

4 September 2020

NSW Parliament
Legislative Assembly Committee on Law and Safety
By email: lawsafety@parliament.nsw.gov.au

Dear Committee Members,

Re: Inquiry into assaults on members of the NSW Police Force

Thank you for the opportunity to provide comment to this Parliamentary Inquiry.

Community Legal Centres NSW supports the right of all citizens to a safe working life and opposes violence in all its forms. We should all work towards a world where police officers do not experience assault in the lawful exercise of their duties. However we are concerned by the risk that this Inquiry may fail to consider the full range of factors that contribute to high rates of recorded assaults on police. Many of these assaults occur in a context that needs to be fully considered if the frequency of these incidents is to be reduced. We strongly believe that the 'quick fix' here – higher penalties – will be no fix at all, indeed it will make matters worse. This Inquiry offers the panellists the opportunity to reflect on some major social justice problems that are shaping the incidence and nature of interactions with police, including assaults. Many of these problems most significantly impact Aboriginal people in NSW. These include the over-policing and over-incarceration of Aboriginal people in NSW, and the historical role of the Police Force in implementing NSW Government policies that have harmed Aboriginal people and communities. Other problems relate to the disproportionately negative impacts of police actions on people who experience mental ill-health. Community Legal Centres NSW believes:

- Punitive approaches and increased sentences do not work to reduce or eliminate violence or address the socio-economic drivers of criminalised behaviours, like poverty, racism and mental illness.
- There is evidence of ongoing over-policing of Aboriginal and Torres Strait Islander people and communities by the NSW Police Force, directly contributing to high rates of over-incarceration.
- Police officers and the people charged with assaulting police are held to different standards around the appropriate use of force. Courts rarely find police officers' use of force to be excessive. However, members of over-policed communities can be - and frequently are - charged with 'resist arrest' and 'assault police' for even minor acts of non-compliance.
- Police action often escalates rather than diffuses tension in difficult situations. Police are being called as first responders in circumstances where other, more therapeutic interventions would be more helpful. One way of reducing assaults on police would be to remove them from situations where their presence is counterproductive.

In addition to these brief submissions, Community Legal Centres NSW strongly endorses the recommendations made by our member centres, the Public Interest Advocacy Centre and

Redfern Legal Centre. We also endorse the submission made by the Aboriginal Legal Service (NSW/ACT). We believe the Aboriginal Legal Service (NSW/ACT)'s perspective on these matters to be particularly compelling. As an Aboriginal community-controlled organisation working on the frontline of the state's justice response, the Aboriginal Legal Service (NSW/ACT) is perfectly positioned to comment authoritatively on issues involving police interactions with Aboriginal people.

About Community Legal Centres NSW

Community Legal Centres NSW is the peak representative body for over 40 community legal centres in NSW. Our team supports, represents and advocates for our members, and the legal assistance sector more broadly, with the aim of increasing access to justice for people in NSW. Our membership includes three Aboriginal community-controlled services and many centres that operate programs targeting Aboriginal people. Increasing access to justice for Aboriginal people is a key goal of our movement.

Community legal centres are independent non-government organisations that provide free legal help to people and communities at times when that help is needed most, particularly to people facing economic hardship, disadvantage or discrimination.

Community Legal Centres NSW is advised on matters relating to policing by several of our member centres with expertise in policing, including the Public Interest Advocacy Centre and Redfern Legal Centre. We are further advised by the sector's Aboriginal Advisory Group, which includes all Aboriginal workers across our membership. Community Legal Centres NSW is also guided by the advice of allied organisations in the broader legal assistance sector, such as the Aboriginal Legal Service (NSW/ACT).

Punitive approaches and increased sentences don't work

Community Legal Centres NSW believes that increasingly punitive approaches to 'law and order' are ineffective and give rise to multiple unjust outcomes. Criminalising people who experience poverty, discrimination or mental ill-health, locking them away for longer and longer periods of time, and increasing targeted policing of particular demographics and neighbourhoods serves to increase rates of violence and crime rather than decrease them.¹²³⁴

Violence – in all forms and from all sources - is something we should strive to eliminate. Violent interactions between police officers and community members often occur in situations of heightened tension, which are underpinned by historical and socio-economic factors including the historic over-policing of Aboriginal and Torres Strait Islander people and other marginalised groups, racism and discrimination, and poverty. In our members' experience, police violence

¹ Jo Deakin, 'Treating young people like criminals actually makes violent crime worse', *The Conversation*, 28 April 2018, <https://theconversation.com/treating-young-people-like-criminals-actually-makes-violent-crime-worse-91723>

² Oriol Feldman-Hall and Peter Sokol-Hessner, 'Is the Justice System Overly Punitive?', *Scientific American*, 9 December 2014, <https://www.scientificamerican.com/article/is-the-justice-system-overly-punitive/>

³ Rev. D. Anthony Everett, Commissioner of the Kentucky Commission on Human Rights, 'Punitive responses to gang violence are not effective', *Sentencing Project*, 28 March 2018, <https://www.sentencingproject.org/news/punitive-responses-gang-violence-not-effective/>

⁴ Terry Kirby, 'Punitive approach to crime 'will not work': Vengeance likely to breed more violence, leading reformer says', *Independent*, 8 November 1993, <https://www.independent.co.uk/news/uk/punitive-approach-to-crime-will-not-work-vengeance-likely-to-breed-more-violence-leading-reformer-1502871.html>

against members of marginalised communities in particular is too common and too little is done to genuinely address or minimise it.

Rather than adopting and funding punitive responses, including harsher sentences, the NSW Government would be better advised to critically examine the root causes of criminalised behaviours and conflict between communities and police. It could effectively address these causes by implementing compassionate, evidence-based, community-focussed solutions that reduce violence and promote genuine justice, safety and wellbeing. Such solutions include safe and affordable housing for all; programs to address racism, misogyny and other forms of discrimination; a health-based, harm-minimisation approach to substance use; and accessible social services including domestic violence, youth and mental health services.

On this basis, Community Legal Centres NSW does not support increased sentences for the charge of 'assault police', nor an expansion of police powers or responsibilities. Instead we support a justice reinvestment approach under which resources can be diverted from the criminal justice system into community designed and led services that prioritise de-escalation and safety and help build strong, non-violent communities. These reforms would, we believe, create safer communities and reduce the police experience of assault.

Targeted policing

Aboriginal and Torres Strait Islander people in Australia continue to experience the highest rates of over-incarceration in the world. Targeted policing practices have contributed to this damning statistic since colonisation.

The 1996 Australian Human Rights Commission report into Indigenous Deaths in Custody found that Aboriginal and Torres Strait Islander people are disproportionately placed in custody for trivial offences, including those referred to as the 'trifecta phenomenon' (discussed below). Once arrested, Aboriginal and Torres Strait Islander people are far less likely to be granted bail than non-Aboriginal people, and far more likely to die in custody.⁵ As an example of unequal targeting of Aboriginal and Torres Strait Islander people for trivial offences, at the time of the death in police custody of Yorta Yorta woman Tanya Day (2017), data showed that Aboriginal women were 10 times more likely to be targeted by police for public drunkenness than non-Aboriginal women.⁶

Below are listed three further examples of contemporary police practices that disproportionately target and criminalise Aboriginal and Torres Strait Islander people, increase the potential for violence towards them, and generally heighten tensions and distrust between Aboriginal and Torres Strait Islander communities and the police.

Suspect Target Management Program

Under the NSW Police's Suspect Target Management Project (STMP), police create a list of young people they suspect may commit offences. Once identified, these young people are

⁵ Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Chapter 6: Police Practices', *Indigenous Deaths in Custody 1989-1996*, Australian Human Rights Commission, 1 January 1996, <https://humanrights.gov.au/our-work/indigenous-deaths-custody-chapter-6-police-practices>

⁶ Human Rights Law Centre, 'Aboriginal women 10 times more likely to be targeted by police at time of Tanya Day's death in custody', *HRLC*, 30 April 2019, <https://www.hrlc.org.au/news/2019/4/30/aboriginal-women-10-times-more-likely-to-be-targeted-by-police>

repeatedly stopped, detained and visited at home by police.⁷ According to the Public Interest Advocacy Centre:

*The STMP is a very invasive police policy that has significant detrimental impact on the lives of young people who are subject to it, and their families. Some young people, as young as 13, report being stopped and searched in public, including on the train, sometimes several times a week, and visited at home by police, late at night, for no specific reason. We know that children as young as ten have been placed on an STMP. There is no publicly available evaluation or evidence that the STMP actually prevents or reduces crime.*⁸

The program breeds distrust between police and the young people who are targeted, and often leads to a cycle of criminalisation that follows young people into adulthood. Data shows that, as of 2019, more than half of the young people targeted by the NSW STMP are Aboriginal.

Unequal application of drug laws

Another example of unequal and harmful policing is the approach to illicit drugs. In June 2020, *The Guardian* revealed that between 2013 and 2017 the NSW Police pursued charges against more than 80% of Aboriginal and Torres Strait Islander people found with small amounts of cannabis through the courts while letting others off with warnings. This disproportionately forces young Aboriginal people into a criminal justice system that legal experts say they will likely never escape.⁹ This is despite the existence of a specific cautioning scheme introduced to keep minor drug offences out of the courts. The Guardian reported:

*During the five-year period, 82.55% of all Indigenous people found with a non-indictable quantity of cannabis were pursued through the courts, compared with only 52.29% for the non-Indigenous population, the data compiled by the NSW Bureau of Crime Statistics and Research shows. The data shows police were four times more likely to issue cautions to non-Indigenous people.*¹⁰

This is illustrative of a discriminatory approach to drug use that results in systemic injustice and the over-incarceration of Aboriginal and Torres Strait Islander people.

Strip searches

Police disproportionately strip search Aboriginal people. A total of 1,183 Aboriginal and Torres Strait Islander people were strip searched in NSW between 2016 and 2018, including children as young as 10 years old. This represents 12% of all strip searches conducted in the period, despite Aboriginal people making up just 3.4% of the state's population.¹¹

⁷ Claudianna Blanco, 'Racist policing': NSW Police slammed as data reveals more than half of youth targeted by secret blacklist are Indigenous', *SBS News*, 19 April 2018, <https://www.sbs.com.au/nitv/nitv-news/article/2018/04/18/racist-policing-nsw-police-slammed-data-reveals-more-half-youth-targeted-secret>

⁸ Public Interest Advocacy Centre, 'The Suspect Targeting Management Plan', *PIAC*, 23 November 2017, <https://piac.asn.au/project-highlight/the-suspect-targeting-management-plan/>

⁹ Michael McGowan and Christopher Knaus, 'NSW police pursue 80% of Indigenous people caught with cannabis through the courts', *The Guardian*, 10 June 2020, <https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>

¹⁰ *Ibid.*

¹¹ Michael McGowan, 'NSW police disproportionately target Indigenous people in strip searches', *The Guardian*, 16 June 2020: <https://www.theguardian.com/australia-news/2020/jun/16/nsw-police-disproportionately-target-indigenous-people-in-strip-searches>

According to a 2019 report, *Rethinking Strip Searches by NSW Police* by Dr Michael Grewcock and Dr Vicki Sentas:¹²

Aboriginal and Torres Strait Islander people are being strip searched in circumstances where there is an absence of the necessity for the search and of serious and urgent circumstances. Aboriginal and Torres Strait Islander people routinely experience searches, including strip searches, in public places. Personal and strip searches reported to lawyers by Aboriginal and Torres Strait Islander people are often not recorded by police.

In particular, the report highlights:

... longstanding concerns raised by advocates from within Indigenous communities about the disproportionate use of strip searches to intimidate and control Indigenous people... The disproportionate numbers of strip searches conducted on Indigenous people reflects wider discriminatory and harmful impacts of the criminal justice process.

Police action often escalates rather than diffuses tension

The ‘trifecta phenomenon’

Community Legal Centres NSW is concerned by the high numbers of people ultimately charged with ‘assault police’ as a result of the ‘trifecta phenomenon.’ Under this phenomenon, a person is initially targeted for a relatively minor offence (commonly ‘offensive language’). Police intervention escalates rather than diffuses the situation, and the targeted person responds angrily or aggressively. Finally, police charge the person with ‘resist arrest’ and ‘assault police’ in addition to the original, minor infringement.¹³

Community Legal Centres NSW endorses the recommendations of the Aboriginal Legal Service (NSW/ACT) in relation to the ‘trifecta phenomenon’ and draws the Panel’s attention to the case studies provided by the Service, which demonstrate this phenomenon and the police’s propensity to escalate rather than diffuse tension in interactions with Aboriginal and Torres Strait Islander people in particular.

‘Reasonably necessary’ use of force and the ‘agony of the moment’ lens: a double standard between police officers and members of the public

The key statutory provisions for allowable use of force by police in NSW are sections 230 and 231 of *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) (LEPRA)*.¹⁴

230 Use of force generally by police officers

It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function.

231 Use of force in making an arrest

¹² Dr Michael Grewcock and Dr Vicki Sentas, *Rethinking Strip Searches by NSW Police*, UNSW Sydney, 2019: <https://rlc.org.au/sites/default/files/attachments/Rethinking-strip-searches-by-NSW-Police-web.pdf>

¹³ Australian Human Rights Commission, *Indigenous Deaths in Custody: Report Summary*, 1996, see: parts 4.5, 6.4, 7.2 and 7.3: <https://humanrights.gov.au/our-work/indigenous-deaths-custody-report-summary>

¹⁴ *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*, s 230-231 <https://www.legislation.nsw.gov.au/#/view/act/2002/103/part18/sec231>

A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest.

What is ‘reasonably necessary’ in any situation depends on context. However when police use of force is challenged in court, it is very rare for a court to find that the use of force was beyond that which is reasonably necessary.¹⁵ One reason for this is that courts evaluate police conduct in light of ‘the pressure of the events and agony of the moment’ and not by reference to hindsight.¹⁶ However, the same ‘pressure of events’ lens is seldom applied to an analysis of the behaviour of members of the public against whom police force is being exercised. Instead, if an arrestee resists in any way, police officers can legally increase their use of force, and the arrestee is likely to be given greater charges, including ‘assault police’.¹⁷

As Connor J stated in *McIntosh v Webster*:¹⁸

[Arrests] are frequently made in circumstances of excitement, turmoil and panic [and it is] altogether unfair to the police force as a whole to sit back in the comparatively calm and leisurely atmosphere of the courtroom and there make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances.

This analysis surely underestimates the capacity of highly trained, professional police to analyse objectively the level of threat in situations of heightened tension and potentially reduces accountability for disproportionate use of force, all while members of the public are granted no such leniency.

Section 230 is underpinned by an implied understanding that police officers must discharge their duties, including conducting arrests, even if there is significant risk of injury to a suspect or bystander. Courts have found that police officers should not be limited by the fear of liability to ‘suspected criminals, victims or bystanders because that will impede the discharge of those duties.’¹⁹

Section 230 is also underpinned by an assumption that ‘the community requires a strong and energetic police force to enforce criminal law by preventing crime and protecting members of the public from injury to their person and damage to their property.’²⁰ Under this ‘policing as crime prevention framework’, a stricter approach to the use of force is not supported because it would render policing ‘unduly defensive and therefore inefficient, and, as a consequence, members of the community would be put at risk.’²¹

¹⁵ For a small body of the relevant authorities, see, e.g., *Ussher v State of NSW* [2017] NSWDC 189; *State of New South Wales v Ouhammi* [2019] NSWCA 225; *Charara v New South Wales* [2009] NSWDC 263; *Reznytska v State of New South Wales* [2012] NSWCA 103; *Wessell v State of NSW* [2017] NSWDC 235; *Reilly v State of New South Wales* [2016] NSWDC 234 .

¹⁶ <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NWCA/2001/35.html>

¹⁷ RW Harding, *The Law of Arrest in Australia* (eds Duncan Chappell and Paul Wilson) p 254 of Australian Criminal Justice System 1977 cited in http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NWDC/2010/243.html?context=1;query=%22leara2002451%20s230%22;mask_path=

¹⁸ (1980) 43 FLR 112 at 123

¹⁹ *State of New South Wales v McMaster* [2015] NSWCA 228 at [26] (Beazley P)

²⁰ *Australian Capital Territory v Crowley* [2012] ACTCA 52 at [271] (Lander, Besanko and Katzmann JJ)

²¹ Above n 14

This reinforces the sense that police officers are constantly operating in situations of urgency, and that options like de-escalation, diffusion or issuing cautions are rarely 'reasonably appropriate.' Instead force is the primary, and 'reasonable' option.²² Through this lens, everything from a 'sudden movement'²³ to walking towards the officers²⁴ can present unpredictable intention and justify the use of force in the moment.

This framework for viewing police use of force is problematic. Police officers are not all about crime prevention. Police officers cannot and should not be everywhere at all times. Police very often arrive after an incident and attempt to fulfil a responsive function. Police guidelines and culture should reflect this reality in relation to appropriate use of force, rather than framing police work as taking place entirely in the context of urgent crime prevention.

Unlike some parts of the United States,²⁵ there is no general principle that the use of force should be a 'last resort' in New South Wales. This sets a dangerous double standard in which a heavily armed police officer is legally authorised to use a significant amount of force against a person. Yet if that person responds in any way, including in self-defence, they will then almost certainly be charged with 'resist arrest' and 'assault police'. If the aim is to reduce violence against police, then a key consideration must be preventing escalation from 'incident' to 'violent incident' and ensuring police contribute to de-escalation.

Police responses to people experiencing mental health crises

Police responses to people experiencing mental health crises often tend to do more harm than good. The official Memorandum of Understanding between NSW Health and the NSW Police Force regarding the role of police in responding to mental health crises states that 'Police **may** be required to attend situations which pose a threat to public safety, e.g. involving violence or the imminent threat of violence, or where weapons are involved or where a crime is being committed.'²⁶

However the reality is that police officers are deployed as a matter of course when emergency services are called to assist a person in a mental health crisis. Officers deployed can outnumber medical staff, are fully armed, and often cause the situation to escalate. This is despite the fact that the MOU itself recognises that, 'for the most part, attendance by police at non-urgent mental health related incidents is associated with poor outcomes for mental health consumers and should be a last resort'.

Disproportionately, people with mental illness who are criminalised or imprisoned are Aboriginal or Torres Strait Islander. Dr Eileen Baldry, Professor of Criminology at UNSW, notes that Aboriginal people generally do not have the same access to early childhood services that would diagnose and support people with mental-illness or cognitive impairments. Equitable access to

²² State of New South Wales v Ouhammi [2019] NSWCA 225 at [198]-[201] (Simpson AJA)

²³ Ibid

²⁴ Wessell v The State of New South Wales (No. 2) [2017] NSWDC 235: <http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NWDC/2017/235.html?stem=0&synonyms=0&query=nsw%20consol+act%20learn+2002451%20s230>

²⁵ Rebecca Everett, 'Camden police launch strict 'last resort' use-of-force policy. County wants it to be a national model', *New Jersey*, 23 August 2019, <https://www.nj.com/camden/2019/08/camden-police-launch-strict-last-resort-use-of-force-policy-chief-wants-it-to-be-national-model.html>

²⁶ NSW Ministry of Health, *NSW Health – NSW Police Force Memorandum of Understanding 2018*, March 2018, https://www.police.nsw.gov.au/_data/assets/pdf_file/0003/560289/MOU_NSWH_NSWPF_Mar18_V5.pdf

such early supports could prevent a significant number of Aboriginal people with mental illness from ending up in the criminal justice system.²⁷

A damning 2010 study into the mental health histories of people against whom the Victoria Police used lethal force revealed that 42 of the 48 fatalities recorded in Victoria Police's Use of Force Register between 1982 and 2007 involved people with mental illness.²⁸

The 2018 death of a mental health patient in Camperdown is just one NSW example of where the involvement of police in responding to people in mental health crises resulted in immense harm. The 30-year-old was seen acting erratically before police restrained him and took him to Royal Prince Alfred Hospital under the Mental Health Act. According to a spokesperson from the hospital, the man was initially compliant and cooperated with medical staff in the emergency department before becoming agitated and fleeing. No staff were injured. At least six police officers found him later that same day, tased him multiple times and deployed capsicum spray.²⁹ The man then lost consciousness and stopped breathing.

These statistics and stories demonstrate how police officers' interventions risk escalating tense situations to the point where force is used. This can result in charges of 'assault police' being laid on the person experiencing a mental health crisis and, in the most serious cases, their injury or death.

This risk of force against people experiencing a mental health crisis is heightened further when the person in crisis is Aboriginal or Torres Strait Islander. We draw the Panel's attention to the case studies included in submissions by the Aboriginal Legal Service, which further reinforce this point.

Conclusion

NSW police should enjoy safety at work. However the high number of 'assault police' charges will not be reduced by increasing penalties, but only through a broader reimagining and restructuring of police role in NSW. Police are being asked to manage situations where their presence is counterproductive, and the consequence is risk to themselves and to others. It is also impossible to deal with the issue of assault police charges without recognising the impact of over-policing and targeted policing practices on Aboriginal and Torres Strait Islander people and the criminalisation of race and poverty that results. By recognising these problems and instituting changes to address them, levels of violence can be reduced statewide and we will all enjoy greater safety as a consequence.

Community Legal Centres NSW is committed to improving just outcomes and working to build strong, non-violent communities. We believe the strategies outlined in this submission will contribute to reducing violence, to the benefit of police officers and the public.

²⁷ John Stewart and Brigid Anderson, 'Indigenous people with mental health issues 'on a train' to jail: UNSW study', *ABC News*, 2 November 2015, <https://www.abc.net.au/news/2015-11-02/indigenous-people-mental-health-issues/6904838>

²⁸ Dragana Kesic, Stuart Thomas and James Ogoff, 'Mental illness among police fatalities in Victoria 1982-2007: case linkage study', *Australian and New Zealand Journal of Psychiatry*, 2010, vol. 44, no. 5, pp. 463-468.

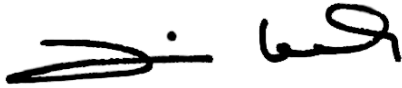
²⁹ Paige Cockburn and Sarah Hawke, 'Mental health patient who died in Camperdown resisted arrest before being tasered, police say', *ABC News*, 19 February 2018, <https://www.abc.net.au/news/2018-02-19/man-killed-in-police-incident-resisted-arrest/9461422>

More information

Thank you for taking the time to consider our submission.

If you have any questions or require further input, please contact Emily Hamilton via emily.hamilton@clcnsw.org.au or (02) 9212 7333.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tim Leach', with a horizontal line underneath the first part of the signature.

Tim Leach
Executive Director
Community Legal Centres NSW