appearance.

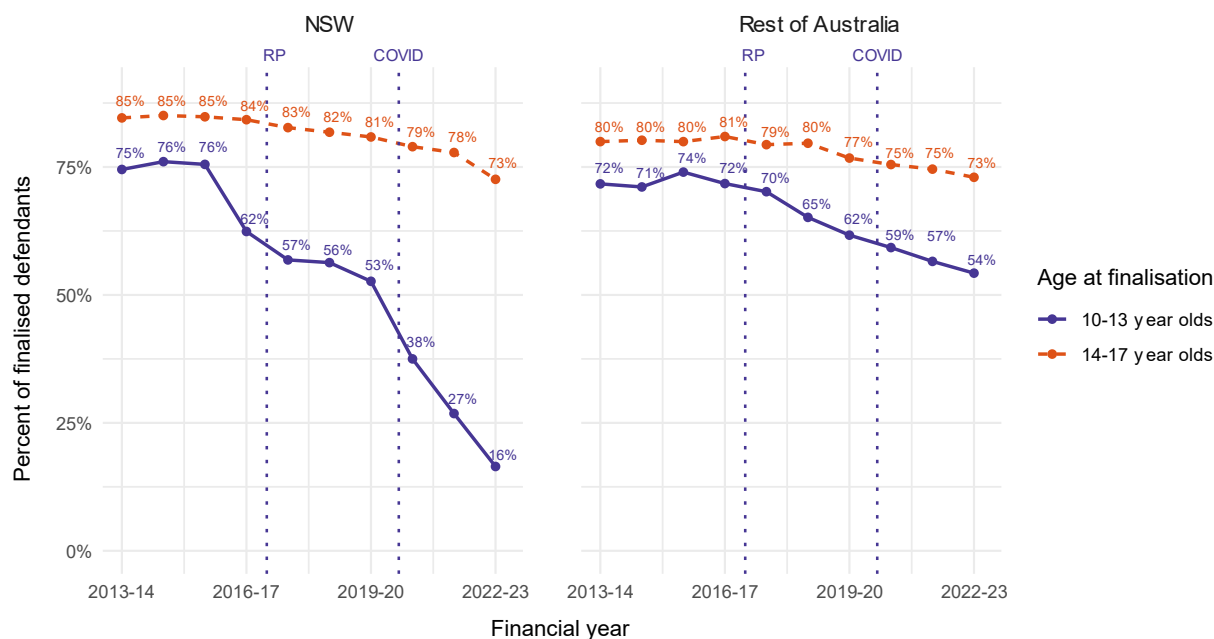
Along with the increase in unproven outcomes, there was also a dramatic rise in the percentage of 10-13 year olds who had all charges withdrawn by the prosecution, which grew from 5% in 2010 to 51% in 2023 (Figure 3). Consistent with the decline in proven court appearances, the sharp increase in the proportion of withdrawn charges started in 2017 after the *RP* decision, and was limited to the 10-13 age group with no comparable increase among 14-17 year olds. The increase in court appearances with all charges withdrawn suggests that after *RP* the prosecution anticipated a higher risk of failure in rebutting the *doli incapax* and were therefore less willing to proceed to a defended hearing.

How do the NSW trends compare to the rest of Australia, and can national trends be explained by the *RP* decision?

The NSW data shown so far shows a large fall in the number and proportion of 10-13 year olds convicted in the Children's Court, which is consistent with the theory that *RP* has made it harder to convict younger children of criminal offences. Due to the sharpness of this decrease in convictions, this section aims to verify whether this fall has also occurred across the rest of Australia, and the extent to which national trends can be explained by the *RP* decision.²⁸

Given the findings in Figure 2 and the characteristics of *RP*, we should expect to see at least two additional features when comparing trends in NSW to the rest of Australia. First, because the presumption of *doli incapax* exists in other Australian jurisdictions and the High Court has national jurisdiction, there should be a decrease in proven cases in other states following the *RP* decision, although this may not be uniform across all states due to differences in how *doli incapax* is formulated across Australia.²⁹ Second, the drop in proven cases may be more prominent in NSW compared to the rest of Australia. This is because the case of *RP* originated in NSW and specifically corrected errors in the NSW Court of Criminal Appeal's approach in matters of *doli incapax*. The NSW Court of Criminal Appeal then confirmed *RP*'s importance in NSW when they applied the *RP* approach during the *BC v R*³⁰ appeal decision in 2019.

Figure 4. Trends in the proportion of finalised defendants with a proven outcome, by age of defendant, NSW vs the rest of Australia



28 This section uses data from a custom extract from the ABS Combined Criminal Courts dataset. This dataset contains annual data on the number of finalised defendants, which has been collected from the Children's Courts of all Australian jurisdictions between the financial years 2013-14 to 2022-23. One important caveat to this dataset is that there are inconsistencies in how diversions have been recorded by states and territories. For example, Victoria has sometimes recorded diversions as a guilty outcome, whereas other jurisdictions have recorded diversions as referrals to non-court agencies.

29 While *doli incapax* exists in all states, there are multiple variations in use across Australia. While states like NSW, Victoria and South Australia follow *doli incapax* "at common law", other states follow legislated versions of *doli incapax* that are slightly different to the common law variation (Crofts 2018; Moritz & Tuomi, 2023). This is detailed further in the discussion section. See *BDO v R* [2021] QCA 220 and *BDO v R* [2023] HCA 16 for an example of how a different formulation of *doli* can affect how it is applied by courts.

30 [2019] NSWCCA 111.

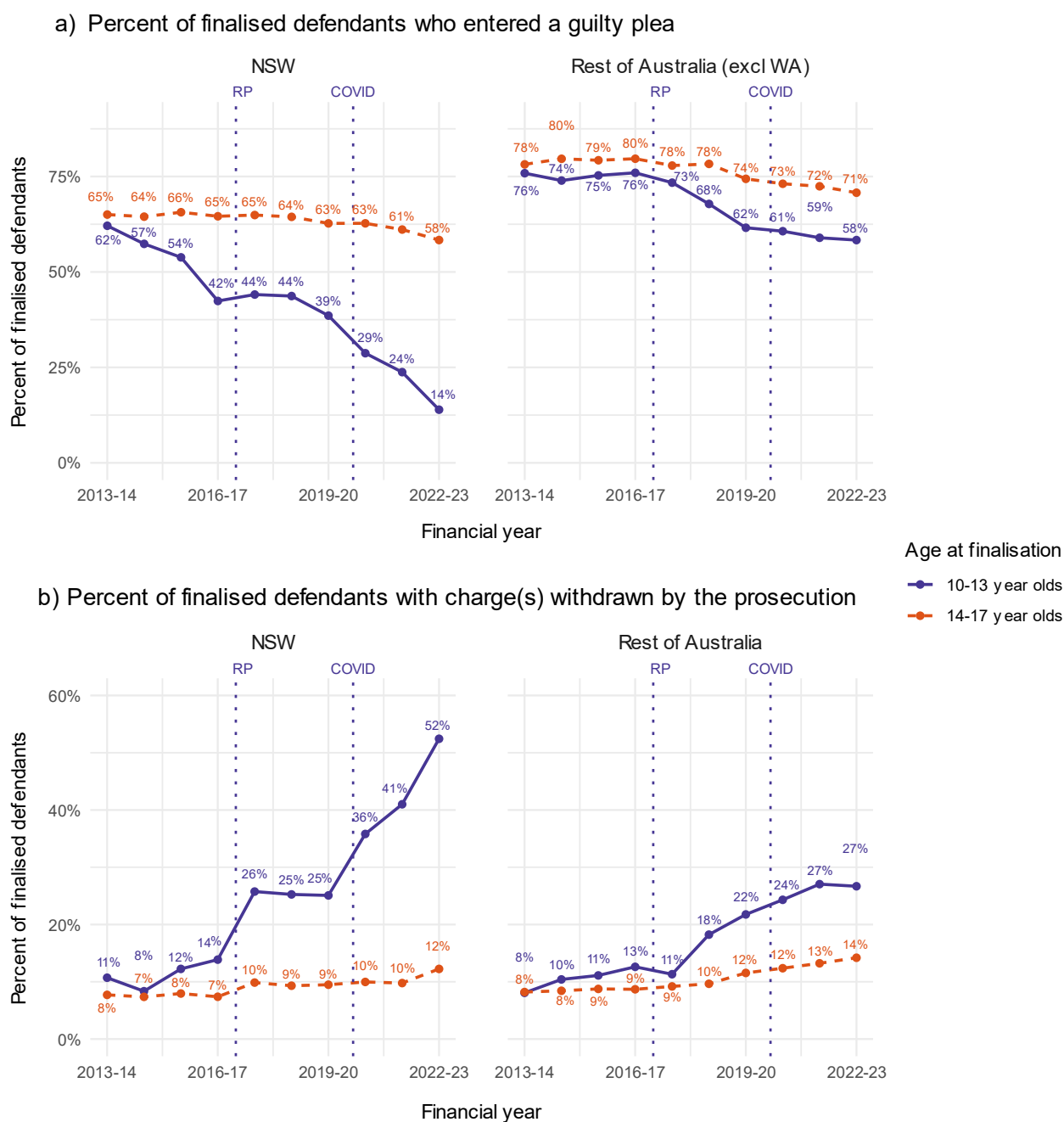
Both these features are apparent in Figure 4. While there has been a reduction in proven outcomes across Australia since *RP*, the reduction is larger in NSW, where the decrease in the proportion of 10-13 year olds convicted fell from a peak of 76% in the 2015-16 financial year to 16% in 2022-23. But across the rest of Australia (excluding NSW), the corresponding fall was from 74% in 2015-16 to 54% in 2022-23. The decline across the rest of Australia is consistent with the *RP* decision having a national impact. However, further analysis shows that the changes differ by State. Victoria and South Australia (SA) show similar declines to NSW in the percentage of proven cases after *RP* (Appendix Figure C1). The NT also recorded a decline in the percentage of proven cases, although their decline started in 2014-15, well before the *RP* decision. On the other hand, Queensland shows almost no change since 2016-17 and Western Australia with far smaller changes than NSW. This suggests that the impact of *RP* has not been uniform across states and territories.³¹ Lastly, for both NSW and the rest of Australia, the declines in proven cases among defendants aged 10-13 years are much steeper than the decline among defendants aged 14-17 years.³²

As noted in the previous section, the three channels which could explain the drop in proven cases are decreases in the proportion of cases where a guilty plea was entered, increases in cases where the prosecution withdrew charges, and an increase in acquittals in defended hearings. Data constraints prevented us from examining acquittals in defended hearings across the rest of Australia, so we have instead focused on the proportion of finalised defendants who entered a guilty plea or had their matter withdrawn by the prosecution.

Figure 5 confirms that the changes in trends observed in Figure 3 are not unique to NSW. Figure 5(a) reveals a decrease across jurisdictions in the percentage of 10-13 year olds entering guilty pleas, falling in NSW from 62% in 2013-14 to 14% in 2022-23, with a smaller decrease across the rest of Australia (excluding Western Australia)³³ from 76% to 58% over the same period. Appendix Figure C2(a) shows that the decrease in guilty pleas across the rest of Australia was driven by large declines in Victoria, South Australia and the NT, but there was almost no post-*RP* shift in the share of guilty pleas for 10-13 year olds in Queensland.³⁴ Figure 5(b) also shows that the percentage of the 10-13 age group who had charges withdrawn has quintupled in NSW from 11% in 2013-14 to 52% in 2022-23, while more than tripling across the rest of Australia from 8% to 27% over the same period.³⁵ Together, these findings provide further evidence that *RP* may have altered the legal strategies of both the defence and prosecution not only in NSW, but potentially in other jurisdictions as well.

-
- 31 The states shown to have experienced a sharp decline in the proportion of proven cases since 2016-17 — NSW, Victoria and SA (Appendix Figure C1) — are also the same jurisdictions that follow *doli incapax* “at common law” (Moritz & Tuomi, 2023), which is the variation of *doli incapax* that was clarified by *RP*. Other Australian jurisdictions, such as Queensland and Western Australia, have slightly altered variations of *doli incapax* due to differences in how they have legislated the principle (Crofts, 2018; Moritz & Tuomi, 2023). Tasmania and the ACT have too few 10-13 year olds going through Children’s Court to draw conclusions on their post-*RP* trends.
- 32 As previously noted, the ages in Figure 4 refer to the age at finalisation, which means that some children in the 14-17 group were aged between 10-13 at the time of the offence, and would therefore be protected by *doli incapax*.
- 33 Data on guilty pleas in the Children’s Court of Western Australia is only available from 2019-20 to 2022-23, and is therefore excluded from Figure 5.
- 34 As Queensland has remained a persistent exception in their case outcome trends with defendants aged 10-13 years, we have also examined the trends in proven cases when normalised by population to check whether the trends are explained by population growth. Appendix Figure C3 shows that after normalising for population, Queensland shows a clear decrease in the population rate of proven cases for defendants aged 10-13 years, but this only took place in the 2019-20 financial year during which the COVID-19 pandemic started. The decrease could therefore reflect a decrease in Queensland’s overall population from pandemic-related migration, rather than a systemic change in Children’s Court outcomes.
- 35 Appendix Figure C4 shows withdrawal rates for each state and territory. The increase in withdrawals in cases with defendants aged 10-13 years was driven by NSW, Victoria, SA, and the NT, mostly occurring after the *RP* decision. As with Appendix Figure C1, Queensland saw little to no movement in withdrawal rates post-*RP*.

Figure 5. Trends in the proportion of finalised defendants who (a) had criminal charge(s) withdrawn by the prosecution or (b) proceeded to sentencing after entering a guilty plea, by age of defendant, NSW vs the rest of Australia

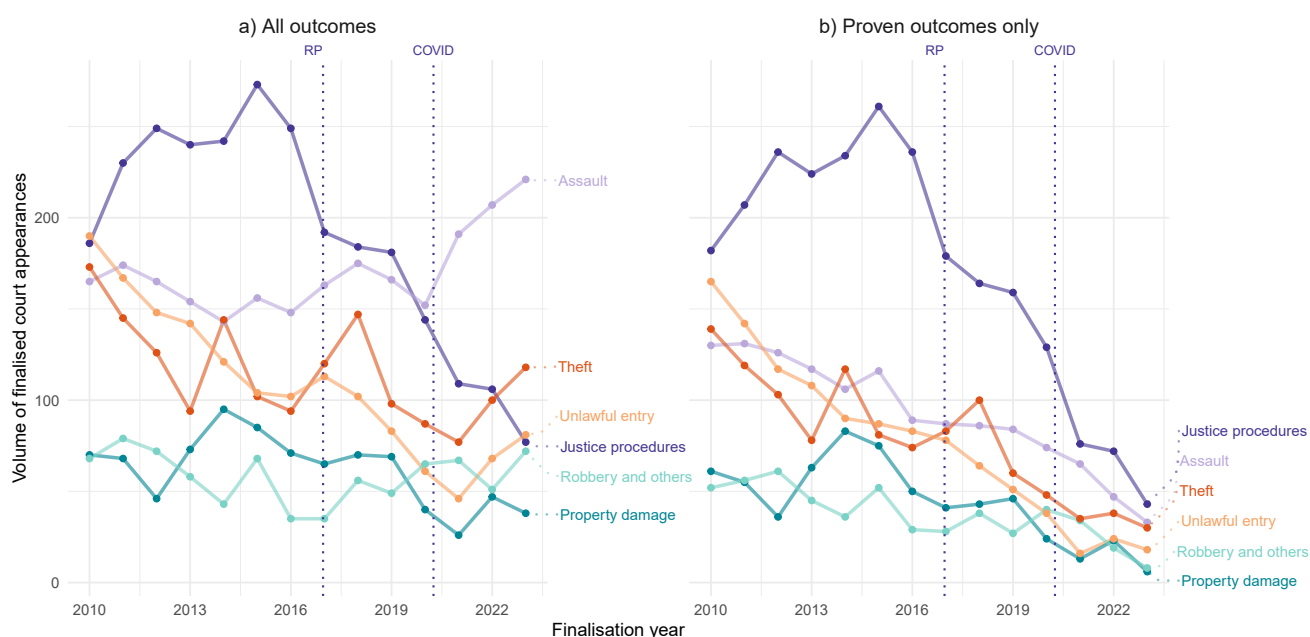


Are the NSW trends in court outcomes explained by shifts in the offending profile of defendants aged 10-13 years appearing in the Children's Court of NSW?

So far, we have focused on explaining the potential effects of *RP* on court outcomes for defendants aged 10-13 years. In the remainder of the paper, we examine other potential explanations for the shift in proven offence trends in the Children's Court of NSW since 2016 and 2017. The first possible explanation we consider is whether the types of offences for which legal proceedings are commenced against 10-13 year olds have changed. For example, if police are now proceeding against children aged 10-13 years for less serious offences or, alternatively, offences that are more difficult to prove, then this could be responsible for the fall in proven offences observed in the previous two sections of this paper.

To further examine this possibility, we separate defendants aged 10-13 years into groups based on the ANZSOC offence division³⁶ of their most serious offence, and then check for shifts in the volume of court finalisations and proven outcomes in recent years. Figure 6(a) shows trends in the volume of finalised court appearances for the top six offences, which account for about 86% of finalised cases involving defendants aged 10-13 years. Since 2010, the number of finalisations for the 10-13 age group has decreased for justice procedure offences (down by 72% from their peak in 2015), unlawful entry offences (down by 57% since 2010), theft offences (down by 31% since 2010), and property damage (down by 46%). In contrast, assault offences have grown by about 34% since 2010, while robbery offences have increased by 6%.³⁷

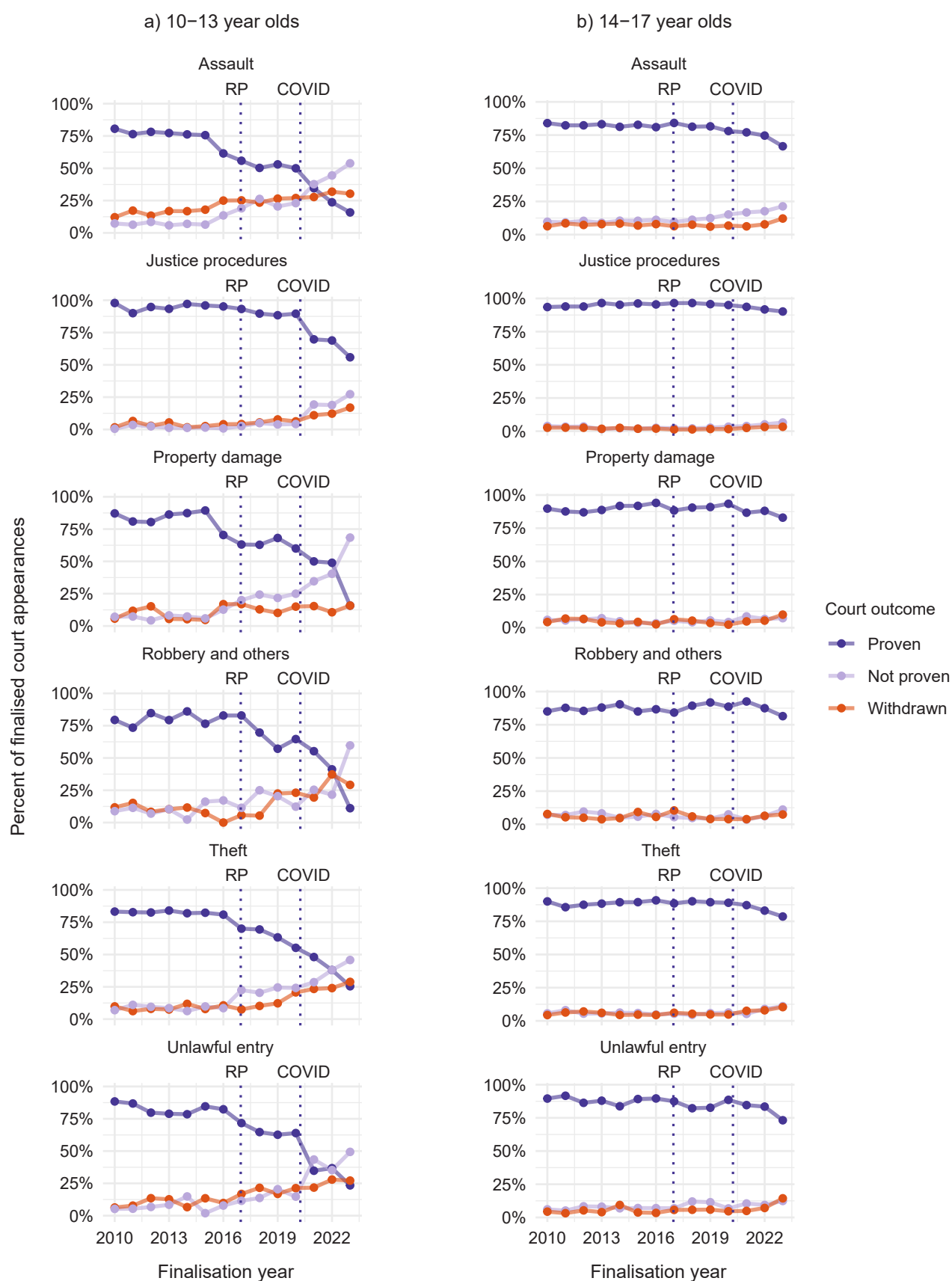
Figure 6. Trends in the volume of finalised court appearances in the Children's Court of NSW for the top six offences involving defendants aged 10-13 years



³⁶ For further details on 2011 ANZSOC offence classifications, see ABS (2011).

³⁷ Similar trends are also reflected in Appendix Figure D1, which shows that compared to the 14-17 age group, the 10-13 age group has experienced bigger shifts in offence composition. In particular, the 10-13 age group experienced a larger decrease in the percent of cases involving justice procedure offences, and a larger increase in the proportion of assault cases.

Figure 7. Trends in court outcomes for the most serious offence in finalised court appearances in the Children's Court of NSW, by age of the defendant, for the top six offences involving defendants aged 10-13 years



If *RP* influenced trends in proven cases, we should see a fall in the volume of proven cases across all offence classifications. This can be seen in Figure 6(b), which shows a clear decline in the volume of proven cases involving defendants aged 10-13 years across all top six offences.³⁸ For example, while there has been 34% increase in the volume of court finalisations for assaults, there has been a 75% decrease in the volume of *proven* court appearances for assault.³⁹

Any influence of *RP* should also be clear when examining the proportion of proven court appearances at the offence level. In other words, for each offence type, there should be a decline from 2017 in the proportion of finalised court appearances with a proven outcome and a corresponding increase in the proportion of finalised court appearances where all charges were withdrawn by the prosecution. Figure 7 shows this pattern across most of the top six offences. On the other hand, for the 14-17 age group, the proportion of proven court appearances for each offence type remained largely stable until 2020, after which we see a slight decrease in the share of proven court appearances. Since the volume and proportion of proven court appearances have fallen across most offence categories, the trends in court outcomes cannot be explained by changes in the offence profile of children aged 10-13 years appearing before the Children's Court of NSW.

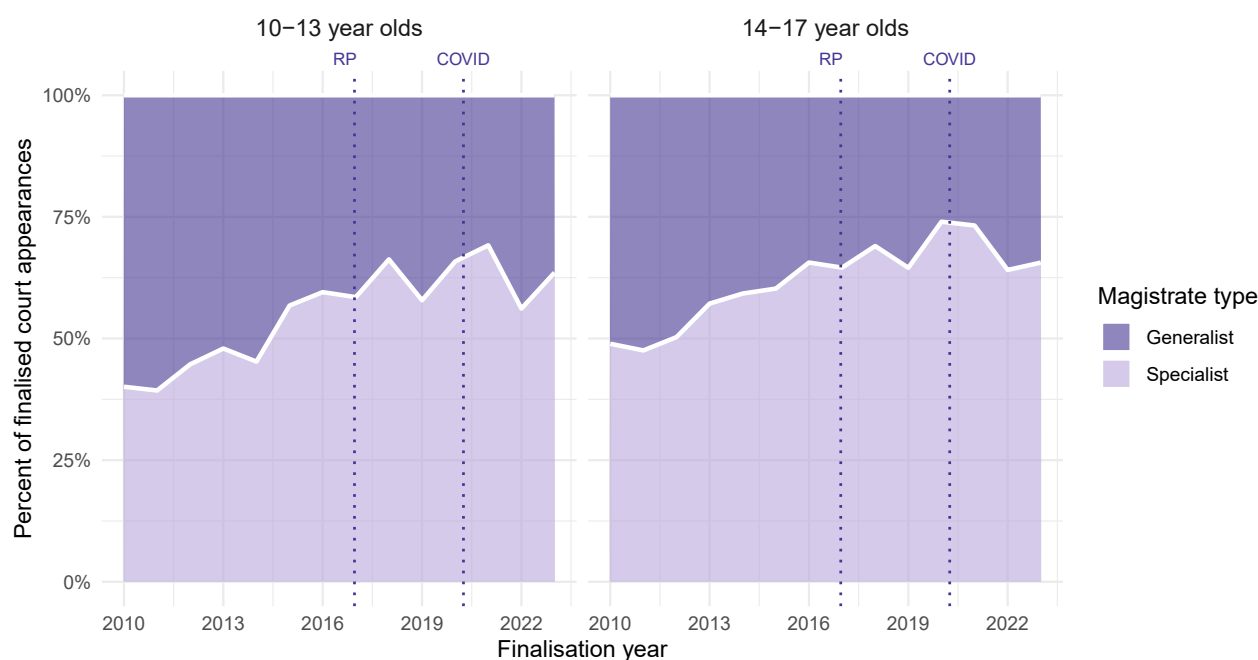
Are the NSW trends in court outcomes explained by the increased prevalence of specialist Children's Court Magistrates?

One last factor that could influence trends in court outcomes for defendants aged 10-13 years is the growth in specialist Children's Magistrates between 2010 and 2023. In NSW, specialist Children's Magistrates preside over cases exclusively in the Children's Court of NSW, unlike generalist magistrates who primarily oversee Local Court cases but can also preside over Children's Court matters if required (Johnstone, 2021). Specialist Children's Magistrates also receive additional training focusing on issues specific to young offenders, network frequently with other specialist Children's Magistrates, and are appointed from a general pool of magistrates based on their experiences, qualifications and skills in managing matters involving children and young people. Specialist Children's Magistrates have grown from overseeing less than half of finalised court appearances in 2010 to over 63% by 2023 (Figure 8). But despite the expansion, specialist Children's Magistrates remain most prevalent in the major cities of NSW (in particular, metropolitan Sydney), where they presided over 83% of finalised matters in 2023 (Appendix Figure E1). In contrast, in the same year, specialist Children's Magistrates presided over about 43% of finalised matters involving defendants living in regional areas. To examine the extent of their influence on overall trends in Children's Court outcomes, this section compares trends in court outcomes for matters heard by specialist and non-specialist magistrates.

³⁸ Appendix Figure D2 further indicates a decline in the number of proven cases across all offences.

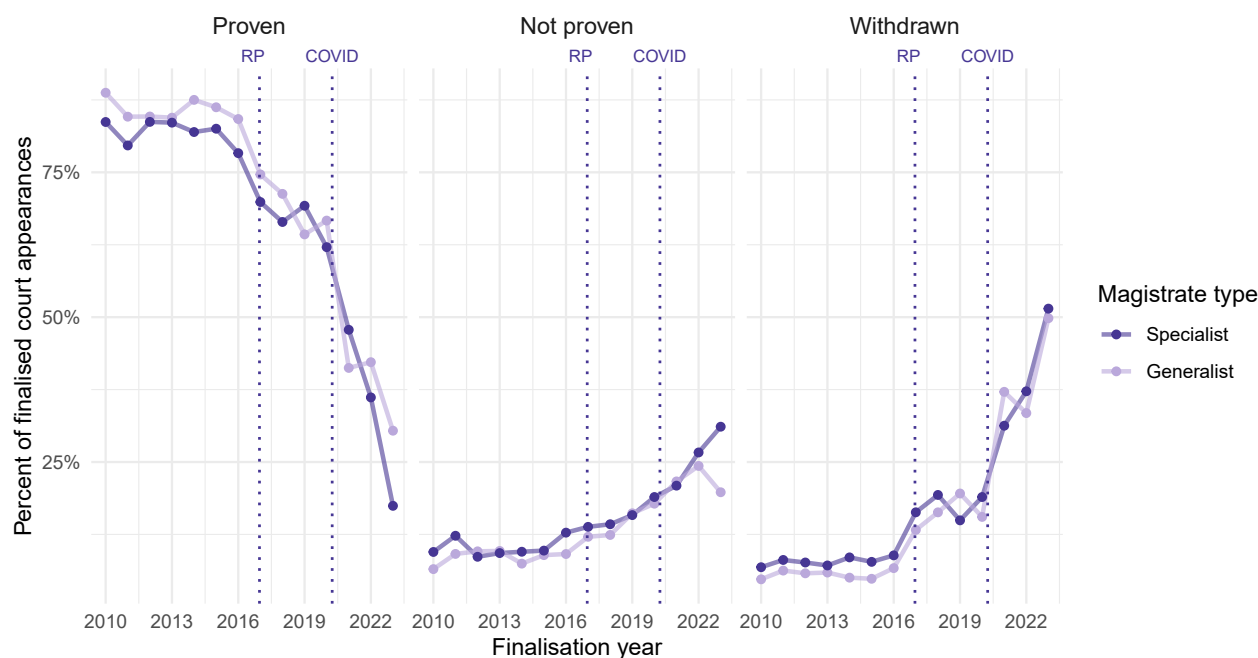
³⁹ Appendix Figure D3 shows relatively stable trends in the proportion of offences concluding with proven outcomes. However, among defendants aged 10-13 years, it is notable that despite the decrease in the *number of cases* involving justice procedures, justice procedure offences have grown as a *proportion of proven* cases since 2016.

Figure 8. Trends in percentage of finalised court appearances by specialist Children's Court Magistrates, by age of defendant



If specialist Children's Magistrates had a disproportionate influence on trends in court outcomes for defendants aged 10-13 years, we would expect to see substantial gaps between the outcomes of finalised court appearances by specialist Children's Magistrates and generalist Local Court magistrates from 2010 onwards. This is not the case. Figure 9 illustrates trends in court outcomes for defendants aged 10-13 years. Before 2016, finalised court appearances by specialist Children's Magistrates had slightly lower rates of proven outcomes and higher rates of withdrawn charges compared to court appearances overseen by generalist Local Court magistrates. But after 2016, the gap between specialist Children's Magistrates and generalist Local Court magistrates largely disappeared. Among both types of magistrates, there was a clear decline in the proportion of proven court appearances and a concurrent increase in the share of finalised court appearances where all charges were withdrawn by the prosecution. In addition, further analysis by the remoteness area of defendants shows little difference in court outcome trends between defendants living in major cities, regional areas or remote areas (Appendix Figure E2), despite specialist Children's Magistrates presiding over less than half of finalised court appearances involving defendants living in regional areas. For these reasons, it is unlikely that the expansion of specialist Children's Magistrates was the primary influence for the post-*RP* decline in proven court appearances.

Figure 9. Trends in court outcomes for finalised court appearances involving defendants aged 10-13 years, by whether the court appearance was finalised by a generalist magistrate or specialist Children's Court Magistrate



What are the NSW trends in court penalties imposed on children aged 10-13 years, and how do they compare to trends in penalties for those aged 14-17 years?

Due to the sharp decline in proven court appearances following the *RP* decision and other major developments in youth detention policy and the MACR after the airing of the Four Corners episode *Australia's Shame*, it is worth examining trends in penalties imposed in court appearances with a proven outcome. While *RP* is not expected to impact penalties (because the decision focused on principles for establishing guilt), some investigation into possible spillover effects is warranted. If *RP* did have any spillover effects, we would expect these to be limited to the 10-13 age group due to the decision's focus on *doli incapax*.

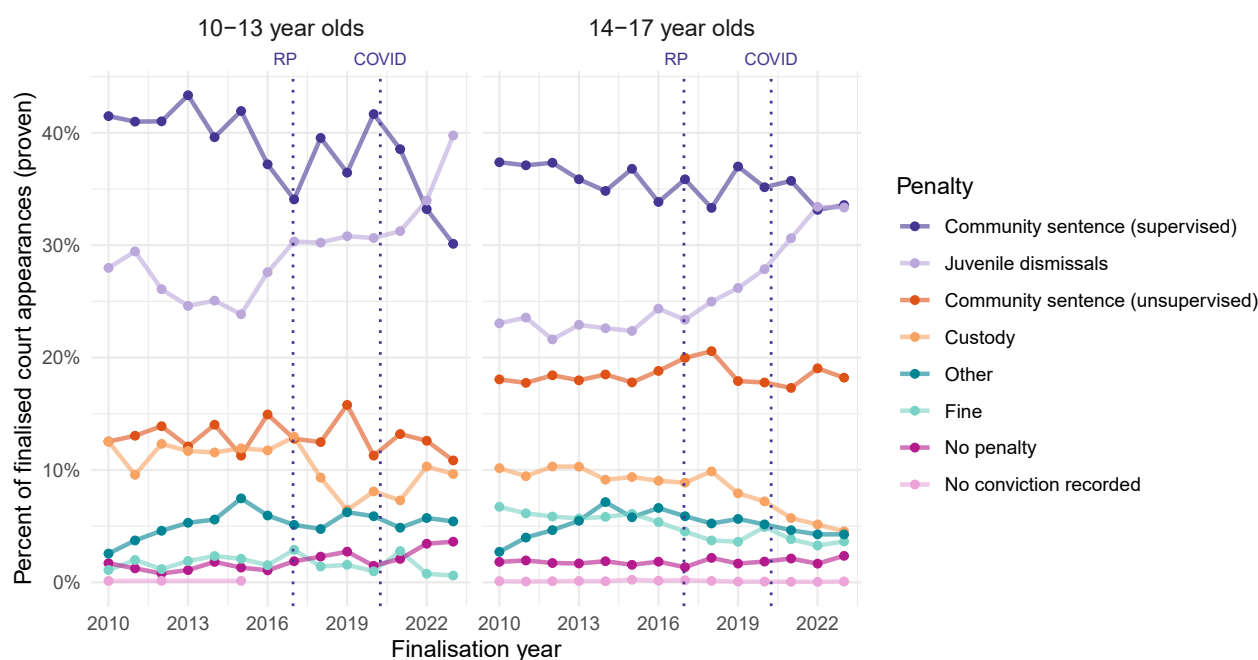
Figure 10 illustrates trends in the principal penalty⁴⁰ imposed for proven appearances in the Children's Court. In NSW, magistrates have the option to issue young people with a traditional penalty (e.g. fine, custody or community order) or they can give a nominal penalty which can involve a caution or youth justice conference.⁴¹ These lesser penalties are grouped here under the heading "juvenile dismissals".⁴² We can see that, unlike the trends in court outcomes, there are similar trends in the penalties imposed for the 10-13 and 14-17 age groups. For both age groups, the proportion of juvenile dismissals began increasing from 2016, eventually overtaking supervised community sentences as the most prevalent penalty for young offenders. From 2016 to 2023, juvenile dismissals increased by about 10 percentage points for both age groups, growing from 28% to 39% for 10-13 year olds and 23% to 33% for 14-17 year olds. In addition, both age groups have experienced a decline in supervised community sentences and custodial sentences as a proportion of total principal penalties. While the decline in community sentences (both supervised and unsupervised) was sharper for defendants aged 10-13 years, there was a steeper drop in custodial sentences for the 14-17 age group.

⁴⁰ Principal penalties refer to the most serious penalty issued by the court in each case.

⁴¹ Youth justice conferences (YJCs) are a non-court diversionary measure available under the *Young Offenders Act 1997* (NSW). YJCs can be ordered by a Magistrate when certain conditions are met (s. 36).

⁴² Juvenile dismissals include cases that are dismissed after a youth justice conference, dismissed with caution, dismissed under the *Children (Criminal Proceedings) Act 1987* (NSW), caution or youth justice conference under the *Young Offenders Act 1997* (NSW), or an unspecified type of dismissal.

Figure 10. Trends in principal penalty imposed for proven court appearances in the Children's Court of NSW, by age of defendant



It is unlikely that the increase in juvenile dismissals is explained by *RP* (because the trends were apparent across both the 10-13 and 14-17 age groups). Instead, these shifts could reflect the Children's Court of NSW's response to the public debate surrounding youth detention and diversion following the airing of graphic footage of the treatment of children at the NT Don Dale Youth Detention Centre in *Australia's Shame* (aired 25 July 2016). This event prompted a Royal Commission, which produced a report containing several recommendations that the Children's Court of NSW supported, including that children under the age of 14 should not be ordered to serve time in detention except in limited circumstances⁴³ (Children's Court of NSW, 2018). Judge Peter Johnstone, then the President of the Children's Court of NSW, supported this position during a speech where his Honour stated that "punishing children by placing them in detention centres, when they have already suffered disadvantage and trauma, makes no sense from an ethical, legal, economic or welfare perspective" (Johnstone, 2017, p. 20). These comments could be emblematic of shifts in the views of Children's Court magistrates more broadly.

⁴³ These circumstances include that the child "Has been convicted of a serious and violent crime against the person, presents a serious risk to the community, and the sentence is approved by the President of the proposed Children's Court" (Royal Commission, 2017a, p. 46).

DISCUSSION

This study aimed to explore how the High Court of Australia's decision *RP v R*⁴⁴ ('*RP*') may be influencing trends in the outcomes of criminal cases involving children aged 10-13 years within the context of recent major developments in youth justice. We found that since *RP* was decided in December 2016, there has been a sharp decline in the number and proportion of proven court appearances involving 10 to 13 year olds (i.e., court appearances where the defendant was found guilty of at least one offence). This is largely due to a steep increase in the proportion of court appearances where the prosecution withdrew all charges against the child.

We found the sharp drop in proven cases and increase in charges withdrawn against 10-13 year olds is very likely a result of the *RP* decision. *RP* not only clarified the law, but likely also had the practical effect of raising the threshold of what the prosecution needs to show to rebut the presumption of *doli incapax* in order to prosecute and convict 10-13 year olds. In doing so, *RP* appears to have made it harder to convict children aged 10-13 years of criminal offences (even though the decision only clarified the existing law on *doli incapax*, rather than creating new legal principles) (Crofts, 2018). The impacts of this decision have also taken time to fully emerge, which is consistent with the gradual process of how justice decision-makers test High Court principles in lower courts before they fully understand how those principles affect their court matters and legal strategies.

We also found evidence supporting a potential shift in the legal strategies of both the defence and prosecution. After *RP*, there was a sharp decrease in the likelihood of children aged 10-13 years pleading guilty in the Children's Court of NSW, which is notable because guilty pleas had accounted for about 64% of proven court appearances prior to the *RP* decision.⁴⁵ The drop in guilty pleas was met with an increase in the likelihood of 10-13 year olds pleading not guilty — possibly so that they could defend the charges in court — as well as an increase in the likelihood of acquittals at defended hearings. Over the same period, prosecutors were more likely to withdraw all charges against 10-13 year olds, possibly because they have become less confident about their likelihood of successfully rebutting *doli incapax*. However, this study does not provide a definitive determination that *RP* caused the changes in NSW court outcomes. This would require additional research comparing cases pre- and post-*RP*, either through transcripts from the Children's Court, case law, and/or interviews with legal practitioners.

In addition to NSW, we also found evidence that *RP* may have had a national impact at least in some States, with similar shifts in the proportion of proven cases and withdrawals seen in the Children's Courts of Victoria and South Australia following the *RP* decision. A possible reason why the impact of *RP* was not uniform across Australian states and territories is that there are slightly different variations of *doli incapax* operating across Australian jurisdictions (Moritz & Tuomi, 2023). The *RP* decision clarified *doli incapax* under common law, which is a variation that is only followed by NSW, Victoria,⁴⁶ and South Australia, with other jurisdictions using slightly different versions of *doli incapax* detailed in their crime statutes. However, it is beyond the scope of this study to explore why other Australian jurisdictions (such as Queensland) have not experienced the same changes in case outcomes for 10-13 year olds. Since existing research on the practical application of *doli incapax* mostly focuses on the Victorian criminal justice system (Baidawi et al., 2024; O'Brien & Fitz-Gibbon, 2017), further research into how *doli incapax* is formulated and applied in other jurisdictions would be beneficial.

44 [2016] HCA 53.

45 Guilty pleas are also required to activate the diversionary options available in the *Young Offenders Act 1997* (NSW).

46 Victoria followed the common law formulation of *doli incapax* until 2024 (beyond the scope of the data examined for this study), when the *Youth Justice Act 2024* (Vic) (s. 11) codified *doli incapax*.

Despite our findings that proven court appearances have decreased and withdrawn charges have increased for 10-13 year olds in NSW, we also found that the volume of court proceedings involving defendants aged 13 remained mostly stable between 2017 and 2023. Prior research has found that the number of legal proceedings commenced by the NSW Police Force against children aged 10-13 years has increased in recent years (Freeman & Donnelly, 2024). The lack of a decrease in the volume of court proceedings despite *RP* making it harder to convict children warrants discussion. An increase in the number of legal proceedings against children aged 10-13 years could indicate either an increase in the underlying offending rate of these children or a greater focus by the NSW Police Force on offending by this age group. Regardless of the underlying cause, the rise in legal proceedings suggests that *RP* has had little impact on decisions of police officers to charge children aged 10-13 years with a criminal offence. However, in most cases, it is also the NSW Police Force — through police prosecutors — that decides whether to withdraw charges in the Children's Court⁴⁷ and our research clearly shows that *RP* has influenced police prosecutors' decisions. In 2023, over 50% of court appearances involving 10-13 year olds were finalised by a police prosecutor who withdrew all charges⁴⁸ — in effect, overturning the decision to charge made by another member of the NSW Police Force. This contrasts with defendants aged 14-17 years, for whom police prosecutors overturned the decision made by the charging officer in about only 9% of cases. Thus, for 10-13 year olds there appears to be a widening gap in how *doli incapax* is applied in practice.

Returning to the underlying trends in the Children's Court of NSW, we also examined three other potential influences on court outcomes: shifts in the type of offences that young people are accused of, the role of specialist Children's Magistrates and disruptions from the COVID-19 pandemic. We found that the offence patterns of 10-13 year olds cannot explain the trends, because the decline in the number and proportion of proven court appearances is apparent across all offence types dealt with by the Children's Court, not only those that might be harder to prove. In addition, despite the increasing number of specialist Children's Magistrates across NSW, we found no indication that this rollout is responsible for the decline in proven outcomes since 2016. In fact, the small differences in court outcomes between specialist Children's Magistrates and generalist magistrates largely disappeared after the *RP* decision. And although specialist Magistrates are more prevalent in metropolitan courts (Appendix Figure E1), additional analysis indicates that there are little to no differences in case outcome trends for defendants in major cities, regional, or remote areas of NSW (Appendix Figure E2). This is further evidence that the growth in specialist Magistrates is not the primary driver of changes in court outcomes for children aged 10-13 years. The similarity in court outcome trends across NSW also implies a lack of regional differences in how the Children's Court applies *doli incapax*, which contrasts with qualitative research that has identified possible differences in how magistrates in regional and metropolitan Victoria apply *doli incapax*⁴⁹ (Baidawi et al., 2024).

We also found that while COVID-19 public health measures coincide with the accelerated decline in proven cases, the downward trend in convictions has persisted well beyond the last stay-at-home orders were issued in NSW. Indeed, the percentage of defendants aged 10-13 years with proven outcomes fell from 53% in 2019-20 to 16% by 2022-23. Another potential explanation for the accelerated decline is the *BC v R*⁵⁰ ('*BC*') decision, delivered by the NSW Court of Criminal Appeal in June 2019. By applying the principles from *RP* to overturn convictions from the NSW District Court, the *BC* decision may have affirmed the relatively high threshold of evidence required to rebut *doli incapax*. This could have had the practical effect of accelerating the increase in the likelihood of the prosecution withdrawing charges and the concurrent decline in the proportion of proven cases. The accelerated decline after *BC* is also

47 Based on calculations using unpublished data from the Criminal Courts database, in 2022, police prosecutors were responsible for about 99% of finalised court appearances in the Children's Court with defendants aged 10-13 years at the earliest offence date. The remaining 1% was overseen by the Office of the Director of Public Prosecutions (ODPP). However, a small number of cases commenced by police prosecutors may have been later transferred to the ODPP.

48 Author's calculations based on finalised court appearances in the Children's Court of NSW during the 2023 calendar year.

49 Research has found that there is a legal culture in Victoria where defence lawyers described having to raise issues of *doli incapax*, rather than the onus falling to prosecutors to rebut presumption of *doli incapax* (Baidawi et al., 2024; O'Brien & Fitz-Gibbon, 2017). This could vary between regional and metropolitan courts (Baidawi et al., 2024).

50 [2019] NSWCCA 111.

consistent with how appellate decisions from the NSW Court of Criminal Appeal can be an important step in furthering legal practitioners' knowledge about how to correctly apply principles from a relatively recent High Court decision. Further qualitative research would be needed to understand the extent to which the accelerated decline in proven cases was connected to *BC*, other decisions by the NSW Court of Criminal Appeal after *RP*, other gradual changes by NSW courts in response to *RP*, or COVID-related disruptions.

Lastly, this study briefly examined trends in the types of penalties imposed on young offenders in the context of major national developments in youth justice that have occurred in the past decade. We observed a significant growth in the proportion of defendants receiving the nominal penalty of juvenile dismissal from the Children's Court of NSW from 2016 onwards. However, this was evident not only for defendants aged 10-13 years but also those aged 14-17 years. Since the *RP* decision has no legal bearing on penalties imposed on a young person convicted of an offence, this increase in juvenile dismissals for 10-17 year olds could be explained by changing attitudes among magistrates about the appropriateness of youth detention following the airing of *Australia's Shame* and the subsequent Royal Commission into the Protection and Detention of Children in the Northern Territory, but the details surrounding how this shift took place are beyond the scope of this study.

This study has several limitations. First, the control variables we include in our analysis are relatively limited. While the data shown in Appendix Figures E2, E3 and E4 show little difference in trends by the defendant's demographic characteristics, statistical modelling that controls for other confounding factors (e.g., prior offending and custodial history) could better estimate the true impact of the *RP* decision. We were unable to perform this type of modelling due to a lack of data on these confounders at the national level. Second, changes in national trends could be conflated with state-level initiatives. For example, in Victoria, *RP* coincided with a 2016-17 rollout of a state-wide Children's Court Youth Diversion service. While this program aims to lower the total number of children attending court (ABS, 2023), it may have also influenced the volume of proven cases and withdrawals by the prosecution. Third, within the national data extract, we were unable to consistently distinguish between children diverted from court and those with a finalised court appearance due to differences in how each state records diversions. As a result, the trends in proven outcomes reported in Figure 4 may include both diversionary and proven outcomes. Fourth, we are unable to provide definitive quantitative evidence that the *RP* decision *caused* decreases in convictions across Australia. Causal analysis requires methods that can resolve selection bias, which arises when outcomes are influenced by factors that also determine selection into the treatment or intervention (in our case, finalisation of a defendant's matter in the post-*RP* period). These factors include both those that we can easily measure, such as a defendant's criminal history, but also factors that cannot be observed in routine administrative datasets, such as the evidentiary strength of the prosecution's case. Lastly, this study does not directly observe finalised court appearances where *doli incapax* has informed the outcome, instead relying on the 10-13 year old age group as a proxy to identify court appearances most likely to be affected by *doli incapax*. This is because NSW administrative data does not currently record whether a court outcome has been directly influenced by *doli incapax*.

To conclude, this study has found a dramatic shift in how children aged 10-13 years are treated by the criminal justice system in NSW and several other Australian jurisdictions. Since 2016, children aged 10-13 years in NSW, Victoria, SA, and the NT are far less likely to be found guilty of an offence and more likely to have their charges withdrawn by the prosecution. Amid the open debate around whether NSW should follow the ACT and Victoria in raising the MACR from 10 to 12, this study indicates the importance of *doli incapax* as a gateway into the criminal justice system and how shifts in how it is applied can affect trends in outcomes for children aged 10-13 years. But while case law on *doli incapax* (such as *RP*) may make it harder to prosecute 10-13 year olds, this has not translated into fewer police legal proceedings against children, even though these children are increasingly likely to have all their charges eventually withdrawn by police prosecutors. The inconsistencies between decisions to charge and prosecute children should subject to further research given the substantial costs to the criminal justice system, to the children and their families (noting that the average matter in the Children's Court of NSW with a defendant aged 10-13 years takes about 21 weeks to finalise) and given the renewed debate around raising the MACR in NSW. Further research could also examine the impact of MACR reforms in Victoria on inconsistencies between

charges and prosecutions against children protected by doli incapax.⁵¹ While the decision to charge and prosecute very young defendants rests on case-specific factors (such as the severity of offending and availability of evidence), efforts to improve consistency in legal decisions involving young children would contribute to a more efficient and effective justice system.

REFERENCES

- Atkinson, B. (2018). *Report on youth justice*. Brisbane: Queensland Department of Child Safety, Youth and Women. Retrieved 15 January 2025 from Queensland Government website: <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/5229878d-099e-4c2f-902c-94d2bedddfa3/17170-youth-justice-report-5.pdf>
- Australian Bureau of Statistics. (2011). *Australian and New Zealand Standard Offence Classification (ANZSOC)* (cat. No. 1216.0). Retrieved from the Australian Bureau of Statistics website: <https://www.abs.gov.au/statistics/classifications/australian-and-new-zealand-standard-offence-classification-anzsoc/2011>.
- Australian Bureau of Statistics. (2016). *Australian Standard Geographical Classification (ASGC)* (cat. no. 1216.0). Retrieved from the Australian Bureau of Statistics website: <https://www.abs.gov.au/ausstats/abs@.nsf/%20mf/1270.0.55.005>.
- Australian Bureau of Statistics. (2023). *Criminal Courts, Australia methodology, 2022-23 financial year*. Retrieved from the Australian Bureau of Statistics website: <https://www.abs.gov.au/methodologies/criminal-courts-australia-methodology/2022-23>
- Baidawi, S., Ball, R., Sheehan, R., & Papalia, N. (2024). *Children aged 10 to 13 in the justice system: Characteristics, alleged offending and legal outcomes* (Report to the Criminology Research Advisory Council Grant: CRG 41/20–21). Canberra: Australian Institute of Criminology.
- Children's Court of NSW. (2018). *Submission to the inquiry into the adequacy of youth diversionary programs in NSW* (Submission No. 19). Sydney: NSW Legislative Assembly Committee on Law and Safety. Retrieved 20 September 2024 from Parliament of New South Wales website: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2464#tab-submissions>
- Children's Court of Victoria. (2021). *Youth Diversion Service*. <https://www.childrenscourt.vic.gov.au/criminal-division/youth-diversion-service>
- Clancey, G., Wang, S., & Lin, B. (2020). *Youth justice in Australia: Themes from recent inquiries* (Trends and Issues in Crime and Criminal Justice No. 605). Canberra: Australian Institute of Criminology.
- Council of Attorneys-General Age of Criminal Responsibility Working Group. (2022). *DRAFT 2020. Age of Criminal Responsibility Working Group*. Retrieved 24 June 2024 from Council of Attorneys-General website: <https://www.ag.gov.au/sites/default/files/2022-12/draft-report-2020-age-of-criminal-responsibility.DOCX>
- Council of Attorneys-General Age of Criminal Responsibility Working Group. (2023). *Age of Criminal Responsibility Working Group Report*. Retrieved 24 June 2024 from Council of Attorneys-General website: <https://apo.org.au/sites/default/files/resource-files/2023-12/apo-nid325209.pdf>
- Crofts, T. (2018). Prosecuting child offenders: Factors relevant to rebutting the presumption of doli incapax. *Sydney Law Review*, 40, 339.

⁵¹ The *Youth Justice Act 2024* (Vic) introduced additional requirements for Victorian police officers commencing criminal proceedings against 12 or 13 year olds, including that the police officers must have regard to whether it appears that there is admissible evidence to prove beyond reasonable doubt that the child knew that their actions were seriously wrong at the time they allegedly committed the offence (s. 12(1)) and record why they believe there is admissible evidence of that nature (s. 12(3)). Victorian police officers also have powers to take children (aged under 18) under "care and control" (s. 68), where they place the child into the care of a suitable person or appropriate health or welfare agency (s. 69(1)-(5)), without arresting or placing the child in a gaol (s. 68(3)(a), s. 70(2)). It is not known whether these provisions have resolved any inconsistencies between charges and prosecutions for 12-13 year olds.

Crofts, T. (2019). Will Australia raise the minimum age of criminal responsibility? *Criminal Law Journal*, 43(1), 26.

Crofts, T. (2023). Act now: raise the minimum age of criminal responsibility. *Current Issues in Criminal Justice*, 35(1), 118.

Johnstone, P. (2017). *Early intervention, diversion and rehabilitation from the perspective of the Children's Court of NSW*. <https://childrenscourt.nsw.gov.au/documents/other/Judge%20Johnstone%20Juvenile%20Justice%20Summit%205%20May%2017%20paper.pdf>

Johnstone, P. (2021). *Perspectives from the president*. https://childrenscourt.nsw.gov.au/documents/news/Judge_Johnstone_Joint_Care_and_Protection_Conference_Paper.pdf

Moritz, D., & Tuomi, M. (2023). Four thresholds of doli incapax in Australia: Inconsistency or uniformity for children's criminal responsibility?. *Alternative Law Journal*, 48(1), 25-30.

O'Brien, W., & Fitz-Gibbon, K. (2017). The minimum age of criminal responsibility in Victoria (Australia): Examining stakeholders' views and the need for principled reform. *Youth Justice*, 17(2), 134-152.

Royal Commission. (2017). *Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory – Volume 2B*. Retrieved 20 September 2024 from the Royal Commission website: <https://www.royalcommission.gov.au/system/files/2020-09/Volume%202B.pdf>

Victorian Government. (2022). *Therapeutic treatment reports and orders – advice*. Retrieved from the Victorian Government's Child Protection Manual website: <https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/children-specific-circumstances/therapeutic-treatment-reports-and>

ACKNOWLEDGEMENTS

The author would like to acknowledge the work of Tracy Painting and the Data team at BOCSAR for data linkage, the Australian Bureau of Statistics for supplying the national data extract, Steve Yeong, Suzanne Poynton, Jackie Fitzgerald, Professor Thomas Crofts, and reviewers, for their guidance and feedback during the completion of this study, Florence Sin for desktop publishing.

NOTES

In this report we use the term Aboriginal to refer to Aboriginal people, Torres Strait Islanders and people who identify both as Aboriginal and Torres Strait Islander. Note that only a very small proportion of the Indigenous population in NSW are of Torres Strait Islander origin only (see <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release#:~:text=Among%20%20the%20Aboriginal%20and%20Torres,and%20Torres%20Strait%20Islander%20origin>). We use the terms 'Indigenous' and 'Aboriginal and Torres Strait Islander' where original sources use these.

APPENDIX A – LIMITATIONS OF THE ABS DATASET

This section reproduces limitations of the ABS Criminal Courts data extract that we have used to compare the case outcomes from the Children's Court of NSW with the rest of Australia (ABS, 2023).

General caveats

The figures generated in this study are based on data for counts of finalised defendants, not a count of unique persons with court appearances. Perturbation has also been used to reduce the risks of personally identifiable data for year-age combinations with low counts. Perturbation more greatly affects counts under 15. The ABS advises caution in interpreting movements based on very small numbers.

In addition, data constraints also prevent us from consistently identifying defendants whose cases were finalised through a diversion program. Some jurisdictions like Victoria include diversions within the 'proven' outcome, while others may include diversions as a 'non-court referral' (which is a separate outcome to 'proven').

State-level caveats

In Victoria:

- Defendants with an outcome of 'Guilty finding' by the Children's Court are undercounted due to difficulties in reporting. The method of finalisation for these defendants is coded as a 'Proven outcome, not further defined'.
- In January 2017, the Victorian Children's Courts rolled out a state-wide Children's Courts Youth Diversion service, following a 12-month pilot. The diversion program is targeted at young people who are charged with low level offences, have little or no criminal history, and who would otherwise have been sentenced to an outcome not requiring supervision. This contributed to a decrease in defendants finalised in the Children's Courts during 2017–18, impacting age, duration and principal sentence data.
- For all years prior to 2016–17, the number of defendants acquitted in the Victorian Magistrates' and Children's Courts are overstated, while those with a proven outcome and sentenced to a nominal penalty are understated. This resulted from both outcome types being recorded as 'dismissed' on the Victorian Court link system and thereby coded to a method of finalisation of acquitted within the historical Criminal Courts data.
- Prior to 2021–22, ancillary orders made with an adjournment order were incorrectly included as an 'Other non-custodial sentence n.e.c.'. Finalised defendant counts were therefore overstated in previous years by around 2-3% in the Children's Courts.

In Queensland:

- On February 2018, the Youth Justice (Transitional) Regulation commenced, with the age range for the youth justice system including 17 year olds, who had previously been included within the adult justice system.
- These changes resulted in:
 - An increase in the number of defendants finalised during 2017–18 in the Magistrates' Court, via a transfer to the Children's Courts
 - An increase in the number of defendants finalised in the Children's Courts during 2018–19
 - A subsequent decrease in the number of defendants finalised in the Magistrates' Courts during 2018–19
- In Queensland, a defendant can elect to have a summary offence transferred to the Higher Courts (with the consent of the court), where they have also been charged with an indictable offence in the same incident, so the matter(s) can be sentenced at the same time. For the

2017–18 release of the ABS Criminal Courts data, these types of transfers were included in Queensland data for the first time, following improvements to administrative systems. This resulted in an increase in transfers from Magistrates' Courts to Higher Courts for Queensland during 2017–18, and therefore, users are advised to exercise caution when comparing transfers data in Queensland (and Australia) with data prior to 2017–18.

In South Australia:

- In February 2014, the *Statutes Amendments (Fines Enforcement and Recovery) Act 2013* came into effect, causing a decrease in the number of finalised defendants from 2014–15 onwards. The Act transferred responsibility for the collection and enforcement of fines from the Courts Administration Authority to the Fines Enforcement and Recovery Unit (managed by the South Australian Attorney-General's Department). This resulted in decreases in defendants finalised, particularly those with a combination of guilty ex parte finding, a principal offence of ANZSOC Division 14 Traffic and vehicle regulatory offences, and a principal sentence of a fine.
- From 2019–20, cases that are dismissed by the judiciary are coded as 'Charge unproven n.e.c.' where they were previously coded as 'Withdrawn by prosecution'. This contributed to a decrease in cases reported as withdrawn and corresponding increase in cases reported in the broader category of 'Acquittals'.
- In 2022–23, the South Australian Courts Administration Authority introduced a new case management system. This is expected to improve the consistency and quality of data recording, and reduce the number of duplicated defendant records and consolidating relating cases (such as where charges have been changed and re-laid) into one. This is likely to have affected the number of finalised defendants.

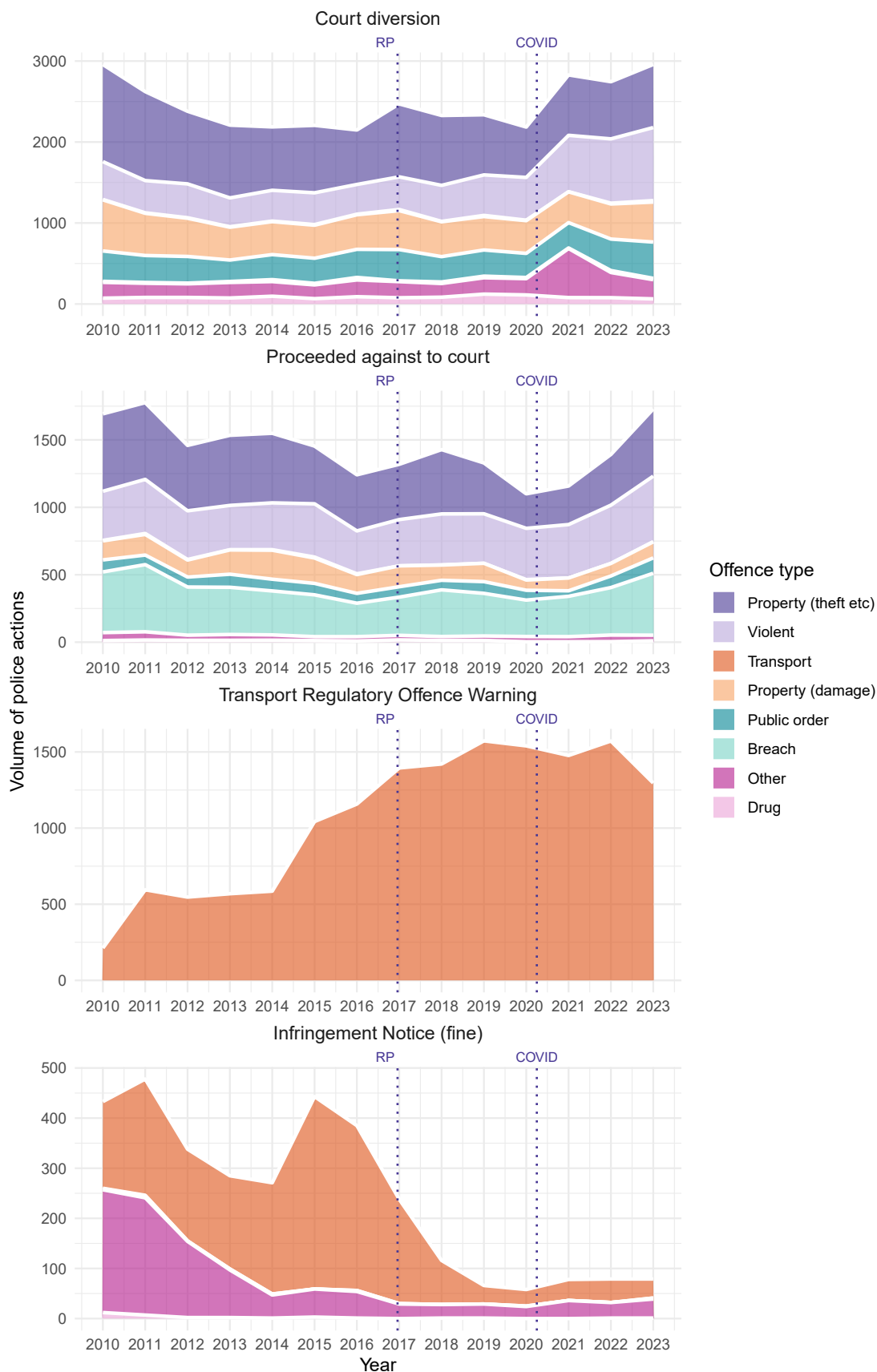
In Tasmania in 2019–20, a review of finalisation methods led to an increase in defendants finalised as 'charges not proven n.e.c.' (acquitted) where previously they were classified as 'withdrawn'.

In the Northern Territory in 2018–19, data quality improvements were made to better classify defendants who were previously categorised with a method of finalisation of 'charges proven, not further defined'. This has resulted in increases in defendants with a method of finalisation of either 'guilty finding by the court' or 'guilty plea by defendant'. Within the time series for defendants with a proven outcome in the Northern Territory, the type of proven outcome before 2018–19 should not be compared with data from subsequent years.

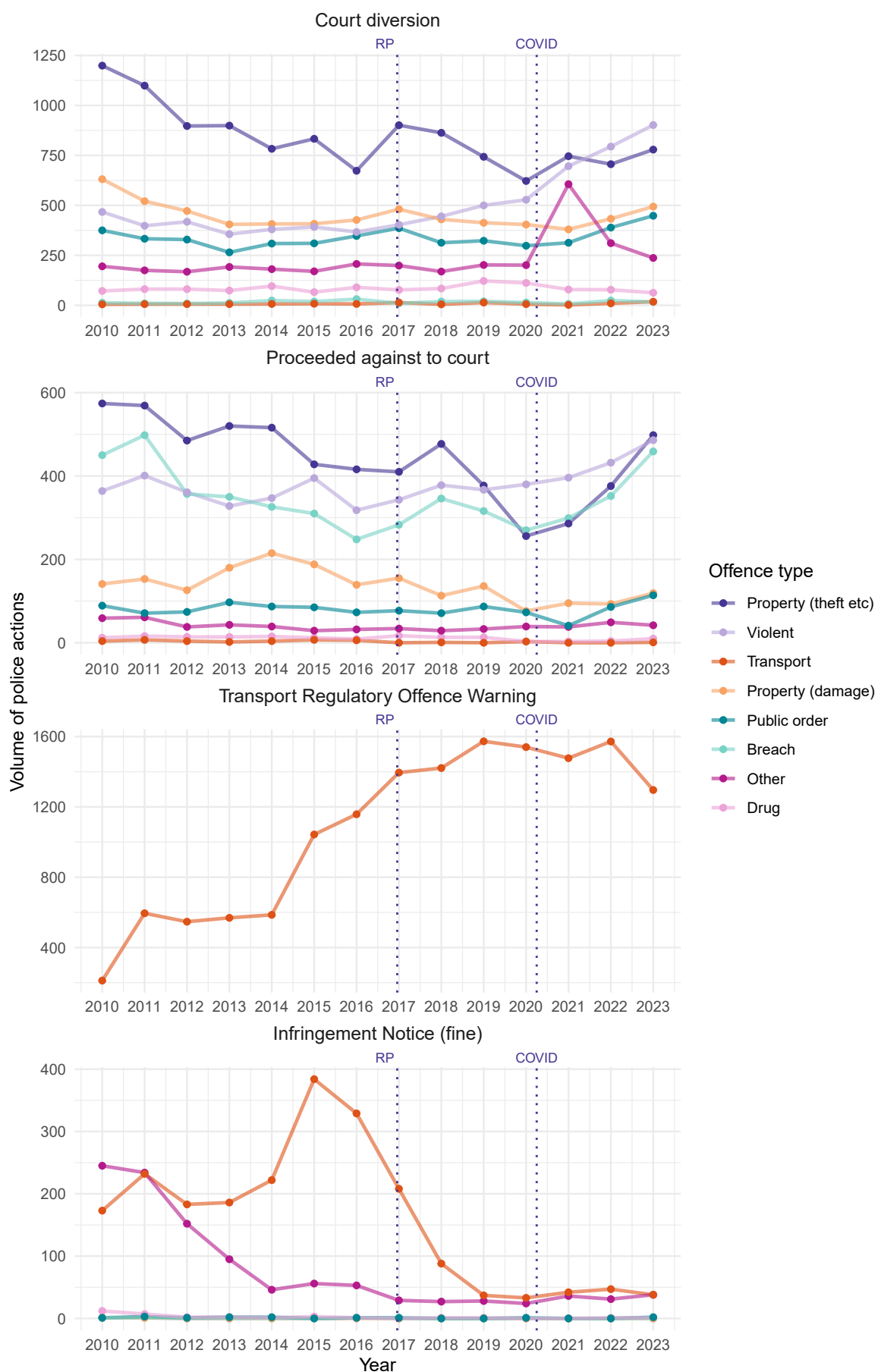
In 2018–19, ACT Courts records were migrated to the Integrated Court Management System. This improved the ability to incorporate external data, reducing the number of duplicated defendant records and consolidating related cases into one. This is likely to have affected the number of finalised defendants.

APPENDIX B – ADDITIONAL FIGURES ON POLICE ACTIONS, PLEAS AND DEFENDED HEARINGS

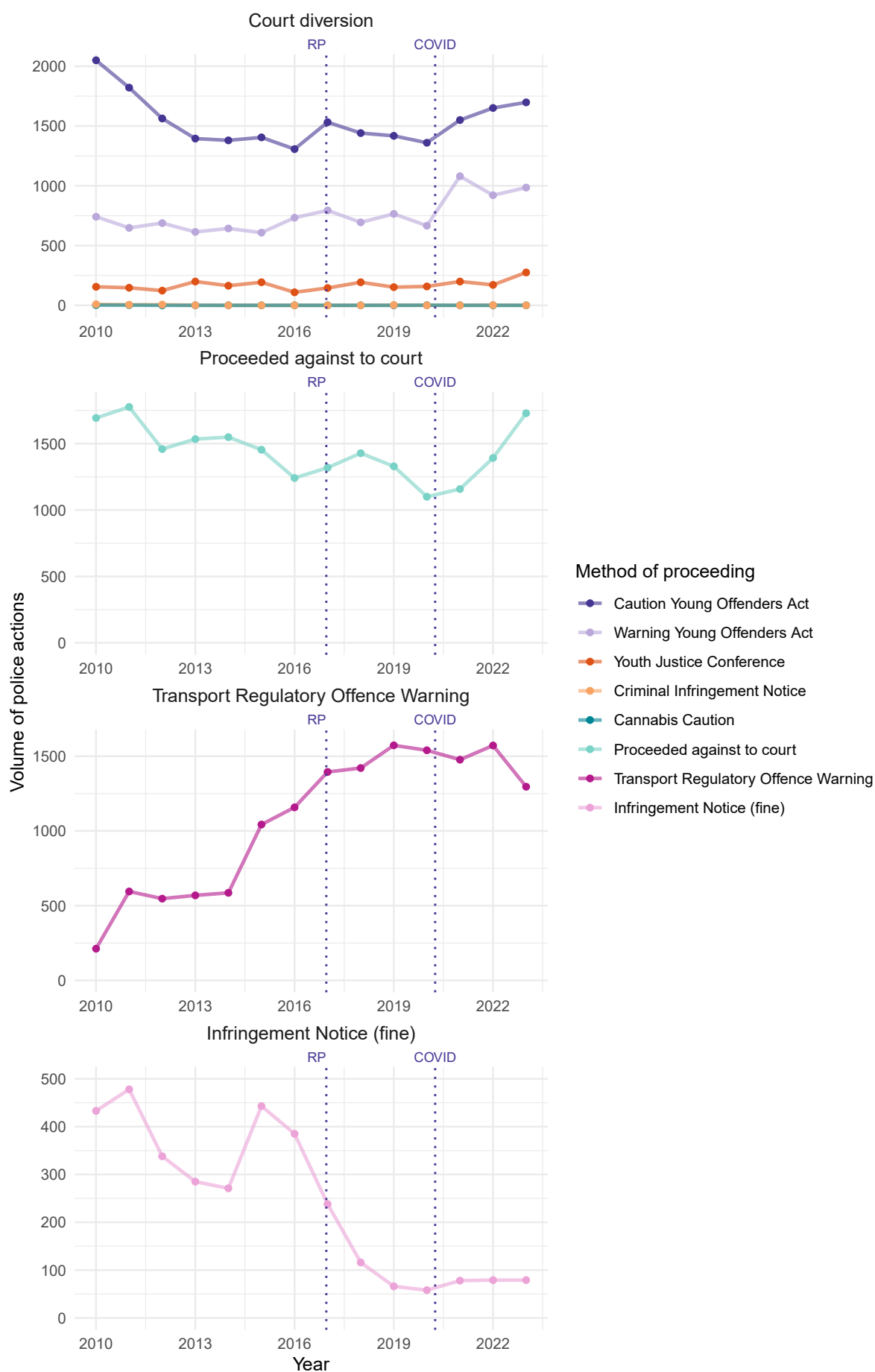
Appendix Figure B1. Trends in police actions against 10-13 year olds, by categories of most serious offence in finalised court appearances (stacked area chart)



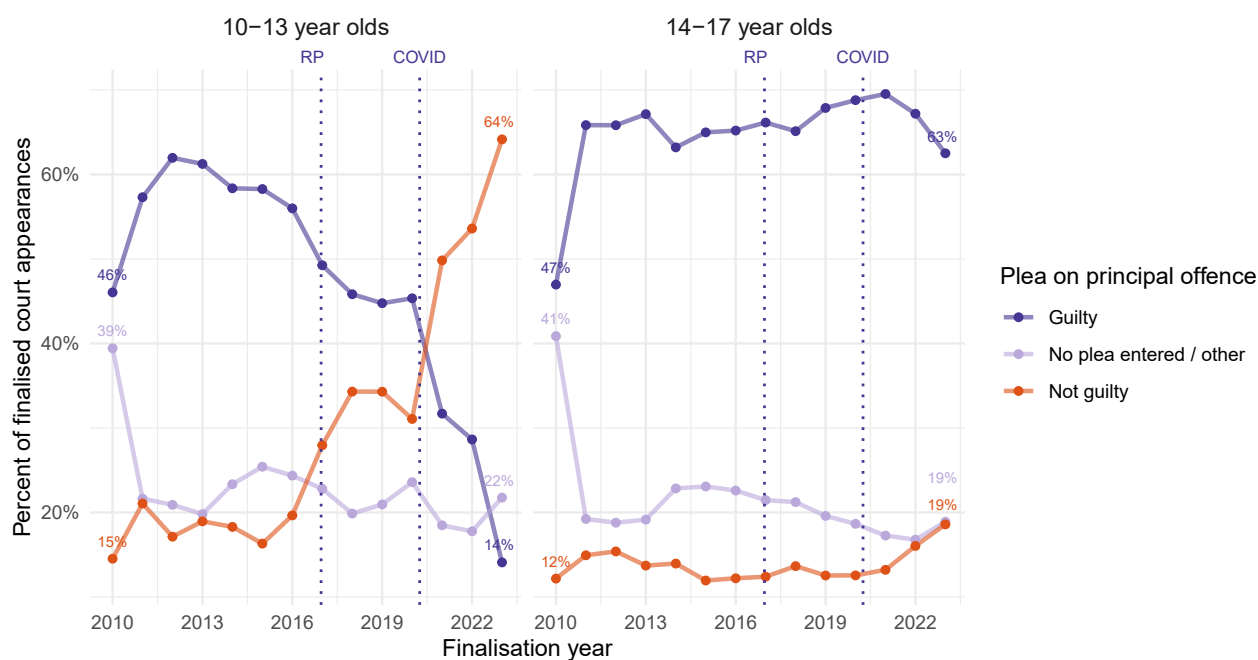
Appendix Figure B2. Trends in police actions against 10-13 year olds, by categories of most serious offence in finalised court appearances (line chart)



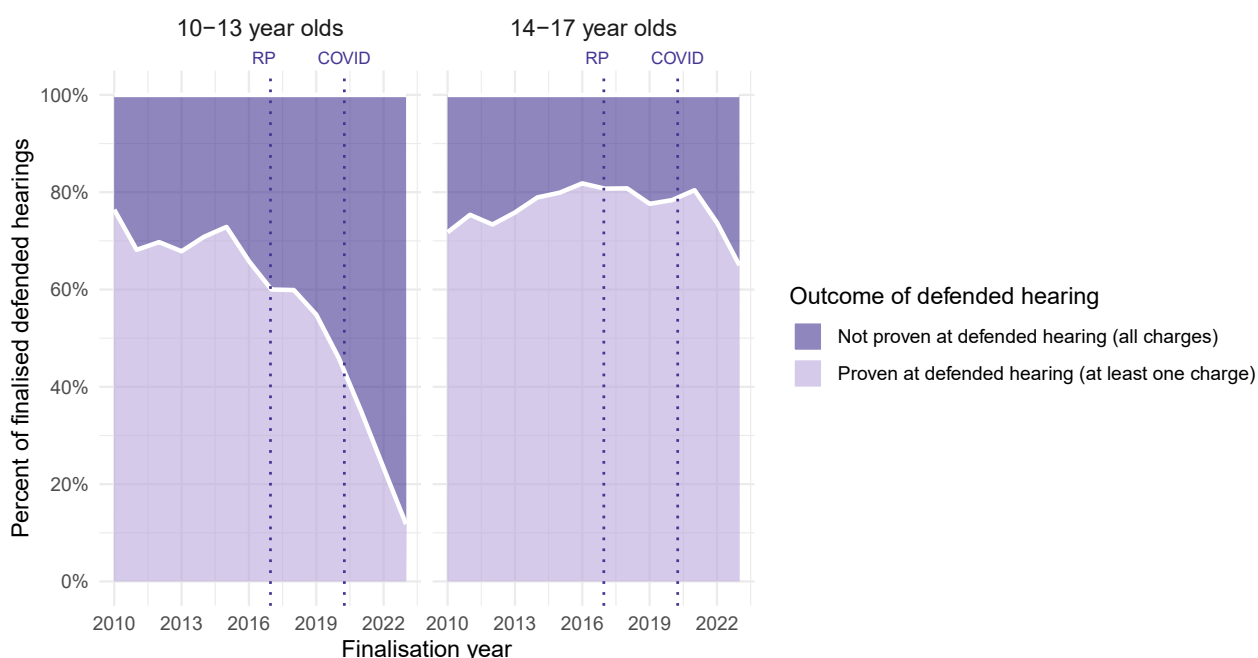
Appendix Figure B3. Trends in police actions against 10-13 year olds, by detailed method of proceeding



Appendix Figure B4. Trends in the rate of pleas entered by defendants in the Children's Court of NSW, by age of defendant.

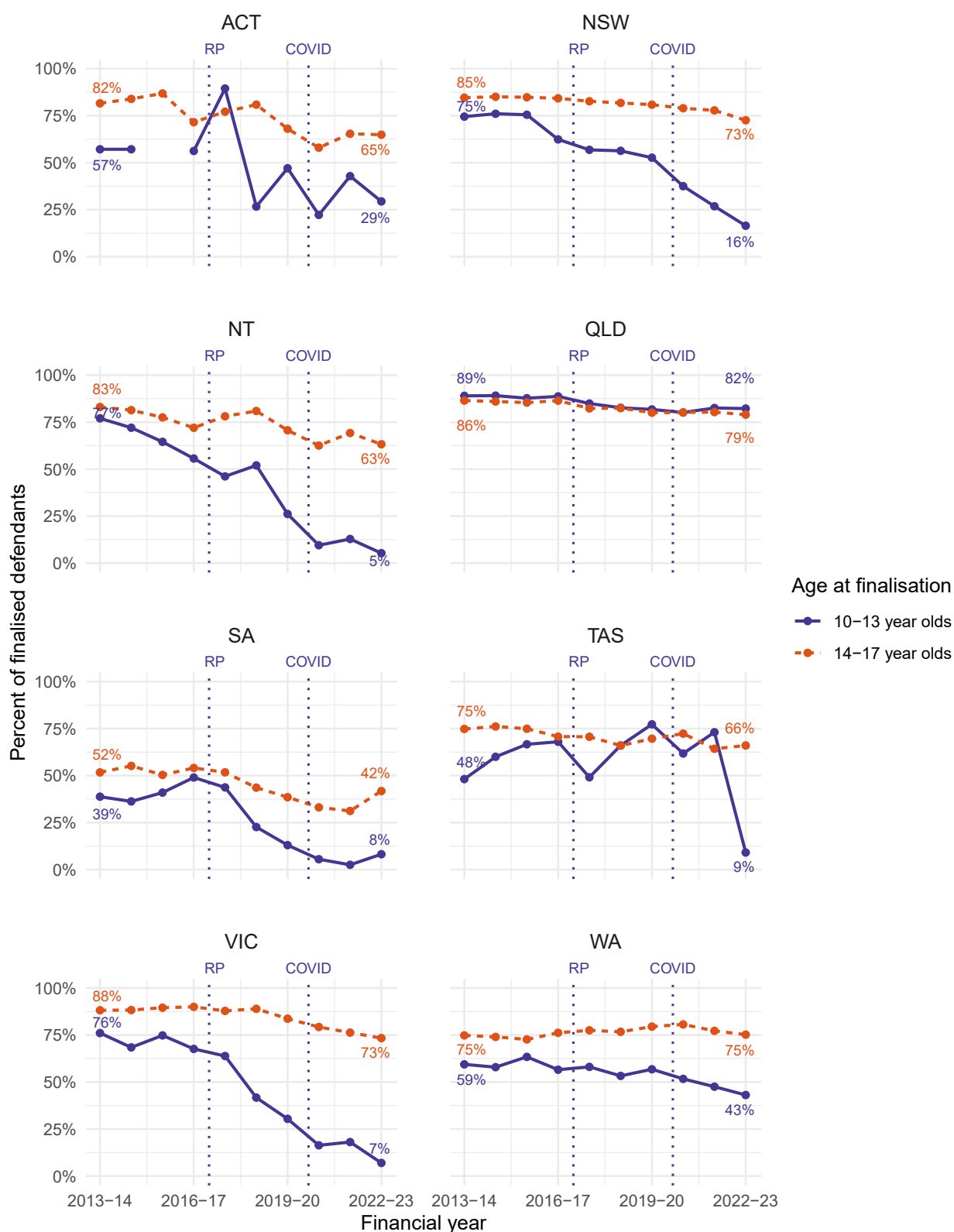


Appendix Figure B5. Trends in the outcomes of defended hearings in the Children's Court of NSW, by age of defendant.

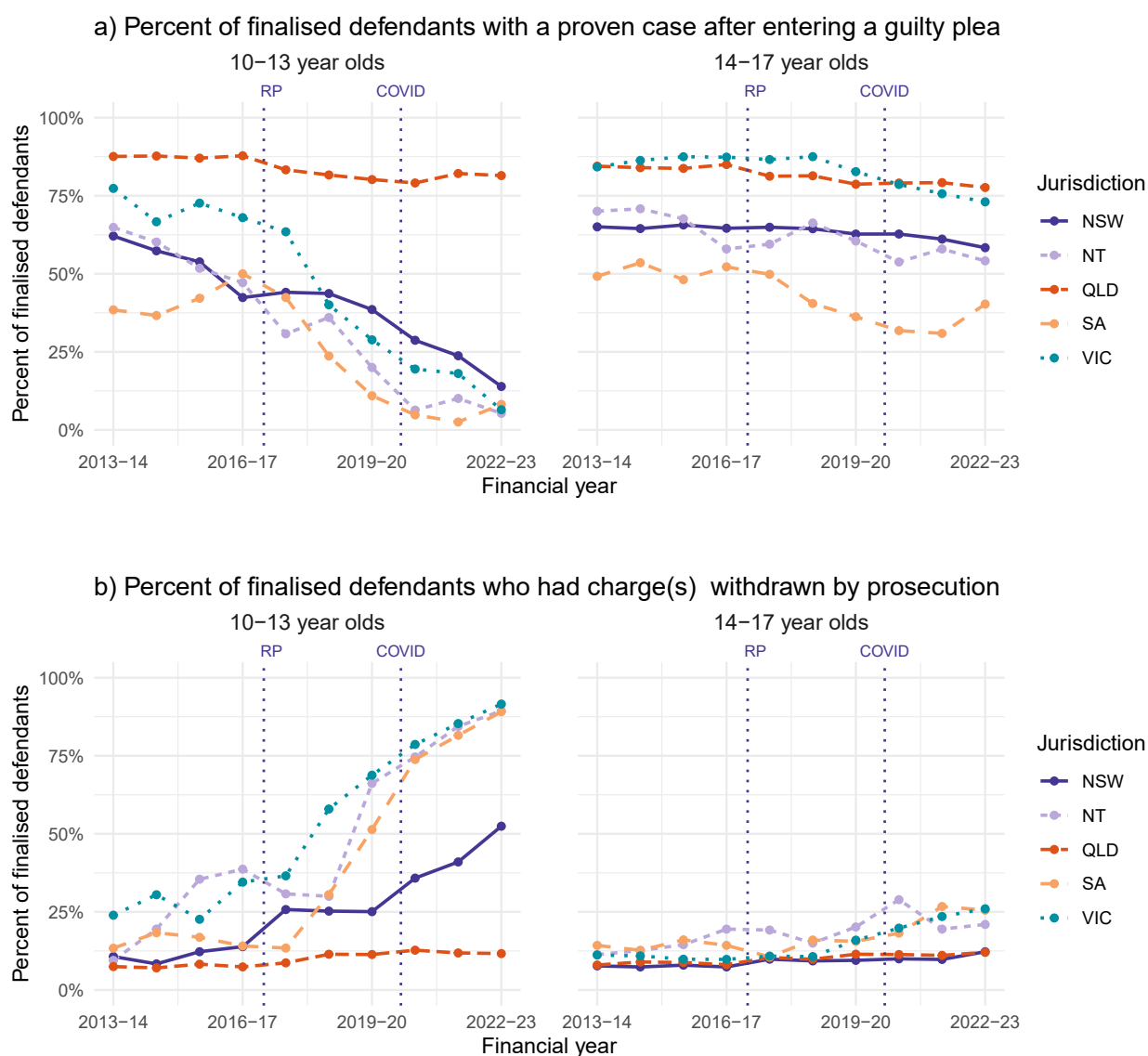


APPENDIX C – ADDITIONAL FIGURES ON COURT OUTCOMES FROM ABS DATA

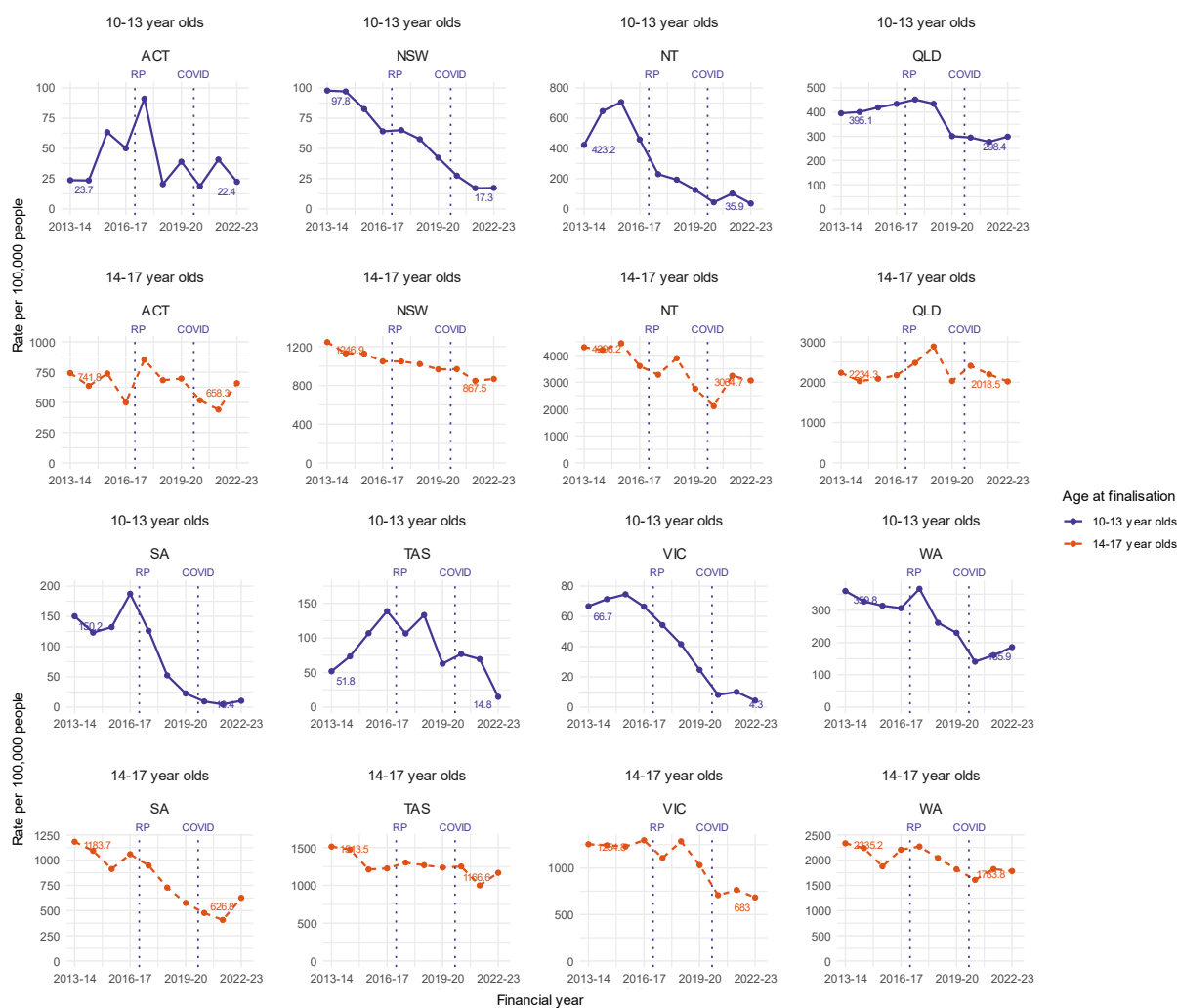
Appendix Figure C1. Trends in the proportion of finalised defendants who had a proven outcome, by age of defendant and by jurisdiction



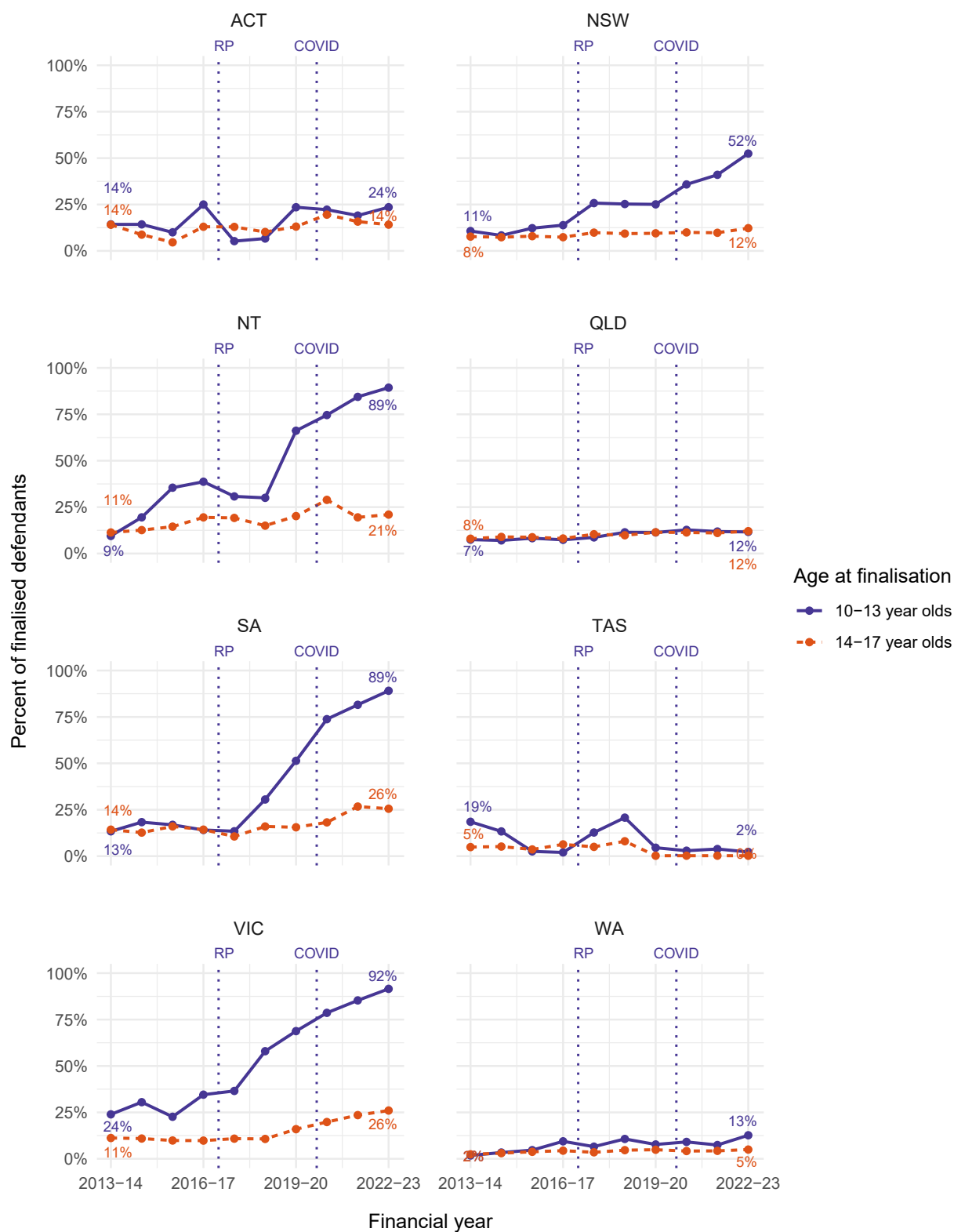
Appendix Figure C2. Trends in the proportion of finalised defendants who entered a guilty plea or had charge(s) withdrawn by the prosecution, by age of defendant and by jurisdiction



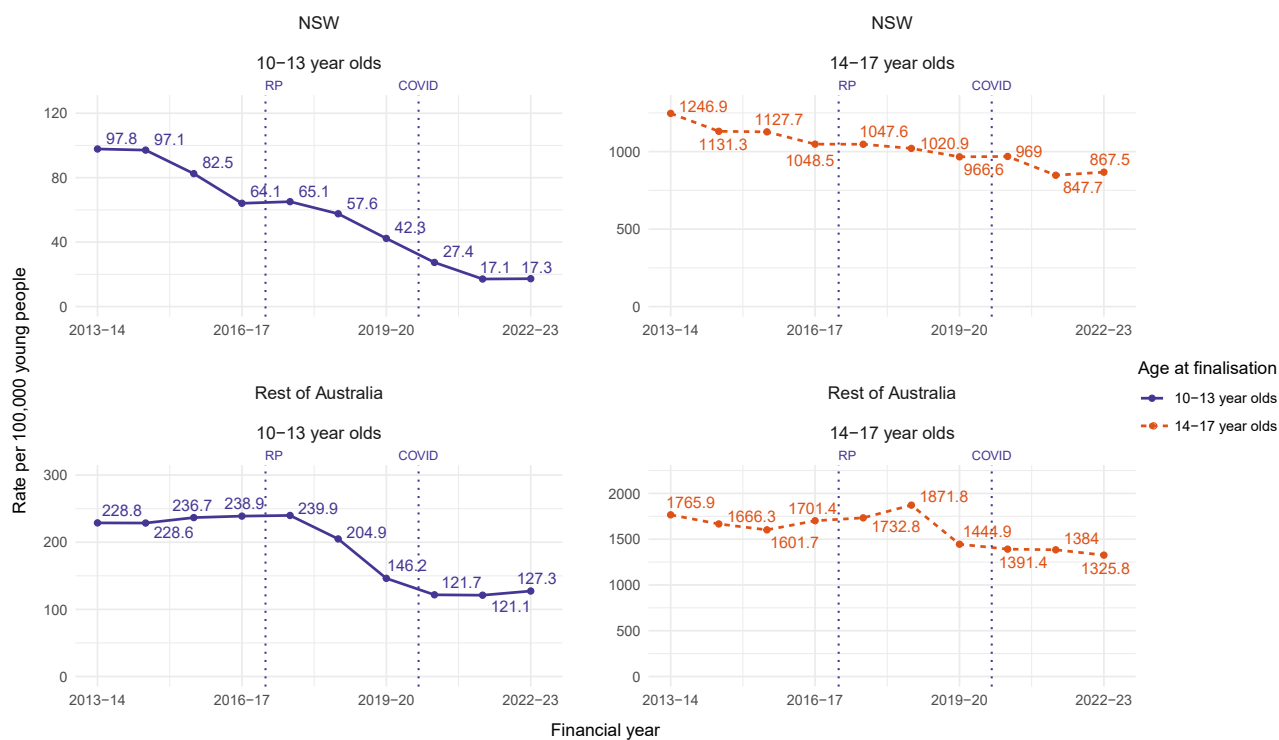
Appendix Figure C3. Trends in the population rate of defendants aged 10-13 years with proven cases, per 100,000 population



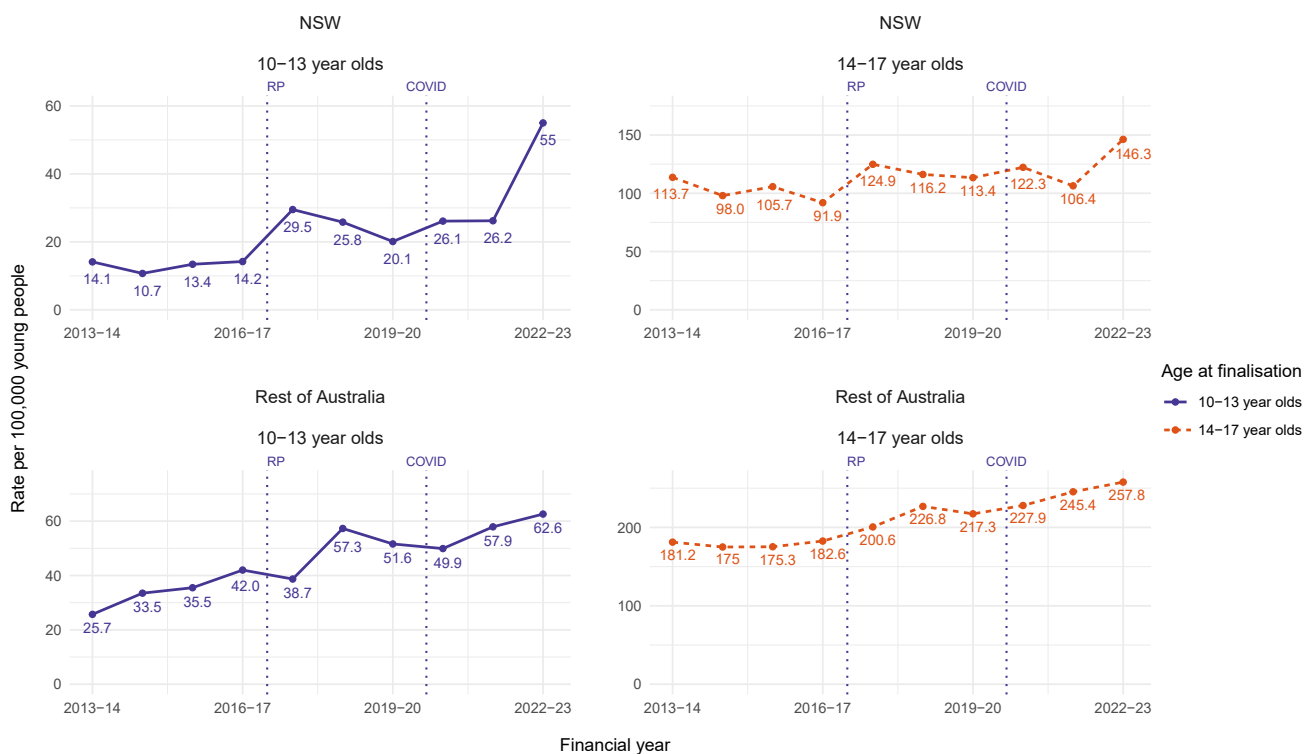
Appendix Figure C4. Trends in the proportion of finalised defendants who had charge(s) withdrawn by the prosecution, by age of defendant and by jurisdiction



Appendix Figure C5. Trends in the rate of defendants aged 10-13 years with proven cases per 100,000 population

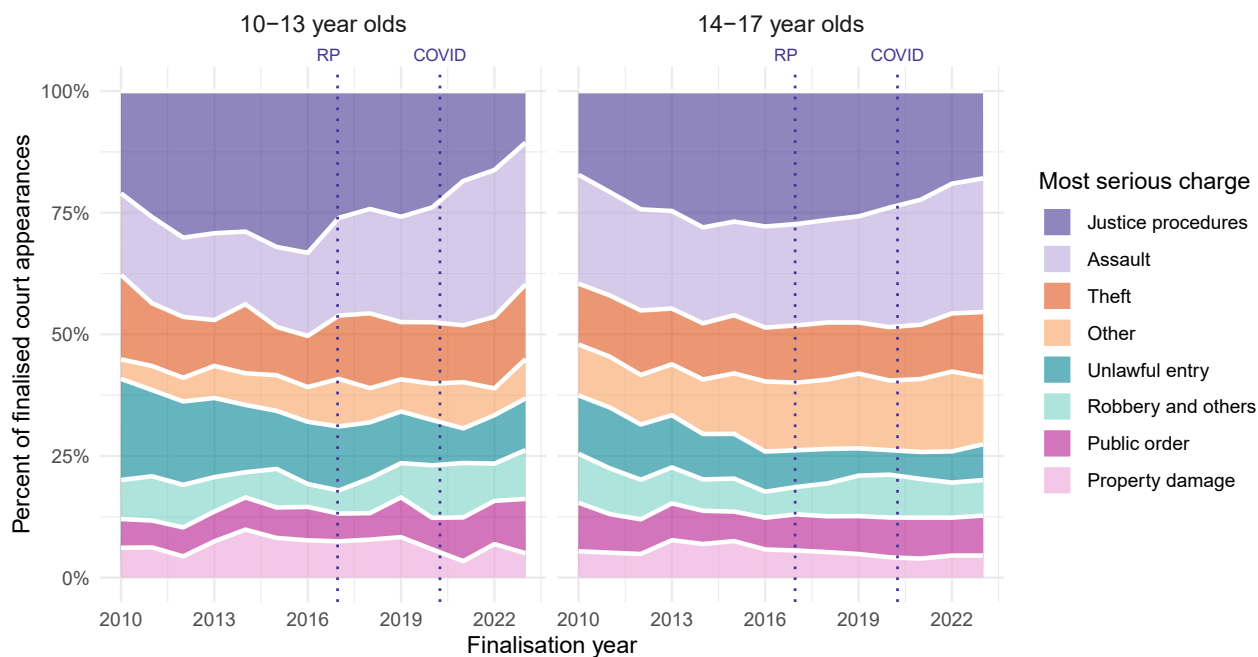


Appendix Figure C6. Trends in the rate of defendants aged 10-13 years with withdrawn cases per 100,000 population

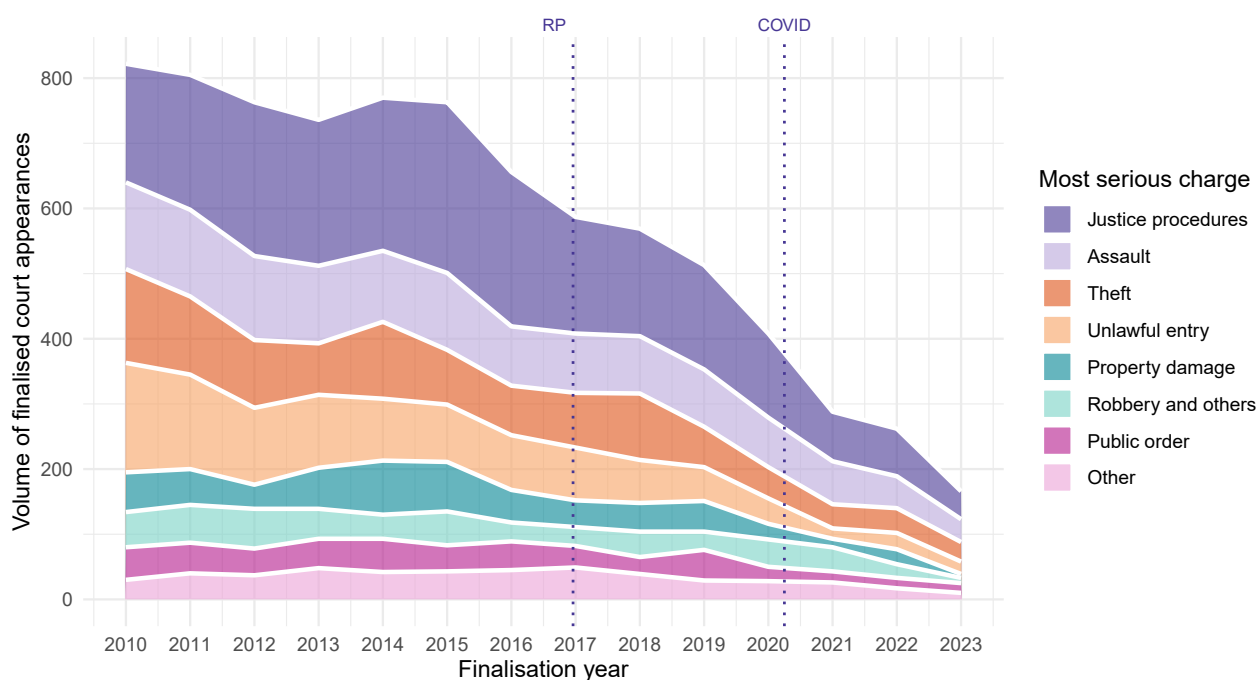


APPENDIX D – ADDITIONAL FIGURES ON OFFENCE PROFILE FOR 10-13 YEAR OLDS IN THE CHILDREN'S COURT OF NSW

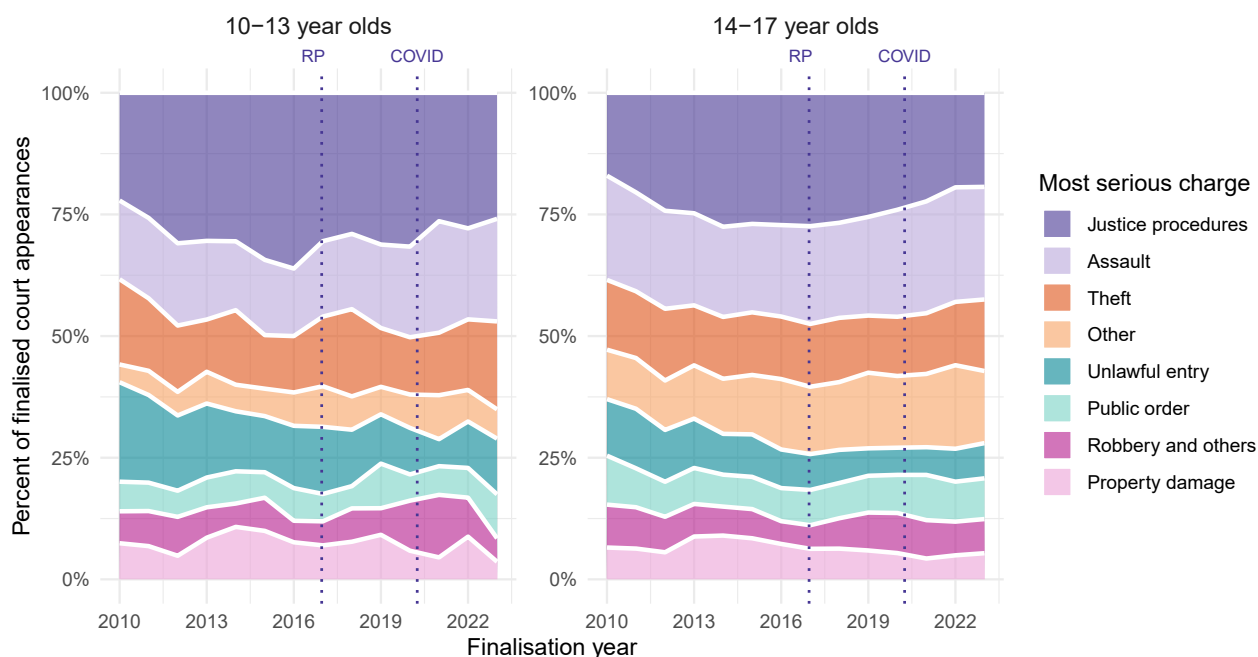
Appendix Figure D1. Trends in the proportion of most serious offences in finalised court appearances, by age of defendant



Appendix Figure D2. Trends in the number of proven cases by most serious offences involving defendants aged 10-13 years

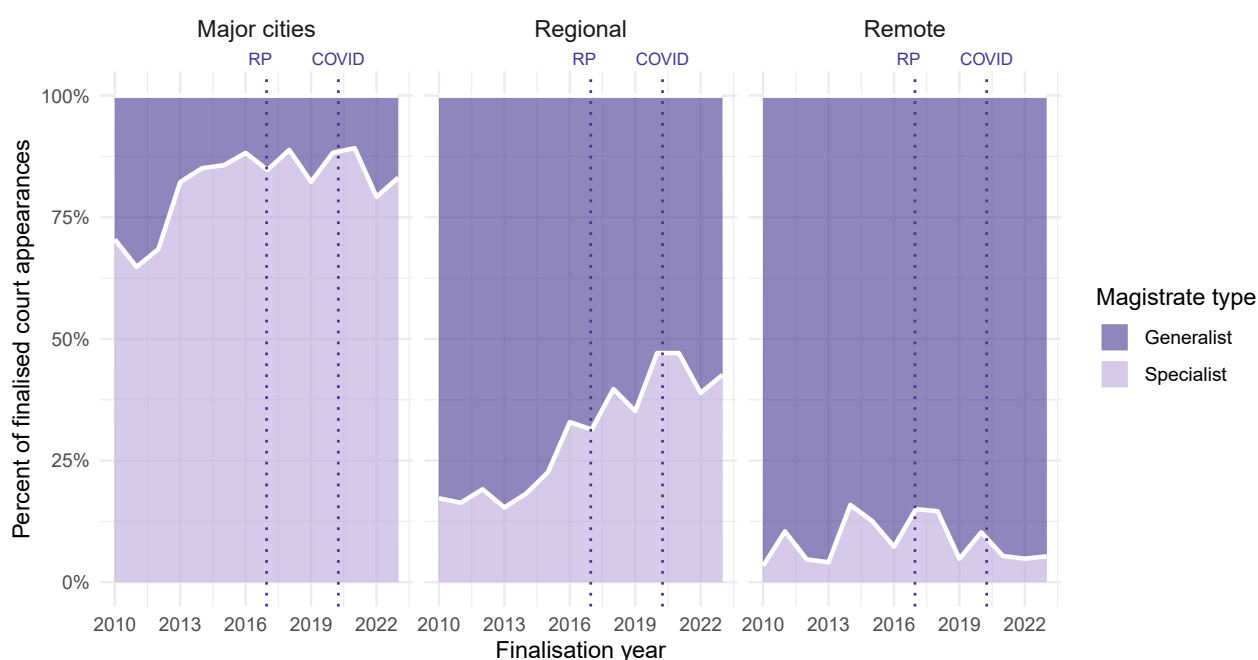


Appendix Figure D3. Trends in the proportion of most serious offences in proven finalised court appearances in the Children's Court, by age of defendant

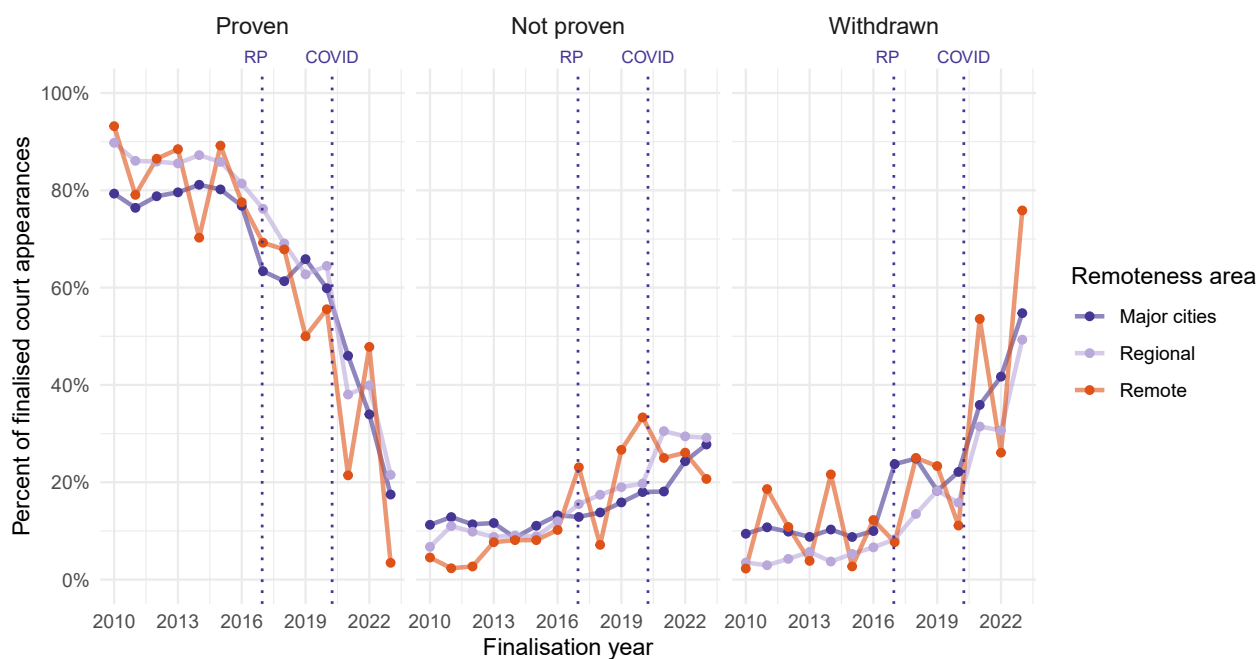


APPENDIX E – ADDITIONAL FIGURES ON OUTCOMES FOR 10-13 YEAR OLDS IN THE CHILDREN'S COURT OF NSW

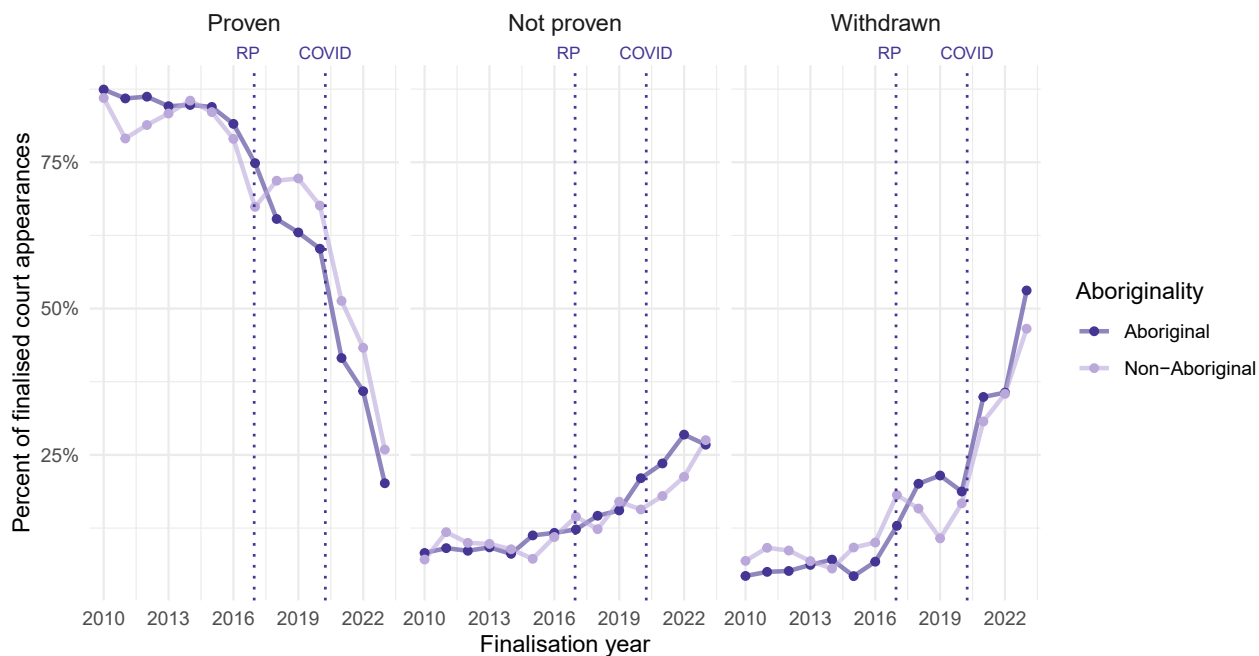
Appendix Figure E1. Trends in the prevalence of specialist Children's Court Magistrates, by the remoteness area of the defendant's place of residence



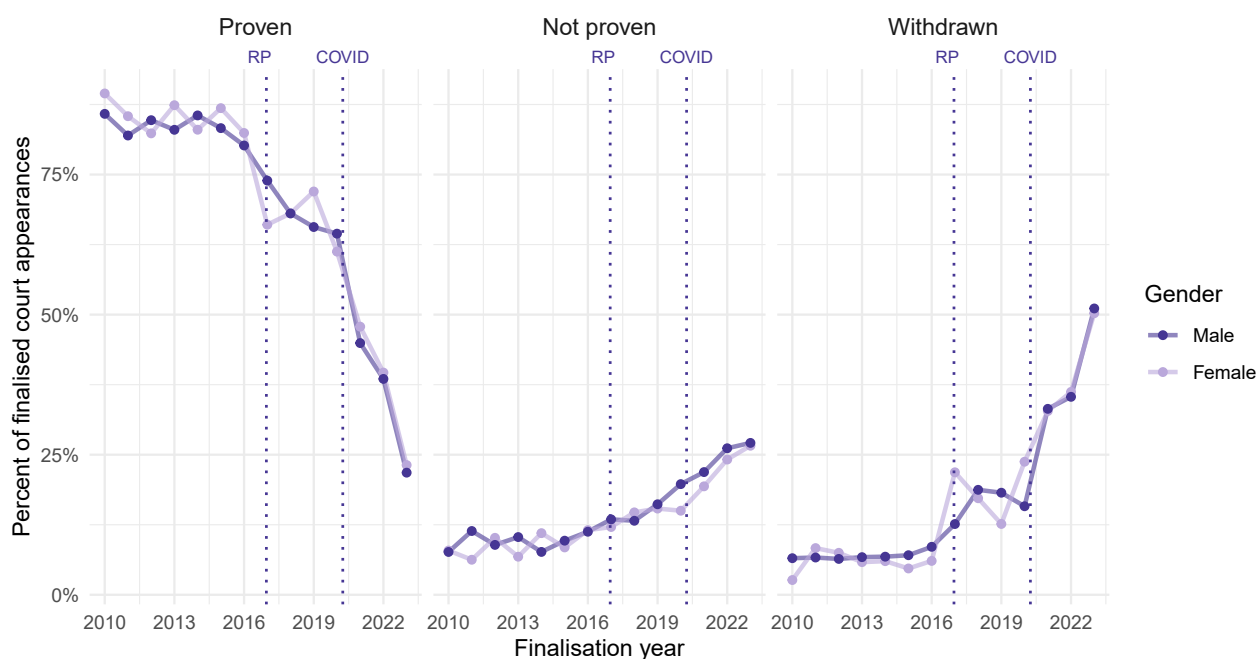
Appendix Figure E2. Trends in outcomes of finalised court appearances involving defendants aged 10-13, by the remoteness area of the defendant's place of residence



Appendix Figure E3. Trends in outcomes of finalised court appearances involving defendants aged 10-13, by Aboriginality of defendant



Appendix Figure E4. Trends in outcomes of finalised court appearances involving defendants aged 10-13, by gender of defendant



Appendix Figure E5. Trends in the percent of finalised court appearances with a Youth Justice Conference, by age of defendant

