6 June 2018

public interest
ADVOCACY CENTRE

Ms Elspeth Dyer
Committee Manager
Legislative Assembly Committee on Law and Safety
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Ms Dyer

Inquiry into the adequacy of youth diversionary programs in NSW – Question on Notice

I appeared before the Committee on Law and Safety at its hearing on Monday 30 April 2018 as part of the Inquiry into the adequacy of youth diversionary programs in NSW.

At that hearing, I took a question on notice in relation to Recommendation 6 from PIAC's submission to this inquiry, namely that:

> 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.

In relation to this recommendation, I note that it draws heavily on the work done by the *Royal Commission into the Protection and Detention of Children in the Northern Territory*, and specifically its recommendation 27.1 that:

> 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.

In reaching that conclusion, the Royal Commission noted that:

> Imposing a minimum age eligibility for detention reflects practices in other international jurisdictions… where children over the age of criminal responsibility are protected from certain sentencing options until they reach higher age thresholds, and there is heavy investment in pre-court diversion alternatives (page 418).

Further, the Royal Commission reported that:

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> 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 serious 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 sustainable in rehabilitation efforts and reducing recidivism.
>
> There is therefore strong evidence in support of restricting the ages of children who may be admitted to detention and for those younger children, focussing intervention in response to their offending wholly around their family life and social network in the community. There would be an exception for children who have committed violent crimes, who were a risk to the community, where the President of the proposed Children's Court would have to approve the sentence. It is anticipated this would be rarely used (page 419).

PIAC was persuaded by this reasoning, and its applicability to NSW, hence the recommendation in our submission that, as well as raising the minimum age of criminal responsibility to 12 years, children under the age of 14 should not be detained at all outside narrowly defined circumstances.

The reference to remand that was included in our recommendation was also based on the Royal Commission's earlier statement that: 'The Commission recommends that for children under 14 years, detention should not be a sentencing option, nor should children under 14 years be remanded in detention' (page 418).

It was referenced in our submission as part of our overall view that criminalisation, and detention of young people, and particularly those who are under the age of 14, is in fact counter-productive to the goal of diverting young people, including young Aboriginal and Torres Strait Islander people, from the criminal justice system.

In the course of the hearing, there was an exchange between myself and the Member for Epping, Mr Damien Tudehope MP, about the meaning of Recommendation 6 from PIAC's submission to the inquiry.

Mr Tudehope appeared to take the view that the reference to remand in Recommendation 6 was a reference to young people in custody who had been denied bail following an application for bail. In this context, he felt our recommendation was unnecessary because he considered that it was already reflected in the *Bail Act 2013* (NSW) (**Bail Act**).[1]

However, denial of bail following arrest for suspected offending is not the only way a young person may be detained on remand.

A young person already released on bail, who has failed or is suspected of failing to comply with a bail condition, can be arrested by a police officer and held on remand before being brought before the Court for reconsideration of bail.[2] Accordingly, a reference to young persons on remand comprises *both* those who have been denied bail in relation to suspected offending and those who have been arrested and detained for breach of bail conditions.

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[1] Evidence to Committee on Law and Safety, Parliament of NSW, Sydney, 30 April 2018, 32, (Mr Damien Tudehope MP, Member for Epping).

[2] *Bail Act 2013* (NSW) s 77 (1)(e).

In fact, a review of matters in the Parramatta Children's Court in the period 2008 to 2010 found that the majority of remand episodes arose as a result of a breach of bail.[3] It was this proportion of the remand population that I was referring to in the exchange with Mr Tudehope.

The factors a police officer must consider whether deciding what action to take when confronted with a suspected breach of bail are set out in the Bail Act s 77(3). The age of the person is not a specific consideration. The concern is that many young people are detained on remand for technical breaches of bail conditions (such as curfews or residence conditions) as opposed to serious suspected offending.

To address this, in addition to recommendation 6, we suggest the Bail Act be amended to reflect the approach taken by the *Royal Commission into the Protection and Detention of Children in the Northern Territory.* That is that when confronted with breach of bail by young people (and particularly children under 14 years old), police be given the power to:

> a. issue an informal or formal written warning to a young person believed to have breached any bail condition, or
>
> b. where a breach has occurred more than once, issue a summons to a young person who has breached bail requiring them to come before the court to determine the consequences of any breach.[4]

I trust this additional information is of assistance to the Committee in its consideration of this topic.

Yours sincerely

[redacted]

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[3] Katherine McFarlane, *Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system* (2015), p 135, available at: http://unsworks.unsw.edu.au/fapi/datastream/unsworks:38185/SOURCE02?view=true>

[4] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017), vol 2B, 298 (Recommendation 25.19 (5)).