

Doli incapax Working Group Report Quarter 3 | July to September 2020

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

The working group met on 15 July 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 August 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 April 2020 meeting, and also welcomed new representatives from the NSW Police Force to the working group.

The NSWPF talked about the difference between the Specialist Youth Officer and Youth Liaison Officer roles, and also provided an update on relevant police training and resources that are in development.

The working group also discussed the development of the online information hub for defence solicitors and barristers, including resources developed by Victoria Legal Aid (VLA) as a guide. Members agreed to form a small sub-group to consider which VLA resources could be adapted for NSW, including a specific checklist for solicitors on doli incapax issues.

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 Judicial Commission of NSW is considering updates to the Children's Court section on doli incapax of the Local Court Bench Book.

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

The working group discussed some of the issues around information sharing between police and the Department of Education, including schools obtaining information from students. The working group also noted that there is a policy in the Department of Education Legal Issues Bulletin (updated 17 December 2019) regarding information sharing, however it doesn't relate specifically to suspects, but includes dealings with students who are complainants and with Police and FACS.

The working group identified several issues regarding information-sharing between the Department of Education and Police, and agreed that Legal Aid NSW would reach out to the Department to suggest a meeting with relevant working group members, to discuss the following:

1. The approach to interactions between Police and the Department of Education, where police are seeking information from the school that can be used in subsequent criminal proceedings involving a child.
2. The policies and procedures that govern when and how school staff members obtain information from students, in particular, drawing on the comments made by Judge Peter Johnstone in the case of [P v JC](#), to explore the possibility of a protocol to be entered into between the Department of Education, Police, Legal Aid NSW and the Law Society of NSW that protects the rights of children in these types of situations.

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 Council of Attorneys-General met on 27 July 2020. Regarding the Age of Criminal Responsibility Working Group, the communique noted that:

Participants noted the Working Group's work to date and noted that the Working Group identified the need for further work to occur regarding the need for adequate processes and services for children who exhibit offending behaviour.

The **next meeting** is scheduled for 7 October 2020.

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

Chair

21 August 2020