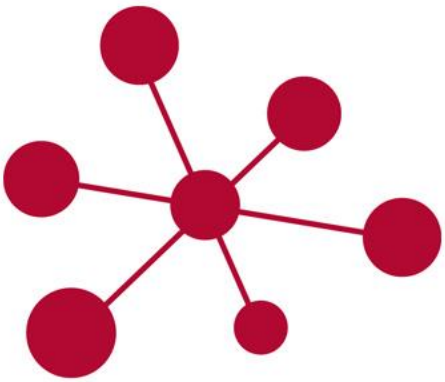

public interest
ADVOCACY CENTRE

NSW Parliamentary Inquiry into the Adequacy of Youth Diversion Programs

5 February 2018

Level 5, 175 Liverpool Street, Sydney NSW 2000
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles difficult issues that have a significant impact upon disadvantaged and marginalised people. We ensure basic rights are enjoyed across the community through legal assistance and litigation, public policy development, communication and training.

Our work addresses issues such as:

- homelessness;
- access for people with disability to basic services like public transport, education and online services;
- Indigenous disadvantage;
- discrimination against people with mental health conditions;
- access to energy and water for low-income and vulnerable consumers;
- the exercise of police power;
- the rights of people in detention, including the right to proper medical care; and
- government accountability, including freedom of information.

1.2 PIAC's work on youth diversion and policing

PIAC has consistently been involved in issues surrounding police accountability and the exercise of police powers, through both strategic litigation and policy advocacy. This includes an emphasis of the impact of police powers on young people, and especially on Aboriginal and Torres Strait Islander young people.

Specifically, PIAC has been a leading member of the Youth Justice Coalition and contributed to the October report examining the NSW Police Suspect Target Management Plan.[1]

In the past six months, PIAC has also contributed to the Australian Law Reform Commission inquiry into Incarceration Rates for Aboriginal and Torres Strait Islander People.[2]

Both of these documents inform this submission, and have been included as Attachments A and B respectively.

This submission also draws on the wide range of other relevant work we undertake through our litigation practice, Indigenous Justice Project and policy and law reform efforts.

---

1 Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A study of the Suspect Target Management Plan*, 25 October 2017, available at: https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf accessed on 2 February 2018.

2 PIAC, *Submission to the Australian Law Reform Commission Inquiry re Incarceration Rates of Aboriginal and Torres Strait Islander People*, 31 August 2017, available at: https://www.piac.asn.au/wp-content/uploads/2017/09/17.08.31-PIAC-Submission-to-ALRC-re-Indigenous-Incarceration-Final.pdf accessed on 2 February 2018.

2. Recommendations

Recommendation 1

NSW Police discontinue applying the STMP to children under 18. Children suspected of being at medium or high risk of offending should be considered for evidence-based prevention programs that address the causes of reoffending (such as through Youth on Track, Police Citizens Youth Clubs NSW (PCYC) or locally based programs developed in accordance with Just Reinvest NSW), rather than placement on an STMP.

Recommendation 2

- *Recommendation 87 of the RCIADIC should be implemented in full.*
- *Powers of arrest (such as those found in s 99 of LEPRA) should expressly provide that arrest and detention must be an option of last resort.*
- *Police policies and procedures (such as those contained in the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) should contain clear guidance to police to the effect that arrest is to be used as a measure of last resort and to encourage diversion of suspected offenders away from the criminal justice system including by use of court attendance notices where appropriate.*
- *Police policies and procedures (such as those contained in the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) should expressly state that detention should be as a last resort and for the shortest period of time (in line with Convention on the Rights of the Child).*
- *That legislation governing criminal procedures (which in NSW includes the provisions of LEPRA, the Children (Criminal Proceedings) Act, the Young Offenders Act and the Bail Act) should be summarised in internal police policies and procedures (including the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) to (i) reinforce the message that arrest and detention should be a last resort and (ii) provide clear guidance as to the procedure police officers must follow, in accordance with law, when confronted with suspected offending by young people.*

Recommendation 3

- *Bail laws should expressly provide that arrest for breach of bail is a sanction of last resort (including in section 77 of the NSW Bail Act).*
- *Bail laws should expressly provide that police officers must have regard to a person's age when determining what action should be taken for breach of bail (again including in section 77 of the NSW Bail Act)*
- *In consultation with community, consideration should be given to further trials of the 'breach reduction strategy'[3] in communities with large populations of Aboriginal and Torres Strait Islander people.*

[3] Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper 84, July 2017, 2.69.

Recommendation 4

Proactive policing targets should not be set for activities undertaken by NSW Police in relation to people under 18, and the numbers of activities undertaken by NSW Police in relation to people under 18 should be excluded from overall proactive policing target data.

Recommendation 5

The criminal age of responsibility should be set to at least 12, in line with the recommendation by the Royal Commission into the Protection and Detention of Children in the Northern Territory, with consideration to setting it at 14.

Recommendation 6

Young people under the age of 14 years should not be held on remand, and should not be ordered to serve a term of detention, unless they:

- *Have been convicted of a serious and violent crime against the person*
- *Present a serious risk to the community, and*
- *The sentence is approved by the President of the Children's Court of NSW.*

3. Youth Diversion in NSW: Select Issues

In this submission, PIAC will concentrate on a small number of issues concerning youth diversion in NSW, based on our past work and particular areas of expertise, rather than attempting to address the broad scope of this inquiry.

Specifically, we will focus on 'the way in which youth diversionary efforts work with… the Police' (term of reference a) and 'bail issues' (term of reference f), as well as suggesting law reforms to minimise contact between young people and the criminal justice system.

PIAC is particularly concerned that police powers are being exercised in ways that undermine, rather than support, youth diversionary efforts.

3.1 Suspect Target Management Plan

One of the key issues in terms of youth diversion in NSW is the impact of the Suspect Target Management Plan, and other forms of 'proactive policing', on youth diversion outcomes.

This an issue that PIAC has examined closely, through its participation in the Youth Justice Coalition, including contributing to the October 2017 publication of the report 'Policing Young People in NSW: A study of the Suspect Target Management Plan' (see Attachment A).

While some information about the STMP has not been disclosed by NSW Police and the NSW Government more generally, this study was produced using the following information:[4]

i) available quantitative data on program participants
ii) de-identified case studies drawn from interviews with lawyers
iii) publicly available guidance given to police on STMP operational procedures and
iv) analysis of case law and legislation.

Based on this information, the report contained a range of preliminary findings, including:[5]

- Disproportionate use against young people and Aboriginal people: Data shows the STMP disproportionately targets young people, particularly Aboriginal and Torres Strait Islander people, and has been used against children as young as ten.

  [Subsequent to the report's publication, NSW Police Commissioner Mick Fuller confirmed that approximately 55% of people subject to an STMP are Aboriginal or Torres Strait Islander, and that the youngest person on an STMP was nine years old].[6]

- Patterns of 'oppressive policing' that may be damaging relationships between police and young people: Young people targeted on the STMP experience a pattern of repeated contact with police

---

4 Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A study of the Suspect Target Management Plan*, 25 October 2017, p1, available at: https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf

5 Ibid.

6 Michael McGowan, 'More than 50% of those on secret NSW police blacklist are Aboriginal', *Guardian Australia*, 11 November 2017, available at: https://www.theguardian.com/australia-news/2017/nov/11/more-than-50-of-those-on-secretive-nsw-police-blacklist-are-aboriginal accessed on 2 February 2018.

in confrontational circumstances such as through stop and search, move on directions and regular home visits. The STMP risks damaging relationships between young people and the police. Young people, their families or legal representatives are rarely aware of criteria used to add or remove people from the STMP. As the case studies show, young people experience the STMP as a pattern of oppressive, unjust policing.

- Increasing young people's costly contact with the criminal justice system and no observable impact on crime prevention: The STMP has the effect of increasing vulnerable young people's contact with the criminal justice system. Application of the STMP can be seen to undermine key objectives of the NSW youth criminal justice system, including diversion, rehabilitation and therapeutic justice. The research has identified several instances where Aboriginal young people on Youth Koori Court therapeutic programs have had their rehabilitation compromised by remaining on the STMP. There is no publicly available evidence that the STMP reduces youth crime.

Based on case studies discussed in the Report, it was found that:[7]

> The STMP has particularly concerning negative impacts for Aboriginal and Torres Strait Islander young people who experience intensive monitoring and over-policing. The STMP can generate and compound poor police-community relations and undermine well-being for many Aboriginal and Torres Strait Islander youth. The STMP contributes to the stigmatisation and criminalisation of Aboriginal and Torres Strait Islander young people and furthers their disproportionate contact with police. The STMP also disrupts family relations where a young person is living with their family, and is subject to repeated visits by police at their home.

Of particular concern was the finding of the report that:[8]

> Several Aboriginal youth appear to have been either placed on an STMP, or are receiving STMP like levels of attention, whilst being subject to Youth Koori Court Programs… Young people who experience targeted policing, whether because of the STMP or not, are finding participation in Youth Koori Court Programs difficult.

This seems to subvert the primary purpose of the Youth Koori Court, and similar programs focusing on diverting young people from involvement in the criminal justice system. Instead, the STMP appears to increase contact between NSW Police and young Aboriginal and Torres Strait Islander people.

Based on their analysis of case studies, and other evidence, the report also examined the interaction between the STMP and the diversionary principles of the *Young Offenders Act 1997* (NSW) and concluded that:[9]

---

7 Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A study of the Suspect Target Management Plan*, 25 October 2017, p21, available at: https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf

8 Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A study of the Suspect Target Management Plan*, 25 October 2017, p32, available at: https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf

9 Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A study of the Suspect Target Management Plan*, 25 October 2017, p43, available at: https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf

> The use of the STMP in relation to children is at odds with the aims and principles of the *Young Offenders Act*. The findings of our research indicate that the STMP, when used on children, is a 'parallel system' to the *Young Offenders Act*. The STMP is an inappropriate parallel system because it conflicts with the *Young Offenders Act* principles, not least its aim to divert young people from criminal proceedings. In contrast, the objective of the STMP appears to be to proactively increase police contact to communicate to the young person that they are being monitored and are under surveillance. The STMP is also being used to detect and prosecute minor offences. The negative impacts of the STMP on young people in our research indicates it is not in the best interests of young people.

Based on this analysis, the Report recommended that:[10]

> NSW Police discontinue applying the STMP to children under 18. Children suspected of being at medium or high risk of offending should be considered for evidence-based prevention programs that address the causes of reoffending (such as through Youth on Track, Police Citizens Youth Clubs NSW (PCYC) or locally based programs developed in accordance with Just Reinvest NSW), rather than placement on an STMP.

PIAC submits that this recommendation is equally valid in relation to the current inquiry, with its focus on improving youth diversion in the broader NSW criminal justice system.

Recommendation 1

NSW Police discontinue applying the STMP to children under 18. Children suspected of being at medium or high risk of offending should be considered for evidence-based prevention programs that address the causes of reoffending (such as through Youth on Track, Police Citizens Youth Clubs NSW (PCYC) or locally based programs developed in accordance with Just Reinvest NSW), rather than placement on an STMP.

3.2 Arrest as a last resort and the policing of bail

The issue of youth diversion generally, and diversion of young Aboriginal and Torres Strait Islander people specifically, also came up in last year's public consultation by the Australian Law Reform Commission regarding Incarceration Rates of Aboriginal and Torres Strait Islander people.

Our submission to that process is included at Attachment B. The following sections from that submission are the most relevant to the current inquiry:

3.2.1 Arrest as a last resort[11]

[10] Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A study of the Suspect Target Management Plan*, 25 October 2017, p46, available at: https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf

[11] PIAC, *Submission to the Australian Law Reform Commission Inquiry re Incarceration Rates of Aboriginal and Torres Strait Islander People*, 31 August 2017, pp5-8, available at: https://www.piac.asn.au/wp-content/uploads/2017/09/17.08.31-PIAC-Submission-to-ALRC-re-Indigenous-Incarceration-Final.pdf accessed on 2 February 2018.

In PIAC's submission, the role of police officer discretion in deciding what action to take when confronted with suspected offending in contributing to the rate of incarceration of Aboriginal and Torres Strait Islander people cannot be overstated.

This impact of the exercise of police discretion was well acknowledged by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). In relation to Aboriginal young people, the RCIADIC noted:

> While recognising that many of the issues facing Aboriginal people in general also face Aboriginal youth in particular, I wish to make the point here that police and Aboriginal youth relations are a critical juncture in the entry of Aboriginal youth into the juvenile justice system and often, consequently, into the criminal justice system.[12]

And further:

> The police decision to arrest a juvenile marks the point of entry into the juvenile justice system from whence it is often difficult to disentangle oneself. As David Alcock pointed out in his background paper:
>
> > The 'necessity' to arrest is the first stage in what can often be a particularly difficult situation. One need only mention the consequent charges of assault police, resist arrest, escape lawful custody that can flow simply from the police decision to arrest.[13]

The RCIADIC made numerous recommendations in relation to ensuring that discretion to arrest and detain Aboriginal and Torres Strait Islander people was exercised as a last resort. For example:

> Recommendation 87: That:
> a. All Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders;
> b. Police administrators should train and instruct police officers accordingly and should closely check that this principle is carried out in practice;[14]
>
> Recommendation 92: That governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.[15]

In relation to Aboriginal and Torres Strait Islander young people, the RCIADIC made the following specific recommendation:

> Recommendation 239: That governments should review relevant legislation and police standing orders so as to ensure that police officers do not exercise their powers of arrest in relation to Aboriginal juveniles rather than proceed by way of formal or informal caution or service of an attendance notice or summons unless there are reasonable grounds for believing that such action is necessary. The test whether arrest is necessary should, in general, be more stringent than that imposed in relation to adults. The general rule should be that if the offence alleged to

12 Royal Commission into Aboriginal Deaths in Custody at 14.4.14.
13 Royal Commission into Aboriginal Deaths in Custody at 14.4.16
14 Royal Commission into Aboriginal Deaths in Custody.
15 Royal Commission into Aboriginal Deaths in Custody.

> have been committed is not grave and if the indications are that the juvenile is unlikely to repeat the offence or commit other offences at that time then arrest should not be effected.

In one particular report, the Commissioner Johnston noted:

> In my report of inquiry into the death of Craig Karpany, I emphasised the instance of the role of supervising officers in relation to arrests:
>
> > …What is required, I think, is that the atmosphere inside the police force be such that not arresting (other than where that is essential) is regarded as good intelligent policing; that a tough policy of arresting whenever you can is not regarded as good policing.[16]

In PIAC's experience, the principle of arrest as a last resort is not routinely adhered to by NSW police officers in deciding what action to take when confronted with suspected offending, particularly in relation to Aboriginal and Torres Strait Islander young people.

Our case work shows police exercising their discretion to arrest (*Law Enforcement (Power and Responsibilities) Act 2002* (NSW) (LEPRA) s 99) and continuing the arrest (LEPRA s 105) when circumstances of a person clearly indicate that a warning, caution or court attendance notice would have been more appropriate and desirable.

The failure by police to routinely consider alternatives to arrest and adhere to the principle of arrest as a last resort, particularly in relation to young people, is, in our view, a significant contributor to incarceration rates of Aboriginal and Torres Strait Islander people.

In PIAC's submission, the principle of arrest and detention as a last resort is not sufficiently embedded in the legal frameworks guiding the practices and decision making of police officers in NSW.

In 2013, section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA) was amended to remove the explicit reference to arrest being for the purpose of bringing a person before the Court.

The current section 99 of LEPRA provides police officers with power to arrest a person without a warrant. A police officer must suspect on reasonable grounds that a person is committing or has committed an offence and be satisfied that arrest is reasonably necessary having regard to one or more of the reasons set out in s 99 (1)(b) of LEPRA.

Section 105 of LEPRA provides that a police officer may discontinue an arrest at any time, such as if the person is no longer a suspect, the reason for the arrest no longer exists, or if it is more appropriate to deal with the matter by issuing a warning, caution, penalty notice, court attendance notice or, in the case of a child, dealing with the matter under the *Young Offenders Act 1997* (NSW) (Young Offenders Act). [17]

Nowhere in LEPRA does it expressly state that arrest and detention are to be used as a sanction of last resort.

---

16 Royal Commission into Aboriginal Deaths in Custody at 21.2.26

17 LEPRA, s 105 (2).

There is little published guidance for police officers in relation to the principle of arrest as a last resort.

The *NSW Police Force Handbook* appears to reverse the emphasis, stating that if an officer cannot satisfy the reasons for arrest set out in section 99 (1)(b) of LEPRA, the officer must consider alternatives to arrest.[18] This approach to arrest is also reflected in the *NSW Police Force Code of Conduct for CRIME*.[19]

In the case of children, the Convention of the Rights of the Child requires that arrest, detention and imprisonment of a child should only be used a measure of last resort and for the shortest appropriate period.[20]

Legislation relating to young people embodies these principles to some degree. Section 7 of the *Young Offenders Act* sets out principles guiding persons exercising functions under the Act to include:

a. The principle that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence;[21] and
b. The principle that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.[22]

Further, the *Children (Criminal Proceedings) Act 1987* (NSW) provides that criminal proceedings should not be commenced against a child other than by court attendance notice (CAN).[23] Exceptions to commencement of proceedings by CAN include certain serious offences[24], and whether there are reasonable grounds for believing that the child is unlikely to comply with a CAN or is likely to commit further offences.[25]

The *NSW Police Force Code of Conduct for CRIME* notes that the arrest procedure in section 99 'applies equally to children'.[26] The *NSW Police Force Handbook* sets out the procedure for imposing the least restrictive sanctions for young people by reference to the *Young Offenders Act* and the *Children (Criminal Proceedings) Act 1987* (NSW), including that they entitled to have proceedings commenced by CAN.[27]

Reducing youth crime and diversion of Aboriginal and Torres Strait Islander young people away from the criminal justice system is identified as a priority in the NSW Police Force Aboriginal Strategic Direction 2012-2017[28] and in the NSW Police Force Youth Strategy 2013-2017 (Youth

18 *NSW Police Force Handbook, p. 10-11*
19 *NSW Police Force Code of Conduct for CRIME, 14-15.*
20 Convention of the Rights of the Child, Article 37 (b).
21 Young Offenders Act, s 7 (a).
22 Young Offenders Act, s 7 (c).
23 *Children (Criminal Proceedings) Act 1987* (NSW) s 8(1).
24 *Children (Criminal Proceedings) Act 1987* (NSW) s 8(2)(a).
25 *Children (Criminal Proceedings) Act 1987* (NSW) s 8(2)(b).
26 *NSW Police Force Code of Conduct for CRIME, 14-15.*
27 *NSW Police Force Handbook, see the 'Young Offenders' section, p. 510.*
28 Aboriginal Strategic Direction 2012-2017, pp 28-30.

Strategy).[29] The Youth Strategy further identifies directions to address the specific needs of Aboriginal youth.[30]

Recommendation 2

- *Recommendation 87 of the RCIADIC should be implemented in full.*
- *Powers of arrest (such as those found in s 99 of LEPRA) should expressly provide that arrest and detention must be an option of last resort.*
- *Police policies and procedures (such as those contained in the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) should contain clear guidance to police to the effect that arrest is to be used as a measure of last resort and to encourage diversion of suspected offenders away from the criminal justice system including by use of court attendance notices where appropriate.*
- *Police policies and procedures (such as those contained in the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) should expressly state that detention should be as a last resort and for the shortest period of time (in line with Convention on the Rights of the Child).*
- *That legislation governing criminal procedures (which in NSW includes the provisions of LEPRA, the Children (Criminal Proceedings) Act, the Young Offenders Act and the Bail Act) should be summarised in internal police policies and procedures (including the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) to (i) reinforce the message that arrest and detention should be a last resort and (ii) provide clear guidance as to the procedure police officers must follow, in accordance with law, when confronted with suspected offending by young people.*

3.2.2 Bail[31]

Our comments above in relation to police officers' use of discretion in arrest and detention as a last resort are equally applicable to the discretionary decisions by police in the policing of bail and suspected breaches of bail.

The ALRC Discussion Paper acknowledges that 'police discretion plays a key role in the return to prison of people who breach their bail conditions.'[32]

In relation to young people, the Australian Institute of Criminology identifies that:

> minimising breaches of bail by young people is an important strategy in minimising levels of young people on custodial remand, since a history of breached bail conditions can influence the outcome of future bail decisions, thereby increasing the likelihood of a young person being remanded in custody.[33]

---

29 NSW Police Force Youth Strategy 2013-2017, Objective 4, p, 15.

30 NSW Police Force Youth Strategy 2013-2017, Objective 5, p, 16.

31 PIAC, *Submission to the Australian Law Reform Commission Inquiry re Incarceration Rates of Aboriginal and Torres Strait Islander People*, 31 August 2017, pp8-9, available at: https://www.piac.asn.au/wp-content/uploads/2017/09/17.08.31-PIAC-Submission-to-ALRC-re-Indigenous-Incarceration-Final.pdf accessed on 2 February 2018.

32 Australian Law Reform Commission, Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper 84, July 2017, 2.63.

33 Australian Institute of Criminology, *Bail and remand for young people in Australia,* at 80.

As noted above, the failure by police to consider alternatives to arrest and detention and adhere to the principle of arrest as a last resort is a significant contributor to incarceration rates of Aboriginal and Torres Strait Islander people. In the context of suspected breaches of bail, our case work shows police:

a. failing to consider the alternatives to arrest, such as issuing a warning or application notice, as required by *Bail Act 2013* (NSW) s 77(1) (the *Bail Act*); and
b. failing to consider other matters in deciding what action to take, such as the triviality of the breach and the circumstances of the individual, as required by *Bail Act* s 77(3).

The New South Wales Law Reform Commission Inquiry into Bail recommended that legislation should expressly specify that police officers consider a range of factors when considering what action to take when faced with a suspected breach of bail, including that arrest should be as a last resort.[34] In relation to young people, the NSW Law Reform Commission also specifically recommended that police officers should expressly consider a person's age when determining what action to take for suspected breach of bail.[35]

Recommendation 3

- *Bail laws should expressly provide that arrest for breach of bail is a sanction of last resort (including in section 77 of the NSW Bail Act).*
- *Bail laws should expressly provide that police officers must have regard to a person's age when determining what action should be taken for breach of bail (again including in section 77 of the NSW Bail Act)*
- *In consultation with community, consideration should be given to further trials of the 'breach reduction strategy'[36] in communities with large populations of Aboriginal and Torres Strait Islander people.*

3.3 The role of 'targets' for police activity

Both the Suspect Target Management Plan, and increased bail checks, are part of a wider trend towards greater 'proactive policing' practices within NSW Police.

Taken to its broadest extent, proactive policing includes setting 'targets' for a range of different Police activities, including personal searches, the use of move-on powers and bail checks, amongst others.

While there is limited public evidence of the extent of such targets set within NSW Police, PIAC is aware of at least two different sources indicating such target-setting is relatively common. This includes discussion of the impact of proactive policing, and associated targets, on police workload in a 2012 Industrial Relations Commission decision.[37]

---

34 New South Wales Law Reform Commission, *Bail*, Report 133 (2012) Recommendation 15.2 (1)(b)(iii).
35 New South Wales Law Reform Commission, *Bail*, Report 133 (2012) Recommendation 15.2 (1)(b)(iv).
36 Australian Law Reform Commission, Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper 84, July 2017, 2.69.
37 *Crown Employees (Police Officers – 2009) Award (No 2)* [2012] NSWIRComm 104, available at: https://www.caselaw.nsw.gov.au/decision/54a6385c3004de94513d9f70 accessed on 5 February 2018.

The published minutes of the Lachlan Local Area Command Community Safety Precinct Meetings also indicate the central played by 'proactive' targets.

The 5 June 2017 meeting minutes[38] note that: 'The Pro-activity results for January were provided to the meeting – these included Move Ons, Persons Searches, Vehicle Searches, Licensed Inspections, Bail Check, Search Warrants, School Inspections and Rural Inspections' and further noting that 'The high number of [bail] checks being conducted by police is producing good results'.

The 6 March 2017[39] and 5 September 2016[40] minutes both note a similar list of categories of activities being reported while, revealingly, the 10 June 2015 minutes[41] state that:

> Pro-activity – Overall results were good with Move-ons being 444 which [was] 121 above the target and Person Search are 1080 which is 35 above the target.

While the role of proactive targets seems to be increasingly accepted, at least within NSW Police, PIAC queries whether the adoption of such targets actually leads to a reduction in crime.

Importantly, there is also a risk that setting targets in the numbers of personal searches, move-ons, and bail checks will lead to an increase in these actions carried out as a matter of routine, and therefore a heightened risk that they are not carried out in accordance with the criteria police must consider to carry out these powers, pursuant to legislation.

As was seen in the discussion about the Suspect Target Management Plan, above, the increased and routine use of police powers can lead to a breakdown of trust between the police and the community, and especially with marginalised community groups such as young people.

Perhaps most importantly for the purposes of the current inquiry, it is likely that setting targets for 'proactive policing' simply increases the interaction between NSW Police and young people generally, and young Aboriginal and Torres Strait Islander people in particular. This then exposes young people to a greater risk of arrest and detention.

Pro-active police targets therefore seems to be contrary to the objectives outlined in the NSW Police Youth Strategy 2013-2017,[42] including:

> Objective 2: Enhance positive relationships between police and youth [and]
> Objective 4: Engage in early intervention and prevention initiatives to divert youth from the criminal justice system.

---

38 Available here: https://www.police.nsw.gov.au/__data/assets/pdf_file/0005/491864/cspc_20170605_Lachlan_m.pdf

39 Available here: http://www.police.nsw.gov.au/__data/assets/pdf_file/0009/459099/cspc_20170306_lachlan_m.pdf

40 Available here: http://www.police.nsw.gov.au/__data/assets/pdf_file/0005/424976/CSPC_05092016_lachlan_m.pdf

41 Available here: http://www.police.nsw.gov.au/__data/assets/pdf_file/0020/352703/cspc_20150610_lachlan_m.pdf

42 NSW Police, *Youth Strategy 2013-2017*, available at: http://www.police.nsw.gov.au/__data/assets/pdf_file/0007/277054/NSWPF_Youth_Strategy_2013-2017.pdf accessed on 5 February 2018.

Proactive policing targets also appears to work in the opposite direction to the expressed objective of the NSW Police Aboriginal Strategic Direction 2012-2017 to 'Promote the diversion of Aboriginal youth from the criminal justice system through initiatives such as the Cautioning Aboriginal Young People (CAYP) protocol and the Protected Admissions Scheme (PAS).'[43]

Given the real possibility that the adoption of specific proactive policing targets is counter-productive to the goal of youth diversion, including the diversion of young Aboriginal and Torres Strait Islander people, from involvement in the criminal justice system, PIAC submits that there should be no such targets specifically applied to young people, and that any activities undertaken in relation to young people should exclude any data from people aged under 18.

Recommendation 4

Proactive policing targets should not be set for activities undertaken by NSW Police in relation to people under 18, and the numbers of activities undertaken by NSW Police in relation to people under 18 should be excluded from overall proactive policing target data.

3.4 Criminal age of responsibility

One of the primary ways in which young people can be diverted from contact with the criminal justice system is by reforming laws to raise the minimum age of criminal responsibility.

Currently, in NSW, the minimum age of criminal responsibility is set at 10 years,[44] with a rebuttable presumption that a child between the ages of 10 and 14 does not possess the necessary knowledge to have a criminal intention (*doli incapax*).

PIAC submits that setting the minimum age at 10 years is too young, and unnecessarily brings young people into contact with the criminal justice system even when they are unable to understand that they have done something wrong.

The United Nations Committee on the Rights of the Child has recommended that 12 years of age should be the minimum age.

The Royal Commission into the Protection and Detention of Children in the Northern Territory specifically addressed this issue, noting that:[45]

> Empirical and scientific research has convincingly shown that:
>
> - Many children and young people who engage in anti-social behaviour and even criminal conduct will mature eventually and become responsible adults
> - Those children and young people who are at risk of continuing on a trajectory of criminal behaviour are able to be deflected from such an outcome, and

---

43 NSW Police, *Aboriginal Strategic Direction 2012-17*, page 28, available at: http://www.police.nsw.gov.au/__data/assets/pdf_file/0003/481215/ASD_2012-2017_Book_Revised_FA_Proof.pdf accessed on 5 February 2018.

44 'It shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence': s 5 *Children (Criminal Proceedings) Act 1987* (NSW).

45 Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report*, Chapter 27, page 410.

- If a child can be kept out of the formal criminal justice system the prospects of staying out are considerably enhanced.

After examining this issue in depth the Royal Commission recommended that 'Section 38(1) of the Criminal Code Act (NT) be amended to provide that the age of criminal responsibility be 12 years' [Recommendation 27.1] while the rebuttable presumption between 12 and 14 would be retained.

In welcoming this decision, a range of relevant groups (including the National Aboriginal & Torres Strait Islander Legal Services, Australian Indigenous Doctors' Association, Unicef Australia, the Lowitja Institute, Human Rights Law Centre and the RACP) called for the criminal age of responsibility to be raised to at least 14 years.[46]

Wayne Muir, Co-chair of the National Aboriginal and Torres Strait Islander Legal Services, called for a system that is 'therapeutically and culturally responsive':

> Children are being labelled criminals when all of our efforts should be focussed on keeping children safe and supported within their communities. Removing children as young as ten from their families and forcing them into the criminal justice system takes away their basic rights as children to learn, grow and thrive.

PIAC supports these arguments and submits that the criminal age of responsibility should be raised to at least that recommended by the NT Royal Commission (12), with consideration to setting it at 14.

Recommendation 5

The criminal age of responsibility should be set to at least 12, in line with the recommendation by the Royal Commission into the Protection and Detention of Children in the Northern Territory, with consideration to setting it at 14.

The NT Royal Commission also examined, in detail, the question of whether young offenders who are found liable for criminal offences should be subject to detention:[47]

> There are many considerations which, singly and in combination, establish that any apparent punishment and deterrent value of detention is far outweighed by its detrimental impacts, particularly for the minority group of pre-teens and young teenagers. The reality of this cohort's developmental status; the harsh consequences of separation of younger children from parents/carers, siblings and extended family; the inevitable association with older children with more serous offending histories; that youth detention can interrupt the normal pattern of 'aging out' of criminal behaviour; and the lack of evidence in support of positive outcomes as a result of time spent in detention are all results of detention that are counter-productive to younger children engaging sustainably in rehabilitation efforts and reducing recidivism.

---

46 HRLC et al, *Media Release: Doctors, Lawyers, Experts Unite in Call to Raise the Age of Criminal Responsibility*, 21 November 2017, available at: https://www.hrlc.org.au/news/2017/11/20/experts-unite-in-call-to-raise-age-of-criminal-responsibility accessed on 2 February 2018.

47 Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report*, Chapter 27, page 419.

As a result of these factors, and other arguments, the Commission recommended that, in addition to children under 14 not being remanded in detention:

> Section 83 of the *Youth Justice Act* (NT) be amended to add a qualifying condition to section 83(1)(l) that youth under the age of 14 years may not be ordered to serve a term of detention, other than where the youth:
>
> - 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.

PIAC agrees with the reasoning outlined by the NT Royal Commission that detention of children younger than 14 is likely to be counter-productive, and that therefore a similar prohibition on remand and detention should be introduced in NSW.

Recommendation 6

Young people under the age of 14 years should not be held on remand, and should not be ordered to serve a term of detention, unless they:

- *Have been convicted of a serious and violent crime against the person*
- *Present a serious risk to the community, and*
- *The sentence is approved by the President of the Children's Court of NSW.*