

# Quarterly Highlights Report April to June 2019

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*The New South Wales Legal Assistance Forum (NLAF) Plenary Group Meeting was held on **12 June 2019**, and was chaired by Geoff Mulherin, NLAF Deputy Chair and the Director of the Law and Justice Foundation of NSW.*

## Guest Speakers at the Meeting

### Doli Incapax in NSW

At the previous meeting, Amnesty International presented to NLAF findings from *The Sky is the Limit* report<sup>1</sup> which focuses on keeping young children (under 14 years old) out of prisons. In that report, Amnesty International cites evidence from Victoria that the threshold for rebutting the legal presumption of doli incapax has lowered significantly, and that the onus in some cases has shifted to the defence to prove a child's incapacity to understand that their actions were seriously wrong. NLAF invited representatives from the NSW Bureau of Crime Statistics and Research (BOCSAR) and Legal Aid NSW to provide information about the current application of the presumption of doli incapax in NSW.

Currently in NSW, there is a doli incapax flag available on JusticeLink, but BOCSAR data shows that this flag is not frequently used when magistrates determine that the presumption of doli incapax has not been rebutted. BOCSAR data also shows that the majority of defendants aged between 10 and 14 years are Aboriginal children, with the proportion of Aboriginal children higher among younger defendants. The proportion of defendants found guilty increases as the age of the defendants rises. Defendants aged 13 and 14 years are more likely to plead guilty, but charges against 10- and 11- year-olds are more likely to be withdrawn.

Legal Aid NSW presenters pointed out that the issue of doli incapax is separate to the issue of minimum age of criminal responsibility. Some concerns were raised about the inconsistent application by the police, legal practitioners and the courts across NSW of the presumption of doli incapax, resulting in unintended negative consequences for children. Once a young person is charged, they are more likely to opt for an easy outcome of receiving a caution or a section 32 rather than to await trial where the rebuttal of doli incapax would be raised in court months after the charge. NLAF members will form a Working Group to explore these issues further.

*Below are some of the issues raised by groups that report to NLAF.*

## Aboriginal Incarceration Working Group

The NLAF Aboriginal Incarceration Working Group meeting analysed and discussed further data collated by the NSW Bureau of Crime Statistics and Research on bail conditions and breaches of bail for Aboriginal and Torres Strait Islander people. The data highlights the following:

- Most Aboriginal people received three or more bail conditions imposed by courts.
- There is a significantly higher number of bail breaches by Aboriginal people compared to non-Aboriginal people.

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<sup>1</sup> <https://www.amnesty.org.au/wp-content/uploads/2018/09/The-Sky-is-the-Limit-FINAL-1.pdf>

- The total number of breaches of conditions without further offence by Aboriginal people are higher than the number of breaches by way of further offence.
- For breaches of conditions without further offence, the most frequently breached bail conditions are curfew, reporting, residence and place restrictions.
- Of the bail conditions breached by Aboriginal and Torres Strait Islander people, breaches account for about two thirds of all breaches, whereas breaches by way of further offence account for only about one third of the conditions.
- Where a breach of bail has been established and the breach is recorded with respect to Aboriginal people, most of bail refusals are related to breaches of conditions without further offence rather than breaches by way of further offence.
- Remand decisions do not always match sentence outcomes. Last year, over 35% of female and 25% of male Aboriginal defendants on remand at the time of finalisation received a non-custodial penalty.

The Working Group is concerned that a significant number of Aboriginal people are being refused bail for breaches of bail conditions, such as curfew, reporting, residence and place restrictions, who do not ultimately receive a custodial penalty. Many Aboriginal people are therefore in custody for breaches of bail conditions without further offence who would never be sentenced to prison for their initial crime. The Working Group will write to the Police Commissioner and the Chief Magistrate to explore options to address these concerns.

## Collaborative Service Planning Working Group

The Collaborative Service Planning Working Group is continuing to consult with all relevant stakeholders regarding the definition of catchments for the purpose of collaborative service planning. They have received constructive feedback, and most feedback was positive. Further consultations with regional stakeholders are underway. The Public Purpose Fund has granted funding to the Law and Justice Foundation to coordinate the data sharing process. While formal agreements have not been entered into, all stakeholders have agreed in principle to share their data. The Working Group will pilot the collaborative service planning framework in a number of regions. This process is still in discussion.

## Prisoners Forum

### Supreme Court bail changes

From 3 June 2019, Supreme Court practice Note 11 will commence. The changes in this practice note will make it much harder for individuals to apply for Supreme Court bail. Individuals will only be able to apply for bail by emailing in an application, it cannot be faxed in. This presents an issue for unrepresented or self-represented individuals. The practice note also sets out that applications cannot be made until practitioners are ready to go – so all Affidavits and reports must already be prepared. In the context of a growing remand population in NSW, this will make it much harder for individuals to apply for and get Supreme Court bail. It will also present a problem for practitioners who represent individuals as duty lawyers, or who are running substantive matters but do not have the capacity to assist in a Supreme Court bail application.

## Fines and Traffic Law Working Group

The Fines and Traffic Law Working Group was very pleased to have as their guest speaker Mr Stephen Brady, the Chief Commissioner of State Revenue, Commissioner of Fines Administration, and Deputy Secretary of Revenue NSW. Commissioner Brady provided the Working Group with an update on the reforms to improve customer

experience, change behaviour and create a fairer fines process. For example, Revenue NSW has reviewed, updated and republished review guidelines which they hope will assist customers to navigate and self-assess the likely merit of their review. Mr Brady also identified several areas that Revenue NSW is considering and reviewing in 2019.

## Collaborative Legal Services Delivery (CLSD) Unit

Issues in connection with young people and the criminal justice system were raised in a number of the CLSD partnerships in this quarter with focused meetings on youth justice issues being held in the Moree, Hunter and Northern Rivers regions. A number of regions have identified that relatively few young people apprehended by the police for offences are diverted under the *Young Offenders Act*, including diversion to youth justice conferences. Diversion practices appear to be inconsistent across regional areas. Lack of a specialist Children's Court seems to be a factor having an impact on low rates of diversion.

The Moree CLSD Program partnership held a Youth Forum in May which was attended by local police, Juvenile Justice, ALS local and specialist children's lawyer from Sydney and local youth services. Data for the Moree region indicates very low use of Youth Justice Conferences (YJC). Outcomes of the meeting included:

- ALS undertook to raise the low rate of referrals from the Local Court in Moree with the President of the Children's Court;
- Police to consider participation by legal services in regional police training in September in Inverell;
- Sharing information about the outcomes of YJC to police to encourage referrals;
- Development of a protected admissions form that might be used 'in the field.'
- Sharing information about becoming a YJC convenor.

Other issues identified at CLSD Program meetings regarding young people and their contact with the criminal justice system include:

- Concerns about the use of arrest to address behavioural issues for children who are in out-of-home care;
- Need for dedicated training and debriefing for people (volunteers) who act as support people for young people who have been arrested.
- The Central West CLSD Program partnership has identified the need for a mobile Youth Koori Court for the region. Partners and Aboriginal Elders held a meeting with the President of the Children's Court in Dubbo on 30 May to discuss the proposal.

## Other News

The quarterly working group reports tabled at the NLAF meetings and this NLAF Highlight Reports are posted on our website, please visit [nlaf.org.au](http://nlaf.org.au) to find out more about the work of NLAF.

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**June 2019**