

Doli incapax Working Group Report Quarter 2 | April to June 2020

1. Meeting of members of the NLAF Doli incapax Working Group

The working group met on 22 April 2020.

The members of the working group are: Legal Aid NSW (Chair); the Aboriginal Legal Service; Office of the Director of Public Prosecutions NSW; Children's Court of NSW; NSW Police Force including Youth and Crime Prevention Command; Youth Law (also representing Community Legal Centres NSW); the NSW Bar Association; the Law Society of NSW; the Office of the Director of Public Prosecutions NSW.

The June 2020 working group meeting was postponed, and actions are being progressed out of session.

2. Activities and outcomes

The activities of the working group relating to the objectives set out in the terms of reference are set out below.

Objective 1 - Identify measures to support the consistent application of the presumption of doli incapax in NSW, in the exercise of police discretion about whether to proceed against a child under 14 years

The Chair provided an update on actions arising from the January 2020 meeting – Legal Aid NSW collated the agreed questions from working group members and provided these to the NSWPF. We also discussed the broad issues the working group is interested in, including:

- the opportunity to discuss a collaborative training process, together with the NSWPF, on the issue of doli incapax, and whether there are appropriate representatives from the NSWPF Education and Training that can attend a working group meeting to discuss these issues, and
- ways in which these issues can be resolved as early as possible – particularly at the investigation stage (whether there is evidence to rebut the presumption), and whether any additional training or written materials for Police may assist with this.

The NSWPF Youth and Crime Prevention Command representative has advised (out of session) that they would welcome some examples of recent case studies, to illustrate some of the issues highlighted by the working group, so that police can better understand the issues. The working group agreed to share case studies with Police on a confidential basis.

Legal Aid NSW also gave an update on a meeting with a representative from Police Prosecutions Command regarding doli incapax issues. We discussed some of the written materials and information that is provided by the Police Prosecutions team to the officer in charge, regarding the evidence necessary to rebut the presumption of doli incapax. We also discussed some of the training and education activities that the Police Prosecutions Command team undertakes, and the advisory role that police prosecutors have, in providing advice to officers over the phone. Working group members

expressed interest in finding out more information about the materials on *doli incapax* provided to police officers by the Prosecutions Command.

Objective 2 - Identify measures to support the consistent application of the presumption of *doli incapax* in NSW, in its application in courts across NSW

The working group noted that the Children's Court representative continues to discuss with Children's Court Magistrates possible updates to the relevant sections of the Local Court Bench Book, on the application of the presumption of *doli incapax*. An update will be provided at the next meeting, including whether there is an opportunity for this working group to provide feedback on possible amendments.

Following on from discussions about a comprehensive paper for legal practitioners on the application of the presumption of *doli incapax*, working group members suggested that, rather than a paper, it would be useful to have access to information in an easy form and from a centralised source for practitioners, including:

- a pool of recent cases and case studies (particularly recent trials that have considered the decision in RP)
- template written submissions
- Criminal Trial Benchbook guidelines on *doli incapax*
- a guide for defence practitioners on how and when to raise *doli incapax*, particularly in light of the recent Practice Note changes on pre-trial disclosure, in the context of COVID-19 and
- recent psychological studies to use in submissions.

Legal Aid NSW will investigate this issue further, including the appropriate website to host this information hub, and will provide updates to the working group out of session.

The Law Society of NSW Children's Legal Issues Committee is still considering a CLE session on this issue, which could be scheduled at the end of the year, with timing and format dependant on COVID restrictions and other scheduling considerations.

Objective 3 - Develop protocols about obtaining evidence to rebut *doli incapax*

This issue was not discussed at the April meeting.

Objective 4 - Identify possible legislative reforms (including to the *Young Offenders Act 1997 (NSW)*) to assist the diversion of young people under 14 years from the criminal justice system

The Chair noted that there is no further update from the Council of Attorneys-General Age of Criminal Responsibility Working Group on its report to COAG.

The **next meeting** is scheduled for 26 August 2020.

Anastasia Krivenkova, Manager, Strategic Law Reform Unit, Legal Aid NSW

Chair

9 June 2020

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