

**INQUIRY INTO HIGH LEVEL OF FIRST NATIONS
PEOPLE IN CUSTODY AND OVERSIGHT AND REVIEW OF
DEATHS IN CUSTODY**

Organisation: Law Enforcement Conduct Commission

Date Received: 7 December 2020

Memo

To: Chief Commissioner Blanch; Commissioner Drake
From: Prevention & Education Team
CC:
Subject: NSW Parliamentary Inquiry into the high level of First Nations people in Custody and Oversight and Review of Deaths in Custody.
Date: 23 November 2020

Dear Commissioner Drake,

Prevention notes that on December 7, 2020, the Commission will give evidence before the NSW Parliamentary Inquiry into the high level of First Nations people in Custody and Oversight and Review of Deaths in Custody.

In undertaking our systems focussed work, Prevention has encountered the (disproportionate) use of police powers on Aboriginal people in various projects. We have drawn together a high level summary of these findings to inform the Commission's preparation for the upcoming hearing.

Operation Tepito

In relation to the use of the NSW Police Force (NSWPF) Suspect Target Management Plan (STMP) on children and young people under Operation Tepito, the Commission's analysis showed patterns of targeting that appear to have led to unreasonable, unjust and oppressive interactions for young STMP targets. Our analysis suggests that 72% of the investigation cohort were young people that had been identified by the NSW Police Force (NSWPF) as 'possibly ATSI'. The Commission's investigation did not analyse whether the STMP nomination of young people in the cohort could be justified on the information gathered. However, the fact that 72% of children and young people in the Commission's investigation cohort were recorded by the NSW Police Force as being 'possible ATSI', raises questions about the effects of the target selection process.

The Commission shared concerns with the NSWPF about the effects of STMP target identification process in not demonstrating sufficient rigour so as to prevent the unfair targeting of certain types of young offenders and ameliorate officer bias in who gets selected. For obvious reasons, even the appearance of discrimination in the application of a policy such as the STMP can have negative implications for its

effectiveness.

Given the *Young Offenders Act 1997 (NSW)* emphasises as one of its principles the need to address the over representation of Aboriginal and Torres Strait Islander children and young people in the criminal justice system, the Commission encouraged the NSWPF to carefully scrutinise the reasons for the high representation of young Indigenous STMP targets, to ensure it is consistent with the intention of Parliament to address the over representation of Aboriginal and Torres Strait Islander children and young people in the criminal justice system.

In November 2020 the NSWPF introduced the STMP III, which was developed by the NSWPF in response to the recommendations contained within the Commission's Operation Tepito interim report. Under the STMP III, the NSWPF has amended the STMP selection and risk assessment process, and has committed to increasing the use of specially trained officers to address youth related recidivism e.g. youth trained officers and Aboriginal Liaison officers. The NSWPF has also revised the way it reviews and evaluates the effects of the STMP on an individual, in line with the Commission's recommendations.

The Commission will monitor the roll-out of the STMP III, and will undertake a review of its effectiveness in the Final Operation Tepito report which is to be completed in 2021.

Use of consorting powers

The Commission is currently undertaking a legislative review of the operation of the amendments to the consorting law under Part 3A Division 7 of the *Crimes Act 1900 (NSW)*. A draft interim report is currently being prepared for the consideration of the NSWPF, the focus of which is a review of the legislative amendments aimed at reducing the application of consorting laws to minors, and disadvantaged and vulnerable people not involved in serious criminal activity, including Aboriginal people.

The Commission's analysis shows that 2,361 people were subject to the consorting law across NSW in the period 28 February 2019 to 30 June 2020. Across all ages, the Commission has found that 40% of those subject to the laws were Aboriginal. In terms of children and young people aged 10-18 years, the Commission has found that 25% were Aboriginal. It should be noted that this analysis has yet to be presented to the NSWPF for response.

The Commission is concerned by the high rates of Aboriginal people subject to the consorting law, and will be seeking the advice of the NSWPF about what can be done to reduce the over-representation.

Strip Searches

Prevention is currently finalising the Commission's Inquiry into NSWPF strip search practices (the Inquiry). A draft report is currently with the NSWPF for review and comment and it is expected the report will be made public in mid-December 2020.

The Inquiry draws together findings of the seven investigations conducted by the Commission pursuant to Part 6 of the LECC Act regarding NSWPF strip search practices, as well as police investigations oversighted by the Commission and analysis of policies and processes used by the NSWPF.¹ The Inquiry highlights some of the systemic deficiencies identified by the Commission about how NSWPF officers undertake and record strip searches, as well as the substantial changes to policy and training implemented by the NSWPF in response to the Commission's concerns.

Over the four years from 2015-19 a high proportion of people strip searched identified as Aboriginal. In 2018-19 Aboriginal people accounted for 17.1% of total persons strip searched. Of the total number of persons strip searched in 2018-19, Aboriginal people represented 8.9% of those strip searched in the field and 23.6% of those strip searched in custody.

In 2019-20, 17.8% of all strip searches were conducted on Aboriginal people. Of the total number of persons strip searched in 2019-20, Aboriginal and Torres Strait Islander people represented 12.6% of those strip searched in the field and 22.4% of those strip searched in custody.

The Commission hopes that as a result of the Inquiry and the recommendations we propose to make, the NSWPF will increase its attention on the underlying reasons for this concerning statistical pattern.

NSW Police Force Aboriginal Strategic Direction

The NSWPF Aboriginal Strategic Direction (ASD) is a policy that sets out how the NSWPF will engage with Aboriginal communities. It contains a number of key priority areas against which the NSWPF is to report progress and outcomes. These include but are not limited to issues such as diversion of youth from the criminal justice system; making Aboriginal communities safer; and reducing crime and violence.

At page 15 of the ASD, the Commission is tasked with monitoring the progress of the NSWPF against the requirements of the ASD, as set out below:

¹ Operation Karuka; Operation Sandbridge; Operation Mainz; Operation Brugge; Operation Gennaker; Operation Grassmoor; and Operation Porto.

4.1 Monitoring outcomes of the ASD

Formal reporting against ASD achievements and outcomes will be undertaken quarterly by reporting commands utilising COMPASS. Regional performance will be monitored and reported against by Regional Sponsors at the quarterly ASD Steering Committee meetings. An annual report will be produced on the progress by reporting commands against outcomes in the ASD. The progress of the NSWPF will be monitored by the Law Enforcement Conduct Commission.

The Commission has requested, and is expecting to receive in the near future, information on the NSWPF performance against its ASD and looks forward to reviewing the mechanisms that the NSWPF has in place to respond to the specific social needs, and legal protections afforded to, Aboriginal people and communities.

Summary

Aboriginal and Torres Strait Islander people have been represented at the following rates in recent work undertaken by the Commission's Prevention Team: 72% in the STMP cohort; 40% in the consorting cohort and 18% in the 2019-2020 strip search cohort. Compared with their demographic representation in the community at 3% of the population, this is a concerning trend.

The Commission acknowledges the over-representation of Aboriginal people in the criminal justice system is reflective of a problem that has been identified generally in the Australian community about how this system interacts with Aboriginal people, and is not solely derived from interactions with police. Notwithstanding, policing approaches; the types of policing interactions that occur with Aboriginal people and their communities; and the mechanisms employed by the NSWPF to ensure the needs and legal entitlements of Aboriginal people are met, directly impact the current rates of Aboriginal over-representation and must be acknowledged in this current debate.

Thank you for your consideration.

Kind regards