

Doli incapax Working Group Report Quarter 2 | April to June 2021

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

The members of the working group are: Legal Aid NSW (Chair), the Aboriginal Legal Service, Office of the Director of Public Prosecutions NSW, NSW Police Force Youth and Crime Prevention Command, Community Legal Centres NSW, Youth Law Australia, the NSW Bar Association, and the Law Society of NSW.

Since the last meeting, the Children's Court of NSW has stepped back from the working group, but is still available to be consulted, and will continue to receive the minutes and actions.

NSW Police Force representatives from the Youth and Crime Prevention Command have also suggested that they do not formally attend the working group meetings, but are happy to be consulted on issues and remain as a point of contact for the work of the group.

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.

At its first meeting in 2021, the working group agreed on the following proposed actions to be progressed by members over the coming year.

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 working group has invited the NSWPF Education and Training team to present at a future working group meeting, on the training that is being developed and provided to police on doli incapax, and continues to await a response.

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 continues to progress the development of the online information hub for defence solicitors and barristers, including:

- a guide or checklist for solicitors on doli incapax issues, to be adapted from resources developed by Victoria Legal Aid (a sub-group has been formed to progress the development of a checklist), and
- practice directions, to be drafted by the NSW Bar Association.

The sub-group, consisting of Legal Aid NSW, the NSW Bar Association and the Law Society of NSW met to discuss and progress the draft checklist for defence practitioners. The checklist will be a document summarising the key doli principles and evidentiary matters, which can be referred to at all stages of the process.

Solicitors from ALS and Legal Aid NSW are also looking at collating generic psychological reports used in doli incapax matters, that could be included in the information hub.

Members agreed that the following additional actions be progressed by the working group:

- develop resource for lawyers to explain doli incapax to children
- develop resource for children to help them understand doli incapax, and
- explore possible research projects on best practice in early intervention, as it relates to defence legal services and other safeguards (e.g. appropriate adult / support persons at police stations, lawyers at police stations, and continuity of legal service provision from first contact with police).

At its second meeting in 2021, members discussed some examples of early intervention services for children and young people in contact with the criminal justice system.

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

The working group has reached out to the Department of Education suggesting a meeting to discuss some of the issues raised by members about information sharing between a school and police. However, to date, the Department has said it is unable to meet because of capacity issues. Legal Aid NSW will follow up on this in Q3, 2021, in consultation with the Law Society of NSW.

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 working group continues to monitor the outcome of the review of the *Young Offenders Act 1997* (NSW) and consideration of raising the age of criminal responsibility by state and territory governments.

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

Chair

2 June 2021