

Redfern Legal Centre



12 September 2017

Sabina Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: indigenous-incarceration@alrc.gov.au


Dear Ms Wynn,

Please find attached our submission in response to the ALRC inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples.

We thank the ALRC for taking the time to meet with us on 6 March 2017.

We would welcome the opportunity to meet with you to discuss our submission.

Yours faithfully,
REDFERN LEGAL CENTRE


Joanna Shulman
CEO

Redfern Legal Centre



SUBMISSION: **ALRC inquiry into the incarceration rates of
Aboriginal and Torres Strait Islander peoples**

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1. Introduction: Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are tenancy, domestic violence, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. RLC's work with Aboriginal and Torres Strait Islander clients

RLC has a long history of acting for Aboriginal and Torres Strait Islander clients including those who have been the subject of police misconduct.

In the 2015-2016 financial year, we provided legal services to some 4473 individuals from Redfern and surrounding areas, approximately 11.9% of whom identified as Aboriginal or Torres Strait Islander. Sydney Women's Domestic Violence Court Advocacy Service, which is auspiced by RLC, assisted female clients who identified as Aboriginal and Torres Strait Islander with 3595 service events in 2015/2016; these service events involved providing information, advocacy and referrals in domestic violence proceedings.

3. RLC's work in police misconduct

The systemic abuse of police powers towards members of Aboriginal and Torres Strait Islander communities was one of the major catalysis for the creation of RLC in 1977. In 2011, RLC created a state-wide dedicated police misconduct practice. In 2015, the practice partnered with UNSW to create a student clinic. Since its inception, the practice has advised in more than 1900 police misconduct matters. Of those matters, more than 12% identified as Aboriginal or Torres Strait Islander.

Given our unique expertise in the area of policing, in our submission we have focused on the impact of policing on the incarceration rate of Aboriginal and Torres Strait Islander peoples. In respect of the other questions and proposals in the Discussion Paper, we expect that there are other organisations that would be better placed to comment. However, we would be happy to provide our views in any further consultation.

4. Summary of recommendations

Offensive language

- a. Offensive language provisions be abolished.
- b. If offensive language provisions are not abolished:
 - i. a review of the offensive language provisions to improve clarity on the meaning of 'offensive';
 - ii. a cautioning scheme in place to replace the Criminal Infringement Notice (CIN) scheme;

- iii. if the CIN scheme is not replaced, an automatic review by a senior police officer of CINs issued for offensive language;
- iv. police should be required to examine and monitor the use of offensive language provisions in respect of Aboriginal and Torres Strait Islander people.

Police use of street powers

- c. Police agencies be mandated to collect and provide statistics publicly (at minimum on an annual basis) on the use of police powers state by state. Statistics to be made available should include the numbers of arrests, personal searches, search of premises, vehicle stops, vehicle searches, move on directions and bail breaches and officer perceived ethnicity of the person being police, as per the framework set out in the Police Stop Data Working Group report.
- d. Police receive ongoing, specialist training on the legal basis for exercising their powers.
- e. Police are mandated to explicitly use arrest as a last resort when dealing with Aboriginal and Torres Strait Islander people, in state-based legislation governing police powers.

Bail

- f. Compliance checking be subject to the 'reasonable suspicion' test.
- g. Compliance checking be limited to those offenders at high risk of committing further serious offences.
- h. Police report annually on bail compliance strategies, in particular the demographics of offenders targeted, offences for which targeted offenders are on bail and method for calculating the efficacy of bail compliance strategies.
- i. ALRC to consider the weight that is given by police to the factors in s.77(3) of the *Bail Act 2013* (NSW) when deciding what action to take in respect of a breach of bail.
- j. If a decision is made to arrest for a breach of bail, police be mandated to record:
 - a. the factors considered by police in making the decision to arrest); and
 - b. the reasons that it was determined that an arrest was the most appropriate action.
- k. Introduce a cautioning system for technical breaches of bail in NSW such as breaches of curfew conditions, residence conditions and reporting conditions.
- l. Police be required to report annually on the number of arrests for breaches of bail including specific data on the categories of breach.

Proactive policing

- m. Police be required to publish data on the use of the Suspect Target Management Plan (STMP) including Aboriginal and Torres Strait Islander status.
- n. Police conduct an evaluation on the efficacy of the STMP in reducing crime.

Police Accountability

- o. The Law Enforcement Conduct Commission (LECC) and NSW Police develop policies governing the application of section s45(1)(e) of the *Law Enforcement Conduct Commission Act 2016* (NSW) (LECC Act) .

- p. The NSW Police automatically conduct an investigation under Part 8A of the *Police Act 1990* (NSW) where the Court has made a finding that a police officer has engaged in improper or unlawful conduct.

5. RLC's responses to specific issues

5.1. Fines – offensive language

Question 6.4: Should offensive language remain a criminal offence? If so, in what circumstances?

RLC supports the abolition of the offence of offensive language.

The issues raised by stakeholders through the 2012 NSW Law Reform Commission inquiry into Penalty Notices continue to abide. In particular, the indeterminacy of the test for offensiveness, the change in community standards in relation to offensive language, the frequent use of swear words in popular culture and the netwidening effect of the offence, especially in its impact on Aboriginal communities and where it is used as part of a 'trifecta'¹ of offences.

Aboriginal and Torres Strait Islander people are significantly over-represented in offensive language cases. Many offences are committed using language directed only at police and it has been argued that the provisions are part of an "oppressive mechanism of control"². This is particularly so when police employ their power of arrest which can be the precursor to a number of other more serious charges.

Though ostensibly less serious than criminal proceedings, the consequences of receiving a CIN can be significant. Offenders risk enforcement action for failing to deal with a CIN and for the few that elect to have the CIN decided by the Court, they risk incurring a criminal record, a harsher penalty and additional costs³.

Case Study: Sally

Sally suffers from a serious mental illness and is a very vulnerable woman. Sally came to see us having been issued with \$1,100.00 of fines. What started with an infringement notice for smoking in public, culminated in the issue of three separate infringement notices: one for smoking in a public place and two for offensive language (each occurring 50 minutes apart). Sally told RLC that she had told the police officers to "fuck off" on both occasions.

Sally decided not to challenge the CINs in Court. SDR0 commenced enforcement action and are garnishing funds from her Centrelink payments

Sally's conduct was most likely the manifestation of an historically poor relationship with police and intergenerational experiences of over-policing and harassment. Despite having a good chance of satisfying a Court that her conduct was not capable of amounting to an offence, Sally had little

¹ New South Wales Law Reform Commission, Report 132: Penalty Notices, Page xxiv, 2012, page xxiii.

² New South Wales, Victoria & Tasmania, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*(1991), 145.

³ See note 1.

confidence that she would achieve a positive result.

Aboriginal and Torres Strait Islander people are less likely to request a review or elect to have a CIN dealt with by the Court. The review process is challenging and free (or affordable) legal services are generally not available for what is considered to be a minor matter. As a consequence, in the overwhelming majority of cases, decisions made by police to issue penalty notices for offensive language are not scrutinised by the Court.

Through our casework, RLC has identified a pattern of our clients swearing at police in circumstances in which the interaction was wholly unnecessary. Clients report swearing at police out of frustration at being stopped and searched where there does not appear to be any lawful basis for the exercise of power. The Royal Commission into Aboriginal Deaths in Custody recommended that “the use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest or charge.”⁴ However, in the three decades that have elapsed, police have continued to arrest and charge Aboriginal and Torres Strait Islander people for using offensive language that is directed only at police and is often, the result of their own unnecessary intervention.

We are also aware of a number of matters where CINs have been issued in respect of language and/or behavior that would not meet the legal definition of ‘offensive’ and, in some instances, when the individual police officer did not themselves consider the language offensive.

Case Study: George

George was walking along a quiet residential street in Sydney. George usually takes this road to TAFE in order to avoid the busy streets. George was wearing a black backpack and a black hoodie.

Two police officers - conducting patrols in the area at the time - stopped George. Without giving George any reason for being stopped and questioned, the police officers insisted that George explain why he was in the area. George eventually answered by saying “none of your fucking business”. George was immediately placed under arrest for offensive language. A few moments later, the police officer himself used the word “fucking.”

Recommendation

- a. Offensive language provisions be abolished.

Question 6.5: Should offensive language provisions be removed from criminal infringement notice schemes, meaning that they must instead be dealt with by the Court?

The introduction of the CIN scheme for minor public order offending in order to avoid criminal proceedings was a step in the right direction. However the CIN scheme has not achieved this aim and has resulted in further negative impacts including increasing the number of people subject to CINs and therefore fine default. In addition, our experience has been that the CIN scheme has resulted in widening the net of police interactions with Aboriginal and Torres Strait Islander people and in the issuing of CINs in circumstances where diversion is warranted.

⁴ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, National Report (1991) vol 5, recommendation 86(a).

In spite of the concerns noted above, we do not consider that having offensive language provisions dealt with by the Court would be a suitable alternative to the CIN scheme. As outlined below we recommend that if offensive language is not abolished the CIN scheme be replaced with a cautioning system.

Case Study: George part 2

After being detained and forcibly searched, George allegedly committed a further offensive language offence. He was subsequently issued with a CIN.

This issue of the CIN to George was challenged in the Local Court. On the voir dire, it was argued that the statement “none of your fucking business” was not offensive and even if it was offensive, an arrest was improper. The Local Court disagreed, finding that the statement was objectively offensive and that an arrest for the offence was proper to prevent the “repetition of the offence”.

We are concerned that the removal of offensive language provisions from the CIN scheme would result in an increase in the number of arrests and charges laid for offensive language. In our experience, the prospect of going before a court does not act as disincentive for police to charge Aboriginal and Torres Strait Islander people with minor offences.

The case study of George demonstrates that even with the CIN scheme in place, some police officers still consider that an arrest for offensive language is necessary and appropriate. It also demonstrates the problems with the indeterminacy of the test for ‘offensiveness’ and the inherent risk that some individuals will be convicted in respect of conduct that should not amount to a criminal offence.

Recommendations

See above recommendation that the offence of ‘offensive language’ be abolished.

- b. If offensive language provisions are not abolished:
 - i. a review of the offensive language provisions to improve clarity on the meaning of ‘offensive’;
 - ii. a cautioning scheme in place to replace the Criminal Infringement Notice (**CIN**) scheme;
 - iii. if the CIN scheme is not replaced, an automatic review by a senior police officer of CINs issued for offensive language;
 - iv. police should be required to examine and monitor the use of offensive language provisions in respect of Aboriginal and Torres Strait Islander people.

5.2. Key policing issues for Aboriginal and Torres Strait Islander clients

The impact of policing practices on the incarceration rate of Aboriginal and Torres Strait Islander people is significant. Although the impact of policing strategies is acknowledged in the discussion paper, the paper does not include any clear proposals for addressing over-policing of Aboriginal and Torres Strait Islander people.

Given our expertise in the area of policing, we have taken this opportunity to raise key policing issues for Aboriginal and Torres Strait Islander people that we have identified through our policing

practice. We outline a number of recommendations for how police can improve their street policing practices with Aboriginal and Torres Strait Islander peoples.

a. Stop and search

Many of our Aboriginal and Torres Strait Islander clients experience a pattern of routine stop and search by police without a lawful basis. Our clients' experience of police not having a lawful reason for the stop and search justifiably leads many of our clients to reasonably believe they are being racially profiled.

There is a substantial body of international research that identifies racial profiling to be indicated in the absence of a lawful grounds for suspicion.⁵ A recent report of academic experts commissioned by Flemington and Kensington Legal Centre (the Police Stop Data Working Group) sets out detailed recommendations for how Victoria Police can monitor and prevent racial profiling by collecting and making publically available, demographic and ethnicity data on the use of police powers.⁶ We outline below our recommendation that all Australian jurisdictions legislate to mandate police collection and publication of data on the use of their street powers in order to monitor and prevent the overpolicing of Aboriginal and Torres Strait Islander peoples in particular, and also prevent racialized policing more broadly.

Use of search powers against the person are lawful only for the purpose of investigating an offence. For example, in NSW police only have a lawful basis for conducting a personal search if they suspect on reasonable grounds that the person is in possession of something stolen or unlawfully obtained, anything used or intended to be used in or in connection with a relevant offence, a dangerous article that is being or was used in connection with an offence or a prohibited plant or drug.⁷

In the absence of reasonable suspicion for a search, police offer a range of reasons for stopping our clients. These unlawful reasons are evidenced in police records we have obtained and include that the person is in a high crime area or an area known for drug use, that the person has a suspect demeanor, such as avoiding police eye contact or refusing to answer questions or that there is 'intelligence' justifying the stop.

Case Study: Andrew - part 1

Andrew was stopped and searched eight times near or around his housing commission home over a four month period. On one occasion, police drove alongside Andrew while he was walking home with his groceries. Police parked in a driveway in front of him to block his path. When Andrew crossed the road and kept walking, police exited their vehicle and followed him on foot. Police officers asked him where he was going and what he was doing. When Andrew exercised his right to silence, police became increasingly belligerent, asking him "what's with the fucking attitude?" and telling him to "answer the fucking question." When Andrew asked the reason for the search, the officer said that he was in a

⁵ For a comprehensive review see, Police Stop Data Working Group, *Monitoring Racial Profiling: Introducing a Scheme to Prevent Unlawful Stops and Searches by Victoria Police*, 6 September 2017.

<http://www.policeaccountability.org.au/racial-profiling/shrouded-in-secrecy-racial-profiling-by-victoria-police/>.

⁶ Ibid.

⁷ Section 21, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

“high drug area”.

Being in a high drug/crime area is not sufficient to ground a reasonable suspicion and is an unlawful basis for a search. It is also a poor explanation to give to a member of the community. In terms of fulfilling police obligations to provide reasons under s 201 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (**LEPRA**), it is lacking. The message being sent to the community is that people can be searched because of where they live.

For police to demand that someone “answer the fucking question” in the absence of any lawful power to order them to do so is harassment. Not only did this Constable consider lawful silence to be incriminating, he did not consider the exculpatory value of his own recent, unsuccessful searches. Andrew had been repeatedly searched over recent months, and nothing illegal had been found on him.

Andrew’s experience reflects a recurring pattern across our case files where our clients consider they are being policed for being Aboriginal. Many of our clients have the reasonable belief that police are searching them not because they believe they are in possession of items connected to criminal activity, but because they and their communities are permanently under suspicion of offences.

Discriminatory searches increase the risk that Aboriginal and Torres Strait Islander people become enmeshed in the criminal justice system. Unnecessary police encounters predictably generate conflict when the person being policed questions the lawful authority for police power, even through silence, as in Andrew’s case. In RLC’s experience, overzealous police use of search powers often subject our clients to unnecessary charges such as offensive language, resist and assault police.

For our clients who live with physical, cognitive and/or mental impairments, being stopped and searched without a lawful basis compounds experiences of discrimination and vulnerability.

Case Study: Michael

Michael is living with a number of disabilities after suffering a stroke. Michael was sitting in the passenger seat of a car driven by his non-Aboriginal carer, when police pulled up alongside them at traffic lights. After spotting Michael in the car, police following them into the supermarket carpark. Michael and his carer were told to step out of the vehicle and sit on the ground. Multiple more police cars arrived and Michael, his carer and the car were searched. As to the reason for the search, police informed Michael that it was because they “fit the description of someone who had stolen a car,” despite the fact that police had already verified that the vehicle was not stolen. Police failed to give any other explanation for the search. Understandably, our client felt that the decision to stop and search him was based solely on his being Aboriginal.

The use of force, humiliation and threats of arrest when police conduct searches is of great concern. Our clients who have incarceration histories and/or are on parole appear to be particularly vulnerable to unnecessary or unlawful searches. As discussed in section 5.3, our clients with incarceration histories are likely to have been placed on an STMP. This places Aboriginal and Torres Strait Islander people who have been incarcerated on a trajectory of inevitable, pre-

determined and high-level repeat contact with the police and makes them susceptible to unnecessary further enmeshment with the criminal justice system.

Case Study: Drew

Drew was on parole when he came to RLC for help with ongoing police intimidation and harassment, including repeatedly being approached by police officers in the street and questioned unnecessarily about future court appearances. Drew was told by police that he was on the STMP. Drew was stopped on suspicion of drug possession outside a Centrelink office and was told “if you don’t stop, we’ll lock you up.” Drew was ordered to turn out his pockets, take his shoes off and turn his socks inside out.

When this search produced nothing, he was ordered to remove all of his clothes and asked to spread his buttocks. Drew complied with the search, afraid of the consequences if he failed to do so. The strip search occurred in view of members of the public, including school children, who were waiting at a nearby bus stop. Drew was taken into police custody and released without charge.

Drew’s strip search was wholly unnecessary in the circumstances. Moreover the failure of the officers to find a suitably private area to conduct the search, and the presence of members of the opposite gender to Drew at the bus stop, constitute a failure to preserve Drew’s privacy and dignity during the strip search.

For our clients who are on parole, and on the STMP, punitive and coercive encounters such as these present great risks for Aboriginal people to commit ‘police offences’ such as resist/hinder police, assault police, leading to a breach of parole and a return to prison. The aggressive targeting by police of Aboriginal and Torres Strait Islander people who have incarceration histories requires urgent attention to forestall this entirely avoidable pathway back to incarceration.

For the majority of our Aboriginal and Torres Strait Islander clients, a search by police does not locate illegal items. This raises concerning issues about stop and search being used for unlawful and discriminatory purposes including exerting police authority over Aboriginal and Torres Strait Islander peoples, as evident in Andrew and Drew’s experiences.

When police conduct a search and find small quantities of drugs or a knife, RLC’s experience is that police will arrest and charge an rather than divert the person with a caution or a warning.

b. Police move-on directions

Police directions such as move on orders are routinely given to RLC’s Aboriginal and Torres Strait Islander clients without a lawful basis. In NSW the power in s.197 of LEPPRA is exceedingly broad and allows, amongst other reasons, for police to give directions to a person if the person’s presence causes harassment or intimidation, or is causing or likely to cause fear to a person, even if no member of the public is present⁸. In practice, RLC sees a pattern whereby move on directions are issued unreasonably to control Aboriginal and Torres Strait Islander peoples’ use of public space. Move on directions are largely issued and experienced by our clients as a police punishment and their misuse by police contribute negatively to community relations.

⁸ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), ss. 197(1)(b) and (c), ss. 197 (3) and (4).

Case Study: Andrew – Part 2

After Andrew was searched and nothing was found, he was then directed to move on, despite having made it clear that he lived in the adjacent building. Andrew asked if he could “go upstairs” into his building and a Constable responded: “Not unless you tell us who you are going to see.” RLC was of the view that the officers had not complied with s 197 of LEPRA in issuing the move on order, and that they had no power to require Andrew to tell them who he was going to see.

Non-compliance with a move on direction is an offence. In NSW non-compliance with a move on direction has a maximum of 2 penalty units (\$220)⁹. In RLC’s experience, police often issue move on direction as an ‘add-on’, culminating in both the unnecessary exercise of powers and the accumulation of different penalties.

Case Study: Jack

Jack was approached by police outside a sporting stadium for allegedly selling unauthorised tickets to a sporting event. Jack was searched by police, issued with an infringement notice by security staff for selling tickets on Trust land without authority by security staff. Jack was then given a move on direction by police which he did not comply with. Security staff then issued a second infringement notice for failing to comply with a reasonable direction from a Director/Authorised officer. Jack was then placed under arrest by police for failing to comply with the police move on direction and placed in police custody at the LAC.

In this context, the multiple move on directions escalated police/security staff action, leading ultimately to arrest and several hours in custody for an infringement notice offence.

c. Arrest

It is well established that in the common law, arrest is for the purpose of commencing proceedings against a person and is an action of last resort. In RLC’s experience arrest is routinely used against Aboriginal and Torres Strait Islander people as a first resort rather than utilising the range of alternatives available to police such as a Court Attendance Notice (**CAN**), warning or caution. These alternatives are outlined in legislation and guidance manuals for police. It is clear that meaningful action is required to ensure police arrest practices change. The support of police leadership across Australian police agencies to foster an understanding of and commitment to the principle of arrest as a last resort is needed.

To facilitate this we recommend that police are mandated in legislation to explicitly use arrest as a last resort when dealing with Aboriginal and Torres Strait Islander people. Police policy and training alone are insufficient. For example, the NSW Police Aboriginal Strategic Direction Plan (2012 – 2017) has an important priority focus on reducing the involvement of Aboriginal peoples in the criminal justice system. The Plan however makes no mention of the appropriate use of police discretion in exercising police powers as a strategy to support the diversion of Aboriginal and Torres Strait Islander people from the criminal justice system.

⁹ s.9 *Summary Offences Act 1988* (NSW)

The use of arrest against our clients for minor offending is, in most part, unnecessary and, in many cases, unlawful. An unnecessary arrest is often accompanied by an unreasonable use of force. It is a common pattern for our Aboriginal and Torres Strait Islander clients to be arrested for 'police offences' like resist/hinder, assault police, offensive language - offences that usually only arise during the course of unnecessary police encounters.

The violent arrest of an Indigenous teenager in 2012, Melissa Dunn, and her subsequent treatment at the hands of the NSW police force was featured on the ABC's 7.30 report, who broadcast CCTV footage capturing the excessive use of force used in Melissa's arrest.¹⁰ RLC assisted Melissa's mother with a complaint against NSW Police (detailed in section 5.4 below).

Case Study: Melissa – part 1

Melissa had been celebrating a friend's birthday with a group of teenagers outside a McDonald's restaurant. Several of the young people were intoxicated. Melissa's friend was arrested for swearing at police. After Melissa tried to assist her friend by wrapping her arms around her, Melissa was arrested and charged with resisting and hindering police. The Constable who arrested Melissa tackled her to the ground, put her in a headlock, dragged her towards the back of a paddywagon, dropping her on the ground where Melissa hit her head and became unconscious. The Magistrate who dismissed the charges against Melissa found that police used "an inordinate amount of force."

Case Study: Dylan

According to police records, Dylan was detained by police in order to sober up and was released four and a half hours later. After he was released, Dylan swore at an officer and member of the public in the foyer of the police station. Dylan was subsequently arrested for offensive language and escorted to the charge room. During this time he struggled, was pushed to the ground and handcuffed. The arresting officer and another officer dragged Dylan the remainder of the way to the charge room as he refused to stand. After being brought by police to a stand, our client lunged at a third officer in an attempt to head-butt him. Dylan was subsequently detained in a cell, charged with resist officer in execution of duty, assault officer in execution of duty and offensive language. Dylan plead guilty to offensive language and the resist arrest and assault officer charges were dismissed by the court.

The cases of Melissa and Dylan demonstrate the net-widening effect of the offensive language provisions and illustrate how the unnecessary use of arrest by police can be a structural pathway to incarceration.

Recommendations

- c. Police agencies be mandated to collect and provide statistics publicly (at minimum on an annual basis) on the use of police powers state by state. Statistics to be made available should include the numbers of arrests, personal searches, search of premises, vehicle

¹⁰ <http://www.abc.net.au/news/2015-03-24/sydney-mother-launches-legal-action-against-nsw-police/6345392>

stops, vehicle searches, move on directions and bail breaches and officer perceived ethnicity of the person being police, as per the framework set out in the Police Stop Data Working Group report.

- d. Police receive ongoing, specialist training on the legal basis for exercising their powers.
- e. Police are mandated to explicitly use arrest as a last resort when dealing with Aboriginal and Torres Strait Islander people, in state-based legislation governing police powers.

d. Policing bail conditions: Section 2.63 - 2.70

Although RLC does not typically represent people in criminal proceedings, we regularly advise clients who have been subject to onerous bail conditions, oppressive police surveillance and arrests for technical breaches of bail.

Proactive policing of bail compliance

NSW Police routinely engage in proactive policing of bail compliance, purportedly targeting offenders deemed to be at high risk of breach. In practice, this means that police intentionally and frequently engage with those on bail to monitor compliance with bail conditions.

NSW Police consider proactive policing of bail conditions to be an effective law enforcement strategy¹¹ and it has become deeply entrenched in police policy. While monitoring bail compliance may seem like effective police practice, it is problematic when those powers are routinely exercised in the absence of any underlying 'reasonable suspicion' or enforcement conditions. It is our position that in the absence of any such enforcement conditions¹² or 'reasonable suspicion', random bail checks are unlawful.

Case Study: Aaron

Aaron was on bail in relation to an alleged drug offence. He was pulled over by police for a random breath test, which returned a negative result. After running Aaron's details through their system, police became aware that Aaron was on bail in relation to drug charges. Police asked Aaron to undergo a 'random' drug test, which he passed. Police then conducted a search of Aaron and his vehicle, telling him that it was permitted as he was on bail. Police found no drugs as a result of the search.

Although we acknowledge that preventing crime may be more cost-effective than responding to crime, this is not the prevailing purpose of conditional bail. It is inconsistent with the overarching presumption of innocence and the prima facie right to liberty. Furthermore, risk of re-offending is only one of a number of considerations for the Court in making a bail decision and it must be balanced against other factors.

We are also yet to see any evidence that compliance checks actually result in reduced offending,¹³ as opposed to simply increasing the incidence of bail revocations. Additionally, though police claim

¹¹ NSW Police Corporate Plan 2016-2018, Service Delivery Priorities, page 2.

¹² such as a condition requiring that a person on bail present to the door when police attend.

¹³ NSW Government (2012) NSW Government Response to the NSW Law Reform Commission Report on Bail: paras 12.73, 12.75).

to target those at 'high-risk' of breach, in our clients experience, police fail to draw a distinction between those on bail for minor offences and those on bail for more serious offences.¹⁴

It is also our experience that many of those arrested for breach of bail are arrested for committing minor offences - often not related to the original offence for which they are bailed - or for failing to comply with other conditions. Stringent policing of bail conditions has the effect of putting those on bail back behind bars for conduct that is not itself a criminal offence or for offences that would not ordinarily warrant a term of imprisonment.

Case Study: Toby, Part 1

At the age of 15 Toby was on bail for charges of break and enter, larceny and goods in custody. Police deemed Toby a 'high-risk offender' and closely monitored his movements. In a period of four and a half months, Toby was subject to 155 bail checks. Police attended Toby's home frequently and often after midnight, even when Toby was no longer subject to a curfew. On one occasion, Toby reported that Police attended the family home four times in a single night.

Proactive policing of bail conditions is extremely influential in undermining public confidence in the police. Misconduct in discretionary policing has adverse outcomes for the relationship between the community and police and has destabilising effects on family and social relationships.

Case Study: Toby, part 2

The incessant 'bail checks' of Toby impacted not only Toby, but his mother and siblings. Toby's sister dropped out of her HSC and the lease on their family home was not renewed. Toby's mother believes both her daughter's decision to drop out of the HSC and the landlord's decision not to renew the lease were caused by the constant police presence at their home.

Recommendations

- f. Compliance checking be subject to the 'reasonable suspicion' test.
- g. Compliance checking be limited to those offenders at high risk of committing further serious offences.
- h. Police report annually on bail compliance strategies, in particular the demographics of offenders targeted, offences for which targeted offenders are on bail and method for calculating the efficacy of bail compliance strategies.

Dealing with breaches

The common law principle of 'arrest as a last resort' has not been incorporated into s.77 of the *Bail Act 2013* (NSW) and arrest for a breach of bail is often used as a means of first, not last, resort. Furthermore, despite the compulsory language used in s.77(3), police appear to routinely fail to consider the matters prescribed by s.77(3) and even when those matters are considered,

¹⁴ This is an important distinction given that the *Bail Act 2013* (NSW) itself distinguishes between serious offences for the purposes of bail assessment.¹⁴

there is no requirement that the police officer be satisfied that an arrest is “reasonably necessary.”¹⁵

Many of our clients report being arrested for what we would call ‘minor’ or ‘technical’ breaches of bail. These are breaches for which a term of imprisonment would not ordinarily be imposed.

Case Study: Leigh

While on bail and subject to reporting conditions, Leigh became ill. Leigh’s mother contacted Police to advise that he was home ill and unable to attend to report. Police noted his illness in the COPS database but told Leigh’s mother that she would need to provide a medical certificate on the next reporting date. Leigh was unable to provide a medical certificate and when he attended the police station to report on the next occasion, he was arrested for the prior breach and detained in juvenile detention over the weekend.

It is likely that the decision to arrest Leigh was informed by his status as a “high-risk offender” and seen as a method to pursue the STMP. This zero-tolerance approach to breach of bail has the impact of putting those on bail back behind bars for breaches that are not new offences themselves.

Case Study: Jane part 1

Jane attended the police station to report harassment at her residence. At the police station, Jane inadvertently disclosed her current residential address. Unfortunately for Jane, by disclosing her current residential address, she disclosed to Police that she was in breach of the residence condition of her bail. Jane was immediately placed under arrest and detained overnight in a police cell. The following day she was given bail by the Court with no penalty imposed for the breach.

Jane’s case highlights issues with the current formulation of s.77 as well as the attitude of police when faced with minor breaches of bail. It is also illustrative of the ways in which the improper exercise of police powers with respect to minor offences can compound vulnerability.

Recommendations

- i. ALRC to consider the weight that is given by police to the factors in s.77(3) of the *Bail Act 2013* (NSW) when deciding what action to take in respect of a breach of bail.
- j. If a decision is made to arrest for a breach of bail, police be mandated to record:
 - the factors considered by police in making the decision to arrest; and
 - the reasons that it was determined that an arrest was the most appropriate action.
- k. Introduce a cautioning system for technical breaches of bail in NSW such as breaches of curfew conditions, residence conditions and reporting conditions.
- l. Police be required to report annually on the number of arrests for breaches of bail including specific data on the categories of breach.

¹⁵ As required by section 99(1)(b) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

5.3. Other 'Proactive policing' strategies

The STMP is a particularly problematic proactive policing strategy used by NSW Police to target suspected recidivists in order to prevent future offending.

Many of our Aboriginal and Torres Strait Islander clients are placed on the STMP and overpoliced as a result.

Through our casework, we have observed first hand the deleterious effects of the STMP on Aboriginal and Torres Strait Islander people. Clients report being regularly harassed by police in the form of by being visited by police at their homes or stopped in the street, sometimes several times a week. For some of our clients repeated police contact lasts for several months or even years. In attempting to understand police motivation, our clients remark that they "haven't done anything" to warrant constant stop and searches and constant attendances of police at their homes.

Constant harassment of particular individuals, in circumstances in which there has been no re-offending, has a damaging effect on the relationship between that individual and police and on prospects of reintegration into the community. Furthermore, our clients overwhelmingly feel like they are being targeted due to being Aboriginal or for other arbitrary reasons, aggravating the historical experience of discriminatory policing. The efficacy of the STMP as an appropriate crime prevention tool is therefore brought into question.

Case Study: Drew (repeated)

Drew was on parole when he came to RLC for help with ongoing police intimidation and harassment, including repeatedly being approached by police officers in the street and questioned unnecessarily about future court appearances. Drew was told by police that he was on the STMP. Drew was stopped on suspicion of drug possession outside a Centrelink office and was told "if you don't stop, we'll lock you up." Drew was ordered to turn out his pockets, take his shoes off and turn his socks inside out.

When this search produced nothing, he was ordered to remove all of his clothes and asked to spread his buttocks. Drew complied with the search, afraid of the consequences if he failed to do so. The strip search occurred in view of members of the public, including school children, who were waiting at a nearby bus stop. Drew was taken into police custody and released without charge.

While we recognise that there may be some merit in prioritising offenders deemed to be at high-risk of reoffending in a holistic manner to address the causes of offending, there are a number of critical issues with the STMP policy. In particular:

- the STMP often results in unnecessary contact between Aboriginal and Torres Strait Islander people and the criminal justice system;
- the STMP often results in the person being charged with minor offences (see Simon's case study below);
- the STMP perpetuates the inter-generational experience of arbitrary policing;
- the STMP appears to obstruct proper consideration of the conditions of the exercise of police powers;
- in our experience, there does not appear to be any differentiation between those

- convicted of minor offences and those convicted of serious offences; and
- there is no publically available evidence that STMP has the outcome of substantially reducing re-offending so as to justify the tremendous interference with an individual's liberty.¹⁶

Case Study: Simon

Since his release from custody Simon has been subject to constant police scrutiny. His criminal lawyer believes that police suspect Simon is committing property crime in the area but do not have any evidence to link him to those crimes. Police stop Simon in the street and search him or his vehicle. Police search other people when they are arriving and leaving his house. Police have also stopped Simon in the street and if the search produces nothing (which it always does), issue him with an infringement for trivial offending for which police might ordinarily exercise their discretion not to take any action. When Simon asked police officers why they were constantly stopping him, he was told it was because he is a "high risk offender." Simon didn't know what this meant.

Recommendations

- m. Police be required to publish data on the use of the Suspect Target Management Plan (STMP) including Aboriginal and Torres Strait Islander status.
- n. Police conduct an evaluation on the efficacy of the STMP in reducing crime.

5.4. Police accountability and the complaints system

a. Police accountability

Police play a significant role in the prevention and prosecution of crime. However, police have tremendous powers and it is critical that there is a system for monitoring the conduct of police and holding police accountable for any misuse of their powers.

Police misconduct contributes to the rate of incarceration of Aboriginal and Torres Strait Islander people and the inherent weaknesses in the mechanism for complaints means that much misconduct goes undeterred. A core component of accountable policing is an effective complaints system.¹⁷

b. Complaints against police

The pattern of police misconduct commonly experienced by our clients relates to the improper or unlawful exercise of police powers like stop and search, arrest, directions and the use of force.

Where our clients have experienced police misconduct, many decide not to pursue a complaint due to fear of reprisals or because of a lack of faith in the police to independently investigate their complaint.

¹⁶ NSW Police Force Corporate Plan 2016-2018.

¹⁷ Graham Smith, 'Every complaint matters: Human Rights Commissioner's opinion concerning independent and effective determination of complaints against the police', *International Journal of Law, Crime and Justice*, 38 (2010) 59-74 at 59.

Case Study: Andrew part 3

RLC submitted a formal complaint on behalf of Andrew requesting that the officer involved in multiple stop/search incidents be the subject of non-reviewable action per Sch 1 of the *Police Act 1990 (NSW)*, in order to remedy the issues in his understanding of proper police practice and allow him to effectively contribute to community policing. The LAC investigated the complaint but determined that the evidence did not sustain any of the behaviour complained of.

RLC's position and recommendations in relation to the police complaint framework were detailed in our submission to the Review of Police Oversight in NSW.¹⁸ We do not propose to re-state the issues that we raised in that submission within this document but attach it for the ALRC's reference. We also acknowledge that the new oversight body - which arose out of that Review - the Law Enforcement Conduct Commission (LECC) has now commenced operations.

The LECC's investigative powers are limited to 'serious misconduct' meaning conduct that could result in prosecution for an offence or serious disciplinary action, a pattern of misconduct involving more than one occasion or more than one participant that is indicative of a systemic issue or corrupt conduct. Many complaints made by our clients would not necessarily meet the threshold of 'serious misconduct' as defined in the LECC Act, despite the fact that the conduct complained of may involve an abuse of power that routinely impacts Aboriginal and Torres Strait Islander clients. This means that there may be limited oversight of non-serious misconduct, making the role of police in detecting and deterring misconduct more critical. In this regard, we suggest that the LECC interpret s. 10(1)(b) to include a pattern of conduct that disproportionately impacts Aboriginal and Torres Strait Islander people, whether or not the specific incident involves more than one participant.

We acknowledge that it is unlikely that there will be any substantial changes to the police complaint framework in the short or medium-term. However, there are a number of issues that warrant further consideration by the ALRC such as the use of s.45 of the LECC Act to decline to investigate complaints and the absence of any mechanism for the Court to make binding findings about misconduct.

Section 45(1)(e) of the LECC Act, which gives police the power to decline complaints if there is an "alternative means of redress available", is routinely and incorrectly interpreted by police (and the Ombudsman in the past) to include the criminal hearing, as well as civil proceedings against the State of NSW.

Case Study: Bill

Bill was arrested by Police in respect of multiple criminal offences. During his arrest, police used excessive force in restraining him which was captured on in-car-video. Bill didn't raise the excessive force in his criminal proceedings as it was not relevant to the substantive charges. After his criminal proceedings were finalised, Bill made a complaint about the excessive force used by police during his arrest. Despite there being independent evidence

¹⁸ Redfern Legal Centre, Submission to the NSW Department of Justice Review into Police Oversight in NSW, No 21.

of excessive force, police declined to investigate on the basis that Bill had “an alternate means of redress”, being his criminal proceedings.

We acknowledge that there are occasions in which improper or unlawful Police conduct can be relevant to criminal proceedings, for example, pursuant to s.138 of the *Evidence Act 1995* (NSW). However, the Court does not have the power to make a finding that the conduct amounts to conduct under s.9(4)(c) of the LECC Act, which means the criminal process is not necessarily a satisfactory means of redress. Whether the officer will be impuned depends on whether the NSW Police decide to conduct their own investigation and if so, what they find.

Case Study: Melissa part 2

Following the Magistrate’s findings in relation to the conduct of police, NSW Police conducted an internal investigation. NSW Police agreed with the Magistrate’s finding and recommended retraining in restraint techniques for the officer involved.

RLC made a complaint on behalf of Melissa’s mother raising further issues that were not considered in the internal investigation such as the decision by police to bring charges against Melissa, the delay in bringing those charges and problems with the evidence given. NSW Police took more than 19 months to release their decision. Although some of the other issues were acknowledged, NSW Police failed to respond to all of the issues raised and no further disciplinary action was recommended.

Melissa’s case does not send the message that NSW Police are is dedicated to ensuring professional standards or the best performance of the criminal justice system. The police need to listen to informed criticism of their performance if they want to serve the community better. Cases like Melissa’s show the importance of an independent police complaints system, to achieving better discipline and standards within the NSW Police.

Likewise, civil proceedings are commenced against the State of NSW (rather than individual officers) and unless specific disciplinary action is undertaken by NSW Police, it does not necessarily have the effect of deterring future misconduct.

Section 45 should not be used to avoid critical review of police conduct. The improper use of s.45 undermines public confidence in the oversight system. This practice of declining to investigate serious allegations also calls into question the weight that should be given to any statistics proffered by Police about “sustained” complaints for unreasonable force. It begs the question of how many complaints were received but “not sustained” or received but not investigated pursuant to s.45(1)(e).

Recommendations

- o. The LECC and NSW Police develop policies governing the application of section s45(1)(e) of the LECC Act.
- p. The NSW Police automatically conduct an investigation under Part 8A of the *Police Act 1990* (NSW) where the Court has made a finding that a police officer has engaged in improper or unlawful conduct.

6. Conclusion

There is an important connection between the exercise of police powers and the rate of incarceration of Aboriginal and Torres Strait Islander people. It is therefore critical that the ALRC consider measures that may limit the improper exercise of police powers and improve police accountability.