

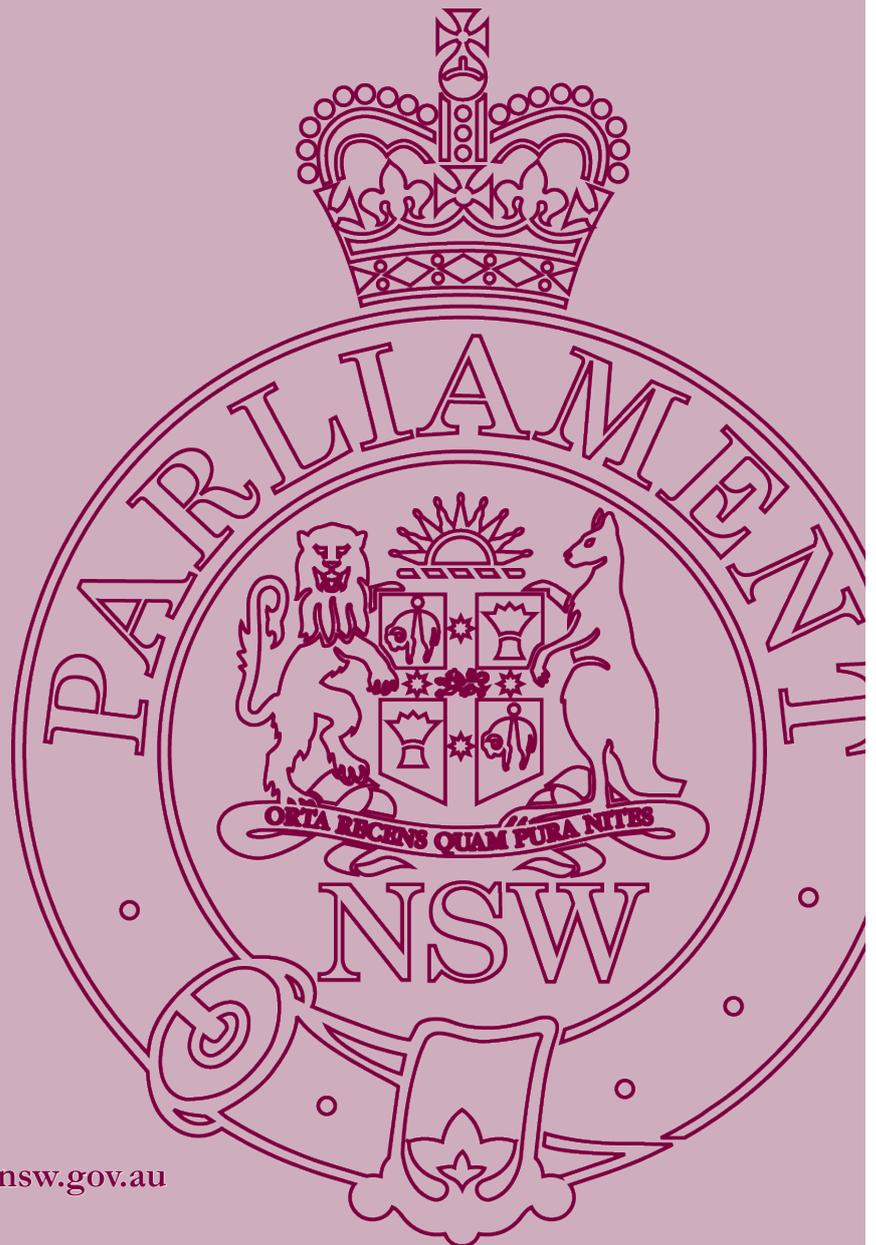


LEGISLATIVE COUNCIL

SELECT COMMITTEE ON THE HIGH LEVEL OF FIRST NATIONS PEOPLE IN
CUSTODY AND OVERSIGHT AND REVIEW OF DEATHS IN CUSTODY

The high level of First Nations people in custody and oversight and review of deaths in custody

April 2021



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Select Committee on the high level of First Nations people in custody and oversight and review of deaths in custody

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Chair: Hon Adam Searle MLC

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Terms of reference

1. That a select committee be established to inquire into and report on First Nations people in custody in New South Wales, and in particular
 - (a) the unacceptably high level of First Nations people in custody in New South Wales,
 - (b) the suitability of the oversight bodies tasked with inquiries into deaths in custody in New South Wales, with reference to the Inspector of Custodial Services, the NSW Ombudsman, the Independent Commission Against Corruption, Corrective Services professional standards, the NSW Coroner and any other oversight body that could undertake such oversight,
 - (c) the oversight functions performed by various State bodies in relation to reviewing all deaths in custody, any overlaps in the functions and the funding of those bodies,
 - (d) how those functions should be undertaken and what structures are appropriate, and
 - (e) any other related matter.
2. That the committee report by 15 April 2021.¹

The terms of reference were referred to the committee by the Legislative Council on Wednesday 17 June 2020.²

¹ The original reporting date was by the final working day in March 2021 (*Minutes*, Legislative Council, 17 June 2020, pp 1057- 1059). The reporting date was later extended to 15 April 2021 (*Minutes*, Legislative Council, 17 February 2021, p 1915).

² *Minutes*, NSW Legislative Council, Wednesday 17 June 2020, pp 1069-1071.

Committee details

Committee members

The Hon Adam Searle MLC	Australian Labor Party	<i>Chair</i>
Mr David Shoebridge MLC	The Greens	<i>Deputy Chair</i>
The Hon Trevor Khan MLC	The Nationals	
The Hon Rod Roberts MLC	Pauline Hanson's One Nation	
The Hon Penny Sharpe MLC	Australian Labor Party	
The Hon Natalie Ward MLC	Liberal Party	

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Chair's foreword

The tabling of this report today marks 30 years since the *Royal Commission into Aboriginal Deaths in Custody*, and sadly, we are no closer to addressing the over-representation of First Nations people in the criminal justice system. While being Chair of this important inquiry has been a privilege, I have also felt the enormous responsibility of the task at hand, particularly when you consider the extensive number of previous reports and reviews that have come before us, most of which have failed to effect meaningful change.

It is extremely disappointing that many of the recommendations made in one of the most influential reports of our time, the *Royal Commission into Aboriginal Deaths in Custody*, have still not been implemented, and that governments have even given up monitoring the implementation of those recommendations.

While many inquiry participants are rightly concerned that this report will be just one more left on the shelf to gather dust, we believe that this report and its recommendations provide the opportunity to bring about important changes for First Nations peoples, particularly in light of the momentum currently taking place with Black Lives Matter movements here and around the world.

While many of the recommendations in this report go to dealing with the symptoms of over-representation of First Nations people in custody, it is clear that the multi-generational disadvantage that First Nations people have faced over time, in areas such as health, housing, employment and education, and the historical dispossession and systemic racism, which underscores each First Nation person's experience with the criminal justice system, must be addressed by government.

This is why the committee has made recommendations to achieve parity in prison rates by 2031, under the *National Closing the Gap Agreement*, and to properly fund community-led justice reinvestment initiatives, to empower the affected communities who know best how to tackle these issues. These are amongst several other recommendations we have made to address the issues within the criminal justice system itself.

It is also critical that the government focuses on youth diversionary programs, to break the cycle of disadvantage and prevent young people entering the criminal justice system and then re-offending later in life. In this regard, the committee makes a number of recommendations relating to youth, including raising the age of criminal responsibility to at least 14 to ensure youth are not caught up in the system, developing therapeutic pathways that integrate health, education and housing approaches to youth behaviour for children between the ages of 10 and 14, enhancing diversion under the *Young Offenders Act 1997*, and establishing a dedicated court list for proceedings involving First Nations children in the Children's Court of NSW.

Turning to the main focus of this inquiry – deaths in custody and the oversight arrangements in place to investigate and review each death. Every unavoidable death that occurs whilst a person is in custody is a tragedy, and the impact on families and communities when a loved one is lost in custody is truly heart-breaking.

The committee heard from a number of First Nations families who have tragically lost a loved one in custody. We acknowledge how difficult it must have been for these families to come forward and speak about their profound grief. Although the committee was not able to re-open or resolve any outstanding issues from the specific cases, the input from families was invaluable, helping us to make our recommendations to address system wide issues.

This report highlights that the current arrangements for reviewing deaths in custody are complex, with many of the functions overlapping across a number of different oversight bodies and not one lead body

to coordinate an effective approach. First Nations families lack confidence in the current system, which is plagued by doubts about independence and transparency. A better approach to overseeing deaths in custody is critical to addressing these concerns.

During this inquiry there were three regularly cited pathways to enhance the effectiveness of the current oversight arrangements; one was to improve the resources and jurisdiction of the NSW Coroners Court; the second was the creation of a new independent investigative body; and the third was that the investigative function be undertaken by the Law Enforcement Conduct Commission.

Our preferred choice is to enhance the role of the NSW Coroners Court, but unfortunately the lack of resourcing and a much needed review of this jurisdiction makes this option not viable at this time. The second option, which we were sympathetic to, focused on establishing a First Nations-led independent body, but it is our belief that the weight of expectations on this body would be highly problematic, in addition to it taking a significant amount of time to establish. The best way forward the committee agreed on was to expand the functions of the Law Enforcement Conduct Commission to undertake full investigations in relation to deaths in custody, with appropriate resourcing and support. Alongside this, the appointment of a First Nations senior officer, will ensure the Commission is genuine and culturally safe in its approach.

In relation to the coronial jurisdiction, which plays a significant role in this space, there were many concerns regarding the resourcing and timeliness of coronial inquests that are impacting significantly on the families that must endure them. A comprehensive review of the coronial system has not been done since 1975 and is much needed to modernise this important jurisdiction. This committee therefore has recommended that such a review occur, alongside a number of other recommendations to enhance the effectiveness of the Coroners Court.

I also wish to note that late in the piece, the committee received an unpublished report from the NSW State Coroner which will be tabled shortly in the NSW Parliament. This report is a valuable piece of evidence, and although the committee was not able to refer to it extensively, we acknowledge that it is an excellent adjunct to this report.

The committee thanks all those who participated in this inquiry through their submissions and oral evidence. I wish to make particular mention to the families who have lost a loved one in custody, who came before this committee to speak so openly and honestly about their experience. I acknowledge that this would have been immensely difficult for you and thank you again for having the courage and resilience to share your story.

I also wish to acknowledge and thank my committee colleagues for their participation in this important inquiry and for working collaboratively to find a way forward on these issues. I also thank the secretariat for their hard work and professionalism.

Although there were some differences of opinion amongst committee members, the vast majority of the recommendations made in this report were agreed to unanimously. I hope this report provides a realistic roadmap for the NSW Government to deliver better outcomes for First Nations people and for others in the criminal justice system. I commend the report to the House.



Hon Adam Searle MLC

Committee Chair

Recommendations

- Recommendation 1** 17
That the NSW Government commit to the immediate and comprehensive implementation of all outstanding recommendations from the *1991 Royal Commission into Aboriginal Deaths in Custody* report and 2017 Australian Law Reform Commission's *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* report, with the exception of recommendations that fall outside of state jurisdiction.
- Recommendation 2** 18
That the NSW Government establish a clear, formal and effective oversight mechanism to monitor and report on progress made in relation to the implementation of any recommendations relating to First Nations people and achievement towards the Closing the Gap targets, with an annual report provided to the NSW Parliament.
- Recommendation 3** 18
That the NSW Government, within its jurisdictional plan to implement the *National Closing the Gap Agreement*, commit to achieving parity in prison rates by 2031.
- Recommendation 4** 42
That the NSW Bureau of Crime Statistics and Research, in conjunction with the Department of Communities and Justice, conduct research into the growing number of First Nations women in custody, with a view to identifying the factors and causes of this trend.
- Recommendation 5** 43
The NSW Government ensure long-term funding for projects such as the Miranda Project and other post release support programs for women who have been in prison, including expansion to rural, regional and remote areas.
- Recommendation 6** 43
The NSW Government urgently expand the number of post release housing beds for First Nations women coming out of prison that can support women and their children to find long-term housing.
- Recommendation 7** 43
That the NSW Bureau of Crime Statistics and Research lead a project to identify ways in which data collection and reporting could be enhanced in relation to the contact First Nations people have with the criminal justice system, with input from the NSW Police Force, Corrective Services NSW and the NSW Courts.
- Recommendation 8** 76
That the NSW Government amend the *Bail Act 2013* to include a standalone provision that stipulates a bail decision maker must take into account any issues that arise due to the person's Aboriginality, similar to section 3A of the *Bail Act 1977(Vic)*.
- Recommendation 9** 76
That the NSW Government work in partnership with the Aboriginal Legal Service (NSW/ACT), and other relevant Aboriginal and Torres Strait Islander organisations, to introduce the use of Gladue style Aboriginal Community Justice Reports in NSW Courts.

- Recommendation 10** 77
That the NSW Government amend section 4A of the *Summary Offences Act 1988* to ensure that the offence only captures a situation where there is intimidation and/or an actual threat of harm, except if the offensive language is used in or near or within hearing of a school.
- Recommendation 11** 77
That the NSW Government raise the minimum age of criminal responsibility and the minimum age of children in detention to at least 14.
- Recommendation 12** 77
That the NSW Government establish an inter-agency and inter-department taskforce to develop a cohesive, whole of government approach to therapeutic pathways that integrate health, education and housing approaches to youth behaviour for children between the ages of 10 and 14.
- Recommendation 13** 78
That the NSW Government, in consultation with key stakeholders, amend the *Young Offenders Act 1997* to expand the offences in which the legislation can apply and remove the caps on the number of cautions young people can be given.
- Recommendation 14** 78
That the NSW Government expressly legislate in the *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Children (Criminal Proceedings) Act 1987* that the arrest, detention or imprisonment of a person should be used only as a measure of last resort and for the shortest appropriate period of time.
- Recommendation 15** 78
That the NSW Government allocate long-term funding to community-led justice reinvestment initiatives.
- Recommendation 16** 79
That the NSW Government establish, in consultation with the Children's Court of NSW and other relevant stakeholders, a dedicated court list for proceedings under the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* involving First Nations children.
- Recommendation 17** 79
That the Department of Communities and Justice work with First Nations communities to increase the number of local government areas in which Circle Sentencing is available.
- Recommendation 18** 80
That the NSW Government immediately expand the Drug Court to Dubbo and make plans for further expansion into other regional, rural and remote areas.
- Recommendation 19** 80
That the NSW Government expand the Drug Treatment Centre at Parklea Correctional Centre.
- Recommendation 20** 80
That the NSW Government provide adequate funding and resources to ensure that drug and alcohol rehabilitation services are available across New South Wales to support referrals from the Drug Courts.

- Recommendation 21** **80**
That the NSW Government provide adequate resourcing and funding for the establishment of the Walama Court in the District Court of New South Wales.
- Recommendation 22** **81**
That in the reviews of the Suspect Target Management Program by the NSW Police Force and Law Enforcement Conduct Commission, there be consideration of the removal of the program for under 14 year olds.
- Recommendation 23** **106**
That Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Health Network conduct a comprehensive review of internal processes following a death in custody, with a view to:
- ensuring appropriate notification of death processes are in place
 - establishing a single point of contact for families
 - establishing clear communication protocols with families, including the provision of counselling and support services up to and including the coronial hearing
 - ensuring all staff within facilities receive training in culturally sensitive and trauma informed care, with training prioritised for staff in roles specific to the investigation or oversight of deaths in custody.
- Recommendation 24** **122**
That the NSW Government commission an independent review into the provision and effectiveness of health screening, services and treatment in correctional centres, including consideration of alternative service models for First Nations people with a focus on incorporating Aboriginal Community Controlled health services.
- Recommendation 25** **122**
That Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Health Network review mental health screening procedures, with particular attention given to the placement of prisoners with mental health conditions.
- Recommendation 26** **122**
That the NSW Government increase the funding to support mental health assessment, management and treatment of prisoners.
- Recommendation 27** **123**
That Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Health Network:
- engage with the National Disability Insurance Agency to establish timely, clear and comprehensive protocols for supporting people with a disability in custody to access support upon release
 - review current processes to ensure a more robust, holistic, culturally sensitive and comprehensive approach to support people with a disability in custody to access the National Disability Insurance Scheme and other services upon release.

- Recommendation 28** **123**
That Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Health Network also engage with the Aboriginal Housing Office, Child Protection, Housing NSW, TAFE NSW, providers of mental health services and Centrelink to establish timely, clear and comprehensive protocols for supporting people with a disability and others in custody to access support upon release.
- Recommendation 29** **124**
That the NSW Government assess the current status of hanging points in all New South Wales correctional facilities and develop a detailed plan and timetable for the removal of these points or the discontinued placement of vulnerable inmates in these cells, including First Nations people.
- Recommendation 30** **150**
That the New South Wales Legislative Council establish a Select Committee to conduct an inquiry into the New South Wales coronial system.
- Recommendation 31** **150**
That the NSW Government allocate additional resources, including adequate funding and staffing, to ensure that the NSW Coroners Court can effectively undertake its role in investigating deaths in custody in a timely manner.
- Recommendation 32** **151**
That the NSW Government amend the *Coroners Act 2009* to ensure that the relevant government department and correctional centre respond in writing within six months of receiving a Coroner's report, the action being taken to implement the recommendations, or if no action is taken the reasons why, with this response tabled in the NSW Parliament.
- Recommendation 33** **151**
That the NSW Government amend the *Coroners Act 2009* to stipulate that the Coroner is required to examine whether there are systemic issues in relation to a death in custody, in particular for First Nations people, with the Coroner provided with the power to make recommendations for system wide improvements.
- Recommendation 34** **152**
That the NSW Government amend the *Coroners Act 2009* to mandate Coroners to make findings on whether the implementation of any, some or all of the recommendations from the *Royal Commission into Aboriginal Deaths in Custody* report could have reduced the risk of death in all cases where a First Nations person has died in custody.
- Recommendation 35** **179**
That the NSW Government expand the functions of the Law Enforcement Conduct Commission to undertake full investigations in relation to deaths in custody, with appropriate resourcing and support.
- Recommendation 36** **179**
That the NSW Government amend the *Law Enforcement Conduct Commission Act 2016* to include a senior statutory First Nations position to undertake engagement across the organisation and review policies and case work, and to ensure it is genuinely approachable and culturally safe.

- Recommendation 37** **180**
That the NSW Government implement a program to actively employ a greater number of First Nations staff across all areas of the criminal justice system.
- Recommendation 38** **180**
That the Attorney General consider appointing significantly more suitably experienced and qualified First Nations people to the judiciary.
- Recommendation 39** **180**
That the NSW Government consider merging the functions of the Inspector of Custodial Services into the NSW Ombudsman's office.

Conduct of inquiry

The terms of reference for the inquiry was referred to the committee by the Legislative Council on Wednesday 17 June 2020.

The committee received 132 submissions and five supplementary submissions.

The committee held five public hearings in the Macquarie Room at Parliament House in Sydney on 26 and 27 October 2020, and 3, 7 and 8 December 2020.

The committee heard directly from several First Nations families who had lost a loved one whilst in custody.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice and supplementary questions.

First Nations peoples should be aware that this report contains the names of people who have passed away.

Chapter 1 Introduction

The Black Lives Matter movement has brought the racism, inequality and abuses of power that have haunted our nation for so long to the forefront of public consciousness. This year marks 250 years since Captain Cook first landed in Australia. Despite this significant passage of time, the Black Lives Matter movement has exposed that our criminal justice system remains a tool of injustice for Indigenous Australians, who are one of the most incarcerated people in the world.

- Chief Justice of New South Wales, the Honourable TF Bathurst AC.³

This chapter provides some background and context to the committee's inquiry, highlighting that it follows a number of other significant and valuable reports and reviews into the over-representation of First Nations people in the criminal justice system, including the seminal *Royal Commission into Aboriginal Deaths in Custody*. Taking into account that this year marks 30 years since the findings of the Royal Commission's report were handed down, this chapter also outlines stakeholder's calls for urgent action to address disproportionate rates of incarceration of First Nations people and First Nations deaths in custody.

Focus of this inquiry

- 1.1 Given significant community concerns over the last 30 years and in recent times through the Black Lives Matter movement, this inquiry was primarily established to consider the oversight arrangements for deaths in custody in New South Wales, including the suitability of the existing oversight bodies tasked with inquiring into deaths in custody. From the outset, as stated in the terms of reference, the committee acknowledged the unacceptably high level of First Nations people in custody.
- 1.2 Given recent and significant community concerns, particularly following the Black Lives Matter movements, much of the evidence to this inquiry focused on the over-representation of First Nations people in the criminal justice system, including the historical, social and economic drivers that contribute to disproportionate incarceration rates of First Nations people. While part of this report centers on the oversight arrangements for deaths in custody, the committee acknowledges the expansive body of work in previous reports and inquiries into incarceration rates of First Nations people and First Nations deaths in custody.
- 1.3 This report is structured in two parts. The first part focuses on the over-representation of First Nations people in the criminal justice system and specific reforms to address disproportionate incarceration rates. The second part of this report – from chapter 4 onwards – will focus on oversight arrangements for deaths in custody and proposals for change.

³ Chief Justice of New South Wales, the Honourable TF Bathurst AC, as cited in Submission 3a, NSW Bar Association, p 6.

Terminology

- 1.4 The committee acknowledges and respects that there are diverse cultures, practices and differences in First Nations communities, and that there may be different preferences in terms of the appropriate terminology to use.
- 1.5 As the terms of references for this inquiry refer to 'First Nations people', the committee has adopted this terminology throughout the report as much as possible, particularly when making committee comments and recommendations. An exception to this is where previous reports have used different language or different terminology was used by a stakeholder in their evidence, in which case the committee has retained use of those descriptors to correctly capture evidence.

Previous reports and reviews

- 1.6 The committee acknowledges the many reports, research and inquiries that have extensively considered the over-representation of First Nations people in the criminal justice system. Many have comprehensively outlined the historical, social and economic context which has contributed to disproportionate incarceration rates of First Nations people, including dispossession and systemic racism. Many have examined the entrenched disadvantage First Nations people have faced over time, particularly in terms of health issues, housing, employment and education.
- 1.7 Without listing them all, this section will outline several key reports and papers relevant to matters raised during the inquiry, dating back to the seminal *Royal Commission into Aboriginal Deaths in Custody* report.

Royal Commission into Aboriginal Deaths in Custody report (1991)⁴

- 1.8 The *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) was conducted between 1987 and 1991. It was established to investigate Aboriginal and Torres Strait Islander deaths in custody in the 1980's, but ultimately expanded to examine the causes of Aboriginal and Torres Strait Islander incarceration.
- 1.9 The final report was provided in 1991 and made 339 recommendations. A large number of the recommendations related to policing, criminal justice, incarceration and deaths in custody, although there were also recommendations relating to health, education and self-determination.
- 1.10 The Royal Commission also recommended an ongoing program be established by the Australian Institute of Criminology to monitor Indigenous and non-Indigenous deaths in custody. This led to the creation of the National Deaths in Custody Program which commenced in 1992, with its role to collect comprehensive data on the extent and nature of all deaths in custody in Australia.

⁴ See Royal Commission into Aboriginal Deaths in Custody (1991) *Royal Commission into Aboriginal Deaths in Custody: National Report*, Australian Government Publishing Service, <<https://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>

- 1.11 The RCIADIC report and its recommendations can be accessed online via the Australasian Legal Information Institute (AustLII).

Deaths in custody: 10 Years on from the Royal Commission (2001)⁵

- 1.12 This study used case records from the *National Deaths in Custody Monitoring and Research Program* to compare the number and circumstances of custodial deaths which occurred during the decade examined by the RCIADIC (1980-1989) with the number of custodial deaths in the subsequent decade (1990-1999).
- 1.13 One of the findings of this study was that while the number of deaths remained relatively constant over the two periods, there was a change in the distribution of Indigenous deaths between custodial authorities responsible for detention. Between 1980 and 1989 a majority of the deaths were in police custody, whereas between 1990-1999 most of the deaths occurred in prisons. The study found that almost three times as many Indigenous persons died in prison custody in the post RCIADIC decade than in the decade examined by the Royal Commission.
- 1.14 The study noted that the timing and completion rate of implementing some of the RCIADIC recommendations might have influenced results, for example, recommendations relating more specifically to police custody matters.

Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody (2018)⁶

- 1.15 Deloitte Access Economics was engaged by the Commonwealth Government to review the progress made in relation to the implementation of the RCIADIC recommendations. Across all recommendations, the review found that:
- 64 per cent of recommendations were implemented in full
 - 14 per cent have been mostly implemented, meaning significant progress has been made but work is not completed
 - 16 per cent have been partially implemented, meaning some elements have been implemented but work is not completed
 - 6 per cent have not been implemented at all.
- 1.16 The report highlighted that like some other States and Territories, New South Wales has not fully completed implementing recommendations across a number of areas, for example, recommendations in relation to coronial matters, the justice system, prison safety, self-determination, the cycle of offending and health and education.

⁵ See Australian Institute of Criminology, *Deaths in Custody: 10 Years on from the Royal Commission*, Trend and Issues in Criminal and Criminal Justice (April 2001), <<https://www.aic.gov.au/sites/default/files/2020-05/tandi203.pdf>>

⁶ See Deloitte Access Economics, *Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody*, Department of Prime Minister and Cabinet (August 2018) <<https://www.niaa.gov.au/sites/default/files/publications/rciadic-review-report.pdf>>

- 1.17 Concerns relating to the methodology used in the review process are discussed at paragraph 1.50, and are relevant to stakeholders' views that the implementation of many recommendations from the RCIADIC remains unresolved.

Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (2017)⁷

- 1.18 The Australian Law Reform Commission's report contained 35 recommendations aimed at addressing the disproportionate incarceration rates for First Nations peoples. Finalised in December 2017, the report noted that an Aboriginal and Torres Strait Islander person was 12.5 times more likely to be in prison than a non-Indigenous person, and that the over-representation in prisons was growing.
- 1.19 Focusing on reforms to laws and legal frameworks which would address the over-representation of Aboriginal and Torres Strait Islander people in relation to incarceration rates, the recommendations were aimed at:
- promoting equality before the law for Aboriginal and Torres Strait Islander people
 - promoting fairer enforcement of the law and fairer application of legal frameworks
 - ensuring Aboriginal and Torres Strait Islander leadership and participation in the development and delivery of programs
 - reducing recidivism through the provision of effective diversion, support and rehabilitation programs
 - providing alternatives to imprisonment that are appropriate to the offence and an offender's circumstances
 - promoting justice reinvestment through the redirection of resources from incarcerations to prevention, rehabilitation and support, in order to address the long-term economic costs associated with incarceration.
- 1.20 The report and its recommendations can be accessed on the Australia's Law Reform Commission's website.

National Agreement on Closing the Gap⁸

- 1.21 In July 2020, the *National Agreement on Closing the Gap* was entered into by all jurisdictions within Australia and the Coalition of Aboriginal and Torres Strait Islander Peak Organisations. The objective of the agreement is to overcome the entrenched inequality faced by Aboriginal and Torres Strait Islander people so that their life outcomes are equal to all Australians.

⁷ See Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (December 2017), <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>

⁸ *National Agreement on Closing the Gap* (July 2020)
< <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>>, pp 26-29.

- 1.22** Within the agreement, there are priority areas for reform, for example, in relation to education and health outcomes. One specific area of reform is to ensure Aboriginal and Torres Strait Islander people are not over-represented in the criminal justice system. The target is that by 2031, the rate of Aboriginal and Torres Strait Islander adults held in incarceration is to be reduced by at least 15 per cent.
- 1.23** Another priority in the agreement is to ensure Aboriginal and Torres Strait Islander young people are not over-represented in the criminal justice system. The target in relation to this is that by 2031, the rate of Aboriginal and Torres Strait Islander young people (aged between 10 and 17 years) is to be reduced by at least 30 per cent.
- 1.24** The NSW Government will be working in partnership with the NSW Coalition of Aboriginal Peak Organisations and other Aboriginal representative bodies and organisations to develop a strong jurisdictional plan. Aboriginal Affairs NSW also advised that more governance mechanisms will be established to specifically support the implementation of Closing the Gap, and that responsibility for Closing the Gap implementation sits across all clusters, although Aboriginal Affairs has set up a Closing the Gap Directorate to facilitate co-ordination and participation of all clusters.⁹
- 1.25** Whether New South Wales needs to set more ambitious targets than what was agreed at the national level is discussed from paragraph 1.60.

The call for action

- 1.26** A recurring theme in the submissions and oral evidence given by witnesses was the need for governments to fully implement all RCIADIC recommendations and the recommendations from the ALRC *Pathways to Justice* report. Stakeholders expressed frustration with the lack of progress made to date in addressing the systemic issues that contribute to the over-representation of First Nations people in the criminal justice system.
- 1.27** Many stakeholders highlighted the sheer number of previous reviews, reports and inquiries which have been undertaken in relation to these issues, and yet the lack of effective or meaningful change in addressing disproportionate incarceration rates and socio economic disadvantage for First Nations people.
- 1.28** Some of the other reports highlighted in submissions included the Senate Finance and Public Administration References Committee 2016 report on the *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services*, the 2017 *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, PwC's Indigenous Consulting 2017 report on *Indigenous Incarceration: Unlock the Facts* and the NSW Law Reform Commission's 2000 report on the *Sentencing of Aboriginal Offenders*.¹⁰
- 1.29** Stakeholders stressed the need for action, a strong political will to effect change, and a genuine commitment to address the issues. As the Jumbunna Institute of Indigenous Education and

⁹ Answers to questions on notice, NSW Aboriginal Affairs, 22 January 2021, pp 3-4.

¹⁰ Submission 3a, NSW Bar Association, p 4.

Research emphasised: 'It is important that this inquiry does not become another repository for good ideas. This inquiry must lead to concrete action'.¹¹

1.30 Mr Tony McAvoy, Chair of the NSW Bar Association's First Nations Committee, and Member, Joint Working Party on the Over-representation of Indigenous People in Custody in New South Wales, highlighted an observation made by Justice Peter Callaghan during the Royal Commission into the protection and detention of children in the Northern Territory that 'there seems to have developed a culture of reporting in lieu of doing'. Mr McAvoy stated: 'I raise that now to encourage this Committee, this Parliament, to be focused on the act of doing'.¹²

1.31 Reflecting on the lack of action in relation to findings and recommendations from previous reports, the NSW Aboriginal Land Council contended that 'most of the recommendations in these reports have not been implemented, or only partially implemented without adequate resourcing to provide any lasting change'.¹³

1.32 The Chief Magistrate of the Local Court of New South Wales, Judge Graeme Henson AM, also observed:

Although significant resources have been dedicated to remedying the factors identified by the Royal Commission in the 30 years which have since passed, there has been little or no impact on the disproportionate rate of Aboriginal incarceration. Yet it remains clear that if the number of First Nation deaths in custody is to be reduced, governments need to grapple both with the underlying causes of over-representation.¹⁴

1.33 Similarly, the National Justice Project noted that since the RCIADIC, 'First Nations Peoples continue to be grossly over-represented in Australia's prison system, with deleterious social and health outcomes'. It noted that 'notwithstanding a Royal Commission and numerous other human rights inquiries, the majority of the recommendations have not been implemented'.¹⁵

1.34 Expressing the same sentiment, the Western NSW Community Legal Centre and Western Women's Legal Support stated:

Across the last three decades, the Terms of Reference of the Committee have been addressed in a multitude of government reports, and decades of advocacy work has focused on the systemic discrimination and disadvantage experienced by Aboriginal and Torres Strait Islander peoples. However, despite having identified the problem, and being told how to fix it, Australian government have failed to effect meaningful change. Successive Australian governments have failed Aboriginal and Torres Strait Islander communities and it is nothing short of a national tragedy.¹⁶

¹¹ Submission 115, Jumbunna Institute of Indigenous Education and Research, p 1.

¹² Evidence, Mr Tony McAvoy, Chair, NSW Bar Association's First Nations Committee, and Member, Joint Working Party on the Over-representation of Indigenous People in Custody in New South Wales, 26 October 2020, p 2.

¹³ Submission 98, NSW Aboriginal Land Council, p 2.

¹⁴ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 3.

¹⁵ Submission 102, National Justice Project, p 9.

¹⁶ Submission 123, Western NSW Community Legal Centre and Western Women's Legal Support, pp 1-2.

1.35 Sisters Inside Inc. also highlighted the number of previous reviews and inquiries, noting that many recommendations have not been implemented to date, with significant detriment to First Nations people:

Over the past 30 years, the imprisonment of First Nations people and consequent deaths in custody has been the subject of endless research studies, parliamentary inquiries and, tragically, inquests. The reality is that we already know what action is needed to end the criminalisation and imprisonment of First Nations peoples – in NSW, and nationally. Too often, the primary recommendations of these investigations have been ignored, and superficial, ineffective reforms pursued instead. Meanwhile, the number of First Nations people in police cells and prisons continues to grow, as does the commensurate risk of further deaths in custody.¹⁷

1.36 In the context of discussing the lack of action taken to address the underlying causes of disproportionate incarceration rates for First Nations people, several stakeholders referred to the Deloitte Access Economic report which was commissioned by the Commonwealth to review implementation progress in relation to the RCIADIC 339 recommendations.

1.37 According to the Jumbunna Institute of Indigenous Education and Research the Deloitte report 'claimed that RCIADIC's work is 78% completed, and 16% of its recommendations are 'partially implemented'. The Jumbunna Institute noted that the report has been criticised for its findings as it was based on a 'desktop review of government policy and government self-assessment'. By contrast, the Jumbunna Institute noted that Amnesty International, Change the Record and Clayton Utz have all suggested that in terms of implementing recommendations from the RCIADIC, governments have 'categorically failed'.¹⁸

1.38 The Law Society of NSW also referred to the Deloitte report, and while noting that there were criticisms about its methodology, highlighted that the lowest proportion of fully implemented recommendations relate to self-determination, non-custodial approaches, and the cycle of offending. Given these recommendations, among others, are critical to addressing the issues, the Law Society of NSW stated:

Given that the key finding of the RCIADIC and other reviews since is that the crux of the problem is the disproportionate rate at which Aboriginal and Torres Strait Islander people are incarcerated, and the systemic issues underlying incarceration, it is not surprising that this issue remains unaddressed almost 30 years after the RCIADIC.¹⁹

1.39 Many inquiry participants emphasised that the findings and recommendations from previous reports remain just as relevant to the issues today. For example, Legal Aid NSW stated that the 'recommendations of the RCIADIC remain vital in considering how to reduce incarceration rates for Aboriginal and Torres Strait Islander peoples'.²⁰ Similarly, the Royal Australian and New Zealand College of Psychiatrists reflected: 'In our experience and discussion with Aboriginal representatives, we note that many of the findings and recommendations remain relevant today'.²¹

¹⁷ Submission 81, Sisters Inside Inc., p 2.

¹⁸ Submission 115, Jumbunna Institute of Indigenous Education and Research, p 7.

¹⁹ Submission 113, The Law Society of NSW, p 2.

²⁰ Submission 117, Legal Aid NSW, p 5.

²¹ Submission 105, Royal Australian and New Zealand College of Psychiatrists, p 2.

1.40 In particular, there was consensus that the recommendations from the 1991 RCIADIC report and the 2017 Australian Law Reform Commission's *Pathways to Justice* report need to be prioritised in terms of implementing change. Mr McAvoy stated that 'these two reports in themselves provide a guidebook for the States and the Commonwealth as to how they might reduce over incarceration'. He added:

... [T]he level of over representation in custody is gross and inhumane and it need not wait. There are things that need to be done immediately and could be done immediately.²²

1.41 Similarly, the Law Society of NSW contended that the 'ALRC report sets out a thorough and considered roadmap to addressing the vexed issue of Indigenous over incarceration, and should continue to be a starting point when considering the issues under inquiry'. It noted, however, that 'Governments at all levels have not responded substantively to the recommendations made in this report'.²³

1.42 Other stakeholders also recommended that the NSW Government commit to full implementation of the recommendations from the RCIADIC report and/or the ALRC *Pathways to Justice* report, including the Jumbunna Institute of Indigenous Education and Research, the NSW Aboriginal Land Council, Legal Aid NSW, the Public Service Association of NSW, the NSW Nurses and Midwives' Association and the Australian National University Law Reform and Social Justice Research Hub.²⁴

1.43 More specifically, the NSW Bar Association contended that there were 10 priorities in the ALRC report that need to be implemented. This includes:

- the establishment of an independent justice reinvestment body, overseen by a Board with Aboriginal and Torres Strait Islander leadership, and the initiation of justice reinvestment trials to promote engagement in the criminal justice system
- the establishment of properly resourced specialist Aboriginal and Torres Strait Islander sentencing courts, to be designed and implemented in consultation with Aboriginal organisations, including the Walama Court in the NSW District Court
- repeal of mandatory or presumptive sentencing regimes which have a disproportionate effect on Aboriginal offenders
- the expansion of culturally appropriate community-based sentencing options
- the diversion of resources from the criminal justice system to community based initiatives that aim to address the causes of Indigenous incarceration
- the revision of bail laws to require bail authorities to consider cultural issues that arise due to a person's Aboriginality

²² Evidence, Mr McAvoy, 26 October 2020, p 2.

²³ Submission 113, The Law Society of NSW, p 2.

²⁴ Submission 115, Jumbunna Institute of Indigenous Education and Research, p 51; Submission 98, NSW Aboriginal Land Council, p 1; Submission 117, Legal Aid NSW, pp 4-5. Submission 118, Public Service Association of NSW, p 19; Submission 129, NSW Nurses and Midwives' Association, pp 1-2; Submission 109, Australian National University Law Reform and Social Justice Research Hub, p 6.

- raising the minimum age of criminal responsibility and the minimum age of children in detention to 14
- the abolition or restriction of offences relating to offensive language to genuinely threatening language
- fine defaults not resulting in imprisonment
- the introduction of specific sentencing legislation to allow courts to take account of unique systemic and background factors affecting Indigenous peoples.²⁵

1.44 Some inquiry participants emphasised the need for 'political will' to address the over-representation of First Nations people in the criminal justice system. Mr Jason O'Neil, Executive Director, Ngalaya Indigenous Corporation, stated:

We are concerned that without the political will, this inquiry will join many other inquiries, submissions and reports on this and similar issues which have largely gone ignored by Parliament in that culture of reporting and not action.²⁶

1.45 Likewise, reflecting that many previous recommendations have not been implemented and 'the lack of political will' to address the issues to date, Karly Warner, Chief Executive Officer, Aboriginal Legal Service (NSW/ACT), stated:

There have been numerous other royal commissions, inquiries and recommendations which have focused on ending the imprisonment of Aboriginal people and preventing Aboriginal deaths in custody, yet many of these recommendations sadly continue to sit on the shelf and gather dust, quite frankly. Aboriginal people continue to offer up solutions but their solutions appear to be largely ignored. While governments fail to act more Aboriginal people are dying in custody and more families are being forced to grieve and to seek justice simultaneously. This is not a choice that we need to keep making. We are not lacking in solutions to address these issues, but we have been lacking in some political will.²⁷

1.46 Ms Warner added: 'It is critical, from the ALS' perspective, that the New South Wales Government uses this process as an opportunity, without delay, to rapidly and radically transform the justice system'.²⁸

1.47 Likewise, the National Justice Project contended that there has been an 'absence of political will' to effect change, despite having practical solutions available. It called on the NSW Parliament to 'take immediate, specific and meaningful steps to reduce the over-incarceration and deaths in custody of First Nations people'.²⁹

1.48 Highlighting that a failure to act on these issues will continue to have tragic consequences on First Nations people lives, the NSW Aboriginal Land Council stressed:

²⁵ Submission 3, NSW Bar Association, pp 2-3.

²⁶ Evidence, Mr Jason O'Neil, Executive Director, Ngalaya Indigenous Corporation, 26 October 2020, p 17.

²⁷ Evidence, Ms Karly Warner, Chief Executive Officer, Aboriginal Legal Service (NSW/ACT), 26 October 2020, pp 30-31.

²⁸ Evidence, Ms Warner, 26 October 2020, pp 30-31.

²⁹ Submission 102, National Justice Project, p 9.

It is critical that the NSW Government acts without delay to rapidly and radically transform the justice system – Aboriginal peoples' lives depend on it. We recognise the advocacy work and fight for justice that has been undertaken for generations - by Aboriginal people who have lived experience of the justice system and families who have had loved ones die in custody. It is vital that all law reform and policy responses centre their voices and experiences.³⁰

- 1.49** In a similar vein, the Jumbunna Institute of Indigenous Education and Research reminded the committee of the importance of addressing these issues for First Nations communities:

This Select Committee will be presented with statistics. Underneath these statistics are Indigenous people, families and communities profoundly affected by their contact with the criminal justice system. They are at the heart of our concern around the high rates of incarceration of First Nations and the continuing number of First Nations deaths in custody. That concern is intensified with the consistent finding in investigations into First Nations deaths in custody that many of those deaths were preventable. Each is a life lost, and the impact of this loss on First Nations communities is immeasurable.³¹

Oversight of previous recommendations

- 1.50** One of the issues examined during the inquiry was what arrangements were in place to oversight the implementation of recommendations from previous reports and reviews.
- 1.51** While the Deloitte report reviewed implementation of the RCIADIC recommendations in 2018, the committee explored what role NSW Government agencies currently have in publicly reporting on the progress in implementing the Royal Commission's recommendations at the state level, along with recommendations from other critical reports, including the ALRC's *Pathways to Justice* report.
- 1.52** The NSW Police Force confirmed that it does not provide public reporting on the recommendations that came out of the 1991 RCIADIC, although it noted that it provided input into the Deloitte review, that report being publicly available.³²
- 1.53** In addition, the NSW Police Force advised that it provides periodic progress updates to the Department of Communities and Justice in response to recommendations from the ALRC report. Acknowledging the importance of the lessons learnt from previous reports, it stated:

The NSW Police Force has been highly conscious of the lessons learnt from deaths in custody and implemented many new procedures, systems and educational programs that prevent deaths in custody. In turn, the NSW Police Force recognises the broader importance of its engagement and operational strategies, as well as training, to reduce the over-representation of First Nations People in the Criminal Justice System; and will continue to be proactive in its work with Aboriginal communities.³³

³⁰ Submission 120, Aboriginal Legal Service (NSW/ACT), p 10.

³¹ Submission 115, Jumbunna Institute of Indigenous Education and Research, p 3.

³² Answers to questions on notice, NSW Police Force, 25 January 2021, p 2.

³³ Answers to questions on notice, NSW Police Force, 25 January 2021, p 2.

- 1.54** The committee also heard from Corrective Services NSW that no formal reporting on the implementation of Aboriginal deaths in custody recommendations occurs on a national basis, based on a decision made some time ago by Aboriginal justice advisory councils. Instead, jurisdictions moved to individual state-based justice plans – including development of a NSW Aboriginal Justice Plan. Deputy Commissioner Grant stated that this plan embraced a similar theme, albeit expressed differently, but was 'driven by Aboriginal people'. Since then, the plans have evolved, with the Deputy Commissioner noting that there was been the 'Two Ways Together' plan and then the Aboriginal Affairs state plan.³⁴
- 1.55** Mr Michael Coutts-Trotter, Secretary for the Department of Communities and Justice, was also questioned on the department's obligations to formally report on progress in relation to the ALRC report's recommendations. While he confirmed that there is no formal requirement to report, he acknowledged the importance of learning from those findings:
- It is obviously an important contribution to the policy issues at play. The essential themes in that report and the themes in the agency, when I speak to the agency, particularly the justice part of the agency's response with the over-representation of Aboriginal people in the justice system—there is one to reduce or avoid Aboriginal people's contact with the justice system and then to try to reduce the length of time that Aboriginal people may spend in custody and then reduce the rate of Aboriginal reoffending. And there is a range of initiatives and interventions aimed at those three broad goals that basically align with what we have heard from major reviews of the field for a very long period of time. The challenge is to find those initiatives that reduce or avoid Aboriginal people's contact with the justice system and then if the contact happens try to resolve the community harms without drawing people unnecessarily deep into the justice system where they find it increasingly hard to get out of.³⁵
- 1.56** Stakeholders emphasised the need for effective oversight of the implementation of previous recommendations, contending that the oversight to date has been inadequate. This included Community Legal Centres NSW, who called for the setting up of appropriate oversight mechanisms, both in relation to the implementation of recommendations from previous reports, but also in relation to specific targets under the national Closing the Gap framework.³⁶
- 1.57** Legal Aid NSW also raised concerns that 'many of the recommendations of our previous submissions and the previous inquiries and reviews have not been implemented or remain unanswered'. It argued that 'a key plank of any response to the issue of Aboriginal and Torres Strait Islander deaths in custody should involve oversight and ongoing monitoring of Government response(s) to such recommendations'.³⁷
- 1.58** Dr Fiona Allison and Professor Chris Cunneen from the Indigenous Law and Justice Hub, Jumbunna Institute for Indigenous Education and Research, and Ms Melanie Schwartz, Deputy Head of School, Law, University of Technology Sydney, noted the importance of tracking what happens with the implementation of individual coronial inquiries (discussed further in chapter 6) and the RCIADIC recommendations, as this 'is another important component of ensuring

³⁴ Evidence, Commissioner Peter Severin, Corrective Services NSW, 7 December 2020, p 49; Evidence, Deputy Commissioner Luke Grant, Corrective Services NSW, 7 December 2020, p 49.

³⁵ Evidence, Mr Michael Coutts-Trotter, Secretary, Department of Communities and Justice, 7 December 2020, pp 49-50.

³⁶ Submission 110, Community Legal Centres NSW, p 3.

³⁷ Submission 117, Legal Aid NSW, p 5.

accountability'. They argued that 'government ought to be providing resources and other capability to monitor and follow up on implementation of recommendations'.³⁸

- 1.59** One idea put forward by the Jumbunna Institute of Indigenous Education and Research to continue reflecting back on the recommendations made by the RCIADIC is to amend the *Coroners Act 2009* to 'clearly mandate Coroners to make findings on whether implementation of any, some or all RCIADIC recommendation could have reduced the risk of death in all cases where an Aboriginal or Torres Strait Islander has died in custody'.³⁹

The Closing the Gap targets

- 1.60** As outlined earlier, New South Wales, along with other Australian jurisdictions, entered into the *National Agreement on Closing the Gap* in July 2020. Two key targets within that agreement are to:
- reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15 per cent by 2031
 - reduce the rate of Aboriginal and Torres Strait Islander young people (aged between 10 and 17 years) by at least 30 per cent by 2031.⁴⁰
- 1.61** Many stakeholders contended that New South Wales needs to set more ambitious targets than those agreed at the national level, including the Aboriginal Legal Service (NSW/ACT), the NSW Aboriginal Land Council, NSW Young Lawyers, Legal Aid NSW, Community Legal Centres NSW, St Vincent de Paul Society and the NSW Bar Association.⁴¹
- 1.62** In particular, the Aboriginal Legal Service (NSW/ACT) acknowledged that it 'is historic for national justice targets to be included in the Closing the Gap agreement', but stated that it, along with the broader Aboriginal and Torres Strait Islander Legal Service Network, 'have continually emphasised that justice targets must be ambitious and drive real change to end the over-incarceration of our communities'.⁴²
- 1.63** In this regard, the NSW Bar Association noted that the targets have attracted 'widespread criticism as being unambitious and inadequate from a number of organisations'. Like the Aboriginal Legal Service (NSW/ACT), the NSW Bar Association expressed support for stronger jurisdictional based targets that aim to end the over-imprisonment of First Nations

³⁸ Submission 108, Dr Fiona Allison and Professor Chris Cunneen from the Indigenous Law and Justice Hub, Jumbunna Institute for Indigenous Education and Research, and Ms Melanie Schwartz, Deputy Head of School, Law, University of Technology Sydney, p 16.

³⁹ Submission 115, Jumbunna Institute of Indigenous Education and Research, p 44.

⁴⁰ *National Agreement on Closing the Gap* (July 2020)
< <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>>, pp 26-29.

⁴¹ Submission 120, Aboriginal Legal Service (NSW/ACT), p 15; Submission 98, NSW Aboriginal Land Council, p 1; Submission 76, NSW Young Lawyers, p 15; Submission 117, Legal Aid NSW, p 6; Submission 110, Community Legal Centres NSW, p 4; Submission 121, St Vincent de Paul Society of NSW, p 5; Submission 3a, NSW Bar Association, pp 5-7.

⁴² Submission 120, Aboriginal Legal Service (NSW/ACT), p 14.

people within 10 years, as part of the state's plan to progress action under the National Agreement.⁴³

- 1.64** Highlighting how the state's prison population has reduced during COVID-19, the NSW Bar Association contended that the over-representation of First Nations people could be addressed far more quickly:

A commitment to reduce incarceration rates by 15 percent by 2031 is clearly insufficient, when the evidence suggests it is realistically possible to end First Nations over-representation in custody during that period. Research released in August 2020 by the NSW Bureau of Crime Statistics and Research (BOCSAR) indicated that the State's prison population had been reduced in eight weeks by 10.7 percent and the youth detention population by 27 percent from February to June in response to the threat of COVID-19.

This data illustrates that the Commonwealth justice target is unambitious and that reducing the prison population can evidently be done successfully, efficiently and more quickly, without impermissibly compromising community safety.⁴⁴

- 1.65** In the NSW Bar Association's view, the over-incarceration of First Nations people could be ended within a decade, and 'addressing this crisis must be a matter of national urgency for state and Commonwealth Governments alike'.⁴⁵

- 1.66** Also expressing its support for more ambitious targets at the state level, the NSW Young Lawyers highlighted a comment in the media made by the Co-chair of the National Aboriginal and Torres Strait Islander Legal Service that 'over-incarceration needs to be addressed urgently, but this target wouldn't see parity in prison rates for adults until 2093'.⁴⁶

- 1.67** In a similar manner, Mr John Nicholson SC highlighted his concerns regarding the targets, and the timeframe he believes it would take to reach parity:

In NSW that means a 15% reduction in the current 26% NSW Indigenous incarceration rates becomes a 22% incarceration rate by 2031. That is a 4% overall rate reduction from 26% to 22%. Sadly however, it would not be until the decade after 2041 that the incarceration rate of ATSI prison population falls below 20% - still an alarmingly high rate. Assuming a final incarceration rate sought for Aboriginal and Torres Strait Islander adults sits at something less than 6%, using a 15% rate reduction every decade, means that a 6% target will not be reached until 2111.⁴⁷

- 1.68** Mr Nicholson highlighted how incarceration rates for Aboriginal people have increased over the last four decades, contending that 'without legislative changes the current Closing the Gap target cannot succeed in the face of four decades of ATSI custodial history'. He said 'it cannot be achieved under the existing paradigm'. Mr Nicholson advocated for more significant

⁴³ Submission 3a, NSW Bar Association, pp 6-7.

⁴⁴ Submission 3a, NSW Bar Association, pp 6-7.

⁴⁵ Submission 3a, NSW Bar Association, p 7.

⁴⁶ Submission 76, NSW Young Lawyers, p 15.

⁴⁷ Submission 132, Mr John Nicholson SC, p 2.

legislative and philosophical changes, including changes to sentencing laws, justice re-investment programs and post-custodial rehabilitation and support.⁴⁸

- 1.69** As to what the targets could be at a state level, Mr James Christian, Chief Executive Officer, NSW Aboriginal Land Council, told the committee that the NSW Government should 'be aiming for at least a 23 per cent reduction for adults and a 28 per cent reduction for youth, year on year, in order to reach parity on incarceration rates with mainstream levels within the 10-year life of that current Closing the Gap agreement'.⁴⁹
- 1.70** Mr Christian also emphasised the importance of the government changing its approach, from 'delivering systems that are predicated upon disadvantaged to facilitating life outcomes and respecting self-determining rights for First Nations people'.⁵⁰
- 1.71** The Public Service Association of NSW also stated that the Closing the Gap targets are 'not ambitious enough as far as timeframes', although it welcomed the 'incorporation of greater responsibility with different tiers of government'. One of the aspects it emphasised was the need to incorporate self-determination, discussed further in the next section:

Additionally, but just as important, remains the lingering undermining effects of racism that allows prejudice to undermine people in achieving equality because of the way they look or their cultural background. The Association recommends an approach that incorporates self-determination as a key aspect for all approaches to closing the gap.⁵¹

Importance of self-determination

- 1.72** Stakeholders emphasised the importance of self-determination, which should underpin any changes or programs in addressing the over-representation of First Nations people in the criminal justice system.
- 1.73** The Ngalaya Indigenous Corporation stated that 'the current criminal justice system is not culturally appropriate and it does not promote self-determination'. It emphasised that 'all levels of the criminal justice system would benefit from increased First Nations involvement, and a commitment to the First Nations' principles of community-centeredness, care and accountability'. It added that First Nations people have the knowledge and skills to reduce over-incarceration, and a shift in this direction is needed in how the criminal justice system is currently working:

At the heart of self-determination is the understanding that First Nations people have the knowledge and skills to address First Nations issues. There is significant room to involve First Nations in reducing over-incarceration. This can be achieved by shifting the culture of the criminal justice system and developing evidence-based and community-specific solutions to community problems.⁵²

⁴⁸ Submission 132, Mr John Nicholson SC, pp 4 and 9.

⁴⁹ Evidence, Mr James Christian, Chief Executive Officer, NSW Aboriginal Land Council, 27 October 2020, p 21.

⁵⁰ Evidence, Mr Christian, 27 October 2020, p 21.

⁵¹ Submission 118, Public Service Association of NSW, p 5.

⁵² Submission 84, Ngalaya Indigenous Corporation, pp 1-2.

1.74 The Deadly Connections Community and Justice Services informed the committee that 'true lived experience, culture, healing, self-determination and a deep community connection' must be 'the heart and soul of all work with Aboriginal communities to find ways to break the cycles of inter-generational trauma, disadvantage and poverty and reduce the numbers in child protection and the justice system'. It said that First Nations people have the capacity, strengths and right to lead change for their community, and change is achieved when First Nations people are empowered to drive the solutions. It added that 'self-determination must be the founding principle of reforms and recommendations'.⁵³

1.75 Further, the Deadly Connections Community and Justice Services highlighted that programs and policies developed without First Nations input do not work, with research showing First Nations involvement is key to success:

Where policies, programs and services are developed by non-Aboriginal decision-makers, they may be inaccessible to First Nations peoples and, even if they are accessible, they are unlikely to achieve their objectives. Both national and international research demonstrates that genuine and meaningful Aboriginal involvement and participation in policy-making, program design and service delivery leads to improved outcomes across various sectors such as health, child protection and criminal justice.⁵⁴

1.76 Likewise, Mr Christian said that 'when governments understand and respect First Nation rights to self-determination, and when policies, programs and services are designed and then delivered by Indigenous people for Indigenous people, we get better outcomes'. He questioned how programs can be designed and delivered appropriately for First Nations people when those designing these programs really 'have no idea about what goes on in the life of First Nations people in the State of New South Wales'. Mr Christian indicated that governments have lost the skills, the relationships and the respect in the way that First Nations communities work and this needs to be reframed and reset. He added: 'By resetting I mean there needs to be an understanding of that self-determining right and that Aboriginal community-controlled organisations should be the preferred provider of services to Indigenous people because we get better outcomes'.⁵⁵

1.77 In addition, the NSW Aboriginal Land Council commented that governments need to shift away from how they have been working to date, to enable self-determination of First Nations people:

The role of governments must shift from delivering systems predicated on disadvantage, to facilitating the aspirations, priorities and self-determination of Aboriginal peoples. Governments must be prepared to move into an enabling and innovative space to support Aboriginal self-determination, and long-term partnerships.⁵⁶

1.78 The Public Interest Advocacy Centre declared that self-determination is at the heart of reform, and urged the committee 'to emphasise the role of Aboriginal communities in leading reforms that impact on their communities'.⁵⁷

⁵³ Submission 126, Deadly Connections Community and Justice Services, pp 10-11.

⁵⁴ Submission 126, Deadly Connections Community and Justice Services, p 11.

⁵⁵ Evidence, Mr Christian, 27 October 2020, p 23.

⁵⁶ Submission 98, NSW Aboriginal Land Council, p 2.

⁵⁷ Submission 114, Public Interest Advocacy Centre, p 3.

- 1.79** Some of the legal groups who appeared before the committee also highlighted the importance of embedding self-determination in any reforms. The Law Society of NSW commented that 'respecting the principle of self-determination and its manifestation in practice by empowering communities and individuals is critical', noting that outcomes for First Nations people are better if initiatives are led and owned by First Nations people.⁵⁸
- 1.80** Community Legal Centres NSW contended that implementation of recommendations from previous reports, along with this inquiry's report, must be 'guided by high-level principles including self-determination'.⁵⁹ The Women's Legal Service NSW also recommended 'entrenching principles of truth telling, self-determination and restorative justice in all actions'.⁶⁰
- 1.81** Stakeholders pointed to the National Aboriginal and Torres Strait Islander Legal Services advice that reforms aimed at reducing contact with the criminal justice system must be underpinned by the following principles:
- Aboriginal and Torres Strait Islander communities, their organisations and representative bodies must be directly involved in decision-making about matters that affect Aboriginal and Torres Strait Islander peoples
 - Aboriginal and Torres Strait Islander community controlled organisations are the preferred provider of culturally safe services and supports and are therefore responsive to the particular needs and requirements of Aboriginal and Torres Strait Islander peoples
 - Aboriginal and Torres Strait Islander community controlled organisations, including legal services, must receive adequate levels of funding to have the capacity to respond to community needs and demand
 - More flexible funding models should be established to enable Aboriginal and Torres Strait Islander community controlled organisations can deliver holistic wrap around services that are responsive to community needs and to ensure the collaboration of unique expertise across sectors
 - Governments must shift away from punitive and law enforcement focused approaches, and towards approaches that prioritise prevention, early intervention and diversion from the criminal justice system.⁶¹
- 1.82** The importance of self-determination was also one of the key underlying principles considered by the RCIADIC to enable First Nations people to be empowered to make many of the decisions affecting their lives.⁶² As noted earlier, self-determination is also at the centre of the new National Agreement on Closing the Gap, with all Australian governments committed to working with First Nations people, their communities, organisations and businesses.⁶³

⁵⁸ Submission 113, The Law Society of NSW, p 3.

⁵⁹ Submission 110, Community Legal Centres NSW, p 3.

⁶⁰ Submission 119, Women's Legal Service NSW, p 2.

⁶¹ Submission 127, Just Reinvest NSW, p 9; Submission 120, Aboriginal Legal Service (NSW/ACT), pp 12-13.

⁶² Submission 126, Deadly Connections Community and Justice Services, p 10; Submission 120, Aboriginal Legal Services (NSW/ACT), p 9.

⁶³ Closing the Gap, *What we know*, <<https://www.closingthegap.gov.au/>>

Committee comments

- 1.83** It has been 30 years since the *Royal Commission into Aboriginal Deaths in Custody* handed down its findings and recommendations and it is not surprising that First Nations communities and other stakeholders are frustrated and angered with the lack of progress made to date in addressing the underlying causes of disproportionate incarceration rates for First Nations people.
- 1.84** Clearly, the historical, social and economic drivers contributing to disproportionate incarceration rates for First Nations people still exist, as does the entrenched disadvantage First Nations people experience in terms of health outcomes, housing, the impact of child removal, employment and education. Despite the passage of time, the extensive volume of work previously undertaken in relation to these issues, and the multitude of reforms and solutions put forward, we have failed to effect meaningful change on these matters. This is nothing short of a tragedy, and a gross injustice for First Nations people and the entire New South Wales community.
- 1.85** Even though it has been 30 years since the *Royal Commission into Aboriginal Deaths in Custody* handed down its report, the committee is concerned that there remains no clear, transparent monitoring or reporting on the implementation of recommendations.
- 1.86** While the Deloitte Access Economic report reviewed implementation progress in relation to the Royal Commission's 339 recommendations, it did not contain a clear and accessible list of what recommendations were outstanding for New South Wales to implement. The report was also the subject of criticism from stakeholders as the information reported by governments in relation to progress was on the basis of a 'self-assessment' and through a desktop analysis without input from First Nations community members or First Nations organisations.
- 1.87** Noting the lack of a clear reporting framework in place, and the lack of an up to date picture of what recommendations still need to be implemented, the committee implores the NSW Government to commit to the immediate and comprehensive implementation of all outstanding recommendations from the *Royal Commission into Aboriginal Deaths in Custody* report and the Australian Law Reform Commission's *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* report. An exception to this would be all recommendations that fall outside of the New South Wales' jurisdiction. We also note that some of the recommendations from these reports feature within our own report.

Recommendation 1

That the NSW Government commit to the immediate and comprehensive implementation of all outstanding recommendations from the 1991 *Royal Commission into Aboriginal Deaths in Custody* report and 2017 Australian Law Reform Commission's *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* report, with the exception of recommendations that fall outside of state jurisdiction.

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- 1.88** The committee is also concerned that there is no clear, formal and effective oversight mechanism in place to monitor the implementation of recommendations relating to First Nations people and communities. While we acknowledge that the NSW Government will be working in partnership with the NSW Coalition of Aboriginal Peak Organisations and other

Aboriginal representative bodies and organisations to develop a strong jurisdictional plan to implement the *National Agreement on Closing the Gap*, and that there will be a Closing the Gap Directorate within Aboriginal Affairs NSW to coordinate agencies responses, we are unclear to what extent this Directorate will be able to monitor and track progress in relation to previous recommendations or matters beyond the scope of Closing the Gap. In our view, this broad oversight role needs to be clearer to promote greater accountability and transparency.

- 1.89 Therefore, whether part of the Directorate's role or not, we recommend that the NSW Government establish a clear, formal and effective oversight mechanism to monitor and report on progress made in relation to the implementation of any recommendations relating to First Nations people and achievement towards the Closing the Gap targets, with an annual report provided to the NSW Parliament. We note that this would include monitoring and reporting in relation to the implementation of recommendations from the *Royal Commission into Aboriginal Deaths in Custody* report.
-

Recommendation 2

That the NSW Government establish a clear, formal and effective oversight mechanism to monitor and report on progress made in relation to the implementation of any recommendations relating to First Nations people and achievement towards the Closing the Gap targets, with an annual report provided to the NSW Parliament.

- 1.90 The committee is sympathetic to the call for more ambitious Closing the Gap targets, however these targets were clearly a compromise reached between governments and organisations within the Coalition of Aboriginal and Torres Strait Islander Peak Organisations. The targets were agreed through a national process, and reflect that fact. However a rate of change that would not see parity in incarceration rates until the end of this century should not be accepted. This is a genuine crisis and it must be seen as such and appropriate political will and resources directed to address it with real urgency.

- 1.91 That being said, the committee believes that instead of reducing the number of First Nation adults and youth incarcerated by 15 and 30 per cent respectively by 2031, the NSW Government, as part of its jurisdictional plan, should work towards achieving parity in prison rates within this timeframe. The committee therefore makes this recommendation.
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Recommendation 3

That the NSW Government, within its jurisdictional plan to implement the *National Closing the Gap Agreement*, commit to achieving parity in prison rates by 2031.

- 1.92 The committee acknowledges that a commitment to self-determination must be at the core of any solution to the over-representation of First Nations people in the criminal justice system. More meaningful and effective change will likely take place if First Nations people are involved in the design, implementation and evaluation of any program, reform or solution affecting First Nations communities.
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- 1.93** The committee acknowledges that old approaches have not worked, and that the government will need to shift its thinking so as to work in greater partnership with First Nations people and communities on effective solutions that will address the over-representation of First Nations people in the criminal justice system. We urge the NSW Government to commit to the principle of self-determination in its response to any of the matters raised within this report.

Chapter 2 The over-representation of First Nations people in the criminal justice system

As noted in the previous chapter, the over-representation of First Nations people in the criminal justice system, and more specifically in custody, has been well documented in previous reviews and reports. This chapter will examine the trends indicated by current data, both in relation to incarceration for First Nations people and deaths in custody. It will also discuss the drivers of disproportionate incarceration rates for First Nations people.

Data on the over-representation of First Nations people in the criminal justice system

- 2.1** In the Australian Law Reform Commission's 2017 report entitled *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* it was noted that the over-representation of Aboriginal and Torres Strait Islander Peoples is a 'persistent and growing problem', with Aboriginal and Torres Strait Islander adults making up 2 per cent of the national population but constituting 27 per cent of the national prison population.⁶⁴
- 2.2** According to data from the Australian Bureau of Statistics (ABS) in 2019, Aboriginal adults are 9.3 times more likely to be in prison than non-Aboriginal adults. Acknowledging that this level of over-representation is 'terribly high', Ms Jackie Fitzgerald, Executive Director of the NSW Bureau of Crime Statistics and Research (BOCSAR), also explained that the ABS figures are relatively stable and 'do not show an increase in the rate of over-representation', taking into account that in 2010 Aboriginal people were 9.2 times more likely to be in prison.⁶⁵
- 2.3** Ms Fitzgerald clarified, however, that the same stability could not be said for the situation in New South Wales, given data from the BOCSAR shows that the Aboriginal prison population has increased 37 per cent in the 6 years to February 2020.⁶⁶ This is despite First Nations people accounting for only 3.4 per cent of the population in New South Wales.⁶⁷
- 2.4** As shown in Figure 1, there were 2338 Aboriginal adults in custody in March 2013, 2657 in 2014, 2784 in 2015, 3029 in 2016, 3234 in 2017, 3305 in 2018, 3383 in 2019 and 3643 as at February 2020.⁶⁸

⁶⁴ See Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (December 2017), pp 21-22, <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>

⁶⁵ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 2; Evidence, Ms Jackie Fitzgerald, Executive Director, NSW Bureau of Crime Statistics and Research, 8 December 2020, pp 2-3.

⁶⁶ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 4; Evidence, Ms Fitzgerald, 8 December 2020, pp 2-3.

⁶⁷ NSW Aboriginal Affairs, *Key Data – NSW Aboriginal People* (September 2020), <https://www.aboriginalaffairs.nsw.gov.au/media/website_pages/new-knowledge/facts-and-figures/KEY-DATA-ABORIGINAL-PEOPLE-SEP-2020.pdf>

⁶⁸ Tabled document, NSW Bureau of Crime Statistics and Research, *NSW Custody statistics March 2013 to February 2020*.

Figure 1 NSW Custody statistics by status, Aboriginality and gender between 2013 and 2020⁶⁹

Count			Month							
Aboriginality	Gender	Legal Status	Mar-2013*	Feb-2014	Feb-2015	Feb-2016	Feb-2017	Feb-2018	Feb-2019	Feb-2020
Aboriginal	Female	Remand	86	95	109	127	138	133	148	144
		Sent	122	163	167	173	219	196	189	196
		Total	208	258	276	300	357	329	337	340
	Male	Remand	618	670	738	824	997	1006	1037	1185
		Sent	1512	1729	1770	1905	1880	1970	2009	2118
		Total	2130	2399	2508	2729	2877	2976	3046	3303
	Total	Remand	704	765	847	951	1135	1139	1185	1329
		Sent	1634	1892	1937	2078	2099	2166	2198	2314
		Total	2338	2657	2784	3029	3234	3305	3383	3643
Non Aboriginal	Female	Remand	134	168	193	247	307	307	264	277
		Sent	350	323	335	364	381	376	379	376
		Total	484	491	528	611	688	683	643	653
	Male	Remand	1927	2174	2397	2837	3101	3220	3187	3282
		Sent	5046	5303	5463	5749	5893	5968	6071	6286
		Total	6973	7477	7860	8586	8994	9188	9258	9568
	Total	Remand	2061	2342	2590	3084	3408	3527	3451	3559
		Sent	5396	5626	5798	6113	6274	6344	6450	6662
		Total	7457	7968	8388	9197	9682	9871	9901	10221
Unknown	Female	Remand	16	3	1	0	2	10	3	4
		Sent	2	1	0	0	0	0	3	2
		Total	18	4	1	0	2	10	6	6
	Male	Remand	117	33	18	30	46	61	27	77
		Sent	27	16	16	20	14	20	28	27
		Total	144	49	34	50	60	81	55	104
	Total	Remand	133	36	19	30	48	71	30	81
		Sent	29	17	16	20	14	20	31	29
		Total	162	53	35	50	62	91	61	110
Total	Female	Remand	236	266	303	374	447	450	415	425
		Sent	474	487	502	537	600	572	571	574
		Total	710	753	805	911	1047	1022	986	999
	Male	Remand	2662	2877	3153	3691	4144	4287	4251	4544
		Sent	6585	7048	7249	7674	7787	7958	8108	8431
		Total	9247	9925	10402	11365	11931	12245	12359	12975
	Total	Remand	2898	3143	3456	4065	4591	4737	4666	4969
		Sent	7059	7535	7751	8211	8387	8530	8679	9005
		Total	9957	10678	11207	12276	12978	13267	13345	13974

2.5 Additionally, based on a snapshot as at June 2020, the BOCSAR indicated that:

- 18 per cent of all adults proceeded against to court by the police are Aboriginal (a 34 per cent increase over 5 years for Aboriginal adult offenders as compared to an 18 per cent increase for total adult offenders)
- 40 per cent of adults who are bail refused when their court appearance is finalised are Aboriginal (an increase of 6 per cent over the last 5 years for Aboriginal offenders, as compared to an increase of 12 per cent for all defendants refused bail)
- 22 per cent of all proven court appearances involve an Aboriginal defendant (a decrease for Aboriginal offenders by 1 per cent over 5 years, whereas there was an 11 per cent decrease across all total proven court appearances)

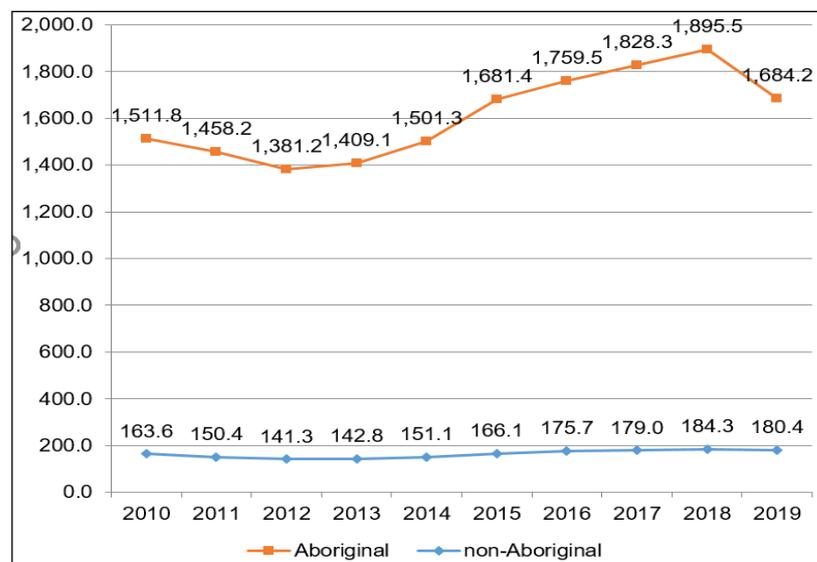
⁶⁹ Tabled document, NSW Bureau of Crime Statistics and Research, *NSW Custody statistics March 2013 to February 2020*.

- 40 per cent of prison sentences handed down by the courts are to Aboriginal defendants (a decrease of 5 per cent over the last 5 years for Aboriginal adults, which is consistent with the trend for all prisoners)
- 25 per cent of the adult prison population is Aboriginal (an increase of 3 per cent in 5 years, whereas the increase is 1 per cent for all adults in prison).⁷⁰

2.6 Reflecting on the increase in Aboriginal adults in custody over recent years (as shown in Figure 1) Ms Fitzgerald noted that the 'general increase we are seeing for Aboriginal people is consistent with non-Aboriginal increases'. She also highlighted that both the remand and sentenced population of Aboriginal people in custody has increased, although the remand population has increased more rapidly (up 74 per cent since 2013 versus an increase of 22 per cent for the sentenced prisoner population). Ms Fitzgerald noted that the 74 per cent increase 'translates to about 57 per cent of the total increase' in the Aboriginal prison population.⁷¹

2.7 Ms Fitzgerald provided the following table in Figure 2 to show the imprisonment rate for Aboriginal and Non-Aboriginal adults in New South Wales since 2010.

Figure 2 Aboriginal and Non-Aboriginal Imprisonment rate in New South Wales since 2010⁷²



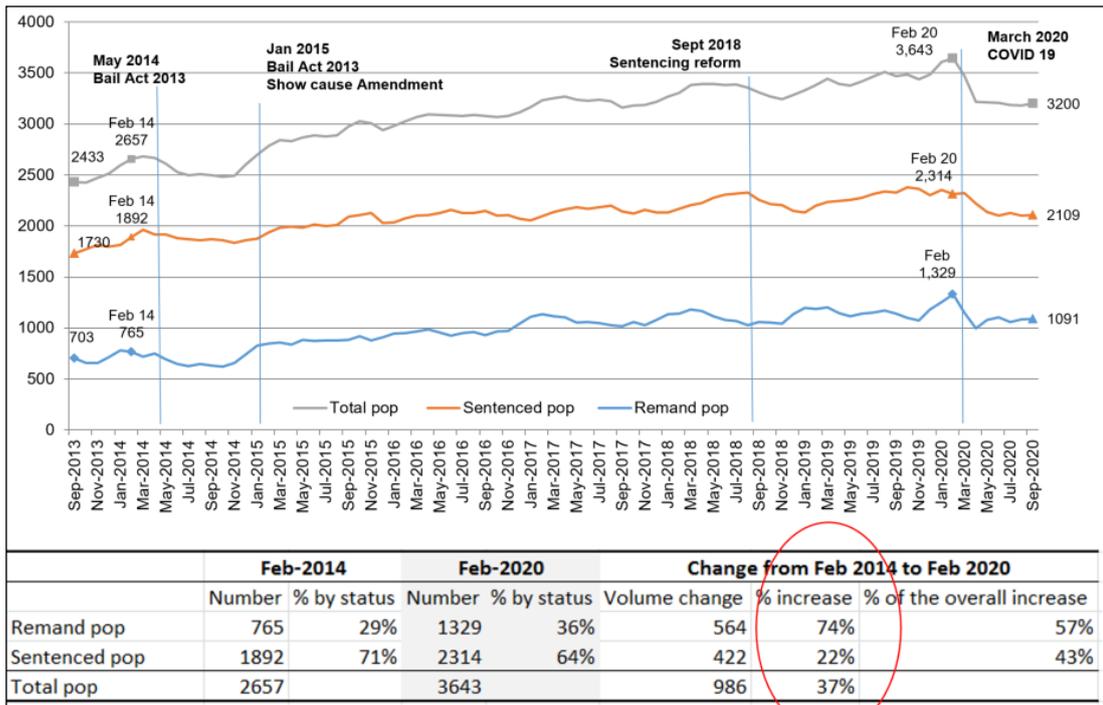
⁷⁰ See Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Justice Snapshot – Aboriginal over-representation in the NSW Criminal Justice System – Adults* (June 2020 Summary); Tabled document, NSW Bureau of Crime Statistics and Research, *Over-representation of Aboriginal adults in the NSW Criminal Justice System* (June 2020 update).

⁷¹ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 4; Evidence, Ms Fitzgerald, 8 December 2020, pp 2-3.

⁷² Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 2.

2.8 On the increase in prisoner population, including prisoners held on remand, Ms Fitzgerald highlighted three relevant events (as shown in Figure 3), these being changes to the bail legislation in 2014 and 2015 and sentencing reforms in late 2018.⁷³

Figure 3 Number of Aboriginal adults in custody: sentenced, remand and total, between 2013 and 2020⁷⁴



2.9 The current pandemic was also noted to have impacted the remand population and incarceration rates, as further discussed at paragraph 2.24.

Nature of offences

2.10 The committee was also provided with data from the BOCSAR on the nature of offences committed by Aboriginal adults in custody.

2.11 Ms Fitzgerald noted that based on data as at February 2020, the main offences for which Aboriginal adults were in prison were assault (28 per cent), breach community order/parole (16 per cent), break and enter (9 per cent), sexual assault (8 per cent), robbery (8 per cent), homicide (5 per cent), drug offences (4 per cent), intimidation/stalking (3 per cent), negligent acts (3 per cent), theft (3 per cent), weapons (2 per cent) and other (9 per cent).⁷⁵

⁷³ Evidence, Ms Fitzgerald, 8 December 2020, pp 2-3.

⁷⁴ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 4.

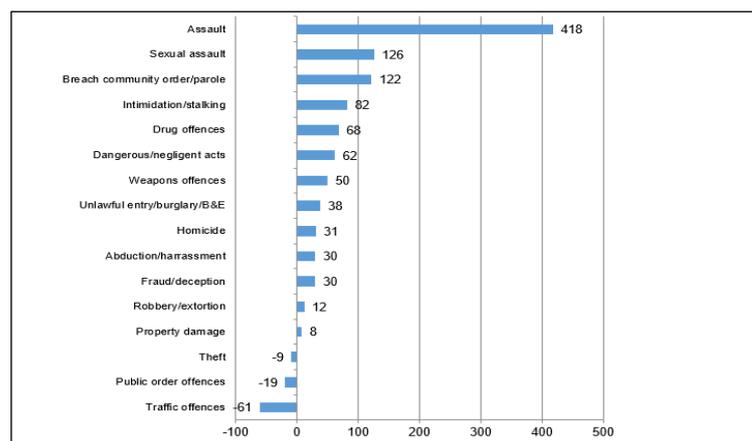
⁷⁵ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 6.

2.12 Figure 4 shows the number of adults in custody for each of these offences, in February 2014 and February 2020. Figure 5 indicates the change in these categories over time. The data indicates that in terms of Aboriginal adults in custody for assault, this category has risen by 41 per cent over the last six years (from 666 Aboriginal adult prisoners in 2016 to 1079 Aboriginal adult prisoners in 2020).⁷⁶ Other categories have also grown, except for traffic offences, with Ms Fitzgerald explaining that only a low number of Aboriginal adults are now in custody for traffic matters.⁷⁷

Figure 4 Aboriginal adults in custody by offence, in February 2014 and February 2020⁷⁸

	Feb-14	Feb-20	Difference	% change	% of total increase
Assault	666	1079	413	62%	41%
Sexual Assault	173	300	127	73%	13%
Breach community/custodial/parole order	445	553	108	24%	11%
Intimidation/stalking*	63	147	84	133%	8%
Illicit drug	88	156	68	77%	7%
Dangerous driving and other negligence	62	124	62	100%	6%
Weapons & explosives	31	81	50	161%	5%
Break and enter	302	343	41	14%	4%
Homicide	138	169	31	22%	3%
Fraud	34	64	30	88%	3%
Abduction, Harassment	33	63	30	91%	3%
Robbery	269	283	14	5%	1%
Other justice procedures	12	24	12	100%	1%
unknown	8	17	9	113%	1%
Property damage	36	44	8	22%	1%
breach violence order	21	24	3	14%	0%
Misc	4	1	-3	-75%	0%
theft and related	132	123	-9	-7%	-1%
Public order	38	19	-19	-50%	-2%
Traffic	90	29	-61	-68%	-6%
Total	2645	3643	998	38%	100%

Figure 5 Change in volume of Aboriginal adults in prison change by offence, in February 2014 and February 2020⁷⁹



⁷⁶ Tabled document, NSW Bureau of Crime Statistics and Research, *Prison Population by offence - All Aboriginal adults in custody*.

⁷⁷ Evidence, Ms Fitzgerald, 8 December 2020, p 10.

⁷⁸ Tabled document, NSW Bureau of Crime Statistics and Research, *Prison Population by offence - All Aboriginal adults in custody*.

⁷⁹ Tabled document, NSW Bureau of Crime Statistics and Research, *Prison Population by offence - All Aboriginal adults in custody*.

2.13 Given the data above, the committee attempted to explore to what extent the assault category included domestic violence related assaults. On this aspect, Ms Fitzgerald made several observations based on data from the BOCSAR. Firstly, she stated that about half of the assault offences represented in the statistics above were domestic violence related. Secondly, she noted that there has been an 'increase in the clear up rates for domestic violence related assaults', as well as a 'slow increase in the volume of domestic violence assaults coming to police attention'. She added:

There has definitely been an increase in charging. I think the clear-up rate now – about 65 per cent of domestic violence assaults reported to police result in a charge. That was 60 per cent or so five years ago, so it is definitely increasing the volume of charges.⁸⁰

2.14 Domestic violence related matters are discussed further in chapter 3.

2.15 The BOCSAR also provided the committee with criminal courts statistics, to provide further insight into the contact Aboriginal adults have with the criminal justice system.

2.16 It provided data on the number of finalised court appearances involving Aboriginal adults by the most serious offence, being the offence with the most serious penalty, as shown in Figure 6. This table only shows the offences that account for 90 per cent of the total increase in finalised court appearances.

Figure 6 Finalised court appearances involving Aboriginal adults by most serious offence, between 2013 and 2019⁸¹

Principal or Most serious finalised offence	2013	2014	2015	2016	2017	2018	2019	Difference	% change	% of total change
Breach custody/community order	1996	2119	2294	2557	2694	2797	2910	914	46%	15%
Possess and/or use illicit drugs	1321	1616	1748	1908	1919	1860	2141	820	62%	14%
Intimidation/stalking	1038	1185	1322	1499	1572	1547	1747	709	68%	12%
Traffic and vehicle regulatory offences	3857	4275	4693	5503	5583	5108	4528	671	17%	11%
Prohibited and regulated weapons and explosives offences	267	428	508	542	634	667	840	573	215%	9%
Breach of violence orders	1283	1173	1333	1413	1296	1560	1664	381	30%	6%
Theft (except motor vehicles)	1213	1160	1351	1459	1410	1515	1557	344	28%	6%
Fraud, deception and related offences	377	476	564	637	674	710	714	337	89%	6%
Assault - DV related	1986	2089	2089	2072	2124	2193	2246	260	13%	4%
Receive or handle proceeds of crime	721	774	836	951	876	893	945	224	31%	4%
Dealing, importing, manufacturing illicit drugs	288	366	343	420	360	424	449	161	56%	3%
Motor vehicle theft and related offences	244	206	273	249	299	316	394	150	61%	2%

New prison admissions and custodial length

2.17 Relevant to the data on the number of Aboriginal adults in prison is new prison admissions and custodial length, with the BOCSAR also providing data on these points.

2.18 The committee was informed that while COVID has led to a decline in new prison receptions, due to court interruptions and delays, the number of Aboriginal adults entering prison each year has increased by 34 per cent between 2013 and 2019. By comparison, the total number of new prison receptions increased by 29 per cent over the same period.⁸²

⁸⁰ Evidence, Ms Fitzgerald, 8 December 2020, pp 6-7.

⁸¹ Tabled document, NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2013-2019, Table 3, Finalised court appearances involving Aboriginal adults by most serious offence*.

⁸² Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 8.

2.19 In terms of custodial length, the committee was advised that the 'duration of Aboriginal adult custodial episodes are roughly stable'. Essentially, the average duration of a stay in custody for an Aboriginal adult in 2019 is the same as it was in 2014 (about 200 days), and less than the general average (240 days).⁸³

Bail decisions

2.20 As noted above, bail reforms influenced prison population growth in 2014 and 2015. This involved the introduction of the unacceptable risk test and show cause tests in relation to bail decisions.

2.21 Based on data from the BOCSAR, the total number of first court appearances by Aboriginal adults increased 54 per cent, while first court appearances where the defendant was bail refused increased 77 per cent. The rate of Aboriginal adult defendants refused bail at first appearance increased 15 per cent, from 22.4 per cent to 25.8 per cent in 2019.⁸⁴

2.22 The committee was informed that a BOCSAR evaluation of the 2013 Bail Act changes found an increase in bail refusal for most defendants, and that the impact was greater for Aboriginal defendants.⁸⁵

2.23 Turning to the reasons in which bail is refused, the data provided by Ms Fitzgerald showed that:

- Aboriginal adults are mostly refused bail because they fail the unacceptable risk test (this accounts for 48 per cent of bail refusals), followed by the 'show cause' determination (which accounts for 41 per cent of refusals)
- in terms of bail refusals in terms of the unacceptable risk test, the most commonly nominated risk for Aboriginal adults is that they will be a danger to individuals or the community, followed by concerns that the defendant will commit a serious offence while on bail
- in terms of bail refusals based on the show cause condition, the most commonly triggered condition is that the Aboriginal adult will commit the offence while on bail/parole.⁸⁶

The impact of COVID-19 on the prison population

2.24 A number of stakeholders discussed the impact of COVID-19 on incarceration rates, and suggested that the same approaches being used during the response to COVID could be employed longer term, potentially to decrease the over-representation of First Nations people in the criminal justice system.

⁸³ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 8.

⁸⁴ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 9.

⁸⁵ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 6.

⁸⁶ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 6.

- 2.25** Based on data from the BOCSAR, the number of Aboriginal adults entering custody has decreased in 2020 'due to COVID court interruptions, altered offending patterns and associated changes in bail decisions'.⁸⁷ This past year has been an exception though, given the number of Aboriginal adults entering custody has generally increased over the last seven years (see paragraph 2.7).
- 2.26** The Public Service Association of NSW discussed how the prison population in New South Wales decreased during COVID-19 due to changes in sentence administration and the operation of courts. For example, the Association noted that there was a suspension of new jury trials in the District Court, postponement of defended hearings and sentencing matters and suspension of new judge alone trials and appeal hearings. The Public Service Association stated that 'this led to court finalisations being delayed' and a likely reduction in the 'back log in the system for remand inmates'.⁸⁸
- 2.27** On remand rates in particular, the Association explained that due to the risks posed by COVID-19 for individuals, 'the Local Court considered release applications from inmates on remand who might ultimately spend more time on remand than the duration of their custodial penalty if found guilty'. It stated that 'this reversed the long trend to bail refuse inmates on remand for what might be considered crimes of the lower end severity'.⁸⁹
- 2.28** Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force, also highlighted that there has been a three per cent reduction in bail refusal rates by the police over the last 12 months, which he said 'may well be connected with COVID'.⁹⁰
- 2.29** Discussing the trends during COVID, Ms Sarah Crellin, Principal Solicitor for the Criminal Practice of the Aboriginal Legal Service (NSW/ACT) and member of the Law Society's Indigenous Issues Committee, argued that the 'system does have the ability to choose other options apart from imprisonment'. She said that 'COVID has kind of given us the evidence to show that crime does not go up if you choose an option that sees a member of our community remain in the community rather than in custody'.⁹¹
- 2.30** In this context, several stakeholders called for reforms which may emulate the trends seen during the pandemic and ensure prison was only used as a last resort, especially for First Nations people. For example, Dr Louis Schetzer, Policy and Advocacy Manager with the Australian Lawyers Alliance, stated:

One thing that the last six months has shown us is the capacity of governments to act in the face of a crisis, as we have seen from responses to the COVID-19 pandemic. It is reasonable and quite obvious to say that the over-representation of Aboriginal and

⁸⁷ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 8.

⁸⁸ Submission 118, Public Service Association, p 12.

⁸⁹ Submission 118, Public Service Association, p 12.

⁹⁰ Evidence, Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force, 7 December 2020, p 29.

⁹¹ Evidence, Ms Sarah Crellin, Principal Solicitor, Aboriginal Legal Service (NSW/ACT), and member of the Law Society's Indigenous Issues Committee, 26 October 2020, p 5.

Torres Strait Islander people in detention and in prison is a crisis that requires urgent attention. We have seen that governments can respond in crisis.⁹²

- 2.31** Professor Eileen Baldry also called for reductions in the use of remand, expressing her support for the NSW Law Reform Commission Report, given 'remand impacts more on Indigenous Australians and people with disability as they are more over-represented in remand than non-Indigenous people'.⁹³
- 2.32** Deadly Connections Community and Justice Services Limited also echoed these sentiments, stating that 'the rapid decrease in incarceration demonstrates that where health and wellbeing considerations are prioritised in bail, sentencing and parole decisions, First Nations imprisonment can decline rapidly'.⁹⁴
- 2.33** Ultimately, the Public Service Association recommended that the approach adopted during the COVID-19 pandemic of weighing the relative severity of the crime, and the risks not only of COVID-19 but other factors such as the physical and psychological health of First Nations people in the granting of bail during remand and sentencing could be a consideration for future judicial law reform.⁹⁵

First Nations young people

- 2.34** This section will focus on the data for First Nations young people, and the contact First Nations youth are having with the criminal justice system.
- 2.35** Based on a June 2020 snapshot that the BOCSAR provided to the committee:
- 35 per cent of all young people proceeded against to court by the police are Aboriginal
 - 62 per cent of young people who are bail refused when their court appearance is finalised are Aboriginal
 - 42 per cent of all court appearances for young people involve an Aboriginal defendant
 - 60 per cent of prison sentences handed down by the courts to young people are to Aboriginal defendants
 - 39 per cent of the juvenile detention population is Aboriginal.⁹⁶
- 2.36** However, unlike the trends seen in the Aboriginal adult prisoner population, the number of Aboriginal youth in custody has largely decreased over the last seven years, as shown in Figure 7.

⁹² Evidence, Dr Louis Schetzer, Policy and Advocacy Manager, Australian Lawyers Alliance, 26 October 2020, p 3.

⁹³ Submission 48, Professor Eileen Baldry, p 1.

⁹⁴ Submission 126, Deadly Connections Community and Justice Services, p 5.

⁹⁵ Submission 118, Public Service Association, p 12.

⁹⁶ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Justice Snapshot – Aboriginal over-representation in the NSW Criminal Justice System – Young People*, June 2020 Summary.

Figure 7 Number of juveniles in custody by legal status, Aboriginality and gender between 2013 and 2020⁹⁷

Aboriginality	Gender	Legal Status	Month								Feb 2013 to Feb 2020	
			Feb-2013	Feb-2014	Feb-2015	Feb-2016	Feb-2017	Feb-2018	Feb-2019	Feb-2020	Difference	% change
Aboriginal	Female	Remand	8	12	12	10	9	8	6	10	2	25%
		Sent	8	4	2	3	5	2	3	1	-7	-88%
		Total	16	16	14	13	14	10	9	11	-5	-31%
	Male	Remand	84	72	76	72	72	85	52	61	-23	-27%
		Sent	70	66	66	68	62	48	50	46	-24	-34%
		Total	154	138	142	140	134	133	102	107	-47	-31%
	Total	Remand	92	84	88	82	81	93	58	71	-21	-23%
		Sent	78	70	68	71	67	50	53	47	-31	-40%
		Total	170	154	156	153	148	143	111	118	-52	-31%
Non Aboriginal	Female	Remand	7	5	10	5	5	9	7	9	2	29%
		Sent	5	8	3	4	2	5	2	2	-3	-60%
		Total	12	13	13	9	7	14	9	11	-1	-8%
	Male	Remand	66	93	57	60	68	74	60	73	7	11%
		Sent	63	74	64	47	40	44	39	63	0	0%
		Total	129	167	121	107	108	118	99	136	7	5%
	Total	Remand	73	98	67	65	73	83	67	82	9	12%
		Sent	68	82	67	51	42	49	41	65	-3	-4%
		Total	141	180	134	116	115	132	108	147	6	4%
Unknown	Female	Remand	0	0	0	0	0	1	0	0	0	-
		Sent	0	1	0	0	0	0	0	0	0	-
		Total	0	1	0	0	0	1	0	0	0	-
	Male	Remand	1	2	1	0	0	2	0	1	0	0%
		Sent	1	1	2	0	0	2	2	2	1	100%
		Total	2	3	3	0	0	4	2	3	1	50%
	Total	Remand	1	2	1	0	0	3	0	1	0	0%
		Sent	1	2	2	0	0	2	2	2	1	100%
		Total	2	4	3	0	0	5	2	3	1	50%
Total	Female	Remand	15	17	22	15	14	18	13	19	4	27%
		Sent	13	13	5	7	7	7	5	3	-10	-77%
		Total	28	30	27	22	21	25	18	22	-6	-21%
	Male	Remand	151	167	134	132	140	161	112	135	-16	-11%
		Sent	134	141	132	115	102	94	91	111	-23	-17%
		Total	285	308	266	247	242	255	203	246	-39	-14%
	Total	Remand	166	184	156	147	154	179	125	154	-12	-7%
		Sent	147	154	137	122	109	101	96	114	-33	-22%
		Total	313	338	293	269	263	280	221	268	-45	-14%

2.37 This shows that the number of Aboriginal juveniles in custody was as follows: 170 in 2013, 154 in 2014, 156 in 2015, 153 in 2016, 148 in 2017, 143 in 2018 and 111 in 2019. A slight increase occurred from February 2019, with 118 Aboriginal juveniles in custody recorded as at February 2020.⁹⁸

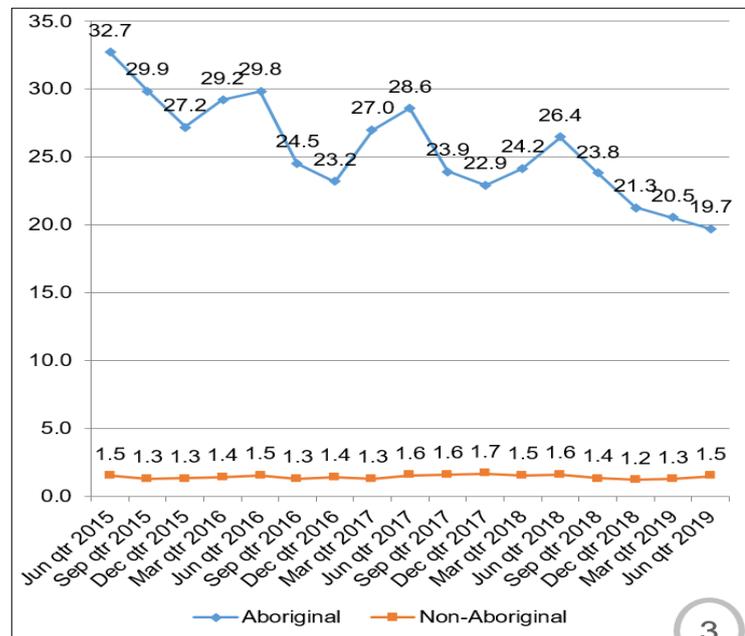
2.38 As shown in Figure 8, the rate of over-representation for Aboriginal youth in custody has fallen over the last four years. In June 2015 Aboriginal young people were 21.5 times more likely to be in custody, whereas in June 2019 it was 13.2 times.⁹⁹

⁹⁷ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal over-representation custody and court statistics, March 2013 to February 2020*.

⁹⁸ Tabled document, NSW Bureau of Crime Statistics and Research, *NSW Custody statistics March 2013 to February 2020*.

⁹⁹ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 2.

Figure 8 Aboriginal and non-Aboriginal youth custody rate between 2015 and 2019¹⁰⁰



2.39 Providing some insight into the reduction of young people in custody, Ms Fitzgerald said that the data indicates a 'marked reduction in court volumes'. While she noted that the 'likelihood of a young person being remanded in custody is reasonable stable in terms of proportions', she said that the overall figures are falling 'because we have fewer young people coming into the criminal justice system'.¹⁰¹

2.40 Ms Fitzgerald reflected that the downward trends for youth justice in general are 'more pronounced ... for First Nations', which she attributed to a 'genuine reduction in offending and a genuine reduction in participation in crime'.¹⁰² She added:

We did produce a paper last year that looked at an age-specific rate, so an age-adjusted rate of participation in crime. You can see there are big declines in young people being proceeded against for all types of offences over the longer term—for high-volume theft offences and assault offences. It actually seems like a generational shift in participation in crime by young people. Young people these days are just not offending at the same levels.¹⁰³

First Nations Women

2.41 Of equal or greater concern is the experience of First Nations women, with an alarming increase in First Nations women in custody in New South Wales. This was highlighted in submissions by stakeholders, including the NSW Bar Association and Women's Legal Service. In fact, the

¹⁰⁰ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 2.

¹⁰¹ Evidence, Ms Fitzgerald, 8 December 2020, p 21.

¹⁰² Evidence, Ms Fitzgerald, 8 December 2020, p 22.

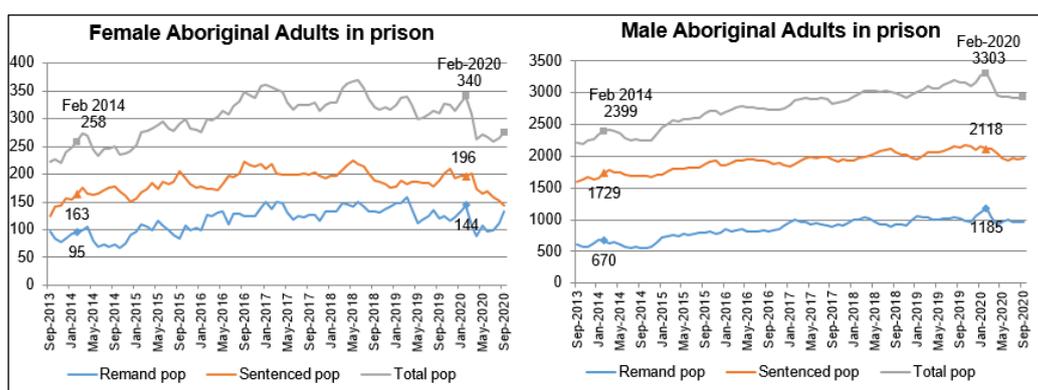
¹⁰³ Evidence, Ms Fitzgerald, 8 December 2020, p 22.

Women's Legal Service contended that 'First Nations women are the fastest growing prison population in NSW'.¹⁰⁴

2.42 Data from the BOCSAR supported this assertion, showing that in February 2014 there were 258 Aboriginal women in prison, whereas in February 2020 there were 340.¹⁰⁵

2.43 Looking comparatively at the prison population, Ms Fitzgerald noted that Aboriginal male and Aboriginal female prisoners have increased by similar amounts in the 6 years to February 2020 (32 per cent and 38 per cent respectively).¹⁰⁶ See Figure 9.

Figure 9 Aboriginal adults in prison by gender between 2013 and 2020¹⁰⁷



2.44 Ms Fitzgerald explained that for Aboriginal women, the increase over the period from February 2014 to February 2020 is actually slightly less than the increase for Aboriginal men. Putting some context to this, particularly in terms of the increases seen in remand populations more generally, she added:

There was a point several years ago ... where the female population was increasing at a faster rate than Aboriginal males, but you can see that the Aboriginal female population has been almost steady for the past three or so years. We still did see a big increase in the years following the 2014 reforms. The takeaway message is that there is a slightly lower increase for Aboriginal women, but still a large increase, and we are still seeing the effects of those remand decisions playing out in a similar way for both genders. Sixty per cent of that April increase is due to the remand population for women and 57 per cent for men, so not a lot of gender differentiation there.¹⁰⁸

¹⁰⁴ Submission 119, Women's Legal Service, p 4.

¹⁰⁵ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 5.

¹⁰⁶ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 5.

¹⁰⁷ Tabled document, NSW Bureau of Crime Statistics and Research, *Aboriginal Over-representation in the Criminal Justice System*, p 5.

¹⁰⁸ Evidence, Ms Fitzgerald, 8 December 2020, p 4.

The drivers of disproportionate incarceration rates

- 2.45** As noted in chapter 1, it is widely accepted that systemic issues and entrenched disadvantaged contribute to the over-representation of First Nations people in the criminal justice system. This section will provide an overview of the drivers, and then discuss more specifically the evidence received in relation to the drivers contributing to the rates of First Nations youth and women in custody.
- 2.46** The *Royal Commission into Aboriginal Deaths in Custody* recognised that there are various historical, social and economic indicators contributing to disproportionate incarceration rates for First Nations people. It stated:
- ... [T]he more fundamental causes for the over-representation of Aboriginal people in custody are not to be found in the criminal justice system but in those factors which bring Aboriginal people into conflict with the criminal justice system in the first place. The view propounded by this report is that the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society-socially, economically and culturally.¹⁰⁹
- 2.47** It is accepted that these factors continue to contribute to the high levels of contact First Nations people have with the criminal justice system today. As outlined during the Australian Law Reform Commission's *Pathways to Justice* report, the drivers of incarceration rates for First Nations people include a lack of education and employment opportunities, health issues, inadequate housing and homelessness, previous contact with the child protection system and youth justice system, family violence and intergenerational trauma. It was also highlighted that 'incarceration itself has a compounding effect on all of the above disadvantages, and can lead to a cycle of incarceration – both for ex-prisoners, and for their families'.¹¹⁰
- 2.48** While this report principally focuses on reforms to address disproportionate incarcerations rates and reforms in terms of overlooking deaths in custody, several stakeholders acknowledged the drivers of incarceration for First Nations people in their evidence.
- 2.49** Just Reinvest NSW provided the image in Figure 10, to highlight the drivers and causal pathways of Aboriginal incarceration, noting that the drivers are 'multi-dimensional and interlinked, founded within the pervasive and structured disempowerment of Aboriginal people and communities'.¹¹¹

¹⁰⁹ See Royal Commission into Aboriginal Deaths in Custody (1991) *Royal Commission into Aboriginal Deaths in Custody: National Report*, Australian Government Publishing Service, <<https://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>

¹¹⁰ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (December 2017), pp 55-82, <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>

¹¹¹ Submission 127, Just Reinvest NSW, p 10.

Figure 10 Drivers and causal pathways of Aboriginal incarceration¹¹²

<p>Intergenerational disadvantage & poverty</p> <ul style="list-style-type: none"> Material poverty, or limited access to basic social needs and services (e.g. education, healthcare, employment, housing and internet access) can all lead to increased rates of incarceration.³² 43.2% of Aboriginal or Torres Strait Islander people are living in a household in the most disadvantaged IHAD (Index of Household Advantage and Disadvantage) quartile compared to 17.4% of non-Indigenous people.³³ 	<p>Homelessness & inadequate housing</p> <ul style="list-style-type: none"> Homelessness, inadequate housing and over-crowded housing, are part of the broader social and economic disadvantage which have the potential to contribute to higher rates of Aboriginal and Torres Strait Islander people in incarceration.³⁴ 	<p>Poor health & intergenerational trauma</p> <ul style="list-style-type: none"> In 2015, the Australian Medical Association noted the connection between health issues experienced by Aboriginal and Torres Strait Islander peoples—including poor mental health, physical disability, cognitive disability and substance abuse—and high incarceration rates.³⁵ The effects of the history of colonisation and dispossession on Aboriginal and Torres Strait Islander communities and individuals cannot be ignored.³⁶
<p>Unemployment</p> <ul style="list-style-type: none"> Unemployment is a well-known indicator of disadvantage and imprisonment.³⁷ Studies tracking the behaviour of individuals over time have found a strong relationship between unemployment and crime, particularly for offenders from low socio-economic status backgrounds.³⁸ 	<p>Drivers & causal pathways of Aboriginal incarceration</p>	<p>Low education</p> <ul style="list-style-type: none"> Lack of educational access and attainment has been identified as a strong multiplier of disadvantage. Research demonstrates a close relationship between poor school performance, early school leaving and self-reported/officially recorded involvement in crime and imprisonment.³⁹
<p>Drug & alcohol abuse</p> <ul style="list-style-type: none"> research on the relationship between substance abuse and crime is overwhelmingly supportive of the hypothesis that drug and alcohol abuse increase the risk of involvement in crime. Illicit drug dependence increases the rate of involvement in crime, at least in part because of the high costs associated with funding illicit drug dependence.⁴⁰ 	<p>Disability</p> <ul style="list-style-type: none"> Aboriginal people are 1.7 times as likely to be living with a disability than non-Indigenous Australians.⁴¹ In Dec 2019, almost 4 in 10 (38%) Indigenous people reported they had a disability.⁴² Individuals with cognitive impairment (e.g. intellectual disability, acquired brain injury) are at greater risk of entering the criminal justice system.⁴³ 	<p>Family and domestic violence</p> <ul style="list-style-type: none"> Domestic and family violence has been identified as a key driver of incarceration of Aboriginal people in multiple studies and reports.⁴⁴ Indigenous women in custody have often experienced long histories of abuse and been victims of child sexual assault and family violence.⁴⁵
<p>Child protection & out of home care system</p> <ul style="list-style-type: none"> Contact with the child protection system and the youth justice system are both risk factors for adult incarceration. Aboriginal and Torres Strait Islander peoples are disproportionately represented in both systems, as well as in the crossover between the two.⁴⁶ 	<p>Early contact with the juvenile justice system</p> <ul style="list-style-type: none"> Contact with the juvenile justice system is a strong predictor of incarceration as an adult.⁴⁷ Between the ages of 10 and 12, the proportion of Aboriginal children making their first contact with the criminal justice system is between 30 and 56 times higher than that of non-Indigenous Australians.⁴⁸ 	<p>Systemic racism & discrimination within the justice system</p> <ul style="list-style-type: none"> Previous contact with the criminal justice system. Over-policing & experiences of police discrimination. Barriers to accessing justice & legal services. Refusal of bail, strict bail conditions and stringent enforcement of bail conditions impact incarceration rates of Aboriginal and Torres Strait Islanders.⁴⁹

2.50 The Jumbunna Institute of Indigenous Education and Research also highlighted the historical context of incarceration and interactions First Nations people have with the criminal justice system. It stated:

We believe that the current rate with which First Nations peoples are overrepresented in custody is connected to Australia's colonial history, the demise of previous systems of penalty and control, and continuing attitudes of racism and indifference towards First Nations peoples. It is by the transformation of these colonial systems of oppression into the modern day criminal legal systems that the entrenched marginalisation and discrimination of First Nations peoples is embedded.¹¹³

¹¹² Submission 127, Just Reinvest NSW, p 10.

¹¹³ Submission 115, Jumbunna Institute of Indigenous Education and Research, p 6.

2.51 Similarly, the Indigenous Social Justice Association emphasised that the indicators of disadvantage contributing to incarceration for First Nations people – the economic position of Indigenous people, their health, housing and lack of access to employment and education – are borne from historical issues:

These factors are a result of the long history of dispossession and genocide at the hands of the settler colonial nation, along with the impacting intergenerational trauma and systematic criminalisation of First Peoples within the Australian criminal justice system.¹¹⁴

Drivers contributing to the rate of First Nations youth in custody

2.52 In addition to the drivers outlined above, inquiry participants also highlighted two matters relevant to First Nations youth in custody.

2.53 Firstly, stakeholders discussed the connection between children and youth being in out of home care and entering juvenile justice. Mr Brendan Thomas, Chief Executive Officer of Legal Aid NSW, stated that 'there is no doubt a correlation' between the two, noting:

The proportion of kids in juvenile justice who are also clients of Family & Community Services or have been clients of FACS at some point is the majority of them. That is not just for Aboriginal kids. Again, if you look at the criminological research around the world, we know that if a young child does not establish an emotional bond with a parental figure between the ages of one and five their likelihood of future involvement in crime is significantly increased. Removing them from the opportunity to establish that bond increases the likelihood of their future involvement in crime. But it is kind of a cyclical thing, because there is a significant proportion of those kids who are going in and out of home care who are going in there because the adult parent is in custody or involved in the criminal justice system. It is kind of a cycle that is feeding itself.¹¹⁵

2.54 Dr Elizabeth Watt, Senior Policy and Research Lead with Yfoundations also contended that the 'systems are concerningly linked', highlighting the link between specialised homelessness services and young people in custody. In particular, Dr Watt noted research about young people being denied bail due to not having a fixed home address and young people being released from custody without having safe and secure accommodation.¹¹⁶

2.55 Explaining that a lack of secure housing can increase the likelihood of young people reoffending, Dr Watt added:

Our Specialist Homelessness Services [SHS] ... do[es] not have the staffing requirements to deal with the particular high needs of a young person leaving juvenile justice. Child protection are often unwilling to take responsibility for these young people. They are often unable to return home because they have apprehended violence orders out against them, they might have a sex offender status, which means they cannot return to their home because it is too close to a school, so they are basically being released out onto the streets.

¹¹⁴ Submission 122, Indigenous Social Justice Association, p 2.

¹¹⁵ Evidence, Mr Brendan Thomas, Chief Executive Officer, Legal Aid NSW, 26 October 2020, p 35.

¹¹⁶ Evidence, Dr Elizabeth Watt, Senior Policy and Research Lead, Yfoundations, 3 December 2020, p 26.

Obviously we know the stats about out-of-home care and there is a report from, I think, the Australian Institute of Health and Welfare which shows the intersection between those three systems and it is the kids in the middle who are both involved in the out-of-home care, Youth Justice and juvenile justice system that are really struggling and being let down by all of the systems.¹¹⁷

- 2.56** Secondly, stakeholders highlighted the link between entering youth justice and adult incarceration for First Nations people. As noted by Ms Verity Smith, Solicitor, Public Interest Advocacy Centre, 'Australian research demonstrated a strong link between encountering the criminal justice system at a young age and reoffending later in life'.¹¹⁸
- 2.57** Given the rate of First Nations youth in custody, and evidence that incarceration at a young age can contribute to reoffending, stakeholders called for the age of criminal responsibility to be raised. This is discussed in chapter 3, as one of the potential reforms that could be implemented to help address the over-representation of First Nations people in the criminal justice system.

Drivers contributing to the rate of First Nations women in custody

- 2.58** A number of inquiry participants also discussed more specifically the drivers contributing to an increase in First Nations women in custody.
- 2.59** The Women's Legal Service highlighted that the majority of women in custody have complex histories of sexual and physical violence, with some studies suggesting that up to 90 per cent of First Nations women in custody are survivors of family and other violence. In its experience, the legal service also reflected how First Nations women in custody are more likely to have experienced poverty, homelessness, racism, unemployment, addiction, cognitive impairment, mental illness and poor literacy. It contended that the women 'have had early and ongoing contact with police, child protection authorities and other state interventions'.¹¹⁹
- 2.60** The Deadly Connections Community and Justice Services told the committee that the 'vast majority' of First Nations women are imprisoned 'because they are denied bail and are awaiting a trial or have been sentenced for minor matters and for short terms'. It indicated that First Nations women are particularly vulnerable due to their 'disproportionate experiences of trauma, abuse, and family violence'.¹²⁰
- 2.61** Keeping Women Out of Prison Coalition told the committee that the key drivers to women's incarceration include:
- increased levels of female poverty and consequential housing instability
 - changes to the show cause provision under the *Bail Act 2013*
 - increase in substance abuse
 - overall lack of post release support

¹¹⁷ Evidence, Dr Watt, 3 December 2020, p 27.

¹¹⁸ Evidence, Ms Verity Smith, Solicitor, Public Interest Advocacy Centre, 26 October 2020, p 16.

¹¹⁹ Submission 119, Women's Legal Service, p 54.

¹²⁰ Submission 126, Deadly Connections Community and Justice Services, pp 23-24.

- the *Summary Offences Act 1988* providing opportunities for over-policing in several of the state's most disadvantaged communities, where First Nations people are disproportionately affected.¹²¹

- 2.62** In relation to housing, Ms Rosalind Strong AM, Convenor, Keeping Women out of Prison Coalition, said that 'support for women leaving prison is grossly lacking' with only nine beds dedicated to women coming out of prisons in New South Wales. She stated that '900 of the 2,760 women who left prison went into homelessness in the 12 months to August 2019'.¹²²
- 2.63** Ms Eleni Psillakis, Keeping Women out of Prison Coalition Member and Program Manager Success Works, Part of Dress for Success Sydney, told the committee that there are many barriers for women when it comes to housing, including five-year housing wait lists, a lack of rental history and funds coming out of prison, and the difficulties in even getting consistent transitional housing. She stated: 'I have had many women say prison is easier. That is a sad state of our society and our systems when people are saying that'.¹²³
- 2.64** Ms Carolyn Jones, Senior Solicitor, Women's Legal Service NSW, said that 'it is just a constant cycle of insecure housing for First Nations women'. She explained that women will lie about bail addresses or parole addresses 'because they are desperate to get out of prison'. She said that these addresses might be the primary home, however it may not be safe for them to go there due to domestic violence and so they will go to another location to keep themselves safe and then breach bail or parole conditions.¹²⁴
- 2.65** Mr Jack de Groot, Chief Executive Officer, St Vincent de Paul Society NSW, said that in general there is not enough social and affordable housing and 'we are in desperate need'. He also indicated that pre-release planning for housing is also not done well and is 'crucial to the success of the first couple of weeks post-release from custody'. Mr de Groot added that there is also a need for wraparound support services with a trauma-informed approach.¹²⁵
- 2.66** It was also raised with the committee that domestic, family and sexual violence is a key link with women and incarceration, and that women may be misidentified as perpetrators in domestic violence incidents.
- 2.67** Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety, stated that 'there are well-established links between women's experiences of domestic, family and sexual violence and imprisonment'. She highlighted the high number of First Nations women who have experienced abuse themselves and the never-ending cycle this can create:

... [S]tudies of the Australian prison populations have estimated that 75 to 90 per cent of incarcerated Aboriginal and Torres Strait Islander women have been victims of

¹²¹ Answers to supplementary questions, Keeping Women out of Prison, 29 January 2021, p 2.

¹²² Evidence, Ms Rosalind Strong AM, Convenor, Keeping Women out of Prison Coalition, 3 December 2020, p 9.

¹²³ Evidence, Ms Eleni Psillakis, Keeping Women out of Prison Coalition Member and Program Manager Success Works, Part of Dress for Success Sydney, 3 December 2020, p 16.

¹²⁴ Evidence, Ms Carolyn Jones, Senior Solicitor, Women's Legal Service NSW, 26 October 2020, p 47.

¹²⁵ Evidence, Mr Jack de Groot, Chief Executive Officer, St Vincent de Paul Society NSW, 27 October 2020, p 34.

sexual, physical or emotional abuse, with most First Nations women experiencing multiple forms of abuse. Women and their children can become caught in cycles of imprisonment and experiencing violence, with the violence exacerbating the risk and effects of imprisonment, and the imprisonment increasing the risk and effects of violence in a never-ending cycle.¹²⁶

2.68 Further, the Australia's National Research Organisation for Women's Safety indicated that 'an increasing issue that contributes to women's imprisonment is the misidentification of the predominant aggressor'. It said that 'treating victims of violence as perpetrators undermines their confidence in the legal system, denies the victim/survivor appropriate support, and can make them less likely to report violence enacted against them in the future'.¹²⁷

2.69 The Women's Legal Service NSW also highlighted its concerns about the number of women in custody who have been misidentified by police and the courts as offenders. It suggested that 'there is growing evidence that at least half of female perpetrated domestic violence occurs in circumstances where the women are the persons most in need of protection but have been misidentified as aggressors'.¹²⁸

2.70 Ms Jones commented that this has been an issue that they have been focused on for decades and described a common story that they hear from women they work with in prison:

They have often been in a circumstance where there has been a domestic violence incident and police have been called. The male person in the household has manipulated the evidence, has lied about what has happened and has sometimes injured themselves and told police that the woman did it. Sometimes we know that the way that women fight back is to pick up a weapon like a knife or something a little bit more heavy-handed that they can use because they do not physically have the capacity to dominate a male person that has been scaring them, intimidating them or threatening their children or animals.¹²⁹

2.71 Ms Samantha Lee, Solicitor, Redfern Legal Centre, provided similar evidence, advising that they have women contact their service telling them that they have rung police during a domestic violence dispute and the police come to their place of residence, speak to the husband and then form the view that they are going to accept the husband's story over the woman's story. Ms Lee said that 'what they do is they end up arresting the person who has called 000 and then they place them into custody'.¹³⁰

2.72 Ms Kelly Parker, Senior Case Manager with the Miranda Project, Community Restorative Centre, reflected on her work within the domestic violence area in Western Sydney for the last seven years and having recently, in the last 12 to 18 months, seen a real shift in 'so many more women than men being charged with domestic and family violence that are actually the victims, not the perpetrators'. Ms Parker was not exactly sure what the change has been for this shift to occur, however she did mention that there is a lot of coercive control occurring in this context and that sometimes women do use weapons to fight back and are then later charged for this.

¹²⁶ Evidence, Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety, 3 December 2020, p 11.

¹²⁷ Submission 43, Australia's National Research Organisation for Women's Safety, pp 5-6.

¹²⁸ Submission 119, Women's Legal Service NSW, p 5.

¹²⁹ Evidence, Ms Jones, 26 October 2020, p 48.

¹³⁰ Evidence, Ms Samantha Lee, Solicitor, Redfern Legal Centre, 26 October 2020, p 51.

Ms Parker was also of the view that it could be a change in the reaction of police attending domestic violence incidents, where they are 'targeting women more so than what they had previously'.¹³¹

- 2.73** Along similar lines, Dr Nancarrow told the committee that the problem could be that women who are victims of violence are using violence in response, particularly First Nations women, including the use of weapons in self-defence. She was also of the view that a lack of cooperation with police and with authorities because of the history of colonisation might play a role, commenting that 'there are very good reasons and it is very understandable why often there is a lack of cooperation'. Another point Dr Nancarrow raised was that 'police culture has been, to some extent, the feeling that they have to take some action and, if there is evidence of abuse, they must apply for a protection order'.¹³²
- 2.74** The committee questioned the Department of Communities and Justice on the cumulative impact of women being identified as aggressors when it comes to domestic violence incidents. The Department advised that it 'is aware that the misidentification of victims of domestic and family violence as the primary aggressor is an important issue and can have significant consequences'. It informed the committee that it will be considering this issue in the context of developing justice system responses to coercive and controlling behaviour. The Department also advised that 'misidentification is one of several interrelated matters that are outlined in the Government's Discussion Paper, which the Joint Select Committee on Coercive Control is to have regard to' and looks forward to reviewing the findings of the committee when it reports in 2021.¹³³

Data collection – limitations and concerns

- 2.75** Data regarding First Nations people's contact with the criminal justice system is collected by the NSW Police Force, Corrective Services NSW and Youth Justice NSW. This is what the BOCSAR uses in some of its reporting.
- 2.76** Several stakeholders have called for improved data collection in relation to First Nations people interactions with the criminal justice system, and greater transparency and accessibility. The Ngalaya Indigenous Corporation contended that there are gaps in data collection, calling for data to be collected at all stages. It discussed the example of potentially discriminatory policing practices, based on racial profiling, and suggested that greater data would help improve and reform the criminal justice system.¹³⁴
- 2.77** Mr Jason O'Neil, Executive Director of the Ngalaya Indigenous Corporation, stated:

Our view is that absolutely throughout the system there are so many touch points that always start with interactions with police where, as was reflected earlier, there is discretion of the police, a magistrate, or a correctional officer, or anyone in these positions of authority working for the State and there is a lack of transparency and data

¹³¹ Evidence, Ms Kelly Parker, Senior Case Manager with the Miranda Project, Community Restorative Centre, 27 October 2020, p 33.

¹³² Evidence, Dr Nancarrow, 3 December 2020, pp 14-15.

¹³³ Answers to questions on notice, Department of Communities and Justice, 22 January 2021, p 1.

¹³⁴ Submission 84, Ngalaya Indigenous Corporation, pp 9-10.

collection into how that discretion is exercised, which inhibits us as lawyers, policymakers, First Nations people, to get a clear picture of when and how much that discretion is exercised to the disadvantage of First Nations people.¹³⁵

- 2.78** The Corporation argued for more publicly accessible data, to allow First Nations people to monitor community interactions with police and the effectiveness of strategies to reduce over-incarceration. It also highlighted the importance of 'Indigenous data sovereignty' which it stated recognises the rights of First Nations people to the collection, ownership and application of data about them and their communities.¹³⁶
- 2.79** Dr Fiona Allison and Professor Chris Cunneen from the Indigenous Law and Justice Hub, Jumbunna Institute for Indigenous Education and Research, and Ms Melanie Schwartz, Deputy Head of School, Law, University of Technology Sydney, also called for more accessible data in relation to First Nations deaths in custody. Noting some difficulties people had found in accessing information about local deaths in custody, these individuals stated that enhanced access to this information would increase 'the capability of First Nations families and communities to be informed about, and to be seen and heard on issues related to legal responses to First Nations deaths in custody'.¹³⁷
- 2.80** In particular, the committee heard about some issues with the data recorded by the NSW Police Force in terms of a person identifying as Aboriginal, mainly in the context of reporting in relation to the Suspect Target Management Program,¹³⁸ but also potentially impacting on reporting at a broader level.
- 2.81** Essentially, there was a large discrepancy in some statistics provided by the NSW Police Force and NSW Law Enforcement Conduct Commission (LECC) on the number of Aboriginal people targeted under the Suspect Target Management Program. The LECC indicated an estimate of 72 per cent as opposed to the NSW Police Force's estimate of 47 per cent.¹³⁹
- 2.82** On these matters, the NSW Police Force advised that its data on Aboriginality is derived wholly from a person self-identifying as Aboriginal, and this status can be recorded in the NSW Police Force COPS database within incidents, custody records and legal actions. It acknowledged that in the past and for research purposes it used a 'problematic' approach to the reporting of Aboriginal status:

In the past and for research purposes, NSW Police has explored the use of a 'most probable' count of Aboriginal status. In order for a person to be identified as 'most

¹³⁵ Evidence, Mr Jason O'Neil, Executive Director, Ngalaya Indigenous Corporation, 26 October 2020, p 20.

¹³⁶ Submission 84, Ngalaya Indigenous Corporation, pp 9-10.

¹³⁷ Submission 108, Dr Fiona Allison and Professor Chris Cunneen from the Indigenous Law and Justice Hub, Jumbunna Institute for Indigenous Education and Research, and Ms Melanie Schwartz, Deputy Head of School, Law, University of Technology Sydney, p 16.

¹³⁸ This program is a policing tool designed to prevent crime before it occurs by increasing policing activities targeted at identifying repeat offenders and disrupting their criminal behavior. It is discussed further in chapter 3.

¹³⁹ See Evidence, Assistant Commissioner Crandell, 7 December 2020, pp 22-24; Evidence, Ms Fitzgerald, 8 December 2020, pp 16-17 and Answers to Questions on Notice, Law Enforcement Conduct Commission, 22 January 2021, pp 2-3.

probable' Aboriginal, they needed to be recorded as Aboriginal in at least 80 per cent of their interactions with the NSW Police Force. The 'most probable' algorithm first looks to custody interactions and if a person has identified as Aboriginal in 80% or greater of their interactions, they are included in the 'most probable group'. If the person does not exist in custody, then the same method is applied from COPS involvements. The algorithm does not represent 80% of people who have 'ever identified' as Aboriginal, as each person is assessed on their engagement with police. The rationale behind this count was to exclude persons who had identified as Aboriginal once or a small number of times from many individual interactions with Police. As a result of a 2020 working party, the 'most probable' count was identified as problematic.¹⁴⁰

- 2.83** Noting that this methodology has since been withdrawn from use, the NSW Police Force explained that a review process is now underway to consider how Aboriginality is identified, both for offenders and victims. While an exact timeframe was not provided for this review, the NSW Police Force explained that some changes would commence in COPS as of 1 July 2021.¹⁴¹
- 2.84** On the issue of recording the status of victims, the NSW Police Force noted that it does not currently record where victims of crime are Aboriginal, which is particularly problematic in terms of identifying Aboriginal victims of domestic violence. It stated that they are undertaking 'scoping work' to improve data on this matter, as it recognises that its data on Aboriginal victimisation is limited.¹⁴²
- 2.85** Also relevant to the issue of data collection, the committee was informed that the BOCSAR does not have access to data from the State Parole Authority.¹⁴³

Committee comments

- 2.86** It is clear from the data that First Nations people continue to be grossly over-represented in the criminal justice system. First Nations people account for approximately 3 per cent of the population in New South Wales, yet 18 per cent of all adults facing court charges are Aboriginal, 40 per cent of all adults refused bail are Aboriginal and 25 per cent of the prison population is Aboriginal.
- 2.87** The committee agrees that the number of First Nations adults in custody is unacceptably high. The numbers have grown by about 37 per cent over the last 6 years or so, and while this may be broadly consistent with the trend seen in the non-Aboriginal prison population, it is still significantly concerning.
- 2.88** Even though the rates of increase have been comparable, given so many more First Nations people are in jail as a proportion of the population what seems like a comparable rate of increase actually reaches far deeper into First Nations communities. These real world impacts in First Nations communities can sometimes be obscured by these figures and the sheer number of First Nations families impacted cannot be ignored.

¹⁴⁰ Answers to questions on notice, NSW Police Force, 25 January 2021, p 8.

¹⁴¹ Answers to questions on notice, NSW Police Force, 25 January 2021, p 9.

¹⁴² Answers to questions on notice, NSW Police Force, 25 January 2021, p 12.

¹⁴³ Evidence, Ms Fitzgerald, 8 December 2020, p 5.

- 2.89** That being said, we acknowledge that the prison population has been influenced by the implementation of bail and sentencing reforms over the years. It is also currently being affected by the COVID-19 pandemic, given health risks have been playing into broader assessments of whether or not people are held on remand. The last twelve months has clearly demonstrated our capacity to shift the focus in the system so as to ensure custody is a last resort. Like stakeholders, we believe this approach could be emulated to help address the over-representation of First Nations people and suggest the NSW Government give this further consideration.
- 2.90** In terms of data for First Nations youth, a slightly different picture was given. While it is clear that 35 per cent of young people facing charges are Aboriginal, and that 39 per cent of the juvenile detention population is Aboriginal, we can see that the number of Aboriginal youth in custody has largely decreased over the last few years. Despite this trend, we acknowledge the link between young people entering the criminal justice system and re-offending, and still find it concerning that First Nations youth are still approximately 13 more times likely to be in custody than a non-Aboriginal young person.
- 2.91** We are equally concerned about the number of First Nations women in custody, and the alarming evidence we received to suggest that the First Nations female population is growing at a faster rate than Aboriginal males. Many stakeholders raised concerns that one of the reasons for the increasing rate of women's incarceration was a result of women being misidentified as perpetrators in domestic and family violence contexts. There has however been little direct research in relation to this issue. The committee therefore believes this issue needs further examination.

Recommendation 4

That the NSW Bureau of Crime Statistics and Research, in conjunction with the Department of Communities and Justice, conduct research into the growing number of First Nations women in custody, with a view to identifying the factors and causes of this trend.

- 2.92** The committee notes that the way First Nations women come into contact with the criminal justice system and the drivers of their incarceration are different to First Nations men. The impact of women's incarceration, especially for short periods of time leads to removal of their children and loss of housing that leads to significant challenges post release.
- 2.93** The committee believes that these issues must be considered when a woman is charged and sentenced with all non-custodial options being explored. The committee urges the government to increase the funding and support for post release programs such as the Miranda Project
- 2.94** The committee is especially concerned that women are giving addresses for bail and parole that mean they are going back to live in unsafe households.

Recommendation 5

The NSW Government ensure long-term funding for projects such as the Miranda Project and other post release support programs for women who have been in prison, including expansion to rural, regional and remote areas.

Recommendation 6

The NSW Government urgently expand the number of post release housing beds for First Nations women coming out of prison that can support women and their children to find long-term housing.

- 2.95** In terms of data collection and reporting, we were concerned about the method the NSW Police Force previously used to report on Aboriginal status. While we understand that this methodology has since been withdrawn, and that a review process is underway, we are not clear to what extent this review process will improve data collection by the NSW Police Force more broadly.
- 2.96** Given it has been 30 years since the Royal Commission's report, and that numerous other reports have highlighted the over-representation of First Nations people in the criminal justice system, the committee was shocked and disturbed at the state of the police data and the lack of a clear pathway to repair. It is also deeply concerning that the police do not collect data in relation to First Nations victims of crime, including identifying victims of domestic violence. Without this data, we do not have a clear picture, and will always be limited in addressing core issues.
- 2.97** On the reporting side, we were greatly assisted in this inquiry by the data held by the NSW Bureau of Crime Statistics and Research. However, this reporting relies on the integrity and consistency of data collected by others, and this is where we believe there is scope for improvement.
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Recommendation 7

That the NSW Bureau of Crime Statistics and Research lead a project to identify ways in which data collection and reporting could be enhanced in relation to the contact First Nations people have with the criminal justice system, with input from the NSW Police Force, Corrective Services NSW and the NSW Courts.

Chapter 3 Addressing the over-representation of First Nations people in the criminal justice system

This chapter will outline a number of reforms which should be implemented to address the over-representation of First Nations people in custody. In particular, it will look at specific legislative reforms, such as changes to bail laws and a reduction in the age of criminal responsibility, along with diversionary programs and specialist courts that could be enhanced or expanded.

Specific legislative reforms

3.1 This section considers a number of specific legislative changes put forward by stakeholders, including changes to bail laws and the introduction of Gladue style reporting in sentencing. It will also consider stakeholders calls for the offensive language provisions to be repealed and for the age of criminal responsibility to be raised.

Changes to bail laws

3.2 Given the high level of First Nations People in custody, stakeholders in this inquiry called for specific changes to be made to the *Bail Act 2013*, to ensure police and courts give proper consideration to a person's Aboriginality when determining whether an accused person should be detained in custody or released on bail, with or without conditions.

3.3 The suggestions put forward by stakeholders were consistent with the recommendations made by the 2017 Australian Law Reform Commission's *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* report (ALRC *Pathways to Justice* report). Essentially, the ALRC recommended that bail laws should require bail authorities to consider issues and circumstances arising from a person's Aboriginality when making bail determinations. In making this recommendation, it noted that:

- up to one third of Aboriginal and Torres Strait Islander people in prison are held on remand awaiting trial or sentence, with a large proportion not receiving a custodial sentence upon conviction, or may be sentenced to time served while on remand
- irregular employment, previous convictions for often low-level offending, and a lack of secure accommodation can disadvantage some accused Aboriginal and Torres Strait Islander people when applying for bail
- when bail is granted cultural obligations to attend sorry business or take care of family may conflict with commonly issued bail conditions leading to a breach of bail conditions, revocation of bail and subsequent imprisonment, and this issue has continued despite existing laws and legal frameworks to enable bail authorities to take cultural considerations into account.¹⁴⁴

¹⁴⁴ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (December 2017)

3.4 More specifically, the ALRC recommended that all states and territories adopt the approach Victoria took, which was to have a standalone provision under the bail legislation requiring a bail decision maker to take into account any issues that arise due to a person's Aboriginality.¹⁴⁵

3.5 The relevant provision in Victoria is section 3A of the *Bail Act 1977* which states:

Determination in relation to an Aboriginal person

In making a determination under this Act in relation to an Aboriginal person, a bail decision maker must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including –

- (a) the person's cultural background, including the person's ties to extended family or place; and
- (b) any other relevant cultural issue or obligation.

3.6 In addition, the ALRC recommended that governments work with Aboriginal and Torres Strait Islander organisations and legal bodies to establish guidelines for the judiciary and identify gaps in the provision of bail supports.¹⁴⁶

3.7 Several stakeholders advocated in favour of these changes, arguing that the current bail framework in New South Wales is deficient in its consideration of Aboriginality, despite existing section 18(1)(k) of the *Bail Act 2013* which stipulates that a bail authority, when making a decision on bail, is to consider 'any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment'.¹⁴⁷

3.8 The support for a more specific standalone reference, similar to the Victorian model, was expressed by the NSW Aboriginal Land Council, Change the Record, Community Legal Centres NSW, the Law Society of NSW, and Legal Aid NSW.¹⁴⁸

3.9 The Aboriginal Legal Service (NSW/ACT) also supported the ALRC's recommendation, noting that 'the current bail regime in NSW unfairly impacts on Aboriginal and Torres Strait Islander people in several ways'. For example, it noted that Aboriginal and Torres Strait Islander adults

<<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>

¹⁴⁵ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (December 2017)

<<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>

¹⁴⁶ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (December 2017)

<<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>

¹⁴⁷ *Bail Act 2013* (NSW), s 18(1)(k).

¹⁴⁸ Evidence, Mr James Christian, Chief Executive Officer, NSW Aboriginal Land Council, 27 October 2020, p 22; Submission 98, NSW Aboriginal Land Council, p 3; Submission 107, Change the Record, p 2; Submission 110, Community Legal Centres NSW, p 11; Submission 113, The Law Society of NSW, p 7; Submission 117, Legal Aid NSW, p 26.

and children are disproportionately represented in the New South Wales remand population and are less likely to be granted bail compared to non-Indigenous people. It also noted that courts often impose restrictive bail conditions which fail to consider specific cultural and community obligations. Highlighting the importance of bail authorities considering Aboriginality when making bail decisions, it stated:

When making a bail determination it is important that bail authorities give consideration to the particular impact of imprisonment on an Aboriginal or Torres Strait Islander person given the ongoing impacts of past and current discriminatory policies and practices, including colonisation, dispossession, and continuing experiences of targeted policing and racial discrimination.¹⁴⁹

- 3.10** Reflecting on section 18(1)(k) in the Bail Act 2013 (NSW), which states 'any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment' is to be considered as part of an assessment, the Aboriginal Legal Service (NSW/ACT) contended that the provision is an 'insufficient' reference to consider Aboriginality and does not apply to enforcement action by police following an alleged breach of bail.¹⁵⁰
- 3.11** In particular, the Aboriginal Legal Service (NSW/ACT) commented that section 18(1)(k) has 'no specific reference or requirement to consider cultural background, cultural obligations or community ties particular to Aboriginal and Torres Strait Islander people'.¹⁵¹
- 3.12** The Aboriginal Legal Service (NSW/ACT) said that 'the benefit of a standalone provision is that it ensures consideration of Aboriginality occurs across the entire spectrum of decisions under the Act, but the court still retains a discretion as to the appropriate weight to give these issues in particular circumstances'. However, it highlighted that any such change to the legislation would need to be supported by a broader bail reform package, including 'adequate provision of holistic support services and training for bail authorities, lawyers and the judiciary in the appropriate and consistent interpretation of the standalone provision'.¹⁵²
- 3.13** Taking into account stakeholders views, the committee wrote to the Chief Magistrate of the Local Court, the Chief Judge of the District Court and the Chief Magistrate of the Supreme Court, seeking a response on the implications and application of section 18(1)(k) of the *Bail Act 2013*. Of particular note was the response from the Chief Magistrate of the Local Court, Judge Graeme Henson AM, who advised:

The words of the provision speak for themselves. It should be noted the word "special" connotes something out of the ordinary. It is unlikely the provision would be interpreted as a consideration of universal application in respect of all indigenous persons, however that is a conclusion for which no evidence exists, of which I am aware.

¹⁴⁹ Submission 120, Aboriginal Legal Service (NSW/ACT), p 21.

¹⁵⁰ Submission 120, Aboriginal Legal Service (NSW/ACT), p 21.

¹⁵¹ Submission 120, Aboriginal Legal Service (NSW/ACT), p 21.

¹⁵² Submission 120, Aboriginal Legal Service (NSW/ACT), p 22.

Subject to a court being satisfied such vulnerability is established, this would be part of the often competing considerations taken into account on a bail issue by a court.¹⁵³

- 3.14** Relevant to any potential bail changes, the committee was advised by stakeholders that the NSW Department of Communities and Justice commenced a statutory review of the *Bail Act 2013* in early 2020.¹⁵⁴ However, it was not clear in the evidence received during this inquiry whether this specific legislative change would be considered as part of the department's review.

Introduction of Gladue style reporting

- 3.15** Stakeholders also called for the introduction of pre-sentencing and bail reports, similar to that used in Canada, that expressly address the circumstances and needs of First Nations offenders. This is known as Gladue Style reporting.
- 3.16** The Aboriginal Legal Service (NSW/ACT), a key voice advocating for this style of reporting, explained that Gladue reports, which are used in Canada, 'allows the specific background and broader circumstances of a person's Aboriginal community to be considered' by sentencing courts. The reports would include the background of an individual and their community and the available community-based rehabilitation options, which would ensure sentencing focuses on the needs of the individual and community, thereby reducing the existing over-reliance on assessments of risk.¹⁵⁵
- 3.17** The Aboriginal Legal Service (NSW/ACT) therefore recommended that 'the NSW Government work in partnership with Aboriginal and Torres Strait Islander organisations to support the use of Gladue style Aboriginal Community Justice Reports and consideration of a person's Aboriginality in sentencing'.¹⁵⁶
- 3.18** In this regard, the Aboriginal Legal Service (NSW/ACT) noted that it has established the Bugmy Evidence Project to develop reports that provide narrative and statistical information on communities with significant populations of Aboriginal people in New South Wales. It advised that 'the aim of the project is to provide evidence of disadvantage and discrimination at a community level, where it exists or has existed, to support an individual's experience in that community'. The Aboriginal Legal Service (NSW/ACT) indicated that this information would be available for use by the legal profession and the judiciary, and recommended that these reports 'prepared through the Bugmy Evidence Project be used by the court as part of any Gladue style of reporting'.¹⁵⁷
- 3.19** To support this, the Aboriginal Legal Service (NSW/ACT) also suggested legislative changes to direct the courts to 'consider Aboriginal and Torres Strait Islander identity and the impacts of

¹⁵³ Correspondence from Judge Graeme Henson AM, Chief Magistrate of the Local Court, to Chair, 20 January 2021, as corrected in correspondence from the Chief Magistrate's Office, to secretariat, 1 April 2021.

¹⁵⁴ Department of Communities and Justice, *Administrative review of the Bail Act 2013* (8 July 2020), <https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/administrative-review-of-the-bail-act-2013.aspx>

¹⁵⁵ Submission 120, Aboriginal Legal Service (NSW/ACT), pp 22-23.

¹⁵⁶ Submission 120, Aboriginal Legal Service (NSW/ACT), pp 23-24.

¹⁵⁷ Submission 120, Aboriginal Legal Service (NSW/ACT), p 23.

colonisation as sentencing factors, and also to consider each and every alternative to prison for Aboriginal and Torres Strait Islander peoples'. Further, it noted that 'the development of Gladue style reports in NSW must also be supported by appropriate investment in diversionary programs, case workers, report writers and appropriate training for judiciary'.¹⁵⁸

- 3.20** The Law Society of NSW also supported the implementation of Gladue style reporting. It drew to the committee's attention the Bugmy Evidence Project, noting that although this is not individualised reporting about the community for a person facing court it would inform and assist any future Gladue reporting project. In terms of implementing Gladue style reporting in the courts, the Law Society of NSW advised that preparation of the reports need to be conducted by an independent body with input from First Nations people and informed by members of the Aboriginal communities in question. It also referred to models in other jurisdictions, including the New Zealand Youth Court and in Ontario Canada, where Gladue style of reporting originated from.¹⁵⁹
- 3.21** The Deadly Connections Community and Justice Services also advocated for 'Bugmy Justice Reports' as 'an essential step towards reducing the severe over-representation of First Nations people in custody'. It suggested that these would help to ensure that there is specific consideration of the unique systemic and background factors affecting First Nations people during the sentencing process. Noting that this suggestion is consistent with what the ALRC recommended, the Deadly Connections Community and Justice Services also put forward that, as an Aboriginal organisation, it would be ideally suited to write 'Bugmy Justice Reports' as they 'have a better understanding of the unique circumstances faced by Aboriginal people and, more often than not, share common experiences and challenges'.¹⁶⁰
- 3.22** Further, the Deadly Connections Community and Justice Services emphasised the therapeutic benefits of incorporating this style of reporting in the courts, including First Nations people being able to present issues that have contributed to them being in contact with the criminal justice system:

One of the more obvious benefits of having a *Bugmy Justice* report completed is that it provides an opportunity for an Aboriginal person to provide insight and address issues that may have contributed to them being in the criminal justice system. One of the underlying benefits not seen by the criminal justice system is the therapeutic process of having a *Bugmy Justice* report completed. Many justice-involved Aboriginal people have not been provided an opportunity to explain who they are or, in most instances, never had an opportunity to self-reflect on the individual they have become or why. From this perspective, a *Bugmy Justice* report is not just a sentencing report. It serves as a holistic approach that often begins the first step in an Aboriginal person's healing journey.¹⁶¹

¹⁵⁸ Submission 120, Aboriginal Legal Service (NSW/ACT), p 23.

¹⁵⁹ Submission 113, The Law Society of NSW, p 11.

¹⁶⁰ Submission 126, Deadly Connections Community and Justice Services, p 21.

¹⁶¹ Submission 126, Deadly Connections Community and Justice Services, p 22.

Removal of offensive language provisions

- 3.23** Section 4A of the *Summary Offences Act 1988* stipulates that 'a person must not use offensive language in or near, or within hearing from, a public place or a school' and imposes a maximum penalty of six penalty units.
- 3.24** Many stakeholders highlighted that although arrest for offensive language alone does not lead to imprisonment, it often has a compounding effect, particularly impacting First Nations people, whereby a person is charged with offensive language and the situation then escalates with additional charges added.
- 3.25** Community Legal Centres NSW called this the 'trifecta phenomenon', explaining that under this phenomenon a person is initially targeted for a relatively minor offence, such as offensive language, and when police intervene a situation may escalate rather than diffuse, with the targeted person responding angrily or aggressively. It said that these situations can lead to police also charging the person with 'resist arrest' and 'assault police', in addition to the original minor infringement. Community Legal Centres NSW contended that this 'trifecta phenomenon' leads to 'the imprisonment of many Aboriginal and Torres Strait Islander people' and that the NSW Police Force should investigate and end the overuse of this 'trifecta' practice.¹⁶²
- 3.26** Ms Sarah Crellin, Member of the Law Society's Indigenous Issues Committee, agreed that this was 'absolutely still a phenomena'. She said that 'once again, it raises that issue of discretion in that police can either turn away from someone swearing on the side of the road, or they can decide to arrest or fine them'.¹⁶³
- 3.27** Mr Tony McAvoy SC, Chair of the NSW Bar Association's First Nations Committee, and Member, Joint Working Party on the Over-representation of Indigenous People in Custody in New South Wales, stated to the committee that 'the use of summary offences as a form of social control over Aboriginal and Torres Strait Islander communities is notorious'. He also described the compounding effect of offensive language charges, and highlighted that it can also compound later sentencing. In this regard, Mr McAvoy explained that 'people appear before magistrates with a list of summary offences and the magistrate is less inclined to exercise leniency in terms of a non-custodial sentence when they are charged with something else'.¹⁶⁴
- 3.28** Mr Jason O'Neil, Executive Director, Ngalaya Indigenous Corporation, and Ms Verity Smith, Solicitor, Public Interest Advocacy Centre, echoed the views of Mr McAvoy. Mr O'Neil said: 'I think that the offensive language provision is one of the clearest examples you have of police being given a discretion that they actively and disproportionately use against Aboriginal people very regularly across New South Wales'.¹⁶⁵ Ms Smith added that 'serious consideration should

¹⁶² Submission 110, Community Legal Centres NSW, p 7.

¹⁶³ Evidence, Ms Sarah Crellin, Member of the Law Society's Indigenous Issues Committee, 26 October 2020, p 14.

¹⁶⁴ Evidence, Mr Tony McAvoy SC, Chair of the NSW Bar Association's First Nations Committee, and Member, Joint Working Party on the Over-representation of Indigenous People in Custody in New South Wales, 26 October 2020, pp 13-14.

¹⁶⁵ Evidence, Mr Jason O'Neil, Executive Director, Ngalaya Indigenous Corporation, 26 October 2020, p 26.

be given to whether these types of offences are kept on the books, when they so readily lead to escalation and someone coming into contact with police and ending up in a cell in custody'.¹⁶⁶

3.29 The NSW Bar Association, Ngalaya Indigenous Corporation, Public Interest Advocacy Centre, Jumbunna Institute for Indigenous Education and Research, Legal Aid NSW, and the Aboriginal Legal Service (NSW/ACT), all called for section 4A of the *Summary Offences Act 1988* relating to offensive language provisions to be repealed.¹⁶⁷ This was also recommended by the ALRC in its *Pathways to Justice* report.¹⁶⁸

3.30 There was some discussion around retaining the offensive language provision to be able to act when someone is engaging in extreme examples of offensive language that is threatening to others. Ms Crellin stated that there are other alternatives under the criminal justice system that could address that, commenting 'it is a criminal offence to threaten someone, whether it is including a swear word or it is not, a common assault or a stalk, intimidate offence'. She said 'there are lots of other offences that are provided for under the Crimes Act or other legislation that would encompass threatening words or behaviour'.¹⁶⁹

3.31 Likewise, the Public Interest Advocacy Centre, was of the view that 'the *Crimes Act 1900* (NSW) and *Crimes (Domestic and Personal Violence) Act 2007* (NSW) already contain relevant offences to capture "abusive and threatening language" and both include high penalties or imprisonment. They stated that 'we are not aware of any groups who recommend that the offensive language offence be retained as a protection against oppressive conduct and language'.¹⁷⁰

3.32 The NSW Bar Association held a similar view, stating that there are no 'compelling public policy considerations in favour of retaining offensive language provisions, even in a restricted form'.¹⁷¹

Raising the age of criminal responsibility

3.33 Taking into account that a significant proportion of youth in custody are First Nations (as discussed in chapter 2), and evidence indicating that once a young person has contact with the criminal justice system they are more likely to reoffend, stakeholders called for the age of criminal responsibility be raised in New South Wales.

¹⁶⁶ Evidence, Ms Verity Smith, Solicitor, Public Interest Advocacy Centre, 26 October 2020, p 26.

¹⁶⁷ Answers to questions on notice, NSW Bar Association, 22 December 2020, p 4; Answers to questions on notice, Ngalaya Indigenous Corporation, 26 November 2020, p 4; Answers to questions on notice, Public Interest Advocacy Centre, 26 November 2020, pp 1-2; Answers to questions on notice, Jumbunna Institute for Indigenous Education and Research, 2 December 2020, p 5; Submission 117, Legal Aid NSW, p 57; Submission 120, Aboriginal Legal Service (NSW/ACT), p 18.

¹⁶⁸ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (December 2017)
<<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>

¹⁶⁹ Evidence, Ms Crellin, 26 October 2020, p 14.

¹⁷⁰ Answers to questions on notice, Public Interest Advocacy Centre, 26 November 2020, pp 1-2.

¹⁷¹ Answers to questions on notice, NSW Bar Association, 22 December 2020, p 4.

- 3.34** Currently in New South Wales the minimum age of criminal responsibility is 10 years of age.¹⁷² By comparison, the legal age of consent for sexual interactions is 16 years, and young people aged 16 and 17 years can get married, if consent is provided by their parents and the union is authorised by a magistrate or judge.¹⁷³
- 3.35** The majority of key stakeholders who either provided a submission to this inquiry or gave oral evidence to the committee advocated for the age of criminal responsibility to be raised to at least 14 years of age.¹⁷⁴ Others called for the age to be raised even higher to 15 or 16.¹⁷⁵
- 3.36** Stakeholders argued that children between the ages of 10 and 14 years do not have the cognitive brain development to understand the consequences of their actions and should not be held responsible for a crime.
- 3.37** Dr Calum A Smith, Chair, the Royal Australian and New Zealand College of Psychiatrists NSW Forensic Subcommittee, told the committee that 'the science is quite clear' in this regard. He explained that a person's part of the brain that is responsible for 'decision-making, understanding right from wrong, planning actions and understanding the consequences of those actions' are 'not developed by 10 years old and frankly they are not really developed by 14 years old either'. He noted that studies show that this may not develop until the mid-20s, particularly for males. Further, Dr Smith indicated this can be further delayed as a consequence of trauma. He commented that when reflecting on the design of the legal system 'you really start to struggle to see how people who are 10, 11 or 12 years old have an idea of exactly what it is that they are doing wrong'.¹⁷⁶
- 3.38** The Australian Lawyers Alliance pointed to advice from the UN Committee on the Rights of the Child who noted that there is documented evidence in the field of child development and neuroscience indicating that 'the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing'. It highlighted that 'therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings' and would also be affected by their entry into adolescence. The Australian Lawyers Alliance argued that children between the ages of 10 and 14 'are not at a cognitive stage of

¹⁷² *Children (Criminal Proceedings) Act 1987* (NSW), s 5.

¹⁷³ *Crimes Act 1900* (NSW) s 66c and *Marriage Act 1961* (Cth) Pt II.

¹⁷⁴ Submission 114, Public Interest Advocacy Centre, p 6; Submission 86, Australian Lawyers Alliance, p 12; Submission 76, NSW Young Lawyers, p 12; Answers to questions on notice, NSW Bar Association, 22 December 2020, p 3; Submission 107, Change the Record, p 2; Evidence, Dr Gray, 27 October 2020, p 55; Evidence, Dr Danielle McMullen, President, Australian Medical Association, 3 December 2020, p 31; Submission 45, Yfoundations, p 10; Submission 49, Justice and Peace Office of the Catholic Archdiocese of Sydney, p 6; Submission 66, Office of the NSW Advocate for Children and Young People, p 9; Submission 71, Community Restorative Centre, p 23; Submission 105, The Royal Australian and New Zealand College of Psychiatrists, p 7; Submission 113, The Law Society of NSW, p 7; Submission 117, Legal Aid NSW, p 15; Submission 119, Women's Legal Service NSW, p 2; Submission 120, Aboriginal Legal Service (NSW/ACT), p 15; Submission 121, St Vincent de Paul Society of NSW, pp 6-7; Submission 129, NSW Nurses and Midwives' Association, p 2.

¹⁷⁵ Submission 65, New England Greens Armidale Tamworth, p 1; Submission 118, Public Service Association of NSW, p 19.

¹⁷⁶ Evidence, Dr Calum A Smith, Chair, the Royal Australian and New Zealand College of Psychiatrists NSW Forensic Subcommittee, 3 December 2020, p 34.

development where they can appropriately appreciate the nature and significance of criminal conduct and the lifelong consequences of undertaking such conduct'.¹⁷⁷

- 3.39** Ms Ashlee Kearney, Disability Role Commission Project Manager, First Peoples Disability Network, noted that 'there is medical evidence that clearly shows how developmentally, children are very different to adults'. She explained that a child would have 'relatively immature brain development when it comes to decision-making, organisation, impulse control and planning for their future'. She further noted that 'disabilities impact this greatly and require additional support and consideration'.¹⁷⁸
- 3.40** Yfoundations stated that the 'research on the physical and neurocognitive vulnerabilities of young people between the ages of 10 and 13 is clear and unequivocal'. It argued that 'detention is an inappropriate, counter-intuitive and damaging response for addressing a young person's offending behaviour, particularly where there has been significant trauma'.¹⁷⁹
- 3.41** Along similar lines, Mr McAvoy noted that the medical evidence is all in support for the age of criminal responsibility to be increased. He said that currently 'we are incarcerating children basically because they are impoverished rather than understanding that their brain function has not sufficiently developed to properly understand the risk involved in their actions'. Mr McAvoy made the point that it would be an 'easy objective for this Parliament to adopt' and one that 'would put New South Wales in a position of parity with most European countries'.¹⁸⁰
- 3.42** Other stakeholders also pointed to international standards, many of which have set the age of criminal responsibility higher than 10.
- 3.43** Dr Louis Schetzer, Policy and Advocacy Manager, Australian Lawyers Alliance, commented that 'the overwhelming medical evidence' shows in terms of cognitive development of a child it is at the age of 14, however this age is regarded as the 'lower end of when that cognitive ability is said to take place'. He highlighted that some countries recognise that this should be at the age of 16.¹⁸¹
- 3.44** Mr Simon Bruck, Vice-President, NSW Young Lawyers, reported that Austria, Germany, Italy and Spain all have a minimum age of criminal responsibility set at the age of 14.¹⁸²
- 3.45** The Australian Lawyers Alliance noted that the worldwide median age of criminal responsibility is 14 years, and that Australia's states and territories age of ten years old is 'in breach of human rights standards and puts Australia out of step with much of the rest of the world'. It added that the 'UN Committee on the Rights of the Child has consistently said that countries should be working towards a minimum age of 14 years or older'.¹⁸³

¹⁷⁷ Submission 86, Australian Lawyers Alliance, pp 13-14.

¹⁷⁸ Answers to questions on notice, Ms Ashlee Kearney, Disability Role Commission Project Manager, First Peoples Disability Network, 4 December 2020, p 3.

¹⁷⁹ Submission 45, Yfoundations, pp 10-11.

¹⁸⁰ Evidence, Mr McAvoy, 26 October 2020, pp 3-4.

¹⁸¹ Evidence, Dr Louis Schetzer, Policy and Advocacy Manager, Australian Lawyers Alliance, 26 October 2020, p 9.

¹⁸² Evidence, Mr Simon Bruck, Vice-President, NSW Young Lawyers, 26 October 2020, p 10.

¹⁸³ Submission 86, Australian Lawyers Alliance, pp 12 and 16.

- 3.46** The Public Service Association of NSW also indicated that 'most developed nations around the world have increased their age of criminal responsibility to 15'. It noted that 'several have established a framework around diversionary programs prior to custody, limitations on sentence for juveniles and several have also included exceptions for certain crimes of the most severe nature'.¹⁸⁴
- 3.47** Stakeholders highlighted how First Nations children and young people are more impacted by this law, when compared to non-Indigenous children and young people.
- 3.48** The Public Interest Advocacy Centre commented that 'the current minimum age of criminal responsibility of 10 years of age disproportionately draws Aboriginal and Torres Strait Islander children and young people into the criminal justice system at an early stage of their life'. It noted available data which showed 'that Aboriginal and Torres Strait Islander children tend to come into conflict with the law at a younger age than non-Indigenous children', and that 'the greatest over-representation occurs between the ages 10 and 14'.¹⁸⁵
- 3.49** The Aboriginal Legal Service (NSW/ACT) stated that 'it is Aboriginal and Torres Strait Islander children who are most impacted by this injustice'. It noted the high rates of Aboriginal and Torres Strait Islander youth in detention across Australia compared to non-Indigenous youth, commenting that 'rather than harming, stigmatising and marginalising these 600 children in the criminal legal system, we should change the law to give kids every possible opportunity to succeed'. It added that 'we should be supporting kids to thrive in community and culture, not separating them from their families by locking them up in harmful prisons'.¹⁸⁶
- 3.50** The Office of the NSW Advocate for Children and Young People also highlighted that the impact is greater for Aboriginal and Torres Strait Islander children and young people, who are then at risk of beginning the cycle within the criminal justice system:
- Criminalising the behaviour of young and vulnerable children creates a cycle of disadvantage and forces children to become entrenched in the criminal justice system. This disadvantage is acutely experienced by Aboriginal and Torres Strait Islander children and young people who, as the Committee has acknowledged, are disproportionately represented in the criminal justice systems, not only in NSW, but across Australia.¹⁸⁷
- 3.51** In terms of the number of children under the age of 14 in detention, Mr Paul O'Reilly, Executive Director, Youth Justice NSW, said that 'it is generally between three to six young people' and 'most of those young people are Aboriginal'. As at the time of the hearing, the number of young people under the age of 14 in detention was six.¹⁸⁸
- 3.52** In evidence later provided to the committee, the Department of Communities and Justice noted that there were 1134 individual young people under the age of 14 admitted to Youth Justice NSW custody between the ten financial years of 1 July 2010 and 30 June 2020. Of this 59 per

¹⁸⁴ Submission 118, Public Service Association of NSW, p 17.

¹⁸⁵ Submission 114, Public Interest Advocacy Centre, p 5.

¹⁸⁶ Submission 120, Aboriginal Legal Service (NSW/ACT), p 15.

¹⁸⁷ Submission 66, Office of the NSW Advocate for Children and Young People, p 9.

¹⁸⁸ Evidence, Mr Paul O'Reilly, Executive Director, Youth Justice NSW, 7 December 2020, p 64.

cent were Aboriginal, 39 per cent were non-Aboriginal and 2 per cent were unknown. It was noted that 'a young person under the age of 14 can be admitted more than once'.¹⁸⁹

3.53 Stakeholders highlighted that any change in raising the age must coincide with clear referrals to divisionary programs and/or other supports.

3.54 Mr Brendan Thomas, Chief Executive Officer, Legal Aid NSW, told the committee that 'there are very few young people committing what would be serious criminal acts without some kind of underlying serious problem—behavioural disorder; mental health condition; intellectual disability'. He said that it is this that 'needs to be managed and treated in a way that is going to reduce the risk that person might pose to the rest of the community'. He argued for a 'stronger therapeutic approach', commenting that this would really be for 'a very small number of people' and would be a much better investment than the cost on the criminal justice system.¹⁹⁰

3.55 Dr Danielle McMullen, President, Australian Medical Association, also highlighted that there would be underlying causes as to why these children and young people were coming into contact with police at such a young age and that more needs to be done to support youth outside of the criminal justice system:

You cannot just sit back and do nothing with 10-year-olds showing difficult behaviours, but recognising that that likely reflects a significantly challenging home or school environment ... Our view would be that, yes, we should increase the age of criminal responsibility but also recognise that these young people are at risk, and if people are coming to the attention of authorities, that we should be providing them and their families and their communities with increased support across those socio-economic factors that contribute both to ill health and to incarceration.¹⁹¹

3.56 Likewise, Dr Smith said that 'it is clear that it is not as simple as just changing the age of criminal responsibility' and that 'additional early intervention services would have to be developed alongside that'. He argued that investment in this early stage and preventing the incarceration of children this young would save the investment later down the line, noting that 'there are very high rates of adult incarceration for people who have been to juvenile justice'.¹⁹²

3.57 Mr Bruck pointed to a number of existing programs that could be expanded or used as a model for new programs, such as New Street Services run by NSW Health and Youth on Track run by the NSW Department of Communities and Justice. He stressed the importance of new programs to be 'holistic, multi-disciplinary, culturally safe and evidence based'.¹⁹³

3.58 Similarly, Mr McAvoy emphasised the importance of necessary systems to be put in place to deal with children who come to the attention of police so that 'it is not just directing them into a vacuum'.¹⁹⁴ In this regard, the NSW Bar Association recommended that 'the Government

¹⁸⁹ Answers to questions on notice, Department of Communities and Justice, 22 January 2021, p 18.

¹⁹⁰ Evidence, Mr Brendan Thomas, Chief Executive Officer, Legal Aid NSW, 26 October 2020, p 34.

¹⁹¹ Evidence, Dr Danielle McMullen, President, Australian Medical Association, 3 December 2020, pp 34-35.

¹⁹² Evidence, Dr Smith, 3 December 2020, p 36.

¹⁹³ Answers to questions on notice, Mr Simon Bruck, Vice-President, NSW Young Lawyers, 26 November 2020, p 1.

¹⁹⁴ Evidence, Mr McAvoy, 26 October 2020, p 10.

create an interagency and inter-department taskforce to develop a cohesive, whole of government approach to therapeutic pathways that integrate health, education and housing approaches to youth behaviour, instead of a criminal, justice approach'. It highlighted that when children and young people are supported with 'robust education, holistic healthcare services and adequate housing, they are set up to succeed'.¹⁹⁵

- 3.59** In this regard, the committee noted that in February 2019, the Council of Attorneys-General established an inter-jurisdictional working group to consider whether or not to raise the age of criminal responsibility from 10 years of age.¹⁹⁶ It had planned to report back within 12 months, however in November 2019 the working group agreed to undertake public consultation on the issue and report with recommendations in 2020.¹⁹⁷
- 3.60** Further advice in July 2020 noted that 'the working group identified the need for further work to occur regarding the need for adequate processes and services for children who exhibit offending behaviour'.¹⁹⁸ The working groups report and recommendations have not yet been handed down and a decision not yet made by the Council of Attorneys-General.¹⁹⁹
- 3.61** Stakeholders expressed their disappointment that more progress has not been made by the Council of Attorneys-General on the age of criminality. For example, the Public Interest Advocacy Centre noted its disappointment with the delays, highlighting that 'as First Nations juvenile offenders make the majority of detainees in the Youth Justice system, this delay impacts most heavily on this and future generations of First Nations people'.²⁰⁰ Likewise, the Australian Medical Association were disappointed that a decision has not yet been made, as doing so 'would have had an immediate impact on the over-representation of Indigenous children'.²⁰¹ St Vincent de Paul Society of NSW noted its concerns with the delays and recommended that 'this reform be progressed immediately as all of the evidence is currently available'.²⁰²

Expansion of diversionary programs and specialist courts

- 3.62** This chapter now turns to specific diversionary programs highlighted by stakeholders. It begins with a discussion relating to the overarching principle behind diversion - that arrest must be used as a mechanism of last resort. It then considers a number of diversionary programs, including enhanced use of diversion under the *Young Offenders Act 1997* and implementation of justice reinvestment in First Nations communities.

¹⁹⁵ Answers to questions on notice, NSW Bar Association, 22 December 2020, p 3.

¹⁹⁶ Media release, Council of Attorneys-General, 'Age of criminal responsibility working group terms of reference'.

¹⁹⁷ Media release, Council of Attorneys-General, 'Council of Attorneys-General (CAG) communiqué', 29 November 2019.

¹⁹⁸ Media release, Council of Attorneys-General, 'Council of Attorneys-General (CAG) communiqué', 27 July 2020.

¹⁹⁹ Evidence, Ms Smith, 26 October 2020, p 16.

²⁰⁰ Submission 118, Public Service Association of NSW, p 16.

²⁰¹ Submission 103, Australian Medical Association, p 3.

²⁰² Submission 121, St Vincent de Paul Society of NSW, p 6.

- 3.63** Finally, this section considers the expansion of a number of specialist sentencing courts, to provide culturally competent, culturally safe and culturally appropriate diversionary options for First Nations people. This was supported by a number of stakeholders as a solution that would help to address the over-representation of First Nations people in the criminal justice system.
- 3.64** The ALRC *Pathways to Justice* report also considered a number of diversionary programs and specialist sentencing courts. In particular, it made recommendations for governments to support justice reinvestment trials in partnership with First Nations communities, and for governments to improve access to community-based sentencing options for First Nations offenders.²⁰³

Ensuring arrest is a last resort

- 3.65** Stakeholders gave evidence that police are failing to apply the principle of arrest as a last resort for First Nations people and that this needs to be strengthened in the legislation to ensure people are being diverted away from the criminal justice system. This was particularly important given the over-representation of First Nations people in the criminal justice system more broadly and the opportunity for diversionary programs to help address underlying systemic issues and break the cycle of offending.
- 3.66** The Public Interest Advocacy Centre advised that it regularly assists First Nations people to make claims 'for false imprisonment where police do not have a lawful basis for making an arrest'. It said that 'the failure to apply the principle of arrest as a measure of last resort to Aboriginal and Torres Strait Islander people contributes to the higher levels of arrest'. The Public Interest Advocacy Centre advocated for the principle of arrest as a last resort, particularly for young people, to be more clearly legislated and that this reform is essential to effective diversion and addressing over-representation.²⁰⁴
- 3.67** The Public Interest Advocacy Centre explained that currently section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* 'governs the power of police officers to arrest without a warrant, including young people'. It said that although the principle of arrest as a measure of last resort may be inferred it is not expressly stated in the Act. It also noted that originally the Act provided that the power to arrest for the purposes of taking proceedings for an offence 'must not' be exercised unless it meets six purposes as set out in the Act. However, following amendments to the Act in 2013 this was changed and now stipulates that 'a police officer may, without a warrant, arrest a person if' the requisite suspicion is held on reasonable grounds and the arrest is reasonably necessary for the prescribed purposes.²⁰⁵
- 3.68** Further, the Public Interest Advocacy Centre said that in its experience 'the principle of arrest as a measure of last resort is not routinely adhered to by police officers in deciding what action to take when confronted with suspected offending, particularly in relation to young people and Aboriginal and Torres Strait Islander people'. It recommended that:

²⁰³ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (December 2017)

<<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>

²⁰⁴ Submission 114, Public Interest Advocacy Centre, p 10.

²⁰⁵ Submission 114, Public Interest Advocacy Centre, p 11; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99.

- Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* should be amended to expressly legislate that the arrest, detention or imprisonment of a person should be used only as a measure of last resort and for the shortest appropriate period of time
- the *Children (Criminal Proceedings) Act 1987* should be amended to expressly legislate that the arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time.²⁰⁶

3.69 The Aboriginal Legal Service (NSW/ACT) also gave evidence that in its experience 'arrest is routinely used against Aboriginal people in the first instance, rather than police utilising a range of alternatives such as issuing warnings, cautions or Court Attendance Notices'. It also recommended that 'the NSW Government legislative to mandate arrest is a last resort for Aboriginal and Torres Strait Islander people'.²⁰⁷

3.70 Legal Aid NSW reported that children and young people are also being impacted by a failure to comply with this principle, commenting that its 'casework experience suggests that children are very frequently arrested unnecessarily' and that 'police officers do not turn their mind to alternatives'. Legal Aid NSW also proposed amendments to the legislation to ensure that arrest is a last resort, particularly for children.²⁰⁸

3.71 As the Law Society of NSW and the Aboriginal Legal Service (NSW/ACT) highlighted, making these legislative changes would be in line with the recommendations made by the *Royal Commission into Aboriginal Deaths in Custody*. Recommendation 92 of the report noted 'that governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort'.²⁰⁹

3.72 A number of other stakeholders also provided evidence on the need to emphasise arrest as a measure of last resort for First Nations people, including the Justice and Peace Office of the Catholic Archdiocese of Sydney and Royal Australian and New Zealand College of Psychiatrists.²¹⁰

Enhanced use of the Young Offenders Act

3.73 As discussed earlier, children and young people who come into contact with the criminal justice system should have the opportunity to be diverted away from the system before a cycle of disadvantage and reoffending is created. In this regard, stakeholders discussed diversion under the *Young Offenders Act 1997*, and while many agreed it is a step in the right direction, some concerns were raised regarding its implementation for First Nations youth.

²⁰⁶ Submission 114, Public Interest Advocacy Centre, pp 11-12.

²⁰⁷ Submission 120, Aboriginal Legal Service (NSW/ACT), p 24.

²⁰⁸ Submission 117, Legal Aid NSW, p 16.

²⁰⁹ Submission 113, The Law Society of NSW, p 8; Submission 120, Aboriginal Legal Service (NSW/ACT), p 24; See Royal Commission into Aboriginal Deaths in Custody <<https://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>

²¹⁰ Submission 49, Justice and Peace Office of the Catholic Archdiocese of Sydney, p 5; Submission 105, The Royal Australian and New Zealand College of Psychiatrists, p 5.

- 3.74** The *Young Offenders Act 1997* was established to enable the use of youth justice conferences, cautions and warnings instead of court proceedings for children and young people who commit certain offences.²¹¹
- 3.75** Stakeholders suggested that Aboriginal and Torres Strait Islander youth are comparatively disadvantaged in accessing the diversionary programs or opportunities available under this Act.
- 3.76** A key voice on this issue, Legal Aid NSW noted that the Act does provide a good legislative framework for the diversion of young offenders, however it noted that it is not having the same effect on Aboriginal and Torres Strait Islander offenders. It pointed to research by the NSW Bureau of Crime Statistics (BOCSAR) which found that 'Aboriginal and Torres Strait Islander children do not enjoy equal access to diversion under the Act', as they were less likely to receive a caution or a conference than non-Indigenous children.²¹²
- 3.77** Further, Mr Thomas told the committee that 'the rate of diversion from people at the point of court rather than police is higher for young Aboriginal people—meaning they are coming to court when they could have been diverted earlier through the Young Offenders Act'.²¹³ He explained that there are a number of barriers affecting how this works, including:
- caps on the number of cautions young people can be given
 - police diversion varying widely across police commands, with some areas more active in their use of diversionary programs than others
 - the requirement under the Act for young people to admit the offence to get access to those diversions.²¹⁴
- 3.78** On the second point, in terms of policing practices under the Act, the Law Society of NSW also highlighted that it varies across different police commands:
- Finally, we note that policing practices and underuse of diversionary options by police play a considerable role in the over-representation of Aboriginal people in the criminal justice system. Data indicates that some locations with high proportions of Aboriginal people, for example Blacktown LGA in Sydney, have disproportionately lower rates of diversions of young people under the *Young Offenders Act 1997*.²¹⁵
- 3.79** Other stakeholders also reflected on the use of caps for cautions. For example, Ms Karly Warner, Chief Executive Officer, Aboriginal Legal Service (NSW/ACT), stated that 'placing a non-discretionary restriction on the use of cautions can operate arbitrarily, inconsistently and result in missed opportunities for diversion'.²¹⁶
- 3.80** The Office of the NSW Advocate for Children and Young People also noted that by limiting the number of cautions a young offender can receive can disproportionately affect Aboriginal

²¹¹ *Young Offenders Act 1997* (NSW).

²¹² Submission 117, Legal Aid NSW, p 17.

²¹³ Evidence, Mr Thomas, 26 October 2020, p 33.

²¹⁴ Evidence, Mr Thomas, 26 October 2020, pp 33-34.

²¹⁵ Submission 113, The Law Society of NSW, p 13.

²¹⁶ Evidence, Ms Karly Warner, Chief Executive Officer, Aboriginal Legal Service (NSW/ACT), 26 October 2020, p 39.

and Torres Strait Islander children and young people, and conflicts with the aims and principles of the Act. It further noted that this limits the discretion of police and the court, who are best placed to consider if a caution is appropriate. It highlighted that there may be circumstances where a child or young person may receive more than three cautions.²¹⁷

- 3.81** Legal Aid NSW indicated that in recent years their solicitors have 'observed an increase in the number of cautions given to younger children, particularly Aboriginal and Torres Strait Islander children and children living in remote areas'. It said that 'this increases the impact of the cap on cautions, as children will reach their limit of three cautions much earlier, and therefore have more limited opportunity for diversion'.²¹⁸
- 3.82** Both the Office of the NSW Advocate for Children and Young People and Legal Aid NSW recommended removing the limits on cautions that a young person may receive under the *Young Offenders Act 1997*.²¹⁹
- 3.83** Legal Aid NSW also recommended that 'any offence able to be dealt with in the Children's Court, or any person who can fall within the Children's Court jurisdiction, should be eligible to be dealt with under the Act', commenting that many exclusions under the Act 'are unwarranted and prevent the diversion of children in appropriate cases'. It said that 'this includes strictly indictable offences (except serious children's indictable offences), traffic offences, sexual offence matters, and drug matters and graffiti offences'.²²⁰
- 3.84** The Office of the NSW Advocate for Children and Young People also recommended the expansion of offences covered by the Act. In particular, it noted two types of offences repeatedly raised with them by young people that should be reviewed, including transport and driving offences, especially driving without a licence. It indicated that 'the appropriateness of diversion cannot be determined solely by the type of offence, but should be determined by considering the individual circumstances of each offence, and this can best be achieved through the discretion of investigating officials and specialist youth officers'.²²¹

Justice reinvestment

- 3.85** As discussed in chapter 1, Aboriginal community-led programs and services that support community leadership and self-determination is key to addressing the over-representation of First Nations people in custody. Justice reinvestment was one way in which stakeholders felt the government could support First Nations communities to address core issues contributing to criminal behaviour.
- 3.86** Just Reinvest NSW, an organisation that supports First Nations communities to establish justice reinvestment initiatives, advised that 'justice reinvestment is a way of working that is led by the community, informed by data and builds strategies to address issues at a local level'. It outlined that the 'aim is to redirect funding away from the criminal justice system and prisons and into

²¹⁷ Submission 66, Office of the NSW Advocate for Children and Young People, pp 7-8.

²¹⁸ Submission 117, Legal Aid NSW, p 18.

²¹⁹ Submission 66, Office of the NSW Advocate for Children and Young People, p 8; Submission 117, Legal Aid NSW, p 18.

²²⁰ Submission 117, Legal Aid NSW, pp 17-18.

²²¹ Submission 66, Office of the NSW Advocate for Children and Young People, p 6.

communities that have high rates of contact with the criminal justice system, through both community-led initiatives and state-wide policy and legislative reform'.²²²

- 3.87** Just Reinvest NSW explained that it is not a program as such, but an evolving process run by communities that tackle the root cause of First Nations people coming into contact with the criminal justice system:

Justice reinvestment is not a 'program'. It is an evolving process that improves service collaboration to build stronger communities. It recognises the power in placing communities in the driver's seat to identify problems and lead solutions to reduce the number of Aboriginal people coming into contact with the criminal justice system. This includes addressing the socio-economic drivers behind interactions with the criminal justice and child protection systems, as well as finding impactful 'circuit breakers' that disrupt known pathways to prison and reduce the number of people imprisoned for minor offences.²²³

- 3.88** Just Reinvest NSW outlined the phased approach to supporting community-led justice reinvestment and the five levels of the reinvestment framework in its submission. It also highlighted that 'upfront funding for communities is needed to first establish and then continue the core functions of a justice reinvestment initiative'.²²⁴

- 3.89** At a hearing, Ms Sarah Hopkins, Co-Chair of Just Reinvest NSW, further emphasised the importance of adequate funding for communities who wish to embark on justice reinvestment. She explained that it requires 'a series of small but significant shifts in resources and decision-making that will enable reinvestment at a larger scale'. Ms Hopkins outlined that initially it requires the government to provide data to Aboriginal communities on what's happening, followed by resourcing of a small community-led team to support service sector collaboration and deliver the goals in the communities strategy. Next, she advised that the service sector will realign their resources to fill the gaps within the community plan, and that over time key agencies will shift their focus to early intervention and prevention. Ms Hopkins concluded by saying that improved outcomes at the community level will then generate wider savings, with a further shift in resources occurring on a systemic level from savings in the 'significant downward pressure on the prison population'.²²⁵

- 3.90** In terms of the savings potential, the Australian Lawyers Alliance highlighted that 'it has been estimated that incarceration of Aboriginal and Torres Strait Islander people is costing \$7.9 billion per year and rising'. It commented that investment in prisons is not benefiting the community, whereas justice reinvestment would be a better use of public resources:

The principle underlying justice reinvestment is that prisons represent a poor investment of public resources, as they cause significant harm to communities and to the individuals incarcerated, who are often not rehabilitated by their imprisonment, and whose mental health and substance abuse are often exacerbated by the experience of imprisonment. According to the principles of justice reinvestment, public money is

²²² Submission 127, Just Reinvest NSW, p 13.

²²³ Submission 127, Just Reinvest NSW, p 13.

²²⁴ Submission 127, Just Reinvest NSW, pp 13-16.

²²⁵ Evidence, Ms Sarah Hopkins, Co-Chair of Just Reinvest NSW, 27 October 2020, p 26.

better spent by reinvesting in place-based, community-led initiatives that address the causes of offending, particularly in places with a high concentration of offenders.²²⁶

3.91 An example which has shown success is the Maranguka Justice Reinvestment Project in Bourke. Supported by Just Reinvest NSW, Maranguka was the first Aboriginal-led place-based model of justice reinvestment and was established in Bourke in 2013 through a collaboration led by the Bourke Tribal Council.²²⁷

3.92 Yfoundations noted in particular the focus of the Maranguka Justice Reinvestment Project on reducing First Nations young people's contact with the criminal justice system due to the high level of youth offending in Bourke. Yfoundations informed the committee that 'it includes a school-based component, a family component, an out of school hour's component, and an acute response and return to community component'. Yfoundations reported that an evaluation of Maranguka by KPMG has shown positive results, including 'a 38% reduction in the number of juvenile charges in the five most common offence categories over a 1-year period, and a 27% reduction in bail breaches by young people'.²²⁸

3.93 Just Reinvest NSW also noted the review of Maranguka conducted by KPMG in 2017, contending this demonstrates its success within the community:

A KPMG Impact Assessment of Maranguka estimated that the changes in Bourke in 2017 achieved outcomes in areas such as **family strength** (including a 23% reduction in police recorded rates of domestic violence) **youth development** (including a 31% increase in Year 12 retention) and **adult empowerment** (including a 42% reduction in days spent in custody). The same report calculated that this saved the NSW economy \$3.1 million through the impact of the justice system and broader local economy—five times Maranguka's operating costs in the same year.²²⁹

3.94 Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force, advised that the Maranguka program in Bourke 'remains in operation and engages the Bourke Tribal Council with daily communication and organised events to reduce Aboriginal youth in the criminal justice system'. He said that 'Maranguka has been independently assessed as positively associated with reducing domestic violence and Aboriginal incarceration rates while increasing vocational education and achievement of driver licences'.²³⁰

3.95 Since this program, Just Reinvest NSW has assisted in exploring the readiness of two other communities to implement justice reinvestment, including Moree and Mt Druitt.²³¹

3.96 However, Mr O'Neil cautioned that 'it is not a program where the State Government can take a cookie-cutter approach' and apply what has worked in one community in another. He said that self-determination is really the key:

²²⁶ Submission 86, Australian Lawyers Alliance, pp 6-7.

²²⁷ Submission 127, Just Reinvest NSW, p 17.

²²⁸ Submission 45, Yfoundations, p 12.

²²⁹ Submission 127, Just Reinvest NSW, p 17.

²³⁰ Evidence, Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force, 7 December 2020, p 17.

²³¹ Submission 127, Just Reinvest NSW, pp 18-20.

I think the most important consideration in Justice Reinvestment and the reason we have seen it work in the communities that it has is because at its heart is the principle of self-determination and endorsing funding, enabling programs that are run by First Nations people for First Nations people to address the systemic issues that they know exist and that they know the solutions to within their communities.²³²

- 3.97** Both Just Reinvest NSW and the Ngalaya Indigenous Corporation also highlighted that justice reinvestment has been recommended on a number of occasions in previous reports, including by the ALRC in its *Pathways to Justice* report.²³³
- 3.98** Further, Just Reinvest NSW advised that the justice reinvestment framework is strongly aligned with the Closing the Gap priority reforms (as discussed in chapter 1) and the Local Decision Making approach of the NSW Department of Aboriginal Affairs. It also indicated that the NSW Government is currently considering a funding proposal for community-led justice reinvestment in the upcoming Budget and a business case has been prepared by the Department of Communities and Justice. Even so, it recommended that this committee 'express their support to the NSW Government for the provision of funding for community-led justice reinvestment in the upcoming Budget'.²³⁴
- 3.99** Other stakeholders also supported the NSW Government providing funding towards justice reinvestment, including the NSW Bar Association, NSW Young Lawyers, Australian Lawyers Alliance, Australian Medical Association, Community Legal Centres NSW, the Law Society of NSW, the Aboriginal Legal Service (NSW/ACT), and St Vincent de Paul Society.²³⁵

Expansion of the Youth Koori Court

- 3.100** The Youth Koori Court was established in response to the over-representation of First Nations young people in the criminal justice system. It commenced in 2015 as a pilot program in the Parramatta Children's Court and was then expanded to the Surry Hills Children's Court in early 2019.²³⁶
- 3.101** The Youth Koori Court is a modified process within the usual Children's Court process. It involves the assistance of elders and other respected people from First Nations communities to identify the risk factors that may be impacting on a First Nations young person's contact with the criminal justice system. On identifying these risk factors, an Action and Support Plan is developed with the young person, to help them address these risk factors and improve connections with their culture and community. The Action and Support Plan is then

²³² Evidence, Mr O'Neil, 26 October 2020, p 26.

²³³ Submission 127, Just Reinvest NSW, p 8; Submission 84, Ngalaya Indigenous Corporation, p 3.

²³⁴ Submission 127, Just Reinvest NSW, p 14.

²³⁵ Submission 3a, NSW Bar Association, p 5; Submission 76, NSW Young Lawyers, p 9; Submission 84, Ngalaya Indigenous Corporation, p 3; Submission 86, Australian Lawyers Alliance, p 6; Submission 103, Australian Medical Association, pp 3-4; Submission 110, Community Legal Centres NSW, p 5; Submission 113, The Law Society of NSW, pp 3-4; Submission 120, Aboriginal Legal Service (NSW/ACT), p 14; Submission 121, St Vincent de Paul Society of NSW, p 6.

²³⁶ Children's Court New South Wales, *Youth Koori Court* (13 August 2020), <<https://www.childrenscourt.nsw.gov.au/childrens-court/criminal/koori-court.html#:~:text=With%20the%20assistance%20of%20elders,impacting%20on%20the%20young%20person's>>

implemented over a period of months and is monitored by the Youth Koori Court. At the end of the process the judicial officer will sentence the young person taking into consideration the steps the young person has taken to address their issues under the Action and Support Plan.²³⁷

- 3.102** The Office of the NSW Advocate for Children and Young People supported the Youth Koori Court as an initiative to reduce the over-representation of Aboriginal young people appearing before the Children's Court. It pointed to a recent evaluation of the Youth Koori Court undertaken by the Western Sydney University which showed some positive results. The evaluation found that the pilot program is 'an effective and culturally appropriate means of addressing the underlying issues that may have lead many Aboriginal young people to appear before the Court'. It also found that the program reduced the number of days in detention, highlighted the broader reasons for a young person coming in contact with the criminal justice system and aimed to address these to decrease the risk of reoffending:

Prior to the Youth Koori Court, the 33 people involved in the study each spent on average 57 days in detention whereas after involvement with the Youth Koori Court only spent average 25 days in custody. Ultimately, Young people engaged in the court were less likely to end up in detention. Additionally, over the research period, over half the items listed on young people's action plans were completed by the time of sentence. A key strength of the model that the evaluation identified was that for many young people, their issues with the law are either a direct result of, or compounded by, the issues they face in their daily lives – to do with jobs, safe housing and access to essential services. By deferring sentencing until the factors that led to their criminal behaviour are addressed, it not only decreasing the risk of reoffending but as the evaluation found, leads to a greater chance of outcomes plans being achieved.²³⁸

- 3.103** Yfoundations advised that the Youth Koori Court takes the view that 'if key issues such as alcohol and other drugs, mental health, housing and education are addressed, there is a greater chance of keeping Aboriginal young people out of detention'. It also noted the Court 'puts sensible, tailored plans in place for each young person to encourage connection with family, community and culture to stop anti-social behaviour from escalating'. Yfoundations informed the committee that currently the Youth Koori Court has the capacity to support 24 young people each year and should be expanded, particularly to areas with high rates of Aboriginal young people in detention.²³⁹
- 3.104** NSW Young Lawyers and the Law Society of NSW also supported the expansion of the Youth Koori Court to cover regional areas of New South Wales.²⁴⁰
- 3.105** However, some concerns were raised with the committee about the Youth Koori Court model. Ms Ann Weldon, Aboriginal Liaison Officer, Public Service Association of NSW, told the committee that the Youth Koori Court places high expectations on young people who are dealt with there:

²³⁷ Children's Court New South Wales, *Youth Koori Court* (13 August 2020), <<https://www.childrenscourt.nsw.gov.au/childrens-court/criminal/koori-court.html#:~:text=With%20the%20assistance%20of%20elders,impacting%20on%20the%20young%20person's>>

²³⁸ Submission 66, Office of the NSW Advocate for Children and Young People, pp 10-11.

²³⁹ Submission 45, Yfoundations, pp 12-13.

²⁴⁰ Submission 76, NSW Young Lawyers, p 9; Submission 113, The Law Society of NSW, p 8.

Youth Koori Court I have a concern about personally because a lot of those children that actually go before that court, they have to plead guilty even though they are not. Some of the sentences are far harsher than what they would get if they had not pleaded guilty. So the attempts no doubt are measures that could be looked at in a manner where they are succeeding to some degree, but the level of expectation that that child has to— they have to have housing, they have to make sure that they get a job et cetera. Now, because they go to Koori Court, there is no magic wand with that. Just because they go there does not mean that they going to have a house. If they could not have one before and a job that does not automatically happen.²⁴¹

- 3.106** The Public Service Association NSW also had concerns regarding the 12-month timeframe in which young people have to remain connected with the court, contending it is too long. It also commented that the 'Youth Koori Court whilst a restorative justice program is not circle sentencing and circle sentencing is not available for youth offenders'.²⁴²
- 3.107** Likewise, Yfoundations highlighted that this option is only available to 'young people who have either plead guilty to or been found guilty of an offence'. Further, it noted that young people who can take part in the Youth Koori Court must reside in that court's catchment area and that this limits the number of young people also eligible to take part.²⁴³

Establishment of a First Nations specific list in the Children's Court

- 3.108** Stakeholders also called for the establishment of a specific list in the Children's Court to deal with care and protection matters relating to First Nations children and young people.
- 3.109** A key advocate for this recommendation was the Law Society of NSW. It noted the link between out-of-home care and involvement in the criminal justice system (also discussed in chapter 2), highlighting that 'of the 99 Indigenous people who died in custody, and who were the subject of the *Royal Commission into Aboriginal Deaths in Custody*, 43 were separated from their families as children'. It also noted more recent reports, including the ALRC *Pathways to Justice* report, which specifically acknowledged the link between care and protection, juvenile detention and later adult incarceration.²⁴⁴
- 3.110** The Law Society of NSW also pointed to the *Family is Culture* report, which was an Independent Review of Aboriginal Children and Young People in Out of Home Care. The report also recommended the establishment of an Indigenous specific list in the Children's Court in respect of care and protection matters.²⁴⁵
- 3.111** In addition, the Law Society of NSW pointed to other examples of this type of approach, noting that an Indigenous list has successfully been established at the Sydney registry of the Federal Circuit Court since September 2015, and now also established at other registries, including in Melbourne, Adelaide and Alice Springs. It noted the following elements of the Federal Circuit

²⁴¹ Evidence, Ms Ann Weldon, Aboriginal Liaison Officer, Public Service Association of NSW, 7 December 2020, p 3.

²⁴² Submission 118, Public Service Association of NSW, p 13.

²⁴³ Submission 45, Yfoundations, p 13.

²⁴⁴ Submission 113, The Law Society of NSW, p 5.

²⁴⁵ Submission 113, The Law Society of NSW, p 6.

Court list that are critical for success and are transferable to the proposal for a specific Children's Court list:

- there must be at least one judicial officer tasked with 'championing' the indigenous list and taking a person-centred, case management approach to the matters
- a therapeutic jurisprudential approach must be taken, including involvement of wraparound services, preferably led or trusted by First Nations people
- there should be some mechanism to coordinate services, and also to hold them accountable for the delivery of services
- mechanisms that ensure that a First Nations child's safe family members are able to 'stand up' for children at risk.²⁴⁶

3.112 Further, the Law Society of NSW informed the committee that crucial to the success of the Indigenous list is a 'true and committed partnership between Indigenous leadership, Indigenous therapeutic services, legal assistance providers and the Court'. It highlighted the importance of the legal framework being supported by 'comprehensive, culturally safe (and therefore more effective), wrap-around therapeutic support'.²⁴⁷

3.113 Finally, Ms Crellin, representing the Law Society of NSW at a hearing, said 'by having an Indigenous specific list we hope that the issues particular to Aboriginal young people are considered by the courts including, and perhaps most importantly, safety but also cultural sensitivity and ensuring that they are able to remain attached to their people'.²⁴⁸

Expansion of Circle Sentencing

3.114 Circle Sentencing is an alternative sentencing option for First Nations adults who plead guilty or are found guilty in this jurisdiction. It allows input from the victim and offender, and directly involves First Nations people in the sentencing process, with the goal of empowering First Nations communities through their involvement.²⁴⁹

3.115 Circle Sentencing is currently available in 12 Local Court locations. It involves the 'sentencing circle' sitting with the Magistrate to determine the appropriate sentence, with contributions from local Elders, victims, respected members of the community and the offender's family. Circle Sentencing promotes the sharing of responsibility between the community and the criminal justice system and attempts to address the causes of criminal behaviour and develop solutions to issues raised. It also actively involves the community in solving its problems.²⁵⁰

3.116 In May 2020, the BOCSAR evaluated Circle Sentencing and noted positive results. It found that 'Aboriginal people who participate in Circle Sentencing have lower rates of imprisonment and recidivism than Aboriginal people who are sentenced in the traditional way'. The statistics of

²⁴⁶ Answers to questions on notice, The Law Society of NSW, 26 November 2020, p 2.

²⁴⁷ Submission 113, The Law Society of NSW, pp 6-7.

²⁴⁸ Evidence, Ms Crellin, 26 October 2020, p 13.

²⁴⁹ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 4.

²⁵⁰ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 4; Correspondence from Judge Graeme Henson AM, Chief Magistrate of the Local Court, to Chair, 20 January 2021.

the evaluation showed, that when compared to Aboriginal offenders sentenced in the traditional way, offenders participating in Circle Sentencing:

- are 9.3 percentage points less likely to receive a prison sentence
- are 3.9 percentage points less likely to reoffend within 12 months
- take 55 days longer to reoffend if and when they do.²⁵¹

3.117 Judge Henson advised that the study conducted by the BOCSAR 'provides clear evidence that Aboriginal sentencing courts are associated with lower rates of incarceration and recidivism'. Judge Henson said that these results present an opportunity to consider the expansion of the program, and provided the Local Court's support for this to occur:

The Local Court would welcome a decision by NSW Government to invest further funding in this program to increase its availability and effectiveness. Such investment may go towards increasing the number of Aboriginal offenders who are diverted away from the criminal justice system and ultimately reduce the rate of Aboriginal incarceration in NSW.²⁵²

3.118 The Law Society of NSW also noted the positive results demonstrated by the evaluation conducted by the BOCSAR and indicated its support for expanding the availability of Circle Sentencing.²⁵³

3.119 The Public Service Association NSW also recommended that the Department of Communities and Justice work with local Aboriginal communities to increase the number of Local Government areas where Circle Sentencing is available to Aboriginal offenders. It also supported expanding this model to targeting offenders prior to court appearances, for example giving options for Police to explore these as alternative discretionary pathways, supported by the community. Further, it recommended that Circle Sentencing be made available for youth offenders.²⁵⁴

3.120 Legal Aid NSW were also supportive of the Circle Sentencing model. It advised that 'in our experience, Circle Sentencing can provide for a culturally appropriate setting and framework for developing a sentence'. It noted that Circle Sentencing provides 'Elders in the community a respected role in the justice system and the authority to hand down a sentence', and also gives 'Local Court Magistrates the opportunity to see how Elders function and what their expectations are of the participating offenders'.²⁵⁵

3.121 However, Legal Aid NSW noted a few issues with this sentencing option. Firstly, it noted that the effectiveness of the program 'may be limited by the resources available to implement the outcome determined by the circle, particularly with aftercare and support'. It explained that it is sometimes not viable for Elders to monitor and support the offender on a continuous basis,

²⁵¹ Media release, NSW Bureau of Crime Statistics and Research, 'New Circle Sentencing Evaluation finds positive results', 26 May 2020.

²⁵² Submission 100, Chief Magistrate of the Local Court of New South Wales, p 4.

²⁵³ Submission 113, The Law Society of NSW, p 7.

²⁵⁴ Submission 118, Public Service Association of NSW, p 19.

²⁵⁵ Submission 117, Legal Aid NSW, p 28.

and that at times Elders did not want to proceed with Circle Sentencing with an offender as the person was not from their community, and they felt they had no authority over that person.²⁵⁶

- 3.122** Secondly, Legal Aid NSW explained that client participation is another potential barrier, with many clients entering custody who 'are already quite vulnerable, experiencing homelessness and substance abuse issues, and so their capacity to participate is limited'. However, despite these limitations, Legal Aid NSW acknowledged the benefits of Circle Sentencing in reducing reoffending for First Nations people and recommended that it 'be made available in every Magistrates Court in NSW, and to every defendant who qualifies'.²⁵⁷

Expansion of Drug Courts

- 3.123** Stakeholders also suggested that additional Drug Courts be established in other locations across New South Wales, given it has proven to be successful in tackling underlying drug and alcohol problems that contribute to criminal behaviour.
- 3.124** The Drug Court of New South Wales is a specialist court that takes referrals from the Local and District Courts of offenders who are dependent on drugs and who are considered to be eligible for a Drug Court program. The Drug Court currently sits in three locations, Parramatta, Toronto and Sydney CBD. It has Local Court and District Court jurisdiction and operates under the *Drug Court Act 1998* and *Drug Court Regulation 2015*. Its aim is to address underlying drug dependency which has resulted in criminal offending and to provide long-term solutions to the cycle of drug use and crime.²⁵⁸
- 3.125** Community Legal Centres NSW stated that 'New South Wales' punitive approach to drugs does not and will not work'. It argued that 'if we are serious about reducing the harm associated with problematic drug use in our communities, we must act on the clear evidence that harm minimisation and decriminalisation are more effective than criminal justice responses'. It highlighted that the Drug Court is a more effective approach and pointed to studies that demonstrated its success:

Evaluations of the NSW Drug Court have consistently shown that it is more effective than prison in reducing recidivism, is more cost-effective than imprisonment, and is more conducive to improvements in health and well-being of participants than a prison sentence would have been. For instance, 2008 research showed that Drug Court participants are 17 per cent less likely to be re-convicted for any offence, 30 per cent less likely to be reconvicted for a violent offence, and 38 per cent less likely to be reconvicted of a drug offence. The same research showed that the Drug Court was also more cost effective than if the same person had been dealt with through the traditional legal system.²⁵⁹

- 3.126** Community Legal Centres NSW noted that the Drug Court is currently only available in three locations, commenting that this 'is far too limited in its participation numbers, eligibility requirements and size'. It therefore recommended that the Drug Court be expanded across New

²⁵⁶ Submission 117, Legal Aid NSW, p 29.

²⁵⁷ Submission 117, Legal Aid NSW, p 29.

²⁵⁸ Drug Court New South Wales, *What is the Drug Court of NSW?* (6 July 2020), <<https://www.drugcourt.nsw.gov.au/drug-court/about-us.html>>

²⁵⁹ Submission 110, Community Legal Centres NSW, p 9.

South Wales 'so as to enable people impacted by substance abuse issues to access the support they need to heal'.²⁶⁰

3.127 Ms Crellin, representing the Law Society of NSW, also advocated in favour of expanding the Drug Court to other regional areas, including Dubbo, 'which has been calling out for some sort of rehabilitation program, some sort of court that allows the input of the community, to give the community ownership over the system and change the system'.²⁶¹

3.128 Legal Aid NSW raised concerns with 'the lack of community-based support services for rehabilitation' in rural, regional and remote areas. It recommended the expansion of drug courts and drug rehabilitation services, particularly to help vulnerable people with unpaid fines and drug and alcohol addiction. Specifically, it suggested the following:

- expansion of Drug Courts to regional, rural and remote areas, with access to the Drug Court improved by reviewing its cultural appropriateness and eligibility criteria, including expanding eligibility to violent offenders
- expansion of associated drug rehabilitation services (including the Magistrates Early Referral Into Treatment (MERIT) program and the Compulsory Drug Treatment Program) to regional, rural and remote areas
- expansion of MERIT to include people suffering from alcohol abuse problems in all locations, people in custody, and people charged with strictly indictable and/or violent offences.²⁶²

3.129 In relation to the availability of rehabilitation services to support the Drug Court, the Law Society of NSW highlighted that 'there is a distinct lack of residential and other drug and alcohol services in New South Wales', particularly in regional and remote areas. It said that 'it is essential for Indigenous and non-Indigenous people on remand that meaningful alternatives to prison are available in the community, particularly to support people with mental health issues and drug and alcohol dependence'. The Law Society of NSW suggested that without the availability of these services 'the courts are less likely to release an accused person on bail or impose a community-based sentencing option and thus reduce the rate of imprisonment of Aboriginal and Torres Strait Islander people'. In this regard, the Law Society of NSW recommended 'funding be provided for culturally competent, safe and appropriate residential drug and alcohol rehabilitation centres in all regional areas'.²⁶³

Establishment of a Walama Court

3.130 Alongside the proposal to expand the Youth Koori Court, Circle Sentencing and the Drug Court of New South Wales, stakeholders also called for the establishment of the 'Walama Court', a new and specific sentencing court model for First Nations people.

3.131 The Ngalaya Indigenous Corporation proposed that the Walama Court would form part of the District Court and would be modeled on aspects of both the Victorian Koori Court and the

²⁶⁰ Submission 110, Community Legal Centres NSW, pp 9-10.

²⁶¹ Evidence, Ms Crellin, 26 October 2020, p 4.

²⁶² Submission 117, Legal Aid NSW, pp 27 and 45-46.

²⁶³ Submission 113, The Law Society of NSW, pp 12-13.

Drug Court of New South Wales. The proposed model includes wraparound services, post-sentence supervision and a more intensive monitoring role during both the sentence proceedings and post-sentence. It also involves Elders, First Nations communities, and the legal profession to have input in the decisions around sentencing and enable dialogue around the causes of offending and recidivism, for example disconnection with community and intergenerational trauma.²⁶⁴

3.132 The NSW Bar Association explained how the Walama Court might work in practice:

Under the proposal, an offender may elect to be referred to the Walama Court where they have pleaded guilty to an offence, are appealing a Local Court sentence of imprisonment or are to be sentenced for a breach of a community order.

Once the offender's cultural background has been determined, a Sentencing Conversation would be held in Court in the presence of the judge, involving two Elders, the prosecutor, the offender and their lawyer, a Community Corrections officer and any other person at the judge's discretion, such as the victim and a domestic violence support person or mental health workers. Like other Courts, proceedings would be open to the public.

The Conversation would involve discussion about the nature of the offending, the effect on any victims, the offender's background and problematic areas in the offender's life which may need to be addressed. Post sentence, under the Walama Court the judge would have greater capacity to monitor an individual's progress, including through an intensive period of monitoring and supervision by Community Corrections in the community.²⁶⁵

3.133 The NSW Bar Association explained that the Walama Court would not create two systems of justice in New South Wales, as it would be required to deal with proceedings in accordance with the legislative regime and sentencing principles that apply in proceedings generally. For example, if a sentence of more than three years was imposed, the offender would serve it in the normal course. However, the offender would have benefited from participating in a culturally appropriate sentencing 'conversation' and be better understood, with input from Elders on the impact of their actions on the community.²⁶⁶

3.134 The Ngalaya Indigenous Corporation strongly recommended the Walama Court as a 'keystone policy for reducing the over-incarceration of First Nations people'. It indicated that the benefits of a Walama Court is shown in the success of the Victorian Koori Court, the Drug Court of New South Wales and Circle Sentencing, which are similar models. It also suggested that economically the Walama Court is a good policy, noting that 'the publicly reported costing from the NSW Department of Justice (in December 2018) estimated a cost of \$19.3 million for a five-year pilot, with potential savings of \$21.8 million over six to eight years, plus potential productivity gains'.²⁶⁷

3.135 Further, the Ngalaya Indigenous Corporation said that by establishing the Walama Court, 'the NSW Government would be creating a more culturally appropriate response to criminal justice'

²⁶⁴ Submission 84, Ngalaya Indigenous Corporation, p 6.

²⁶⁵ Submission 3a, NSW Bar Association, pp 8-9.

²⁶⁶ Submission 3a, NSW Bar Association, p 9.

²⁶⁷ Submission 84, Ngalaya Indigenous Corporation, p 8.

and 'would be enacting practical and meaningful reform to meet the nation's proposed Closing the Gap refresh target to reduce the rate of incarceration of First Nations adults'. It stated that the Walama Court 'is a sensible, systemic and culturally appropriate reform' that 'recognises the role and importance of First Nations Elders, and community support networks'.²⁶⁸

3.136 The NSW Bar Association also supported the funding and implementation of the Walama Court in the District Court of New South Wales, recommending that this committee advocate for its funding as a priority during the 2020-21 budget. It said that 'the Walama Court proposes an effective way to sentence First Nations offenders which would reduce the disproportionate rate of incarceration and meaningfully address the underlying issues that give rise to repeat offending'.²⁶⁹

3.137 The Association highlighted that underpinning the model is a sound business case, prepared by the Walama Working Group which is led by Her Honour Judge Dina Yehia SC of the District Court. It also has the support of a number of organisations, including the Police Association of NSW. The NSW Bar Association also pointed to the government's support of this model, noting that the Department of Communities and Justice advised at a 2019 Budget Estimates hearing that the Walama Court would be considered in the 2020-21 budget cycle and was 'an excellent proposal', although it needed funding.²⁷⁰

3.138 The NSW Bar Association stated that 'the Walama Court will need to be adequately resourced and funded to ensure its success' but would ensure long-term benefits with reducing incarceration of First Nations people and deliver social benefits to communities:

In the long term the proposal will realise savings for the Government as fewer First Nations Peoples will be imprisoned and reduced recidivism rates would mean generations of people will no longer continue to cycle through the criminal justice system. It will deliver further social benefits to the community, as the model would involve community participation and more supervision resulting in reduced recidivism and increase compliance with court orders to better protect the community.²⁷¹

3.139 Along similar lines, Community Legal Centres NSW pointed to the benefits of the Walama Court model. It stated that 'alongside the clear benefits to people and communities of such an approach, the Walama Court would also deliver millions per year in savings'. It said that 'the project would cost less than \$3.9 million per year to establish and run, and would generate potential savings over eight years of \$16.2 million on prison beds and \$5.6 million from lowered recidivism, as well as potential productivity gains'. Further, it noted that the Walama Court 'would help address over-incarceration of Aboriginal people through increasing the use of community-based sentencing for certain offences' and would be 'based on an understanding of the multitude drivers of over-incarceration of Aboriginal and Torres Strait Islander people'.²⁷²

3.140 The Aboriginal Legal Service (NSW/ACT) also encouraged the NSW Government to continue to support and resource community-led approaches and 'act without delay to establish a Walama Court in NSW'. It said that culturally-specific courts 'play a critical role in providing holistic and

²⁶⁸ Submission 84, Ngalaya Indigenous Corporation, p 7.

²⁶⁹ Submission 3a, NSW Bar Association, p 9.

²⁷⁰ Submission 3a, NSW Bar Association, pp 9-10.

²⁷¹ Submission 3a, NSW Bar Association, p 10.

²⁷² Submission 110, Community Legal Centres NSW, pp 6-7.

wraparound support for our communities', and 'courts that involve Elders, Aboriginal community-controlled organisations and culturally-appropriate members, provide the most effective support for our communities'.²⁷³

3.141 Other stakeholders also supported the funding and establishment of the Walama Court in the District Court, including NSW Young Lawyers, Australian Lawyers Alliance, the Law Society of NSW, Women's Legal Service NSW, and the NSW Aboriginal Land Council.²⁷⁴

Suspect Target Management Program

3.142 A number of inquiry participants raised concerns about the NSW Police Force's Suspect Target Management Plan (STMP), contending that it disproportionately impacts First Nations people and contributes to the over-representation of First Nations people in custody. In particular, some stakeholders called for the STMP program to be abandoned in relation to children and young people.

3.143 STMP is a policing tool designed to prevent crime before it occurs by increasing policing activities targeted at identifying potential offenders and disrupting any criminal behaviour. The STMP strategy was introduced by the NSW Police Force in January 2000 and revised in May 2005.²⁷⁵

3.144 In June 2018 the Law Enforcement Conduct Commission (LECC) initiated an investigation into the use of the NSW Police Force STMP-II on children and young people. The LECC handed down its interim report in January 2020 and found that:

- a high proportion of young people identified as possibly being Aboriginal or Torres Strait Islander by the NSW Police Force were selected for STMP targeting
- overt and intrusive policing tactics have been applied by the NSW Police Force resulting in apparently unreasonable surveillance and monitoring of young people
- patterns of interactions that show the NSW Police Force has used a young person's STMP status as a basis for ongoing and repeated stops, searches or visits to the young person's home, in lieu of legislative or court ordered frameworks
- the target identification and risk assessment process may have introduced unacceptable risks of bias
- the NSW Police Force did not undertake evidence-based evaluations to assess the success, or otherwise, of the STMP on an individual.²⁷⁶

²⁷³ Submission 120, Aboriginal Legal Service (NSW/ACT), p 14.

²⁷⁴ Submission 76, NSW Young Lawyers, p 9; Submission 113, The Law Society of NSW, p 8; Submission 86, Australian Lawyers Alliance, p 18; Submission 98, NSW Aboriginal Land Council, p 4; Submission 119, Women's Legal Service NSW, p 2.

²⁷⁵ Law Enforcement Conduct Commission, *An investigation into the formulation and use of the NSW Police Force Suspect Targeting Management Plan on children and young people, Operation Tepito* (January 2020), <<https://www.lecc.nsw.gov.au/news-and-publications/publications/operation-tepito-interim-report-january-2020.pdf>>

²⁷⁶ Law Enforcement Conduct Commission, *An investigation into the formulation and use of the NSW Police Force Suspect Targeting Management Plan on children and young people, Operation Tepito* (January 2020),

- 3.145** The LECC concluded that the application of the STMP-II in relation to young people 'bears the insignia of being unreasonable, unjust or oppressive'. It made 15 recommendations to improve the application of the program for use in relation to children and young people.²⁷⁷
- 3.146** In the LECC's report, it was noted that the NSW Police Force were drafting the policy and guidelines for STMP-III and that many of the concerns raised by the LECC had been considered by the police in drafting this policy. The LECC stated that it would review the STMP-III policy within the first 12 months of its implementation. The report also noted that the NSW Police Force had agreed to initiate a formal evaluation within the first two years of its implementation, which would be conducted by the BOCSAR.²⁷⁸
- 3.147** The LECC later confirmed that it anticipates completing the review of STMP-III in the last quarter of 2021. It advised that it is currently awaiting full implementation of the new STMP-III scheme by the NSW Police Force before being able to properly evaluate the way that this new policy responds to the issues identified in its first report reviewing STMP-II.²⁷⁹
- 3.148** Providing further information on this program to the committee at a hearing, Assistant Commissioner Crandell informed the committee that STMP-III was introduced on 4 November 2020. He said that the NSW Police Force and its executive are committed to the STMP strategy and indicated that STMP-III now has additional streams of targeting to 'allow greater flexibility to engage recidivist offenders in plans designed to remove them from the criminal justice system'.²⁸⁰
- 3.149** In terms of the numbers of adults and young people included under STMP, Assistant Commissioner Crandell informed the committee that:
- The NSW Police Force currently has 79 Aboriginal adult people listed as active under STMP, which is 23 per cent of the total STMP cohort. Some 16 Aboriginal young people are listed as active under STMP, which is 5 per cent of the total STMP cohort. For domestic violence, 27 Aboriginal people are listed as active under DV STMP, which is 24 per cent of the total STMP cohort. No Aboriginal young people are active under DV STMP.²⁸¹
- 3.150** Assistant Commissioner Crandell also clarified that the Commander of the Capability and Youth Command 'must authorise any child under the age of 14 to be the subject of STMP'. He said

<<https://www.lecc.nsw.gov.au/news-and-publications/publications/operation-tepito-interim-report-january-2020.pdf>>

²⁷⁷ Law Enforcement Conduct Commission, *An investigation into the formulation and use of the NSW Police Force Suspect Targeting Management Plan on children and young people, Operation Tepito* (January 2020), <<https://www.lecc.nsw.gov.au/news-and-publications/publications/operation-tepito-interim-report-january-2020.pdf>>

²⁷⁸ Law Enforcement Conduct Commission, *An investigation into the formulation and use of the NSW Police Force Suspect Targeting Management Plan on children and young people, Operation Tepito* (January 2020), <<https://www.lecc.nsw.gov.au/news-and-publications/publications/operation-tepito-interim-report-january-2020.pdf>>

²⁷⁹ Correspondence from Ms Justice Simpkins, Manager Prevention, Law Enforcement Conduct Commission, 19 March 2021.

²⁸⁰ Evidence, Assistant Commissioner Crandell, 7 December 2020, p 17.

²⁸¹ Evidence, Assistant Commissioner Crandell, 7 December 2020, p 17.

that 'the position that the NSW Police Force will take in relation to any person targeted under STMP-III is one of support and not putting them into the criminal justice system'.²⁸²

- 3.151** Stakeholders in this inquiry were, however, concerned about the application of STMP to First Nations people.
- 3.152** The Public Interest Advocacy Centre, the Western NSW Community Legal Centre, the Western Women's Legal Support, Yfoundations, Legal Aid NSW, NSW Young Lawyers, the Aboriginal Legal Service (NSW/ACT), Change the Record, and St Vincent de Paul Society of NSW, all argued that the STMP disproportionately impacts First Nations adults and youth and contributes to the over-representation of First Nations people in custody.²⁸³
- 3.153** The Public Interest Advocacy Centre also informed the committee that the BOCSAR has released a revised version of its report evaluating STMP-II in February 2021 and the report found 'significant increases in the risk of a custodial sentence post STMP: up 9.2 percentage points for the sample as a whole, up 10.0 percentage points for Aboriginal people and up 6.8 percentage points for juveniles'. It stated that 'the use of the STMP is demonstrated to increase the risk of imprisonment of the Aboriginal people it targets', and 'if the Committee is serious about reducing the high rates of incarceration of Aboriginal people, it should call for the use of the STMP to be discontinued'.²⁸⁴
- 3.154** The experience specifically of children and youth under the STMP strategy was of high concern to stakeholders. Some of the comments in this regard are set out below.
- 'Aboriginal and Torres Strait Islander youth in the Western NSW region frequently report being followed, watched and harassed by police; in many cases after only being charged with minor offences (or in some cases, never having been charged at all). It seems that police do not inform children that they are being monitored under an STMP, or why they are being monitored, and children only become aware of the fact they are a target through increased and repeated contact with police'.²⁸⁵
 - 'Aboriginal young people are targeted while out riding bikes, walking to the local skate park or in shopping centres and face serious penalties for offences for which their non-Aboriginal peers would receive only a warning. Every unwarranted negative experience is damaging to the trust which should exist between the police and our community's youth'.²⁸⁶
 - 'Under the Police Suspects Target Management Plan Aboriginal young people can be targeted because their parents were in prison. Police practices can contribute to the disproportionate arrest, police custody and incarceration rates of Aboriginal people. It

²⁸² Evidence, Assistant Commissioner Grandell, 7 December 2020, p 33.

²⁸³ Submission 114, Public Interest Advocacy Centre, p 7; Western NSW Community Legal Centre and Western Women's Legal Support, p 4; Submission 45, Yfoundations, p 9; Submission 117, Legal Aid NSW, p 20; Submission 120, Aboriginal Legal Service (NSW/ACT), pp 16-17; Submission 121, St Vincent de Paul Society of NSW, p 7; Evidence, Ms Trevitt, 27 October 2020, p 13; Evidence, Mr Bruck, 26 October 2020, p 3.

²⁸⁴ Submission 114a, Public Interest Advocacy Centre, p 1.

²⁸⁵ Submission 123, Western NSW Community Legal Centre and Western Women's Legal Support, p 4.

²⁸⁶ Submission 65, New England Greens Armidale Tamworth, p 1.

also influences Aboriginal peoples' relationship with police and how they respond to interactions with police'.²⁸⁷

- '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. The program breeds distrust between police and the young people they target, and often leads to a cycle of criminalisation that follows young people into adulthood'.²⁸⁸

3.155 Given these concerns, many stakeholders called for the abolishment of STMP for all children under the age of 18 years old.²⁸⁹

3.156 In this regard, Ms Smith from the Public Interest Advocacy Centre told the committee that First Nations people do not think the STMP can ever be improved to benefit their communities and must be abandoned:

The other comment is that I do know that Aboriginal organisations and legal organisations working for Aboriginal people have time and time again made the call that it cannot be improved, it cannot be adapted to First Nations people on the premise that First Nations people will continue to be targeted at the high rate and that instead the STMP-II cannot be improved, it cannot be adjusted to change the purposes, it is a system for disrupting and targeting these people and it needs to be abandoned.²⁹⁰

3.157 Instead of the use of STMP, Yfoundations recommended that 'young people suspected of being at medium or high risk of reoffending should be considered for evidence-based prevention programs that address the causes of reoffending, such as through Youth on Track, Police Citizens Youth Clubs NSW or locally based programs developed in accordance with Just Reinvest NSW'.²⁹¹

3.158 St Vincent de Paul Society of NSW also noted the importance of 'initiatives that seek to build cultural understanding and awareness and create genuine partnerships between the police and Aboriginal people and communities'.²⁹²

Committee comments

3.159 While a number of the matters raised in this chapter have been included in previous reports and recommendations, it was important for the committee to specifically outline them again, given

²⁸⁷ Submission 98, NSW Aboriginal Land Council, p 4.

²⁸⁸ Submission 110, Community Legal Centres NSW, p 8.

²⁸⁹ Submission 114, Public Interest Advocacy Centre, p 9; Submission 123, Western NSW Community Legal Centre and Western Women's Legal Support, p 5; Submission 66, Office of the NSW Advocate for Children and Young People, p 11; Submission 107, Change the Record, p 2; Submission 110, Community Legal Centres NSW, p 8; Submission 117, Legal Aid NSW, p 22; Submission 120, Aboriginal Legal Service (NSW/ACT), p 17.

²⁹⁰ Evidence, Ms Smith, 26 October 2020, pp 19-20.

²⁹¹ Submission 45, Yfoundations, p 9.

²⁹² Submission 121, St Vincent de Paul Society of NSW, p 7.

many stakeholders and the committee felt strongly about the potential for these reforms to address the high number of First Nations adults and youth in custody.

- 3.160** In relation to reforms to the *Bail Act 2013*, the committee notes that First Nations people are disproportionately impacted when it comes to bail decisions and bail conditions are often culturally inappropriate. In our view, having a standalone provision, similar to the one that operates in Victoria, may help to ensure bail decision makers carefully consider Aboriginality when deciding whether a person is to be granted bail, giving consideration to the person's cultural background and the person's ties to extended family and place. We therefore recommend that the *Bail Act 2013* be amended in this regard.
-

Recommendation 8

That the NSW Government amend the *Bail Act 2013* to include a standalone provision that stipulates a bail decision maker must take into account any issues that arise due to the person's Aboriginality, similar to section 3A of the *Bail Act 1977(Vic)*.

- 3.161** Alongside reforms to the *Bail Act 2013*, the committee also supports the introduction of Gladue style reporting in New South Wales Courts to ensure that a First Nations person's background and community is considered when sentencing. We commend the Aboriginal Legal Service (NSW/ACT) for establishing the Bugmy Evidence Project and for commencing work to develop reports that provide narrative and statistical information on communities with significant populations of First Nations people in New South Wales. The work completed as part of this project can play a key role in Gladue style of reporting in the NSW Courts. This initiative can increase the information available to the NSW Courts and allow the background and broader circumstances of a First Nations person to be considered when sentencing. We therefore make this recommendation.
-

Recommendation 9

That the NSW Government work in partnership with the Aboriginal Legal Service (NSW/ACT), and other relevant Aboriginal and Torres Strait Islander organisations, to introduce the use of Gladue style Aboriginal Community Justice Reports in NSW Courts.

- 3.162** It is clear to the committee that section 4A of the *Summary Offences Act 1988* relating to offensive language provisions can be the gateway to more serious charges, in what has been termed by stakeholders as the 'trifecta phenomenon'. While we acknowledge that stakeholders have called for section 4A to be repealed, it is our view that the provision should be amended to ensure that police only prosecute offences where offensive language is causing intimidation and/or there is an actual threat of harm, except if the offensive language is used in or near or within hearing of a school.

Recommendation 10

That the NSW Government amend section 4A of the *Summary Offences Act 1988* to ensure that the offence only captures a situation where there is intimidation and/or an actual threat of harm, except if the offensive language is used in or near or within hearing of a school.

- 3.163** The committee agrees with stakeholders that no child under the age of 14 should be held criminally responsible or incarcerated. The medical advice is very clear that children under this age have not yet developed the brain function to fully understand the consequences of their actions. We note that the Council of Attorneys-General have been considering this proposal since early 2019. We are now two years down the track, and there has been no outcome on this issue. The committee encourages the Council to expedite its report and recommendations in this regard.
- 3.164** We also make a firm recommendation in this regard, given the importance of ensuring children are diverted away from the criminal justice system and children under 14 are not placed in juvenile detention. The committee notes that this in line with the stance taken by other countries and the United Nations Committee on the Rights of the Child.
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Recommendation 11

That the NSW Government raise the minimum age of criminal responsibility and the minimum age of children in detention to at least 14.

- 3.165** By raising the minimum age of criminal responsibility, we do not intend to create a gap where young people are left to their own devices. Rather than criminalising children at a young age, there needs to be strong interventions that reduce the risks posed to themselves and others, with clear referrals to diversionary programs and/or other supports. The committee therefore agrees with the recommendation put forward by the NSW Bar Association for the establishment of a taskforce to develop a whole of government approach to therapeutic pathways for children between the ages of 10 and 14 and we recommend the same.
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Recommendation 12

That the NSW Government establish an inter-agency and inter-department taskforce to develop a cohesive, whole of government approach to therapeutic pathways that integrate health, education and housing approaches to youth behaviour for children between the ages of 10 and 14.

- 3.166** It is disappointing to hear that diversion under the *Young Offenders Act 1997* is not being fully utilised for First Nations youth. We agree with stakeholders that there are some limitations to this Act, including a cap on the number of cautions that young people can be given and restrictions in terms of the offences covered. We therefore make a recommendation that this legislation be amended to remove these limitations. We also note that it is important for the NSW Government to consult with key stakeholders on these changes.
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Recommendation 13

That the NSW Government, in consultation with key stakeholders, amend the *Young Offenders Act 1997* to expand the offences in which the legislation can apply and remove the caps on the number of cautions young people can be given.

- 3.167** In terms of diversionary programs, and the importance of diverting First Nations people away from the criminal justice system, the committee agree that arrest should be used as a last resort and that this should be the priority of police. We agree with stakeholders that legislation could be strengthened to promote this principle. Therefore, we support the recommendation put forward by the Public Interest Advocacy Centre to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Children (Criminal Proceedings) Act 1987* to expressly legislate that the arrest, detention or imprisonment of a child and adult should be used only as a measure of last resort and for the shortest appropriate period of time.
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Recommendation 14

That the NSW Government expressly legislate in the *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Children (Criminal Proceedings) Act 1987* that the arrest, detention or imprisonment of a person should be used only as a measure of last resort and for the shortest appropriate period of time.

- 3.168** The committee also supports community-led justice reinvestment. We understand that this is not a defined program but rather a tailored approach involving an agreement between First Nations communities and government on local solutions to local problems. We are encouraged by the success of the Maranguka Justice Reinvestment Project in Bourke and the commitment of Moree and Mt Druitt to begin this process soon. We also commend the work of Just Reinvest NSW in advocating for and supporting communities in implementing justice reinvestment.
- 3.169** We agree that funding by government should go towards justice reinvestment instead of the correctional system, to focus on prevention rather than sustaining a large prison population. However, we note that justice reinvestment requires commitment and statewide resourcing and that the current model of funding, which focuses on pilot programs or funding for short periods, can be a barrier to success. The committee therefore recommends that the NSW Government allocate long-term funding to community-led justice reinvestment initiatives.
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Recommendation 15

That the NSW Government allocate long-term funding to community-led justice reinvestment initiatives.

- 3.170** The committee also recognises the benefits of specialist sentencing courts for First Nations people and we generally support the continued implementation and expansion of these initiatives, given the potential for them to help address the over-representation of First Nations people in the criminal justice system more broadly.
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- 3.171** In relation to the Youth Koori Court though, the committee notes some mixed feedback from stakeholders. We note that on the one hand there has been some positive results from a recent evaluation and that the Court has been expanded from one location to now two, but on the other hand stakeholders noted limitations to the model. Taking into account the limited evidence we received on the Koori Court, we do not make any recommendations in relation to its expansion at this time.
- 3.172** We do however see great benefit in the implementation of an Indigenous specific list in the Children's Court for care and protection matters, as put forward by the Law Society of NSW and as recommended in the *Family is Culture* report. We agree that this would be a simple and inexpensive initiative that would help to achieve the best outcome for First Nations children in the out-of-home care and criminal justice systems. We note the success of the Indigenous list at the Sydney registry of the Federal Circuit Court and recommend that such a model be implemented in the Children's Court.

Recommendation 16

That the NSW Government establish, in consultation with the Children's Court of NSW and other relevant stakeholders, a dedicated court list for proceedings under the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* involving First Nations children.

- 3.173** The committee can also see from the results of the BOCSAR review that Circle Sentencing is working in reducing the rates of imprisonment and recidivism of First Nations people. It is encouraging to see that 12 Local Government areas offer Circle Sentencing and we agree this measure should be further expanded. We note that there are some concerns surrounding the current model, however we believe that these can be worked through by the department with local First Nations communities. The committee therefore recommends that the Department of Communities and Justice work with First Nations communities to increase the number of local government areas in which Circle Sentencing is available.

Recommendation 17

That the Department of Communities and Justice work with First Nations communities to increase the number of local government areas in which Circle Sentencing is available.

- 3.174** We also see great benefit in diverting people with drug and alcohol related problems away from the criminal justice system where possible. The Drug Court is clearly a model that is achieving success, and we agree that it should be expanded further. We specifically encourage the government to consider Dubbo as a location to expand the Drug Court, given this has been a community based issue for some time. Alongside this model, we note that it is imperative for drug and alcohol rehabilitation services to be available. We recognise that there is a desperate need for these services across New South Wales and without these the main aim of the Drug Court falls over. We therefore recommend that the government immediately expand the Drug Court to Dubbo and make plans for further expansion into other regional, rural and remote areas.

- 3.175** While it was not the subject of specific evidence before us, the committee understands that there are not enough places at the Drug Treatment Centre at Parklea Correctional Centre, both for inmates and for those serving suspended sentences who currently attend the treatment program there. The committee therefore also recommends that the drug treatment centre at Parklea Correctional Centre be expanded to meet the need.
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Recommendation 18

That the NSW Government immediately expand the Drug Court to Dubbo and make plans for further expansion into other regional, rural and remote areas.

Recommendation 19

That the NSW Government expand the Drug Treatment Centre at Parklea Correctional Centre.

Recommendation 20

That the NSW Government provide adequate funding and resources to ensure that drug and alcohol rehabilitation services are available across New South Wales to support referrals from the Drug Courts.

- 3.176** The committee also notes its support for the establishment of the Walama Court in the District Court of New South Wales. We acknowledge the work completed to date by the working group in the District Court to develop a business case for the model and also the support this model has from the Department of Communities and Justice. The committee recommends that adequate resourcing and funding be provided to establish this specialist court.
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Recommendation 21

That the NSW Government provide adequate resourcing and funding for the establishment of the Walama Court in the District Court of New South Wales.

- 3.177** Finally, the committee is also deeply concerned with how the Suspect Target Management Program (STMP) is being applied by the NSW Police Force to children and young people, particularly First Nations youth. We note calls from stakeholders for STMP to be abolished for all young people under the age of 18 years old. We also note that STMP-III has recently been released and takes into consideration the recommendations of the Law Enforcement Conduct Commission (LECC) regarding children and young people under this program. The LECC will be undertaking a further review of STMP-III, anticipated to be completed in the last quarter of 2021, and that the NSW Police Force have also indicated it will initiate a review within the next two years. We recommend that during these reviews consideration be given to the removal of the Suspect Target Management Program for under 14 year olds.
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Recommendation 22

That in the reviews of the Suspect Target Management Program by the NSW Police Force and Law Enforcement Conduct Commission, there be consideration of the removal of the program for under 14 year olds.

Chapter 4 Deaths in custody

This chapter considers the number of First Nations deaths in custody, by looking at both national and state data. It then sets out the oversight arrangements for deaths in custody, explaining the internal and external investigations that will take place when a death occurs. The final section will outline First Nations families' experience with the system, particularly in terms of notification, information and the provision of support.

Underneath the statistics provided in this chapter is the pain, frustration and trauma First Nations families and communities experience with each death in custody. Each is a life lost in the most tragic of circumstances. Although the inquiry's role was not to examine the outcome of specific cases of deaths in custody, we want to acknowledge the Dungay, Chatfield and Reynolds families in particular, for highlighting systemic issues within the oversight arrangements for deaths in custody. We thank the families for their courage and resilience during this inquiry.

First Nations deaths in custody

- 4.1** A number of stakeholders in this inquiry raised concerns about the number of First Nations deaths since the *Royal Commission into Aboriginal Deaths in Custody* report. Stakeholders cited different figures on the number of First Nations deaths in custody, although the figures provided were based on national data and did not exclude deaths from natural causes.
- 4.2** This section will consider data in relation to the number of First Nations deaths in custody, both at the national and state level.

National data

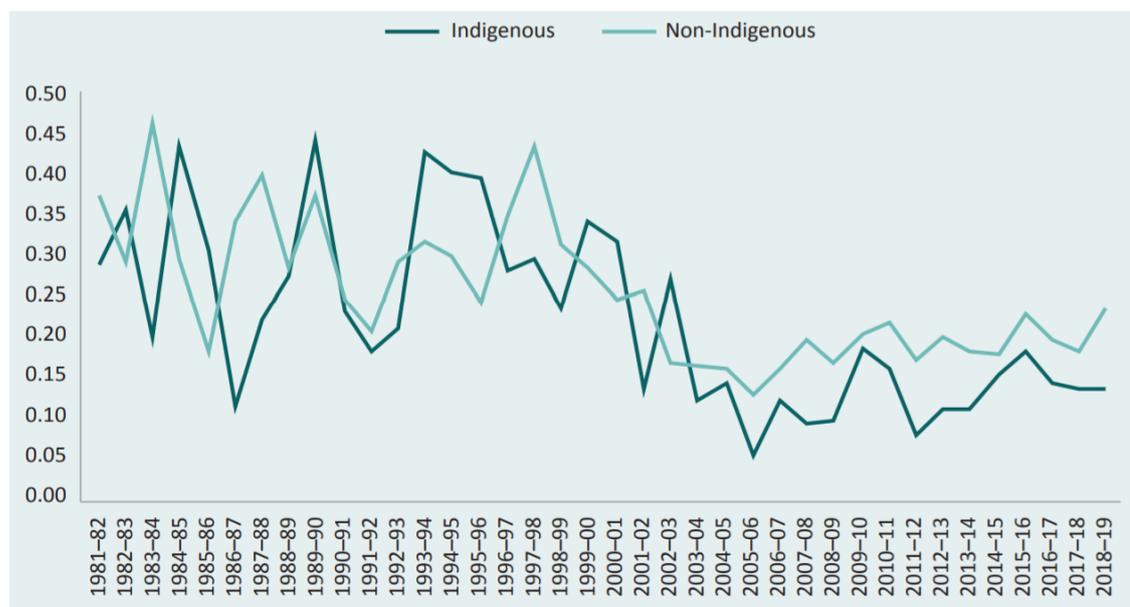
- 4.3** Based on data from the *Australian Institute of Criminology's Statistical Report on Deaths in Custody in Australia 2018-19* there has been 455 Indigenous deaths in custody in the 28 years since the *Royal Commission into Aboriginal Deaths in Custody*.²⁹³
- 4.4** More specifically, in 2018-19 there were 16 Indigenous deaths in prison custody nationally, with this 'accounting for 18 per cent of all deaths in custody over the period'.²⁹⁴ All of the 16 were male prisoners, and two were aged between 25-39 years, 8 were aged between 40-54 years and six were 55 years or older.²⁹⁵
- 4.5** To show the trends in Indigenous deaths in prison custody, the Australian Institute of Criminology has published the rate of deaths per 100 relevant prisoners. See Figure 11 below.

²⁹³ See Australian Institute of Criminology, *Deaths in custody in Australia 2018-19*, Statistical Report 31, <https://www.aic.gov.au/sites/default/files/2020-12/sr31_deaths_in_custody_in_australia_2018-19.pdf>, p 2.

²⁹⁴ Australian Institute of Criminology, *Deaths in custody in Australia 2018-19*, Statistical Report 31, <https://www.aic.gov.au/sites/default/files/2020-12/sr31_deaths_in_custody_in_australia_2018-19.pdf>, p 3.

²⁹⁵ Australian Institute of Criminology, *Deaths in custody in Australia 2018-19*, Statistical Report 31, <https://www.aic.gov.au/sites/default/files/2020-12/sr31_deaths_in_custody_in_australia_2018-19.pdf>, pp 44 and 49.

Figure 11 Deaths in prison custody by Indigenous status, 1981-82 to 2018-19 (rate per 100 relevant prisoners)²⁹⁶



- 4.6** Looking more specifically at the breakdown by state and territory, in 2018-19 New South Wales had the second highest number of Indigenous deaths (4), with Western Australia recording the most (5).²⁹⁷
- 4.7** According to the Australian Institute of Criminology, the most common cause of death for both Indigenous and non-Indigenous prisoners was natural causes, although the 'rate of natural cause deaths was higher for non-Indigenous prisoners than Indigenous prisoners (0.13 vs 0.09 per 100)'. Of 15 deaths nationally in prison in 2018-19 that were attributed to hanging and associated complications, one was an Indigenous prisoner. The Australian Institute of Criminology stated that the rate of hanging deaths was lower for Indigenous prisoners than non-Indigenous prisoners (0.01 vs 0.04 per 100).²⁹⁸
- 4.8** Turning to deaths in police custody, four of 24 deaths in 2018-19 were Indigenous persons. The Australian Institute of Criminology stated that the 'death rate of Indigenous persons in police custody was 0.61 per 100,000 of the Aboriginal and Torres Strait Islander population aged 10

²⁹⁶ Australian Institute of Criminology, *Deaths in custody in Australia 2018-19*, Statistical Report 31, <https://www.aic.gov.au/sites/default/files/2020-12/sr31_deaths_in_custody_in_australia_2018-19.pdf>, p 9.

²⁹⁷ Australian Institute of Criminology, *Deaths in custody in Australia 2018-19*, Statistical Report 31, <https://www.aic.gov.au/sites/default/files/2020-12/sr31_deaths_in_custody_in_australia_2018-19.pdf>, p 9.

²⁹⁸ Australian Institute of Criminology, *Deaths in custody in Australia 2018-19*, Statistical Report 31, <https://www.aic.gov.au/sites/default/files/2020-12/sr31_deaths_in_custody_in_australia_2018-19.pdf>, p 6.

years and over). By comparison, the death rate for non-Indigenous persons in police custody was 0.09 per 100,000 of the non-Indigenous population aged 10 and over.²⁹⁹

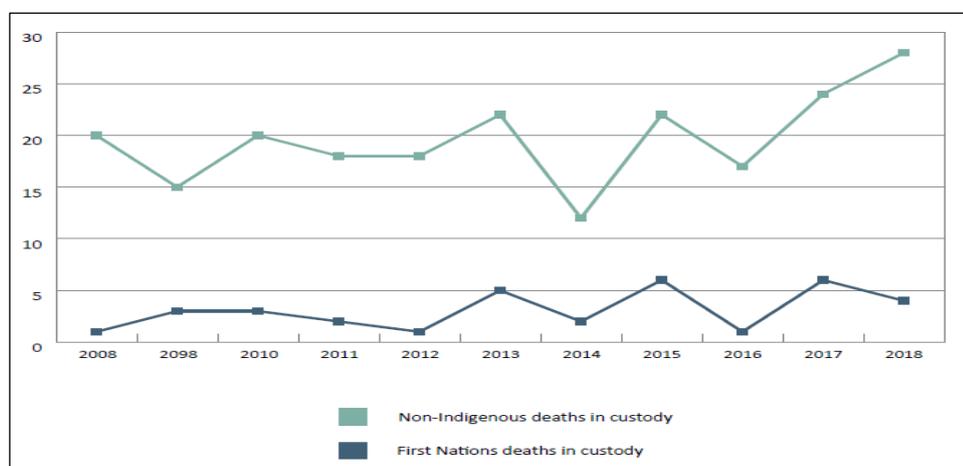
- 4.9 Of the four Indigenous deaths in police custody in 2018-19, two were recorded as 'accidental deaths attribute to other/multiple causes' and one was from a gunshot wound. The cause of death in the remaining case was unknown.³⁰⁰

New South Wales data

- 4.10 The most up to date and comprehensive information provided in relation to First Nations deaths in custody in New South Wales was provided by the NSW State Coroner close to the commencement of this inquiry. The information will soon be publicly released as part of the State Coroner's report into First Nations People's Deaths in Custody in NSW 2008-2018.³⁰¹

- 4.11 According to the NSW State Coroner, there were 250 deaths in custody in New South Wales between 1 January 2008 and 31 December 2018. Of this, 34 were First Nations deaths, accounting for 13.6 per cent of all deaths in custody. A majority of these deaths (31) were First Nations males. Figures 12 and 13 below, shows the trend in New South Wales deaths in custody by Indigenous status by year.³⁰²

Figure 12 New South Wales deaths in custody by Indigenous status by year – 2008 to 2018³⁰³



²⁹⁹ Australian Institute of Criminology, *Deaths in custody in Australia 2018-19*, Statistical Report 31, <https://www.aic.gov.au/sites/default/files/2020-12/sr31_deaths_in_custody_in_australia_2018-19.pdf>, p 12.

³⁰⁰ Australian Institute of Criminology, *Deaths in custody in Australia 2018-19*, Statistical Report 31, <https://www.aic.gov.au/sites/default/files/2020-12/sr31_deaths_in_custody_in_australia_2018-19.pdf>, p 13.

³⁰¹ NSW State Coroner, *First Nations People's Deaths in Custody in NSW 2008-2018*, unpublished report as at the time of tabling.

³⁰² NSW State Coroner, *First Nations People's Deaths in Custody in NSW 2008-2018*, unpublished report as at the time of tabling, p 7.

³⁰³ NSW State Coroner, *First Nations People's Deaths in Custody in NSW 2008-2018*, unpublished report as at the time of tabling, p 7.

Figure 13 Table of New South Wales deaths in custody by Indigenous status by year – 2008 to 2018³⁰⁴

Year	Total deaths in custody in NSW	First Nations people's deaths in custody in NSW	Non-Indigenous people's deaths in custody in NSW
2008	21	1	20
2009	18	3	15
2010	23	3	20
2011	20	2	18
2012	19	1	18
2013	27	5	22
2014	14	2	12
2015	28	6	22
2016	18	1	17
2017	30	6	24
2018	32	4	28
TOTAL	250	34	216

- 4.12** The majority of deaths in custody were the consequence of natural causes, although the proportion of First Nations people who died due to external causes was slightly higher than the proportion of non-Indigenous people who died due to external causes (44 per cent for First Nations people compared with 39 per cent for non-Indigenous people).³⁰⁵
- 4.13** According to the NSW State Coroner, the proportion of deaths in custody attributed to self-harm was similar between First Nations people and non-Indigenous people. Of the First Nations people who died in custody due to intentional self-harm all had a prior history of mental health issues.³⁰⁶
- 4.14** Based on the 34 First Nations deaths between 2008 to 2018, the NSW State Coroner noted:
- that the average age of non-Indigenous people who died in custody is 52 years, whereas for First Nations people it is 41 years
 - the majority of First Nations deaths were sentenced prisoners (59 per cent), as compared to those on remand or those who died in custody in other lawful custody
 - 31 First Nations people died in government run prisons, whereas 3 died in private-run prisons
 - over half of the First Nations people who died in custody had been incarcerated for less than 12 months

³⁰⁴ NSW State Coroner, *First Nations People's Deaths in Custody in NSW 2008-2018*, unpublished report as at the time of tabling, p 8.

³⁰⁵ NSW State Coroner, *First Nations People's Deaths in Custody in NSW 2008-2018*, unpublished report as at the time of tabling, p 8.

³⁰⁶ NSW State Coroner, *First Nations People's Deaths in Custody in NSW 2008-2018*, unpublished report as at the time of tabling, p 10.

- many of the First Nations people who died in custody had moved correctional facilities multiple times during their period of incarceration.³⁰⁷

4.15 Reflecting on the rates of death for First Nations people, compared to non-Indigenous people, Mr Michael Coutts-Trotter, the Secretary for the Department of Communities and Justice, informed the committee that once in custody, 'Aboriginal people, are less likely to die than non-Aboriginal people'. He explained:

In the past 10 years among Aboriginal prisoners, there are 0.09 deaths per hundred inmates per year. The figure for non-Aboriginal prisoners was 0.26 deaths—a rate of death nearly three times higher in that period. This does not necessarily align with community perceptions, but it is consistent with the findings of the 1991 Royal Commission.³⁰⁸

4.16 Looking more closely at the data showing cause of death, Mr Coutts-Trotter added:

If you look at it for unnatural deaths in custody such as suicide, overdose and homicide, then actually the ratio between the probability of an Aboriginal person dying by unnatural causes and the probability of a non-Aboriginal person dying by unnatural causes—it is still a bit more than three times more likely that a non-Aboriginal person will die of unnatural causes.³⁰⁹

4.17 Mr Coutts-Trotter acknowledged, however, that this data is based on the proportion of Aboriginal people in custody rather than in the general community.³¹⁰

4.18 Subsequent to Mr Coutts-Trotter's evidence, the Department of Communities and Justice provided the following data in Figures 14 and 15 showing death rates in corrective services by apparent cause of death, gender and status.

³⁰⁷ NSW State Coroner, *First Nations People's Deaths in Custody in NSW 2008-2018*, unpublished report as at the time of tabling, pp 9-10.

³⁰⁸ Evidence, Mr Michael Coutts-Trotter, Secretary, Department of Communities and Justice, 7 December 2020, p 48.

³⁰⁹ Evidence, Mr Coutts-Trotter, 7 December 2020, p 52.

³¹⁰ Evidence, Mr Coutts-Trotter, 7 December 2020, pp 52-53.

Figure 14 Deaths by natural causes between 2017 and 2020 (deaths 100,000 adults in the community per year)³¹¹

Males		
Year	Aboriginal and Torres Strait Islander	Non- Aboriginal and Torres Strait Islander
2017	2.55	0.41
2018	2.48	0.47
2019	2.41	0.80
2020	3.52	0.49
Females		
Year	Aboriginal and Torres Strait Islander	Non- Aboriginal and Torres Strait Islander
2017	0.00	0.00
2018	0.00	0.03
2019	0.00	0.00
2020	0.00	0.00

Figure 15 Deaths by un-natural causes between 2017 and 2020 (deaths 100,000 adults in the community per year)³¹²

Males		
Year	Aboriginal and Torres Strait Islander	Non- Aboriginal and Torres Strait Islander
2017	1.27	0.41
2018	1.24	0.34
2019	4.82	0.47
2020	1.17	0.46
Females		
Year	Aboriginal and Torres Strait Islander	Non- Aboriginal and Torres Strait Islander
2017	0.00	0.00
2018	0.00	0.00
2019	0.00	0.00
2020	0.00	0.03

³¹¹ Answers to questions on notice, Department of Communities and Justice, 12 February 2021, p 2.

³¹² Answers to questions on notice, Department of Communities and Justice, 12 February 2021, p 3.

- 4.19** The department explained that this data shows that the Aboriginal and Torres Strait Islander male death rates were 5.0 times higher for natural cases and 5.1 times higher for deaths by unnatural causes when compared with non-Aboriginal and Torres Strait Islander males. It stated that the difference is directly attributable to the over-representation rate, although it explained that the 'differential is not as high as the over-representation itself, because Aboriginal prisoners are less likely to die in custody than non-Aboriginal people'.³¹³
- 4.20** The best data available in relation to First Nations deaths in custody in New South Wales was provided to the committee confidentially by the NSW State Coroner at the end of this inquiry. This information will become available at the end of April 2021, providing the most up to date and best analysis of the figures.

High profile cases

- 4.21** A number of First Nations deaths in custody were discussed during this inquiry, including the deaths of David Dungay Jr, Tane Chatfield and Nathan Reynolds. Representatives from each of these families provided evidence to the committee.³¹⁴
- 4.22** Stakeholders also referred to the deaths of Rebecca Maher, TJ Hickey, Eric Whittaker, Patrick Fisher, Steven Freeman and Dwayne Johnstone.³¹⁵ Three other First Nations death in custody also occurred after the hearings for this inquiry, as at 18 March 2021.
- 4.23** We acknowledge how emotionally difficult and challenging it can be to provide evidence to a parliamentary inquiry, and we thank in particular all the First Nations witnesses and families who shared their experiences, including the family of TJ Hickey.

Investigations following a death in custody

- 4.24** When a death in custody occurs in New South Wales, a number of organisations will be involved in the review or investigative process, depending on the nature, context and location of the death. This section will provide an overview of oversight arrangements, then delve into how internal investigations operate for deaths in correctional settings and the role of the Coroner.

Overview of system

- 4.25** Table 1 below sets out who has responsibilities in relation to investigating a death in custody, depending on whether the death occurred in a youth justice centre, adult correctional facility, or in police custody or during a police operation.

³¹³ Answers to questions on notice, Department of Communities and Justice, 12 February 2021, p 1.

³¹⁴ Several family members of David Dungay Jr gave evidence on 26 October 2020, including his mother and siblings. The Chatfield Family, including the mother, father and grandmother of Tane Chatfield, gave evidence on 3 December 2020. The sisters of Nathan Reynolds gave evidence on 7 December 2020.

³¹⁵ Evidence, Ms Karly Warner, Chief Executive Officer, Aboriginal Legal Service (NSW/ACT), 26 October 2020, p 31; Evidence, Mr Jason O'Neil, Executive Director, Ngalaya Indigenous Corporation, 26 October 2020, p 16; Evidence, Ms Faith Black, Spokesperson, Indigenous Social Justice Association, 27 October 2020, p 64.

Table 1: Oversight of deaths in custody³¹⁶

	Internal investigation	External oversight
Death in a youth justice centre	<p>Secretary notified and death reported to Ministry of Health as a Reportable Incident Brief</p> <p>Internal review commenced by Youth Justice NSW and the Justice Health and Forensic Mental Health Network</p>	<p>NSW Police Force will commence a criminal investigation</p> <p>Senior Coroner, may give police directions concerning investigation</p> <p>Children's Guardian - if there has been 'reportable' conduct involved, for example, a sexual assault, ill-treatment, neglect or other assault</p> <p>NSW Ombudsman – if a child (under 18) dies in custody, death is reviewable by the Child Death team.</p>
Death in an adult correctional centre	<p>Secretary notified and death reported to Ministry of Health as a Reportable Incident Brief</p> <p>Corrective Services NSW and the Justice Health and Forensic Mental Health Network</p>	<p>NSW Police Force will commence a criminal investigation</p> <p>Senior Coroner, may give police directions concerning investigation</p> <p>NSW Ombudsman – if reason to suspect misconduct or maladministration</p>
Death in police custody or during a police operation	NSW Police Force (Critical Incidents Unit)	<p>Senior Coroner</p> <p>Law Enforcement and Conduct Commission has power to monitor conduct of critical incident investigation but cannot control, supervise, direct or interfere with investigation.</p>

³¹⁶ This information in this table has been extracted from Answers to questions on notice, NSW Ombudsman, 21 January 2021, pp 8-11.; Submission 111, NSW Ombudsman, pp 5-6.

4.26 A number of other oversight bodies play a role, including the:

- Inspector of Custodial Services – which is an independent statutory office with responsibility for visiting youth and adult correctional centres and reviewing and reporting on systemic issues
- Health Care Complaints Commission – which will investigate complaints related to the quality of care and treatment provided to a person in custody or concerns about the ethical or professional conduct of a health practitioner working in the custodial system
- Independent Commission Against Corruption – which will investigate complaints of corrupt conduct in the NSW public sector.³¹⁷

Internal investigations by relevant agencies

4.27 The committee considered the role, following a death in custody, of agencies charged with the administration of youth and adult corrective services, as well as the agencies responsible for delivering health and mental health care in those settings.

4.28 Corrective Services NSW, as an arm of the Department of Community Services and Justice, runs New South Wales' correctional centres, supervises offenders in the community, and delivers programs to reduce reoffending, support reintegration and build safer communities.³¹⁸ Youth Justice NSW, also part of the same department, supervises and cares for young offenders in the community and in youth justice centres.³¹⁹

4.29 Part of NSW Health, the Justice Health and the Forensic Mental Health Network (Justice Health), is a specialised unit providing health services to those in contact with the NSW criminal justice and forensic mental health systems.³²⁰

4.30 As outlined earlier, each of these agencies are involved in an internal investigation when a death in custody occurs. Where there is a death in a youth justice centre, the Secretary of the Department of Communities and Justice is notified and the death is reported to the Ministry of Health. Both Youth Justice NSW and the Justice Health then conduct an internal review.³²¹

4.31 Similarly, when a death occurs in an adult correctional facility, in addition to the same notification process mentioned above, Corrective Services NSW and the Justice Health each conduct internal investigations.³²²

4.32 The focus of the internal investigation undertaken by these agencies is to:

³¹⁷ Answers to questions on notice, NSW Ombudsman, 21 January 2021, pp 8-11.

³¹⁸ Corrective Services NSW, *Corrective Services NSW*, <<https://correctiveservices.dcj.nsw.gov.au/>>

³¹⁹ Department of Communities and Justice, *Youth Justice* <<http://www.juvenile.justice.nsw.gov.au/>>

³²⁰ Justice Health and Forensic Mental Health Network, About Us, <<https://www.justicehealth.nsw.gov.au/>>

³²¹ Answers to questions on notice, NSW Ombudsman, 21 January 2021, p 8; Submission 111, NSW Ombudsman, p 8.

³²² Answers to questions on notice, NSW Ombudsman, 21 January 2021, p 10; Submission 111, NSW Ombudsman, p 10.

- conduct a root cause analysis
- investigate possible breaches of policies and procedures
- examine the appropriateness of organisational policies, procedures, training
- determine whether referral to another agency is required.³²³

4.33 In respect of the investigations conducted by Corrective Services NSW, Commissioner Peter Severin advised that the same process occurs for all deaths in custody regardless of the cause of death or where the person was located at the time of death.³²⁴

4.34 Assistant Commissioner Carlo Scasserra, Governance and Continuous Improvement, Corrective Services NSW, advised that Corrective Services NSW has two functions to respond to and oversee deaths in custody. The first is the management of deaths in custody group that conducts the internal investigation and 'oversees every death in custody and looks at the recommendations which are made from that'. The second is the Oversight and Review Committee.³²⁵

4.35 In explaining these functions, Commissioner Severin said that the internal investigation group does not conduct a forensic investigation but rather they work to secure the scene, gather relevant documentation in relation to the deceased person to provide to the NSW Police Force, look at the lawfulness of the detention and the way in which the person was managed while in custody.³²⁶

4.36 He further explained that the investigation by Corrective Services NSW centres around the individual who died, including looking at the procedures and interviewing relevant people:

Corrective Services' investigation surrounds more the individual who died, the procedures that guide the management of that person, the procedures that were in place or the processes in place at that particular time, and also, of course, interviewing any staff member involved or anybody else that can make relevant comments, including other prisoners.³²⁷

4.37 Commissioner Severin advised that the outcome of this internal investigation is for a report to be prepared for the Coroner and for Corrective Services NSW to commence taking any action identified in the investigation. The Commissioner identified early action as one of the advantages of Corrective Services NSW' internal investigation:

...[T]he advantage that we have as a result of doing this investigation is that we can start making changes, adjustments or modify documentation processes immediately once it becomes an issue.³²⁸

³²³ Answers to questions on notice, NSW Ombudsman, 21 January 2021, pp 8 and 10.

³²⁴ Evidence, Assistant Commissioner Carlo Scasserra, Governance and Continuous Improvement, Corrective Services NSW, 7 December 2020, p 65.

³²⁵ Evidence, Assistant Commissioner Scasserra, 7 December 2020, p 52.

³²⁶ Evidence, Commissioner Peter Severin, Corrective Services NSW, 7 December 2020, p 61.

³²⁷ Evidence, Commissioner Severin, 7 December 2020, p 61.

³²⁸ Evidence, Commissioner Severin, 7 December 2020, p 62.

4.38 When questioned about the how Corrective Services NSW oversees systemic implementation of recommendations, Assistant Commissioner Scasserra explained that this is the responsibility of the Oversight and Review Committee. He explained:

The function of the oversight and review committee is to look at all recommendations which are made to Corrective Services and to give every recommendation that comes through importance and follow it through to outcome as well. We have responded to the vast majority of recommendations and we continue to respond to those recommendations.³²⁹

4.39 Ms Wendy Hoey, Executive Director, Clinical Operations, Justice Health, elaborated on her agencies' investigations by explaining that her team immediately gets together to look at what happened and to see how they can prevent similar incidents from occurring in the future. She said that they would undertake a root cause analysis and report recommendations up to the Chief Executive.³³⁰

4.40 Mr Matthew Trindall, Director Aboriginal Strategy and Culture, Justice Health, outlined the approach when the death is of a First Nations person. He advised that where possible they provide Aboriginal representation on the root cause analysis process but said that this can be challenging because most of the Aboriginal staff provide front line services which is a different skill set to being involved in an investigation and also they might be associated with the family.³³¹ He added that resourcing constraints can play a part:

Knowing that a lot of our existing Aboriginal workforce is already stretched in certain parts of the organisation because they might be covering a larger gamut within different centres in a rural area, the expectation of trying to bring an Aboriginal worker out of the centre—who is looking after 20 or 30 Aboriginal people in the different centres—does create more complexity.³³²

4.41 The Justice Health subsequently advised that between 1 January 2015 and 31 December 2020, there were 16 Root Cause Analysis investigations undertaken for Aboriginal people who had an 'unexpected' death in custody while in the care of the Network. It advised that its practice is to have an Aboriginal staff member participate in the investigation where the staff member does not have an association with the deceased person and that it has achieved this in all cases.³³³

Police investigations

4.42 In terms of the role of the NSW Police Force in investigating deaths, when a death in custody occurs the correctional centre will contact police as soon as possible who will attend the scene and instigate a forensic investigation. Any evidence inside the cell, documentation and records

³²⁹ Evidence, Assistant Commissioner Scasserra, 7 December 2020, p 52.

³³⁰ Evidence, Ms Wendy Hoey, Executive Director, Clinical Operations, Justice Health and the Forensic Mental Health Network, 8 December 2020, p 40.

³³¹ Evidence, Mr Matthew Trindall, Director Aboriginal Strategy and Culture, Justice Health and the Forensic Mental Health Network, 8 December 2020, p 38.

³³² Evidence, Mr Trindall, 8 December 2020, p 39.

³³³ Answers to questions on notice, Justice Health and Forensic Mental Health Network, 8 December 2020, p 6.

and CCTV footage is secured by Corrective Services NSW and made available to the police on commencement of their investigation.³³⁴

- 4.43** The NSW Police Force will also act on behalf of the Coroner, who will give them directions concerning the investigations to be carried out for the purposes of the coronial proceedings (discussed further below).³³⁵ The NSW Police Force will investigate the immediate cause of death, but will also look at systemic issues, processes and procedures and work with the Coroner on pulling together the brief of evidence.³³⁶
- 4.44** It is also the role of the NSW Police Force to notify the family of the deceased of the death.³³⁷ This is discussed later in this chapter.
- 4.45** Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force advised that the police take learnings from deaths that occur in custody and implement changes to ensure prevention of deaths in the future:

The NSW Police Force has learnt lessons from deaths in custody and implemented many new procedures, systems and educational programs that prevent deaths in custody. Learning products and programs are continually evolving. They address heightened vigilance and awareness of early danger signs for people in custody and now expand to reduce the number of people being brought into custody through use of alternative pathways to Justice.³³⁸

Coronial inquests

- 4.46** As shown in Table 1, when a reportable death in custody occurs in a youth justice centre, adult correctional centre, police custody or during police operations, it is mandatory for it to be reported to the Coroner and for an inquest to be held into the circumstances of the death. A reportable death includes unnatural, unexpected, sudden and suspicious deaths, and suspected deaths in the case of missing persons.³³⁹
- 4.47** In New South Wales, the coronial jurisdiction and the NSW Coroners Court forms part of the NSW Local Court, and all magistrates, by virtue of their office, are Coroners. The State Coroner is responsible for the oversight and coordination of coronial services across the State, with the assistance of those magistrates who are appointed as Deputy State Coroners. The state headquarters for the coronial jurisdiction is in the NSW Coroners Court in Lidcombe.³⁴⁰

³³⁴ Evidence, Commissioner Severin, 7 December 2020, p 61.

³³⁵ Answers to questions on notice, NSW Ombudsman, 21 January 2021, pp 8-10.

³³⁶ Evidence, Commissioner Severin, 7 December 2020, p 62.

³³⁷ Evidence, Mr Craig D. Longman, Head, Legal Strategies and Senior Researcher, Jumbunna Institute for Indigenous Education and Research, Research Unit, 27 October 2020, p 49.

³³⁸ Evidence, Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force, 7 December 2020, p 16.

³³⁹ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 6.

³⁴⁰ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 5.

4.48 The *Coroners Act 2009* provides the legislative framework for which Coroners operate.³⁴¹ In relation to deaths in custody or as a result of police operations the Act stipulates that a Senior Coroner has jurisdiction to hold an inquest concerning the death or suspected death of a person:

- while in the custody of a police officer or in other lawful custody
- while escaping, or attempting to escape, from the custody of a police officer or other lawful custody
- as a result of police operations
- while in, or temporarily absent from, any of the following institutions or places of which the person was an inmate—
 - a detention centre within the meaning of the *Children (Detention Centres) Act 1987*
 - a correctional centre within the meaning of the *Crimes (Administration of Sentences) Act 1999*
 - a lock-up
- while proceeding to an institution or place referred to above for the purpose of being admitted as an inmate of the institution or place and while in the company of a police officer or other official charged with the person's care or custody.³⁴²

4.49 The NSW Coronial Protocol sets out the expectations for all reporting and coronial investigation of deaths in custody. It specifies that all investigations are to be carried out to the highest standard and are to be approached on the basis that the death may be a homicide, with suicide never to be presumed. The protocol outlines:

- Mechanisms for such deaths to be reported promptly by the NSW Police Force to the State Coroner or a Deputy State Coroner, who are rostered on call 24 hours a day, 7 days a week.
- The responsibility assumed by the Coroner for overseeing the initial investigation into the death, including giving directions for experienced detectives from the Crime Scene Unit, other relevant police and a coronial medical officer or a forensic pathologist to attend the scene of the death.
- The coroner will check to ensure that arrangements have been made to notify the relatives and, if necessary, the deceased's legal representatives. Where Aboriginality is identified, the Aboriginal Legal Service is contacted by the NSW Police Force.
- Arrangements regarding the body of the deceased and inspection of the death scene, including the requirement that the post mortem be conducted by experienced forensic pathologists at the forensic facilities located at Lidcombe or Newcastle.
- Arrangements for a request to be made with the Crown Solicitor to instruct independent Counsel to assist the coroner with the investigation into the deaths involving the NSW Police Force, such as in the case of a death in police custody. This course of action is considered necessary to ensure that justice is done and seen to be done.³⁴³

³⁴¹ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 5.

³⁴² *Coroners Act 2009*, s 23.

³⁴³ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 7.

- 4.50** Inquests carried out by the Coroner are inquisitorial in nature, as opposed to adversarial criminal or civil litigation. The Coroner controls the inquests' agenda and is assisted by a solicitor from the Crown Solicitor's Office and a barrister appointed as counsel assisting. The Coroner has the power to give directions to the police undertaking the investigations and to choose and call witnesses to give evidence, including the issuing of a subpoena and compelling the production of documents. The Coroner's role is to investigate and establish the identity of the deceased, the time and place of the death, and the cause and manner of the death. In relation to a death in custody, the Coroner also investigates the quality of the care, treatment and supervision of the deceased prior to death, and whether custodial officers observed all relevant policies and instructions.³⁴⁴
- 4.51** The counsel assisting the Coroner plays a significant role in the conduct of an inquest. The Counsel will oversee the preparation of the brief of evidence, review the conduct of the investigation, and liaise with the relatives of the deceased and witnesses. Prior to the inquest hearing, conferences and direction hearings will often take place between the Coroner, counsel assisting, legal representatives for any interested party and relatives so as to ensure that all relevant issues have been identified and addressed. Counsel then appears at the inquest and ensures that all relevant evidence is brought to the attention of the Coroner and is appropriately tested so as to enable the Coroner to make a proper finding and appropriate recommendations.³⁴⁵
- 4.52** At the conclusion of an inquest, the Coroner will make findings which will be published on the NSW Coroners Court website. The Coroner may make an open finding where in some cases they have been unable to answer all of the questions. If there is any doubt about some of the circumstances surrounding a death the Coroner may make a finding based on what was most likely to have occurred. However, when making a finding of death by suicide the Coroner must be satisfied to the Briginshaw standard that the deceased intended to take their own life.³⁴⁶
- 4.53** The Coroner does not have the power to find someone guilty of a crime. However, if in the course of an inquest the Coroner forms an opinion that a person has committed an indictable offence in connection with the death, the Coroner is required to suspend the inquest and refer the matter to the Director of Public Prosecutions (DPP). It is a matter for the DPP to decide whether charges should be laid against a person, and a matter for the criminal courts to determine whether the person is guilty. The Coroner is also unable to determine civil liability, however the Coroner's findings may be relied upon in subsequent civil proceedings and/or insurance claims.³⁴⁷
- 4.54** The Coroner may also make recommendations relating to anything that can be done to prevent similar deaths occurring in the future or to improve issues of public health and safety, including those which are directed at NSW Government agencies. There is no statutory requirement for NSW Government agencies to respond to the Coroner's recommendations. However, the NSW Premier's Memorandum sets out a process by which the relevant Minister or government agency

³⁴⁴ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 8.

³⁴⁵ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 8.

³⁴⁶ Submission 100, Chief Magistrate of the Local Court of New South Wales, pp 8-9.

³⁴⁷ Coroners Court New South Wales, *Role of the Coroner* (22 June 2020), <<https://www.coroners.nsw.gov.au/coroners-court/how-the-coroners-court-work/role-of-the-coroner.html>>

is to provide the Attorney General within six months of receiving the recommendation, the action being taken to implement the recommendation or the reasons why it is not to be implemented. Details of the recommendations made by Coroners are also recorded in a database kept by the Office of the General Counsel at the Department of Communities and Justice.³⁴⁸

- 4.55** Under the *Coroners Act 2009*, the State Coroner is also required to provide the Attorney General with an annual summary of all deaths in custody and deaths in a police operation which were reported to a Coroner in the previous year. The Attorney General is then required to table the Coroners' report in Parliament. There is currently no legislative requirement for the NSW Government to respond to this report.³⁴⁹

First Nations families' experiences

- 4.56** Family members of David Dungay Jr, Tane Chatfield and Nathan Reynolds, who lost their lives whilst in custody, appeared before the committee and provided heart-felt evidence on their experiences with Corrective Services NSW and the Justice Health following the deaths.
- 4.57** They, along with other stakeholders, identified deficiencies in the way in which Corrective Services NSW and the Justice Health engaged with and supported the families following the deaths. These deficiencies were in respect of notification procedures, contact points within agencies, confidence in investigations, and the provision of counselling and support.

Notifying families and providing information

- 4.58** Stakeholders expressed the view that the way in which family members are notified of a death needs improving. Ms Taleah Reynolds, sister of Nathan Reynolds, said that the notification process is broken from the start and needs to be fixed:

It needs to be fixed from the very beginning, from the notification of death, because that is where it starts to crumble straightaway—the notification of death from New South Wales police to a family member. It is broken from the very start.³⁵⁰

- 4.59** The Reynolds Family outlined their personal experience with the way in which they were informed of Nathan's death and described it as 'chaotic and callous'. They advised that the police came to their door at 4 am and used terminology such as 'we think he passed away'.³⁵¹ Ms Taleah Reynolds advised that despite her being listed as Nathan's next of kin, police went to the house of her terminally ill grandfather.³⁵²
- 4.60** Ms Taleah Reynolds also described her experience in attempting to follow up and get further information, following the initial visit by police. She said 'the following day I constantly rang the

³⁴⁸ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 9.

³⁴⁹ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 12.

³⁵⁰ Evidence, Ms Taleah Reynolds, sister of Nathan Reynolds, 7 December 2020, p 13.

³⁵¹ Submission 124, Reynolds Family, p 4.

³⁵² Evidence, Ms Taleah Reynolds, 7 December 2020, p 9.

jail. I just wanted to know where my brother was'.³⁵³ The family explained that her calls were unanswered and she could not find out where Nathan's body was:

The rest of the day, Taleah spent calling Corrective Services NSW, where she was listed as Nathan's next of kin. She could not find out where Nathan's body was, she wanted to make sure it was not still in the prison, which was unthinkable to the Reynolds family as they grieved. Everyone she attempted to contact was 'in a meeting'. She was not told where Nathan was until she called someone she knew who worked at Glebe Morgue and they confirmed he had been taken to Glebe at the State Coroners Court and forensic centre.³⁵⁴

4.61 Her sister, Ms Makayla Reynolds, told the committee that the most information her family received about Nathan's death was from one of Nathan's fellow inmates. She said:

... [M]y mum got a call from another inmate in custody telling my mum everything that had happened. So she got the most information out of another inmate, who did see what happened. ... they are the ones that informed our family of everything that did happen that day.³⁵⁵

4.62 The Reynolds Family advocated for agencies to follow up quickly with a family to answer any questions they might have.³⁵⁶ In response to these concerns, Commissioner Severin said that he met with the family immediately following the death but that he recognised that the information might not have been as comprehensive as when the brief of evidence was prepared:

I met with the sisters immediately after the incident. I shared with them all the information at that point in time, which no doubt would not have been as comprehensive as it was when the brief of evidence was completed, but it was more around the development of events on the evening this very unfortunate death occurred.³⁵⁷

4.63 The Chatfield Family recounted their experience of being contacted by the Tamworth Correction Centre and told that Tane had been found unresponsive in his cell. They said that they were told that 'we can have an emergency visit with Tane'. They were not given any information and Ms Nioka Chatfield said that when she visited, she expected him to be sitting up in a chair and that she would be able to talk to him. She did not expect him to be on life support. She said that she was not given any information before getting to the hospital, nor were they given information when they left about what would happen next.³⁵⁸

4.64 The National Justice Project also raised concerns about the process to notify families of deaths and the inadequate support provided:

³⁵³ Evidence, Ms Taleah Reynolds, 7 December 2020, p 12.

³⁵⁴ Submission 124, Reynolds Family, p 4.

³⁵⁵ Evidence, Ms Makayla Reynolds, sisters of Nathan Reynolds, 7 December 2020, p 13.

³⁵⁶ Submission 124, Reynolds Family, p 4.

³⁵⁷ Evidence, Commissioner Severin, 7 December 2020, p 61.

³⁵⁸ Evidence, Chatfield Family, 3 December 2020, pp 51-52.

We submit that there is a lack of proper notification to First Nations families in relation to the death of a relative in custody, re-traumatising the families, and there is a lack of support and legal services offered to those families.³⁵⁹

4.65 The National Justice Project expressed concern about the multiple inquiries that have previously recommended improved notification processes, stating that 'valuable solutions have been provided time and time again'. It called for notification to the nominated emergency contact to occur immediately following a death and to be done by a First Nations person known to the family. They also suggested that it be done in a culturally sensitive manner which respects the culture and interests of person being notified.³⁶⁰

4.66 Similarly, the Jumbunna Institute of Indigenous Education and Research told the committee that it has commonly heard complaints about the manner in which notification of a death was made. It said that often notifications 'pay no regard to who is the appropriate member of the family to notify or in what manner a notification should be made'. It also pointed to the need for cultural sensitivity. It went on to point out the problems is with police fulfilling this role, and suggested an independent Aboriginal Liaison Officer as a better option:

The act of notifying a family as to a death in custody is made by NSW Police who are often culturally insensitive and in whom there is often little trust, sometimes to families who have pertinent reasons to fear a visit from police. An alternative proposal would be to give this role Aboriginal Liaison Officers working independently of both NSW Police and Corrective Services NSW, and working within a crisis team in a proposed independent investigations body.³⁶¹

4.67 The Jumbunna Institute of Indigenous Education and Research also said that poor notification practices can inhibit the ability for families to exercise their rights and involvement in the process. It said:

Families who are not appropriately informed — as occurs commonly — miss critical opportunities to know and exercise their legal rights over the custody of their body, how the early investigation is conducted, to receive legal advice in critical early stages, and to access support services.³⁶²

4.68 The Jumbunna Institute of Indigenous Education and Research advised that changes have been made with the implementation of a new policy by Corrective Services NSW, which has clarified the notification procedure, however it advised that while it welcomes this clarity, it remains concerned that the procedure cannot address the loss of control, fear and secrecy that families still experience during the notification process.³⁶³

4.69 Commissioner Severin was asked about the existence of policies that govern the provision of information to families. He advised he did not 'think there is a policy in place' but that 'there is certainly a practice that we have adopted'.³⁶⁴

³⁵⁹ Submission 102, National Justice Project, p 21.

³⁶⁰ Submission 102, National Justice Project, p 22.

³⁶¹ Submission 115, Jumbunna Institute of Indigenous Education and Research, p 18.

³⁶² Submission 115, Jumbunna Institute of Indigenous Education and Research, p 19.

³⁶³ Submission 115, Jumbunna Institute of Indigenous Education and Research, p 19.

³⁶⁴ Evidence, Commissioner Severin, 7 December 2020, p 60.

- 4.70** In explaining this practice Commissioner Severin acknowledged the concerns raised by families and outlined the need for his agency to balance the provision of detailed information while ensuring they do not interfere with an active investigation. He said that this is something they are trying to address:

I certainly have heard concerns raised by families about us not being in a position to provide every bit of information because it is subject to investigation. But most importantly, from providing literally no information to providing as much information as I possibly can without unduly interfering in a police investigation, has been a very proactive step that we have taken very consciously in the context of deaths in custody ... but generally we have, from literally sharing nothing to sharing as [much as we] possibly can, changed our processes.³⁶⁵

- 4.71** The Department of Communities and Justice confirmed that there is an 'Aboriginal Deaths in Custody' policy that outlines the procedures that must be followed by the Aboriginal Strategy and Policy Unit and all Regional Aboriginal Project Officers when a First Nations person dies in custody. This policy instructs the Principal Manager to 'organise a meeting at the earliest opportunity with family members to allow them to raise any questions or issues they may have'.³⁶⁶ As mentioned by Commissioner Severin above, the policy does not include the manner in which a family is notified of the death or what information they should be told.³⁶⁷

- 4.72** Assistant Commissioner Crandell outlined that the amount of involvement and communication that police have with families varies and suggested that a protocol in this regard might assist, noting however that compassion is key:

... [T]here are varying degrees of success and performance in those areas, particularly when dealing with families. Some investigators may have contact with the families far more often than others and advise them of processes, et cetera. Perhaps a protocol in that regard would be helpful.³⁶⁸

Lack of cooperation between agencies

- 4.73** Evidence from the Reynolds Family highlighted the need for agencies to work better together following a death and for families to have a single point of contact.

- 4.74** The Reynolds Family told the committee that in their experience it was clear from the start that agencies were not working together in response to Nathan's death:

Something that was obvious early in how these systems responded to Nathan's death is that there is little cooperation between the organisations that are involved in deaths in custody.³⁶⁹

³⁶⁵ Evidence, Commissioner Severin, 7 December 2020, p 61.

³⁶⁶ Answers to questions on notice, Department of Communities and Justice, 22 January 2021, p 16.

³⁶⁷ Corrective Services NSW, *Deaths in custody*, < <https://correctiveservices.dcj.nsw.gov.au/csnsw-home/resources/research-and-reports/deaths-in-custody.html> >

³⁶⁸ Evidence, Assistant Commissioner Crandell, 7 December 2020, p 21.

³⁶⁹ Submission 124, Reynolds Family, p 6.

4.75 Ms Taleah Reynolds said that she was trying to figure out who to deal with at the beginning to get basic information and agreed with the proposition that a single point of contact for the family would help with the process.³⁷⁰

4.76 Ms Taleah Reynolds advised that when her family did have a meeting with Corrective Services NSW 'they were quick to pass on the blame with New South Wales police'.³⁷¹ She said that they 'received contradictory information from both the Justice Health NSW and Corrective Services NSW'³⁷² and expressed frustration that her family did not see the agencies working together but instead blaming each other:

Not once throughout the inquest have we seen New South Wales police, Corrective Services or Justice Health work together. Instead, they are quick to pass the blame around.³⁷³

4.77 The Reynolds Family outlined that Corrective Services NSW and the Justice Health work so closely together in the day to day care of inmates that their loved ones viewed them as the same organisation. However, following a death, they are suddenly two distinct entities creating a bureaucratic barrier to family being able to get answers or justice.³⁷⁴

4.78 Based on their personal experience, the Reynolds Family advocated for changes to address the overlap of functions. They recommended that:

- both the Justice Health and Corrective Services NSW should attend meetings with the families at the same time not as separate organisations
- that the Justice Health keep families updated on the progress of the root cause analysis report
- both the Justice Health and Corrective Services NSW should be joined as one when both parties are involved in a death in custody.³⁷⁵

Confidence in the integrity of investigations

4.79 A number of inquiry participants discussed the factors that caused them to question the integrity of the internal investigation following a death in custody and the impact this has on families.

4.80 The Jumbunna Institute of Indigenous Education and Research said that in its experience, any internal response of Corrective Services NSW to a death in custody tends to lack any transparency or public accountability and could not properly be characterised as an oversight role.³⁷⁶ In discussing family distrust in the investigations, it submitted that this is often the case because of problems that arise in processes:

³⁷⁰ Evidence, Ms Taleah Reynolds, 7 December 2020, p 12.

³⁷¹ Evidence, Ms Taleah Reynolds, 7 December 2020, p 11.

³⁷² Submission 124, Reynolds Family, p 6.

³⁷³ Evidence, Ms Taleah Reynolds, 7 December 2020, p 9.

³⁷⁴ Submission 124, Reynolds Family, p 7.

³⁷⁵ Submission 124, Reynolds Family, p 7.

³⁷⁶ Submission 115, Jumbunna Institute of Indigenous Education and Research, p 36.

... [C]ommunity and family members are often rightfully and reasonably distrustful of these processes. In many cases we are aware of instances of destroyed evidence, suggestions of institutional complicity, or evidence of more explicit violence than was otherwise disclosed by institutions initially.³⁷⁷

- 4.81** The Australian Lawyers for Human Rights also contended that internal investigations conducted by Corrective Services NSW may lead to questions about independence, given it involves staff from those agencies. They said:

... [T]he use of Corrective Services professional standards to investigate deaths in custody may give rise to the perception of (or an actual) conflict of interest in favour of Corrective Services staff.³⁷⁸

- 4.82** The Chatfield Family held similar concerns about agencies investigating their own actions and said that 'we need to fix this law where they investigate their own'.³⁷⁹ This was echoed by their family friend, and Senior Researcher from Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, Mr Padraic Gibson, who said changes in the investigation of these matters is needed if Aboriginal people are going to rely on them when they are conducted by the NSW Police Force and Corrective Services NSW.³⁸⁰

- 4.83** In response to these concerns, Assistant Commissioner Scasserra acknowledged that the investigation unit is within the Department but explained that it sits outside of the operating areas of the business.³⁸¹

- 4.84** Another factor that stakeholders cited as undermining their trust in the investigation and causing them concern was hearing from agencies that the death of a loved one had involved 'no suspicious circumstances'. Ms Nioka Chatfield, mother of Tane Chatfield, described her concern about this language:

What got me was the Commissioner of Corrective Services being here in Sydney. He was not at the jail that day when this happened to Tane, but he stands on television and spoke like if he was. He said, "We are not suspicious."³⁸²

- 4.85** The Dungay Family recounted a similar experience. Ms Leetona Dungay, mother of David Dungay Jr, explained her family's disappointment following the death of her son to hear the Commissioner refer to the matter in the media as having 'no suspicious circumstances':

My family is extremely disappointed that just after David died a Corrective Services NSW assistant commissioner told the media that the police were not treating the death as suspicious. Imagine if that was your son. My son was held face down by six prison officers until he lost consciousness and his heart stopped.³⁸³

³⁷⁷ Answers to Questions on Notice, Jumbunna Institute of Indigenous Education and Research, 2 December 2020, pp 5-6.

³⁷⁸ Submission 116, Australian Lawyers for Human Rights, p 8.

³⁷⁹ Evidence, Mr Chatfield, 3 December, p 44.

³⁸⁰ Evidence, Mr Padraic Gibson, Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, and friend of the Chatfield Family, 3 December, p 49.

³⁸¹ Evidence, Assistant Commissioner Scasserra, 7 December 2020, p 52.

³⁸² Evidence, Ms Nioka Chatfield, 3 December 2020, p 51.

³⁸³ Evidence, Ms Leetona Dungay, 26 October 2020, p 58.

- 4.86** Family members said that the use of the term 'not suspicious' in respect of David Dungay Jr's death was only hours after the event and before an investigation had been undertaken. They said that 'any Aboriginal death in custody is suspicious' and to 'make a comment like that ... shows that Aboriginal lives are not valued in the justice system'.³⁸⁴
- 4.87** These concerns were echoed by Adjunct Professor George Newhouse, Director and Principal Solicitor, National Justice Project, who expressed that the use of such a phrase suggests a pre-determined view and causes families to question the adequacy of ensuing investigations:
- I think that the reality is that it just deflates families, because any trust they have in the system is broken at that point. They are hearing a prejudgement about the circumstances of that death from a person in authority, and therefore everything begins to unwind at that point. Any faith they have that the death will be adequately investigated and people will be held accountable begins to fall apart when they hear someone in authority say, "We are not treating it as suspicious."³⁸⁵
- 4.88** Commissioner Severin told the inquiry that he believes the phrase was misinterpreted as it was intended to convey 'the fact that there was no evidence provided at that point in time that it was a murder or a death that was caused by a third party'. He later added that he did not intend for the phrase to indicate a pre-determined view about the investigation outcome:
- ... I can also say that obviously I did not make that statement in the context of trying to in any way interfere with investigations or pre-empt outcomes of investigations, because the investigation obviously is quite separate to Corrective Services.³⁸⁶
- 4.89** Commissioner Severin did however acknowledge problems with the use of the phrase and how it was being understood by families and said 'it became very clear very quickly that that was not interpreted in the way it was intended to be interpreted' and said that they have learnt from the experience and stated 'we have not used that that turn of phrase again for exactly those reasons'.³⁸⁷
- 4.90** The failure to treat the location of death as a crime scene was another concern that also led to a distrust in the investigation. Mr Raul Bassi, Secretary of the Indigenous Social Justice Association, expressed a concern that the places of death were not being treated as crime scenes, noting that in David Dungay Jr's case the scene was washed. Mr Bassi and Ms Gail Hickey, mother of TJ Hickey, both agreed with the proposition that all deaths should be treated as a crime scene and evidence protected and that this would improve confidence in the investigations.³⁸⁸

³⁸⁴ Evidence, Mr Paul Silva, nephew of David Dungay Jr, and Ms Lizzie Jarrett, niece of David Dungay Jr, 26 October 2020, p 61.

³⁸⁵ Evidence, Adjunct Professor George Newhouse, Director and Principal Solicitor, National Justice Project, 26 October 2020, p 61.

³⁸⁶ Evidence, Commissioner Severin, 7 December 2020, pp 59-60.

³⁸⁷ Evidence, Commissioner Severin, 7 December 2020, p 59.

³⁸⁸ Evidence, Mr Raul Bassi, Secretary, Indigenous Social Justice Association, and Ms Gail Hickey, mother of TJ Hickey for Families of Deaths in Custody, 27 October 2020, p 62.

Support and counselling

- 4.91** The families of David Dungay Jr, Tane Chatfield and Nathan Reynolds shared similar experiences of losing a loved one whilst in custody and being provided with little to no support or counselling.
- 4.92** Nathan Reynolds' sisters described being informed of their brother's death and then not having been offered any counselling at all throughout the process. Ms Taleah Reynolds emphasised that within those first 24 hours a follow-up needs to be made, someone needs to check in and ask 'Do you need help? Do you have counselling?' adding that 'this is what needs to happen because for that first 24 hours your life is just turned upside down and you do not comprehend what is going on around you'.³⁸⁹
- 4.93** Further, Ms Makayla Reynolds also advised that since that time 'there was no counselling offered to us and there was also no counselling offered to the inmates who witnessed Nathan's death'. Ms Taleah Reynolds said that 'the only support, really, that we had was our legal team – the Aboriginal Legal Service – that is pretty much who we had to support us'. She added that she met with Corrective Services NSW and the Commissioner but felt this 'was pretty much a waste of time' with nothing really coming out of it.³⁹⁰
- 4.94** Ms Lizzie Jarrett, the niece of David Dungay Jr, told the committee that being a traumatised family for four years was hard. She said that throughout the process they were never asked how as a family how they were doing:

We had had four years of being led like a horse with blinders and the crowd's justice. ... We only see tunnel vision. No justice, no equality, no fairness, no respect enough from the system that took Junior's life away from us to come and sit with us and say, "How are you dealing? Here is counselling. Here is anything that could help you deal as a family with not understanding anything." Every time we tried to ask, we were told no'.³⁹¹

- 4.95** This concern was echoed by Mr Paul Silva, the nephew of David Dungay Jr, who stated:

... [T]he Corrective Services did not offer me counselling as a family member, or Nan, being the mother of the person who had just died in custody ... they did not offer any immediate counselling to the family. The police who attended did not offer any immediate counselling.³⁹²

- 4.96** The Chatfield Family recounted a similar experience. When asked if the family was offered any counselling, Ms Nioka Chatfield, mother of Tane Chatfield, replied: 'Never. Not to this day'.³⁹³ Mr Colin Chatfield, father of Tane Chatfield, described the pain and suffering the family continues to endure without counselling and support:

We have been through so much trauma, heartache and pain. Our lives have changed, and the nightmares that continue to this day do not help heal our suffering. We as a

³⁸⁹ Evidence, Ms Taleah Reynolds and Ms Makayla Reynolds, 7 December 2020, p 13.

³⁹⁰ Evidence, Ms Taleah Reynolds and Ms Makayla Reynolds, 7 December 2020, p 11.

³⁹¹ Evidence, Ms Lizzie Jarrett, niece of David Dungay Jr, 26 October 2020, p 65.

³⁹² Evidence, Mr Paul Silva, nephew of David Dungay Jr, 26 October 2020, p 65.

³⁹³ Evidence, Ms Nioka Chatfield, mother of Tane Chatfield, 3 December 2020, p 53.

family have not been [given] the opportunity to have grief counselling. A lot of people have offered, but not one has come back with an appointment time and place for our family. My wife, Nioka Chatfield, said from the start that we have been locked in a dark room.³⁹⁴

Committee comments

- 4.97** In terms of deaths in custody, we acknowledge that due to the over-representation of First Nations people in custody, the rate of First Nations deaths, while lower than what it was in the early 90's, is still unacceptably high. Putting deaths by natural causes to one side, we were disappointed to see that Aboriginal and Torres Strait Islander males are 5.1 times more likely to die from 'unnatural causes' in custody than a non-Aboriginal male.
- 4.98** While the number of First Nations deaths in custody in New South Wales is a low number when compared with the total prison population, the committee acknowledges that any death is one death too many. We also acknowledge the profound grief First Nations' families experience when losing a loved one in custody, and can see that these deaths, in the context of continuing over-representation in the system and inadequate oversight arrangements, is compounding their trauma and loss. We hope that the recommendations contained in this report go some way to addressing the problems in our system.
- 4.99** The committee understands that following a death in custody, both the Justice Health and Corrective Services NSW or Youth Justice NSW each undertake their own investigation, reporting through the hierarchies in their corresponding departments and that, separately, an investigation is also undertaken by the NSW Police Force. The committee also understands that the NSW Police Force is responsible for notifying the family of the death. The committee received significant and compelling evidence from stakeholders that point to problems in these processes.
- 4.100** From talking with First Nations families, the committee identified weaknesses in the notification processes, the way in which agencies work together, the conduct of investigations and the support provided to families. In particular, the committee was concerned to hear about the lack of coordination across agencies following a death and the confusion that this causes for families. The committee is of the view that Corrective Services NSW and the Justice Health and Forensic Mental Health Network need to improve their working relationship following a death and have a united approach with families. This should include the establishment of a single point of contact for families.
- 4.101** We were also alarmed to learn that families had not been connected with appropriate counselling and support services either immediately following the death or throughout the process. Clearly, access to counselling and support services is critical, as is the provision of timely and updated information.
- 4.102** The committee was also disappointed to hear about the powerful impact of language when deaths are discussed in the media and the impact police statements can have on the trust and confidence in investigations. We implore agencies to review these practices to ensure respectful

³⁹⁴ Evidence, Mr Colin Chatfield, father of Tane Chatfield, 3 December 2020, p 44.

and sensitive public communication that does not cause further distress to families or undermine confidence in ensuing investigations.

Recommendation 23

That Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Health Network conduct a comprehensive review of internal processes following a death in custody, with a view to:

- ensuring appropriate notification of death processes are in place
- establishing a single point of contact for families
- establishing clear communication protocols with families, including the provision of counselling and support services up to and including the coronial hearing
- ensuring all staff within facilities receive training in culturally sensitive and trauma informed care, with training prioritised for staff in roles specific to the investigation or oversight of deaths in custody.

4.103 Further discussion and specific recommendations relating to the experience of families involved in the coronial inquest are detailed in chapter 6.

Chapter 5 Health screening and support services in custody

This chapter outlines the health needs of people within the criminal justice system. It considers the health screening processes that are undertaken when a person enters a correctional facility, as well as the provision of health and mental health services within those facilities. It also outlines the way in which people are connected with appropriate services upon their release, in particular with the National Disability Insurance Scheme. The chapter also looks at opportunities to strengthen health and mental health services for First Nations people in custody, including the impacts of the continued existence of suicide hanging points.

Health needs, screening and services

5.1 This section considers the health needs of people in custody, screening processes used to identify health issues and the delivery of services within correctional facilities. Noting that poor health outcomes are also a driver of disproportionate incarceration rates, this section will also explore how health services for First Nations people in custody could be improved.

Health needs of people in custody

5.2 Stakeholders provided information regarding the unique health needs of people in the criminal justice system and the impact that this has upon their incarceration.

5.3 The Australian Medical Association captured these views, pointing to its *Position Statement on Health and the Criminal Justice System* and the strong association between imprisonment and poor health. It outlined:

- prisoners and detainees have significantly higher health needs than the general population
- prisoners face higher levels of serious health conditions such as cancer, heart disease and diabetes, as well as poorer dental health, and a higher prevalence of disability, communicable diseases, and mental illness
- prisoners tend to come from disadvantaged backgrounds marked by high levels of unemployment, low educational attainment, drug and alcohol addiction, insecure housing, and illiteracy and innumeracy
- research indicates a significant proportion of prisoners engage in risky health behaviours, including drug and alcohol use and tobacco smoking
- prisoners and detainees are more likely to be victims of violence or abuse, and many have not had regular contact with health services prior to incarceration or detention
- imprisonment can further exacerbate and entrench the social and health disadvantages that contribute to imprisonment occurring in the first instance

- many of those incarcerated have fallen through cracks and not had access to community-based health and social services, including services for housing, mental health, substance use, disability, and family violence.³⁹⁵

5.4 In addition to the last point above, other stakeholders also contended that poor quality community based health and mental health services are contributing to incarceration rates. For example, Dr Calum A Smith, Chair of the Royal Australian and New Zealand College of Psychiatrists NSW Forensic Subcommittee, said that untreated conditions and inadequate services cause people to be incarcerated. He explained:

But for this person's mental illness, this person's intellectual disability, their drug and alcohol abuse problem, the lack of education and job opportunities, this person would not be in jail.³⁹⁶

5.5 Dr Smith expressed the view that people are falling through the cracks in the community health and mental health system and as a result are ending up in prison. He drew on statistics from Victoria to highlight the number of people there who are already in contact with the health system before ending up in prison; concluding that the system is not giving people the treatment they need:

We get that obviously some people are going to fall through the cracks, but in Victoria it was one-third of people who came into contact with police were actively in psychiatric care, whether it be medication from a GP, seeing a psychologist, seeing a community mental health team. That is one-third. It was two-thirds or 70 per cent that had some form of previous contact with the health service or had some form of previous diagnosis. That suggests that clearly something is going wrong in holding onto these patients and getting them the treatment they need.³⁹⁷

5.6 The Royal Australian and New Zealand College of Psychiatrists advocated for an increase in bed capacity across the public mental health system.³⁹⁸ Dr Smith said:

It is a matter of investment in community services; it is a matter of investment in-patient beds. If we are saying that we want to roll out a court liaison service for acutely psychotic people to divert them away from court we are going to have to have beds and community services so that they can manage them away from the criminal justice system. If we are talking about acutely ill people who are, say, high-risk, and people are worried about going to the local health unit then we need more secure beds to transfer these people out of the criminal justice system and into the secure beds.³⁹⁹

5.7 Representatives from the Justice Health and Forensic Mental Health Network (Justice Health) expressed similar concerns about the quality of community based services and the causal link with incarceration rates. Ms Wendy Hoey, Executive Director, Clinical Operations, Justice Health, said that 'you have to have stable accommodation, stable health services, stable mental

³⁹⁵ Submission 103, Australian Medical Association, pp 2-3.

³⁹⁶ Evidence, Dr Calum A Smith, Chair, the Royal Australian and New Zealand College of Psychiatrists NSW Forensic Subcommittee, 3 December 2020, p 4.

³⁹⁷ Evidence, Dr Smith, 3 December 2020, p 38.

³⁹⁸ Submission 105, The Royal Australian and New Zealand College of Psychiatrists, pp 6-7.

³⁹⁹ Evidence, Dr Smith, 3 December 2020, p 39.

health services and stable communities that can look after those people' to stop them from coming into custody.⁴⁰⁰

Health screening processes

5.8 Understanding the unique health needs of the prison population is important context for understanding the approach needed when people enter a correction facility and the quality of the care they should receive while incarcerated.

5.9 Upon admission to a correctional facility, prisoners undergo a screening process to assess their health and mental health conditions and needs. Ms Hoey, from the Justice Health, explained this process. An overview of her evidence is set out below:

- a person is assessed by a nurse within 24 hours of coming into a facility
- the assessment considers four areas – chronic diseases, drug and alcohol, population health (sexual health or infections etc.) and mental health
- nurses assess a patient's mental health using a self-reported mental health assessment tool (Kessler 10) together with a professional assessment. If mental health issues are identified, secondary services will follow (normally involving a psychiatric assessment). The timing of these services are determined by the below categorisation assigned by the nurse:
 - Category 1 – within 3 days
 - Category 2 – within 14 days
 - Category 3 – within 3 months.
- nurses have access to on-call doctors for advice/support to assist them in making assessments
- during the mental health assessment conducted by the nurse if a person indicates they are on mental health medication and the outline of their history is good, the nurse can contact the doctor to have that medication prescribed. Otherwise the person will need to wait for a psychiatric assessment and for their records to be obtained from the community based service they have been seeing.
- during the screening process, the nurse completes a Health Priority Notification Form and the Justice Health uses this to discuss the health priorities of the person with Corrective Services NSW, including their cell placement needs
- the Justice Health makes recommendations regarding health needs and cell placement requirements, however final placement decisions rest with Corrective Services NSW
- if a person has not been in custody before and does not disclose a pre-existing mental health condition but the screening nurse identifies some mental health issues, then they will be seen by a mental health nurse in accordance with how the patient is categorised
- if there is an emergency, the patient would be seen pretty quickly, particularly given the telehealth services that were introduced during the COVID-19 pandemic

⁴⁰⁰ Evidence, Ms Wendy Hoey, Executive Director, Clinical Operations, Justice Health and Forensic Mental Health Network, 8 December 2020, p 34.

- the Justice Health has the ability, under the *Forensic Provisions Act*, to divert people into general mental health services out of the custodial setting or into the Mental Health Screening Unit at the Metropolitan Remand and Reception Centre or to the Long Bay Hospital.⁴⁰¹

5.10 When questioned about the number of mental health screening beds, Ms Hoey stated that there are only 43 mental health screening beds for 12,500 people in custody and that people with serious conditions are being sent back into the general prison population to make place for others with worse conditions. Ms Hoey said:

We are currently working with Corrective Services to identify more step-down beds for our mental health patients, but there are a lot of people and there are more people with mental health disorders in prison than we have specific areas to keep them.⁴⁰²

5.11 Stakeholders outlined a range of concerns with the health screening process. Legal Aid NSW said that 'death in custody inquests have repeatedly identified deficiencies in the mental health screening process of inmates on entry into custody'. It captured these deficiencies as:

- the failure to identify past self-harm and suicide attempts
- the failure to obtain and review earlier medical records, both from within the custodial setting and from community health providers
- the failure to obtain and provide psychiatric medications in a timely fashion
- the failure to identify psychosis and the danger of an inmate to either themselves or others
- lengthy waitlists to access mental health nurses and psychiatry services.⁴⁰³

5.12 Legal Aid NSW provided a number of case study examples where inadequate health and mental health care was identified by the Coroner as contributing to a person's death in custody. In one case, a person entered custody, underwent a health assessment and received a rating indicating that he required follow up but with no specific timeframe. The person committed suicide in his cell seven weeks after his assessment, before receiving follow up by a mental health professional. The inquest found the health assessment rating was incorrect and that the person should have received a rating that would have had him seen by mental health professionals within 14 days.⁴⁰⁴

5.13 Similarly, St Vincent De Paul Society also expressed concern with health assessments where mental health conditions are present:

... [T]he relevant prison should review the practice and procedures at the intake stage to ensure that inmates with known diagnoses for serious mental illnesses are reviewed by a suitably qualified mental health clinician in a timely manner.⁴⁰⁵

⁴⁰¹ Evidence, Ms Hoey, 8 December 2020, pp 25-28.

⁴⁰² Evidence, Ms Hoey, 8 December 2020, p 29.

⁴⁰³ Correspondence from Legal Aid NSW, to Chair, 8 February 2021.

⁴⁰⁴ Correspondence from Legal Aid NSW, to Chair, 8 February 2021.

⁴⁰⁵ Submission 121, St Vincent de Paul Society of NSW, p 11.

- 5.14** The Royal Australian and New Zealand College of Psychiatrists outlined the complexities involved in the screening process and suggested that diversion and additional resourcing is required:

We note that screening in prison is extremely difficult for a number of reasons. To name just three; a highly complex, highly distressed patient cohort, difficulty in getting up to date background information, and that prisons are built and designed for security or punishment and physical environments are therefore not set up for modern mental health assessments. Therefore, we add only that we believe additional resources would be well spent in this area, and that these issues further emphasise the need for people with mental illness to be diverted prior to being placed in custody as much as is possible.⁴⁰⁶

Health and mental health services within facilities

- 5.15** Health and mental health care is delivered within custodial settings by the Justice Health, a Statutory Health Corporation established under the *Health Services Act (NSW) 1997*. It comprises a multidisciplinary team of qualified clinicians on-site to provide care to those who need it.⁴⁰⁷
- 5.16** The committee considered the adequacy of these services within correctional facilities and the impact on deaths in custody. In this regard, many stakeholders discussed the quality of these services within facilities, with a particular focus on mental health services, and highlighted deficiencies as having contributed to deaths in custody.
- 5.17** Mr David Evenden, Solicitor Advocate, Coronial Inquest Unit, Legal Aid NSW, advised that there are about 20 deaths in custody per year and inquests into these deaths are identifying health care as a factor:

I think what we are seeing when we look at the deaths in custody inquests is that health care is consistently coming up as an issue ... Time and time again in the inquests that I have been involved in there is evidence of incredible resourcing pressures and inadequacies in the health care delivered.⁴⁰⁸

- 5.18** The New South Wales Nurses and Midwives' Association outlined the current inadequate nursing resources as a factor:

We are also aware of nurses who are on call for multiple prisons overnight and are required to travel between prisons alone at night to provide care. This bare-bones approach to access to healthcare for people in custody is unsatisfactory.⁴⁰⁹

- 5.19** Others discussed the under-resourcing of mental health services. Mr Evenden pointed to 'under-resourcing, record keeping and obtaining information outside' as common problems and

⁴⁰⁶ Answers to questions on notice, The Royal Australian and New Zealand College of Psychiatrists, 21 December 2020, p 1.

⁴⁰⁷ Justice Health and Forensic Mental Health Network, *About Us*, <<https://www.justicehealth.nsw.gov.au/about-us>>.

⁴⁰⁸ Evidence, Mr David Evenden, Solicitor Advocate, Coronial Inquest Unit, Legal Aid NSW, 26 October 2020, p 35.

⁴⁰⁹ Submission 129, the New South Wales Nurses and Midwives' Association, p 3.

outlined that these shortcomings are particularly relevant for mental health services explaining that:

There are numerous inquests where people who have identified risk factors, particularly for suicide but also for risk of harm to others, do not have their health care properly attended to... These are people who have gone into custody with clear self-harm issues and have not been seen, or have at least received very inadequate mental healthcare treatment.⁴¹⁰

5.20 Similarly, Dr Smith explained the correction environment as being injurious to mental health and that the system is not resourced to deal with the mental health needs of people in custody. He highlighted the high numbers of acutely mentally ill people coming into the correctional system and said 'these people need to get the help they need'.⁴¹¹ Dr Smith outlined:

The point to make is that resources are completely inadequate. We are talking about a significant increase in the overall prison population in the past, say, five to eight years ... Largely, resources have not increased in terms of, say, psychiatric nurses or psychiatrists. So of course there are going to be difficulties in terms of review, monitoring, et cetera, and that is before you start getting into some of the inherent problems.⁴¹²

5.21 Dr Smith also identified challenges with health care delivery in environments designed for security. He said:

Prison is a place for security and punishment, and hospitals and healthcare settings are places for health care. ... We do our best to work in clinics and deliver as great health care people. I know that a lot of the staff are very passionate and tireless in their work to deliver the best healthcare as can be provided. It is a simple systemic issue that if you have lots of unwell people and not very many resources in an environment that is not designed for healthcare delivery, but designed for security, then you are going to have difficulty delivering it. It is as simple as that.⁴¹³

5.22 When asked if the current resourcing of Justice Health only manages conditions, rather than trying to proactively achieve a level of good health so that when people leave custody those problems do not cause them to return, Ms Hoey replied:

Yes, I think it is challenging for us. Our vision is to return healthier people to the community. In the mental health area, the number of people with mental health issues is overwhelming. You are correct that we do management. The psychological interventions that Corrective Services provide pre-release are helpful but they are about recidivism and criminogenic nature, not necessarily about health in whole. We do not have the capacity to do the psychological interventions that somebody would perhaps receive in the community.⁴¹⁴

5.23 The Royal Australian and New Zealand College of Psychiatrists also added that 'people with mental health conditions in custody need far better care and treatment than they are currently

⁴¹⁰ Evidence, Mr Evenden, 26 October 2020, pp 35 and 40.

⁴¹¹ Evidence, Dr Smith, 3 December 2020, pp 30 and 32.

⁴¹² Evidence, Dr Smith, 3 December 2020, p 38.

⁴¹³ Evidence, Dr Smith, 3 December 2020, p 38.

⁴¹⁴ Evidence, Ms Hoey, 8 December 2020, p 34.

receiving'. It went on to provide information about the current wait times, delays and service access issues, stating urgent attention is required to address existing failings:

It is not uncommon for offenders with mental health problems (sometimes up to 15 at a time) to have to wait weeks, even months, to be transferred to a prison hospital or declared facility to get the treatment they need. And if they are at risk of harm, it is also not uncommon for them to be put in seclusion for long periods of time. The simple truth of the matter is our prisons are not suitably equipped to treat mental illness and the imbalance that exists between services in the community and services in correctional facilities needs urgent redressing.⁴¹⁵

- 5.24** Concerns were also raised about the current approach to involuntary mental health care for people in custody. Legal Aid NSW and Dr Smith from the Royal Australian and New Zealand College of Psychiatrists called for prisoners to be transferred to an appropriate community based mental health facility. They highlighted that in all other jurisdictions, where a patient requires involuntary mental health treatment, this is delivered outside the correctional system and within community based facilities. They advised that community based facilities are better placed to deal with violent mental health patients or people experiencing psychosis.⁴¹⁶

Connecting people with services upon release

- 5.25** As set out above, stakeholders were consistent in their views that improved health and mental health care both before, during and after contact with the criminal justice system is critical to reduce re-offending. These views were captured by Dr Smith:

We believe that there is clear evidence that untreated or under-treated mental illness contributes to crime levels and that good mental health care in appropriate settings prior to, during, and post-contact with the criminal justice system reduces reoffending.⁴¹⁷

- 5.26** Disability was identified as a key concern for people in custody. The Australian Medical Association identified that people in custody have a 'higher prevalence of disability'.⁴¹⁸ Many stakeholders discussed their concern that people with disability are not being connected with appropriate services, such as the National Disability Insurance Scheme, upon release.
- 5.27** The National Disability Insurance Scheme (also referred to as the NDIS) was established to support eligible people with intellectual, physical, sensory, cognitive and psychosocial disability. It moves away from the previous system of funding disability organisations to deliver services to a system where funding is provided directly to a person with a disability to utilise in accordance with their needs.⁴¹⁹

⁴¹⁵ Submission 105, The Royal Australian and New Zealand College of Psychiatrists, p 6.

⁴¹⁶ Evidence, Mr Smith, 3 December 2020, p 32; Correspondence from Legal Aid NSW to the Committee, 8 February 2021, p 6.

⁴¹⁷ Evidence, Dr Smith, 3 December 2020, p 30.

⁴¹⁸ Submission 103, Australian Medical Association, p 2.

⁴¹⁹ National Disability Insurance Scheme, *Understanding the NDIS* (17 February 2020), <<https://www.ndis.gov.au/understanding>>.

- 5.28** Stakeholders pointed to significant gaps in connecting people in custody with the NDIS, identifying poor planning and complex processes as part of the problem.⁴²⁰
- 5.29** Dr Elizabeth Watt, Research and Policy Manager, Yfoundations, expressed that 'connecting young people in custody to the NDIS is often a lengthy, difficult and fruitless process'.⁴²¹ Similarly, Legal Aid NSW explained that poor planning or subsequent market failure can mean that a person exits with inadequate support and is therefore more vulnerable to reoffending.⁴²²
- 5.30** Many stakeholders were consistent in calling for better planning and support to ensure people are connected with the NDIS prior to release to reduce the risk of re-offending. The following comments were made by stakeholders.
- 'Clear processes for planning for a person's release ... should be systematically introduced so that supports are in place to facilitate successful discharge or release and reduce the risk of reoffending or readmission'.⁴²³
 - 'Limited planning occurs prior to release from prison to link individuals returning to the community with the NDIS, resulting in significant wait times for access to services upon release. NDIS support packages should be prioritised for people leaving prison and provided in a timely and streamlined way'.⁴²⁴
 - 'The NDIS in particular is a complicated pathway and there is a high degree of health literacy needed to be able to access that system and people do need support to do so'.⁴²⁵
- 5.31** Stakeholders advised that the Justice Health have dedicated NDIS coordinators to assist in those being released to access NDIS support. However, Ms Hoey said that her agency only coordinates the planning for NDIS for people with mental health needs and that Corrective Services NSW is responsible for other disability, including physical and intellectual disability. Ms Hoey said that 'we find it quite difficult to access the NDIS packages for our patients' however her agency is seeking to have some dedicated NDIS positions within the correction facilities to assist the Justice Health because 'it can be quite a complicated process'.⁴²⁶
- 5.32** Ms Hoey explained that it is a challenge, as 'health and disability working together is difficult because we speak different languages sometimes', adding that 'I know that is not an excuse, but it is a reason'.⁴²⁷

⁴²⁰ See for example Submission 101, First People Disability Network, p 6; Submission 105, The Royal Australian and New Zealand College of Psychiatrists, p 8; Evidence, Ms Ashlee Kearney, Disability Role Commission Project Manager, First Peoples Disability Network, 27 October 2020, pp 2-3; Evidence, Dr Smith, 3 December 2020, p 41.

⁴²¹ Answers to questions on notice, Dr Elizabeth Watt, Research and Policy Manager, Yfoundations, 22 January 2021.

⁴²² Submission 117, Legal Aid NSW, p 42.

⁴²³ Submission 117, Legal Aid NSW, p 42.

⁴²⁴ Submission 105, The Royal Australian and New Zealand College of Psychiatrists, p 8.

⁴²⁵ Evidence, Dr McMullen, 3 December 2020, p 41.

⁴²⁶ Evidence, Ms Hoey, 8 December 2020, p 33.

⁴²⁷ Evidence, Ms Hoey, 8 December 2020, p 33.

5.33 Stakeholders also identified particular concerns regarding First Nations people with disability and their access to appropriate support upon release. Relevantly, Legal Aid NSW highlighted the prevalence of First Nations people in custody with a disability:

45% of Aboriginal and Torres Strait Islander people report a long term health condition of disability. Coupled with the overrepresentation of Aboriginal and Torres Strait Islander people in the prison population, the elevated prevalence of disability among the Aboriginal and Torres Strait Islander population means that there is a high proportion of Aboriginal and Torres Strait Islander people with disability in custody.⁴²⁸

5.34 The First Peoples Disability Network advised that a high proportion of First Nations people with disability in contact with the criminal justice system will have been 'unrecognised and unsupported' and when released are likely to face further incarceration due to a continued lack of support:

When released from prison, the personal, social and systemic circumstances that propelled them into detention or prison will not have changed. Thus, many face a cycle of recurrent detention that goes on indefinitely.⁴²⁹

5.35 Stakeholders advised that NDIS is not equipped to respond to the needs of First Nations people. Ms Ashlee Kearney, Disability Role Commission Project Manager, First Peoples Disability Network, explained why in her view the Scheme is not accessible to First Nations people:

NDIS for most First Nations communities is kind of looked at as something that is not fit for them, it is not either really looking at how to incorporate their culture as part of it. In some communities there are no NDIS services to service people, especially in rural and remote New South Wales; so we really need to address those contextualised issues if we are going to make the NDIS more inclusive and ensure that people are receiving the supports they need before entering any form of criminal justice system or coming into contact with it.⁴³⁰

5.36 Legal Aid NSW and the First Peoples Disability Network advocated for earlier reintegration planning for First Nations people.⁴³¹ The First Peoples Disability Network said that this needs to involve appropriately skilled staff from the National Disability Insurance Agency with a focus on skills and connections people with disability need for release:

There is the need for much earlier reintegration planning and disability support assessments, involving appropriately skilled Indigenous NDIA staff. Through incarceration we strip away the autonomy of individuals (including their personal decision making) and their links with community. This needs to be considered and supported with a view to the skills and connections First People with disability need in place for release.⁴³²

⁴²⁸ Submission 117, Legal Aid NSW, pp 41-42.

⁴²⁹ Submission 101, First People Disability Network, p 4.

⁴³⁰ Evidence, Ms Kearney, 27 October 2020, p 3.

⁴³¹ Submission 117, Legal Aid NSW, p 33; Submission 101, First Peoples Disability Network, p 7.

⁴³² Submission 101, First Peoples Disability Network, p 7.

Improving health services for First Nations people

- 5.37** In addition to concerns about the health needs and services for the general prison population, stakeholders provided evidence specific to the health needs of First Nations people in custody.
- 5.38** The Australian Medical Association highlighted the over-representation of First Nations people in custody is an urgent concern, attributing this to their health and mental health needs.⁴³³
- 5.39** Both the Australian Medical Association and the Royal Australian and New Zealand College of Psychiatrists provided extensive information about the relationship between inadequate health care for First Nations people within the community and incarceration rates. The Royal Australian and New Zealand College of Psychiatrists advised that in its experience, 'too many First Nations people end up in the prison system because primary support systems in health, mental health, and housing have failed them'.⁴³⁴
- 5.40** It explained that health based responses are needed to reduce incarceration rates of First Nations people:
- ... [T]he continued reliance on criminal justice responses is largely ineffective in reducing the overwhelming number of First Nations people in our justice system. We need to move towards health-based approaches that address contributing factors such as mental illness and underlying psychosocial issues such as poverty, trauma, and addiction.⁴³⁵
- 5.41** These views were echoed by Dr Danielle McMullen, President of the Australian Medical Association, who said that 'access to culturally appropriate health care will not only to improve the health of Aboriginal and Torres Strait Islander people but will also prevent many from coming into contact with the criminal justice system'.⁴³⁶ The Australian Medical Association said that it acknowledges the complex drivers of imprisonment in any individual's case but considers the imprisonment gap as symptomatic of the health gap between Indigenous and non-Indigenous Australians.⁴³⁷
- 5.42** Stakeholders agreed that improved community based health services must include culturally competent and culturally sensitive services.⁴³⁸ The Royal Australian and New Zealand College of Psychiatrists advocated for the government to employ more First Nations people in health and justice systems to ensure First Nations people receive culturally appropriate support. It explained:

Our service organisations and systems and the people who work in these, need to better understand the impact of history and significance of culture when engaging with and

⁴³³ Submission 103, Australian Medical Association, pp 2-3.

⁴³⁴ Submission 103, Australian Medical Association, pp 2-3; Submission 105, The Royal Australian and New Zealand College of Psychiatrists, p 6.

⁴³⁵ Submission 105, The Royal Australian and New Zealand College of Psychiatrists, p 4.

⁴³⁶ Evidence, Dr McMullen, 3 December 2020, p 31.

⁴³⁷ Submission 103, Australian Medical Association, p 3.

⁴³⁸ Submission 105, The Royal Australian and New Zealand College of Psychiatrists, p 8; Submission, 103, Australian Medical Association, p 4; Submission 70, Mr Christopher Puplick AM and signatories, pp 2-3.

delivering services to First Nations people. This is important for understanding how First Nations people talk about mental illness, identifying any underlying trauma affecting an individual's mental wellbeing and formulating effective interventions.⁴³⁹

5.43 In a similar vein, Mr Christopher Puplick, a board member of the Justice Health, said that the 'highly complex social and health outcomes of Aboriginal patients need to be addressed by all health agencies, especially while patients are in the community'.⁴⁴⁰

5.44 In addition to the need to improve community based health services, stakeholders were consistent in their views on the need to improve the health and mental services provided to First Nations people in custody. Dr McMullen contended that a lack of access to appropriate healthcare is a significant factor in many Aboriginal deaths in custody.⁴⁴¹

5.45 The Community Restorative Centre outlined that in its experience, First Nations people who self-harm in custody often have no previous history of self-harm but that they are responding to not getting the care they need. It said:

Frequently we hear from people in great distress who are locked up and simply not getting the care or treatment they need. Self-harm is often a response to an incredibly desperate situation.⁴⁴²

5.46 Stakeholders identified the need for additional funding and dedicated resourcing, as well as measures to ensure that health care is provided in a culturally competent and sensitive manner.

5.47 The National Justice Project called for the government to increase funding and ensure culturally appropriate care:

Properly fund and provide appropriate and culturally safe care in detention delivered by culturally appropriate services with such care to include holistic health care, mental health care, disability care and rehabilitation.⁴⁴³

5.48 It also advocated for the involvement of First Nations people in the design and implementation of correctional policies and practices as the only way to achieve culturally safe care.⁴⁴⁴ Similarly, the Australian Medical Association, identified the need for the NSW Government to employ Aboriginal Health Workers to ensure culturally competent health services:

The AMA recommends NSW employs Aboriginal Health Workers and Indigenous health professionals in prison health services to support them to deliver a culturally competent health service. Workforce targets could support the employment of Aboriginal Health Workers and health professionals by prison health services.⁴⁴⁵

⁴³⁹ Submission 105, The Royal Australian and New Zealand College of Psychiatrists, p 8.

⁴⁴⁰ Submission 70, Mr Christopher Puplick AM and signatories, p 3.

⁴⁴¹ Evidence, Dr McMullen, 3 December 2020, p 31.

⁴⁴² Submission 71, Community Restorative Centre, p 17.

⁴⁴³ Submission 102, National Justice Project, p 15.

⁴⁴⁴ Submission 102, National Justice Project, p 15.

⁴⁴⁵ Submission 103, Australian Medical Association, p 4.

- 5.49** This was supported by the New South Wales Nurses and Midwives' Association and St Vincent De Paul Society of NSW who also agreed on the need to employ First Nations health workers in facilities to provide health and mental health care to First Nations people in custody.⁴⁴⁶
- 5.50** Some stakeholders also spoke about the benefits of a dedicated Aboriginal community controlled health organisation to deliver health and mental health services to First Nations people in custody. The New South Wales Nurses and Midwives' Association said that Aboriginal Community Controlled Health Organisations are well known to enhance equitable access to healthcare and effectively manage chronic diseases. It believes that 'First Nations people in NSW gaols should have access to their services'.⁴⁴⁷
- 5.51** When asked about the need and benefit of having First Nations led health services within prisons, Dr McMullen and Dr Smith, agreed with the proposition, however acknowledged that given such an approach would involve a long-term plan, the initial focus should be on ensuring the cultural competence of the services that already exist. Dr McMullen said:
- We would suggest that people at all acuities of illness and in all locations should have access to a culturally competent workforce, including access to at least Aboriginal liaison officers or Aboriginal health workers should be embedded into mental health systems where a separate service does not exist and that even mainstream services do have a responsibility to maintain their cultural competence for our Indigenous peoples.⁴⁴⁸
- 5.52** Stakeholders provided an example of a community based Aboriginal controlled health service delivering health care services into a correctional facility in the Australian Capital Territory, outlined in the case study below.

Case study: Aboriginal Community Controlled Health Services delivered directly into a correctional facility⁴⁴⁹

Winnunga Nimmityjah Aboriginal Health and Community Services is an Aboriginal community controlled primary health care service operated by the Aboriginal community in the Australian Capital Territory.

Winnunga provides outreach services to First Nations people in custody at Bimberi Youth Justice Centre and the Alexander Maconochie Centre (AMC). It delivers a standalone health and wellbeing clinic at the AMC to detainees from 6:30 am to 8:30 pm, with a doctor that also visits daily.

Ms Julie Tongs, the Chief Executive Officer of Winnunga, stated that the health care services they deliver to First Nations people in custody are the same as what they provide on the outside, providing whatever service is needed. She also noted the benefits of her clinic having prior contact with a person in custody:

⁴⁴⁶ Submission 121, St Vincent de Paul Society of NSW, pp 10-11; Submission 129, the New South Wales Nurses and Midwives' Association, pp 2-3.

⁴⁴⁷ Submission 129, the New South Wales Nurses and Midwives' Association, p 3.

⁴⁴⁸ Evidence, Dr Smith and Dr McMullen, 3 December 2020, p 39.

⁴⁴⁹ Evidence, Ms Julie Tongs, Chief Executive Officer Winnunga Nimmityjah Aboriginal Health and Community Services, 26 October 2020, pp 36-37; Winnunga Nimmityjah Aboriginal Health and Community Services, *About* (2008), <<https://winnunga.org.au/about-winnunga>>.

Even though we do not get funded, we still do an Aboriginal health check, we do a mental health care plan, we do a diabetes or asthma care plan—whatever the need of the client is—often because we already know the people that we are working with. We have already got their history documented in our system because we have an electronic patient information record system that works between the outreach or the in reach at AMC and back here at Winnunga.⁴⁵⁰

Ms Tongs said that although not fully operational she believes that in time, Winnunga will have a dramatic impact on the health status of Aboriginal people in the Alexander Maconochie Centre.

5.53 The Aboriginal Legal Service (NSW/ACT) and Legal Aid NSW indicated support for this model.⁴⁵¹ Specifically, Legal Aid NSW said:

We also recommend that consideration be given to a pilot in various NSW prisons for a local Aboriginal Medical Service (AMS) to provide medical services to Aboriginal and Torres Strait Islander prisoners in custody. For example, the Winnunga Nimmitjiah Aboriginal Health Service in Canberra provides a 24/7 nursing service to Aboriginal and Torres Strait Islander prisoners in Alexander Maconochie Correctional Centre in the ACT, together with clinical and psychological services.⁴⁵²

Suicide hanging points

5.54 The issue of suicide hanging points is also relevant in this chapter, given the clear link between suicide and poor mental health, and concerns raised in relation to whether health issues are screened and managed effectively in correctional centres.

5.55 In 1991, the *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) identified the need to remove suicide hanging points to reduce the number of deaths in custody, as have subsequent inquiries.⁴⁵³ However, hanging points were raised by stakeholders as a continuing matter of concern.⁴⁵⁴

5.56 In respect of hanging points in police facilities, Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force, advised that it has met this recommendation, by implementing ten year project with a budget of \$23 million, and

⁴⁵⁰ Evidence, Ms Tongs, 26 October 2020, p 36.

⁴⁵¹ Evidence, Ms Warner, 26 October 2020, p 39; Submission 117, Legal Aid NSW, pp 70-71.

⁴⁵² Submission 117, Legal Aid NSW, pp 70-71.

⁴⁵³ Royal Commission into Aboriginal Deaths in Custody (1991) *Royal Commission into Aboriginal Deaths in Custody: National Report*, Australian Government Publishing Service, <<https://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>; Coroners Court of NSW, *Inquest into the death of Tane Chatfield* (26 August 2020), p 33; Submission 100, Chief Magistrate of the Local Court of New South Wales, p 6.

⁴⁵⁴ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 6; Evidence, Mr Colin Chatfield, father of Tane Chatfield, 3 December 2020, p 44; Evidence, Ms Faith Black, Spokesperson, Indigenous Social Justice Association, 27 October 2020, pp 65-66; Evidence, Mr Padraic Gibson, Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, and friend of the Chatfield Family, 3 December 2020, p 49.

ongoing upgrades, to remove existing hanging points. The NSW Police Force have also implemented screening processes to continually check cells for hazards that could be used as hanging points.⁴⁵⁵

5.57 On the other hand, Commissioner Peter Severin, Commissioner, Corrective Services NSW, acknowledged that hanging points remain 'a live issue' for Corrective Services NSW and it has been this way since he commenced in the field in 1989.⁴⁵⁶

5.58 Deputy Commissioner Luke Grant, Corrective Services NSW, however, clarified that the RCIADIC recommendation was for authorities to screen cells for hanging points and that is what they did. He said:

Back in 1995 we spent about \$2 million removing obvious hanging points. As time has moved on, we keep on identifying additional opportunities.⁴⁵⁷

5.59 Both Commissioner Severin and Deputy Commissioner Grant explained that in addition to the removal of obvious hanging points they have focused on ensuring good assessments, creating safe cells, having active engagement with offenders and not just static observation, to identify at risk people on arrival.⁴⁵⁸ Deputy Commission Grant added:

Our process is to rectify any obvious hanging points as they emerge, but our general strategy is to use a risk-based approach and to manage those people who are at risk in safer environments. That happens quite effectively.⁴⁵⁹

5.60 When questioned about the program of work to retro fit existing cells to remove hanging points, Commissioner Severin reiterated that there is not a program of work to do this across the board but that the department has projects to do this including at Junee, Parklea and Tamworth. Commissioner Severin acknowledged that these centres often have a number of prisoners on remand who can be at increased risk of suicide but advised it was the only available accommodation and they are taking other action to prevent suicides by those at risk:

... [T]hat was the only accommodation available at the time that the places were commissioned for the accommodation of remand prisoners ... I cannot overemphasise the fact that we have put a lot of energy and effort into proactive measures to prevent people from committing suicide or self-harm at Tamworth, Parklea and every other reception facility that accommodates remand prisoners across the State.⁴⁶⁰

5.61 Mr Michael Coutts-Trotter, Secretary, Department of Communities and Justice, expanded on Commissioner Severin's evidence explaining that his agency has a more certain budget position for the next four years and that it can 'now rely upon a minor capital works program that was unavailable to the department previously'. He also said:

⁴⁵⁵ Evidence, Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force, 7 December 2020, p 18.

⁴⁵⁶ Evidence, Commissioner Peter Severin, Commissioner, Corrective Services NSW, 7 December 2020, p 55.

⁴⁵⁷ Evidence, Deputy Commissioner Luke Grant, Corrective Services NSW, 7 December 2020, p 57.

⁴⁵⁸ Evidence, Commissioner Severin, 7 December 2020, pp 55-56, Evidence, Deputy Commissioner Grant, 7 December 2020, p 57.

⁴⁵⁹ Evidence, Deputy Commissioner Grant, 7 December 2020, p 57.

⁴⁶⁰ Evidence, Commissioner Severin, 7 December 2020, p 56.

I have seen a draft proposal for the coming year's minor capital works program and it contains a whole range of projects, a couple of million dollars' worth of projects, to remove hanging points ... we definitely have a committed minor works program that is making a priority of tackling some of this.⁴⁶¹

5.62 The Department of Communities and Justice subsequently advised that the budget for the minor works program mentioned by Mr Coutts-Trotter above has not been finalised but that it intends to use part of its current capital budget to reduce the need to use older higher risk cells. It stated, where possible it refurbishes existing cells to reduce hanging points, but there is no system wide program to do this:

...[O]wing to the age of many correctional centres in NSW, no system-wide work is currently being undertaken as a program to eliminate all hanging points in cells; however, there are various projects underway, or proposed, to remove further hanging points in various centres including Junee and Parklea Correctional Centres.⁴⁶²

5.63 Further, Deputy Commissioner Grant advised that there would not be enough cells in the Tamworth facility to have an approach where no First Nations people on remand are placed in cells with hanging points and also that this would be difficult to enforce in other facilities. He did however advise that following the death of Tane Chatfield, they have 'removed the more obvious hanging points' in Tamworth.⁴⁶³

Committee comments

5.64 The committee acknowledges the complex and challenging nature of custodial environments and the diverse and multifaceted needs of those incarcerated. We accept the evidence that while there are a range of drivers leading to a person's incarceration, people in custody have significantly higher health needs than the general population.

5.65 We have two key concerns essentially, the first being that health screening processes in correctional institutions may be failing to identify the health needs of offenders, and secondly, that health and mental health services being provided to those in custody are lacking, such that we are 'managing' health issues but not proactively treating them.

5.66 In this regard, we acknowledge the shocking information provided by the NSW State Coroner, who noted that all of the First Nations people who died in custody due to self-harm had a prior history of mental health issues and half of the First Nations people who died due to intentional self-harm in custody had previously attempted suicide while in custody.

5.67 So too, we note the Inspector of Custodial Services recent report on *Health services in NSW correctional facilities*, which was released just before our report was finalised. The Inspector's report highlights the complex health needs of Aboriginal and Torres Strait Islander prisoners and the 'health intervention opportunity' provided by the correctional environment. It also highlights the importance of having culturally competent health services in custody for Aboriginal people,

⁴⁶¹ Evidence, Mr Michael Coutts-Trotter, Secretary, Department of Communities and Justice, 7 December 2020, p 56.

⁴⁶² Answers to questions on notice, Department of Communities and Justice, 22 January 2021, p 7.

⁴⁶³ Evidence, Deputy Commissioner Grant, 7 December 2020, p 57.

and the need to embed Aboriginal Health Workers or registered Aboriginal Health and Torres Strait Islander Health Practitioners in New South Wales correctional health centres.

- 5.68** The committee considers the health screening process to be a vital opportunity to properly assess a person's health and mental health needs to ensure they receive the care they require in a timely manner. The committee notes the current weaknesses in this process and encourages the government to review these arrangements, and the allocated funding to health services in correctional institutions, to ensure this is a quality, comprehensive and multi-disciplinary assessment.
- 5.69** In our view, the delivery of health and mental health care services within custodial settings is under-resourced and not fit for First Nations people in custody. The committee believes there is value in exploring a model similar to that delivered by the Winnunga Nimmityjah Aboriginal Health and Community Services in the Alexander Maconochie Centre in the Australian Capital Territory. We believe that this model could be considered in the context of a broader review of the health and mental services in correctional and juvenile detention facilities.
- 5.70** The committee therefore makes three recommendations in this regard; that an independent review be undertaken into the provision and effectiveness of health screening, services and treatment in correction centres; that Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Health Network review mental health screening procedures; and, that the government increase the funding to support mental health assessment, management and treatment of prisoners.
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Recommendation 24

That the NSW Government commission an independent review into the provision and effectiveness of health screening, services and treatment in correctional centres, including consideration of alternative service models for First Nations people with a focus on incorporating Aboriginal Community Controlled health services.

Recommendation 25

That Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Health Network review mental health screening procedures, with particular attention given to the placement of prisoners with mental health conditions.

Recommendation 26

That the NSW Government increase the funding to support mental health assessment, management and treatment of prisoners.

- 5.71** The committee is also concerned that appropriate plans are not being put in place for people with a disability when they are released from prison. The National Disability Insurance Scheme is now a well-established scheme, designed to provide improved and personalised support for
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people with a disability. It is concerning that some of our most vulnerable appear to be falling through the cracks and missing out on these services.

- 5.72 In our view, identifying those that could benefit from assistance via the National Disability Insurance Scheme is an opportunity for agencies to better support a person's release from custody and ideally minimise the risk of reoffending. We therefore make the following recommendation.

Recommendation 27

That Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Health Network:

- engage with the National Disability Insurance Agency to establish timely, clear and comprehensive protocols for supporting people with a disability in custody to access support upon release
- review current processes to ensure a more robust, holistic, culturally sensitive and comprehensive approach to support people with a disability in custody to access the National Disability Insurance Scheme and other services upon release.

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- 5.73 The committee further notes that persons with a disability and other inmates would also benefit from greater access to and co-ordination with other government agencies prior to their release from prison. Without being exhaustive these would include the Aboriginal Housing Office, Housing NSW, TAFE NSW, providers of mental health services and Centrelink. The Committee notes that housing insecurity, poor mental health and a lack of job skills and readiness are key contributors to those released from prison not being able to function in the outside world and are among the reasons many reoffend and return to prison.

Recommendation 28

That Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Health Network also engage with the Aboriginal Housing Office, Child Protection, Housing NSW, TAFE NSW, providers of mental health services and Centrelink to establish timely, clear and comprehensive protocols for supporting people with a disability and others in custody to access support upon release.

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- 5.74 The committee was deeply troubled by the apparent lack of a sustained and dedicated plan to manage the removal of hanging points. It acknowledges the challenges, and indeed cost, associated with achieving complete elimination of hanging points, however the absence of a plan, overseen by agency heads, suggests a complacency toward this issue. Our concern in this regard is compounded by the time that has passed since this issue was identified by the Royal Commission, repeated recommendations from other inquiries and sadly, continued deaths by hanging in New South Wales prisons.

- 5.75 It is now thirty years since the *Royal Commission into Aboriginal Deaths in Custody report* recommended the removal of hanging points in prison cells, this cannot wait decades more to be finally addressed. Not only must there be a plan but it must have a clear and publicly state

timetable for the full implementation of that plan to remove hanging points in New South Wales prison cells.

Recommendation 29

That the NSW Government assess the current status of hanging points in all New South Wales correctional facilities and develop a detailed plan and timetable for the removal of these points or the discontinued placement of vulnerable inmates in these cells, including First Nations people.

Chapter 6 The coronial system

The report now turns to the role of the NSW Coroners Court in relation to investigating deaths in custody. In particular it outlines a number of concerns raised by stakeholders, mainly relating to resourcing and delays. Before outlining these concerns, it is important to note that several stakeholders also highlighted the strengths of the coronial system and the high-quality of work by Coroners in undertaking investigations into deaths in custody.⁴⁶⁴

It is important to note that this inquiry represents the first review of the coronial jurisdiction in New South Wales since 1975. While a full review is beyond the scope of this inquiry, the evidence received was highly relevant to consideration of the oversight system for investigating deaths in custody. There is also a clear need for a comprehensive review of the coronial jurisdiction.

Resourcing and timeliness

- 6.1 This section will consider the concerns raised by stakeholders in relation to the funding and resourcing of the NSW Coroners Court, the timeliness of inquests, the provision of information to family members involved, and the overall impact delays have on the families involved in the inquest process.

Funding and resources

- 6.2 A number of stakeholders commented on the lack of funding and resourcing of the NSW Coroners Court and how this is impacting the effectiveness and timeliness of inquests.
- 6.3 Adjunct Professor Dillon argued that 'the NSW coronial system is under-resourced and suffers from inherent design flaws' and 'as a consequence, it cannot perform at an optimal level'. Adjunct Professor Dillon also reported that 'a rapidly growing backlog of mandatory inquests into deaths in custody and police operations is threatening to overwhelm the system', with increasing delays 'adversely affecting bereaved families'.⁴⁶⁵
- 6.4 Adjunct Professor Dillon outlined that at the end of 2019 there was a bank of 129 outstanding section 23 cases, that is, cases that are deaths in custody and deaths in police operations. He advised that 'the problematic nature of that accumulating number of cases is underscored by the fact that, in 2018, the entire cohort of NSW coroners – specialists and regional magistrates combined – was able only to conduct 111 inquests while in 2019, that number rose only to 117'. Adjunct Professor Dillon concluded that 'it is clear that if the 'senior coroners' did nothing but section 23 inquests they would still struggle to reduce the backlog and deal expeditiously with additional incoming cases (which average about 40 per annum)'.⁴⁶⁶

⁴⁶⁴ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 10; Submission 117, Legal Aid NSW, pp 73-74; Submission 104a, Adjunct Professor Dillon, pp 2-12.

⁴⁶⁵ Submission 104, Adjunct Professor Hugh Dillon, p 1.

⁴⁶⁶ Submission 104, Adjunct Professor Hugh Dillon, p 16.

- 6.5** Adjunct Professor Dillon contended that the only solution is significant resourcing of the NSW Coroners Court from the government to meet the work demands, otherwise it will lead to 'quick and dirty' inquests or resources pulled from the criminal court:

Without significant extra resources – not only increased numbers of coroners but investigators, Counsel Assisting and others who play vital roles in the system – the State Coroner (and the Chief Magistrate who controls the resourcing of the 'coronial jurisdiction') have only two options – either to run 'quick and dirty' s. 23 inquests or move resources away from the Local Court's priority work of criminal trials and sentencing. Neither is viable. The Local Court has limited resources and no fat in the system. I am confident that the State Coroner, Deputy State Coroners and Chief Magistrate do not, and would not, contemplate 'quick and dirty' inquests, especially in relation to the deaths of Indigenous people in custody. The unconscionability of such a course is obvious. ... This is not a problem created by the specialist coroners or the Local Court. The resourcing solution therefore is in the government's hands.⁴⁶⁷

- 6.6** In addition, Adjunct Professor Dillon stated that 'it is a paradox that the NSW Government has been able to find \$4 billion in the past few years to build new prisons, largely to house Indigenous people, but will not adequately resource the coroners sufficiently to enable them to conduct inquests into Aboriginal deaths in custody in a timely way, or to maximise their potential for developing death preventive recommendations'. He stated that 'a tiny fraction of that prison budget – say 0.1 per cent - could make all the difference to the efficiency and quality of the coronial system'.⁴⁶⁸

- 6.7** Legal Aid NSW also commented on the lack of resources in the NSW Coroners Court, noting that 'inadequate resourcing significantly contributes to delay in the coronial system'. It said that 'whilst the quality of individual inquiries is high, their efficacy and the benefits for families are greatly compromised by the significant delays which characterise the coronial system in NSW'.⁴⁶⁹ In addition, Mr David Evenden, Solicitor Advocate, Coronial Inquest Unit, Legal Aid NSW, highlighted that there are 'over 120 of these mandatory inquests that are outstanding now' and 'we are seeing very large numbers of deaths in custody in the last year or two years'. He stated: 'That is going to feed into these delays. So, resourcing is definitely an issue'.⁴⁷⁰

- 6.8** Judge Henson also stated that 'the Coroners Court is an under-resourced jurisdiction'. He said that 'an examination of the resources allocated to equivalent jurisdictions in other States, for example Victoria, provides ample supporting evidence for this statement'. Judge Henson highlighted that the lack of resourcing not only impacts on the timeliness of inquests but also the level of support offered:

Not only do these resourcing issues affect the timeliness of the completion of coronial inquests and the provision associated findings, they affect the level of support provided by the surrounding administrative structure. While the coroners and administrative support staff who undertake coronial functions in NSW do so in a highly commendable

⁴⁶⁷ Submission 104, Adjunct Professor Hugh Dillon, p 17.

⁴⁶⁸ Submission 104, Adjunct Professor Hugh Dillon, p 19.

⁴⁶⁹ Submission 117, Legal Aid NSW, pp 76-77.

⁴⁷⁰ Evidence, Mr David Evenden, Solicitor Advocate, Coronial Inquest Unit, Legal Aid NSW, 26 October 2020, p 40.

and empathetic manner, they are stretched and they have the potential to do more with better funding and resources.⁴⁷¹

6.9 Further, Judge Henson advised that he has made requests for additional resources from government in recent years. He told the committee that in April 2019 he made a request to the Attorney General for additional magistrates including 'three who would be allocated to the coronial jurisdiction as additional Deputy State Coroners'. He also provided feedback 'to the Attorney General and the Department of Communities and Justice as part of the (yet to finalised) statutory review of the Coroners Act 2009'. Judge Henson commented that again he 'drew attention to what the State Coroner and I perceive as deficits in the current resourcing arrangements', and 'we are yet to be advised of an outcome in response to either of these matters'.⁴⁷²

6.10 When asked if there are any plans to significantly increase the resourcing of the coronial jurisdiction, Mr Michael Coutts-Trotter, Secretary, Department of Communities and Justice, responded:

The statutory review of the Act will be responded to once the so-called coronial delay task force, which was a task force established by the Attorney General and the health Minister, reports to Ministers and to the Government, and I am anticipating that that task force will report very early in the new year. So the two things are bound up together. The question of resourcing for the coronial function, of course, is an issue that the Chief Magistrate has pushed particularly hard and has pushed in a written submission to the Committee. It is something that is under consideration with government, but that is all I can tell you at this point.⁴⁷³

Inquest timeframes

6.11 The timeframes in which inquests are completed was also a key concern raised by stakeholders, who argued that they take too long and in doing so add extra strain on the families involved.

6.12 Mr Evenden highlighted that the larger inquests are taking two to three years and sometimes even longer to complete, and in his view they should be coming 'before the court within 18 months or two years' for it to be 'a bearable process for families'.⁴⁷⁴

6.13 Likewise, Adjunct Professor George Newhouse, Director and Principal Solicitor, National Justice Project, noted that the 'coronial process does take a lot of time in all States' as 'Coroners are generally under-resourced in my view and they have a lot of work to do'. He indicated that 'it is a minimum of 12 to 18 months before you can get to a Coroner, even if it is a fast process'.⁴⁷⁵

⁴⁷¹ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 10.

⁴⁷² Submission 100, Chief Magistrate of the Local Court of New South Wales, p 10.

⁴⁷³ Evidence, Mr Michael Coutts-Trotter, Secretary, Department of Communities and Justice, 7 December 2020, p 51.

⁴⁷⁴ Evidence, Mr Evenden, 26 October 2020, p 40.

⁴⁷⁵ Evidence, Adjunct Professor George Newhouse, Director and Principal Solicitor, National Justice Project, 26 October 2020, p 63.

6.14 The Jumbunna Institute of Indigenous Education and Research noted that 'it is common for coronial inquests in NSW to take years to both commence and resolve'. They provided a number of examples:

- David Dungay Jr died on 29 December 2015 and the inquest commenced two and a half years later in July 2018. The evidence closed on March 2019 and the findings were not handed down until almost four years after his death in November 2019.
- Rebecca Maher died on 19 July 2016 and the inquest took over two years to complete with the evidence closing on March 2019 and findings handed down comparatively quickly in July 2019, three years after her death.
- Tane Chatfield died in September 2017 and the inquest was heard recently, almost three years after his death.
- Nathan Reynolds died on 1 September 2018 and his inquest was set down for October 2019, with hearings held late 2020 and findings handed down in March 2021.⁴⁷⁶

6.15 Along similar lines, Legal Aid NSW stated that 'significant delays exist in having inquest matters heard before the NSW Coroners Court' and 'in our experience, many inquests, including deaths in custody, do not run as inquests until two or three or more years after death'. Legal Aid NSW highlighted that 'this delay impacts on the quality of the evidence, causes great distress to the family, and can diminish the utility of any recommendations'.⁴⁷⁷ Legal Aid NSW provided a number of issues that contribute to this, including:

- delays in the provision of autopsy reports which are usually not provided until six to nine months after a death, with the Coroner waiting for this before taking further steps
- delays in obtaining statements from health professions, such as doctors and nurses, which is not obtained by the NSW Police Force but instead prepared by lawyers often well after the event that results in poor quality evidence with little detail
- delays in the preparation and service of the brief of evidence (discussed further below)
- delays due to procedural matters, such as significant delays in having a matter listed or families provided the brief of evidence, caused when parties such as the NSW Police Force or the relevant government department seek to obtain protective orders from the Coroner as to disclosure and non-publication of confidential material.⁴⁷⁸

6.16 Legal Aid NSW advised that 'a Coronial Practice Note was introduced by the Coroners Court in 2018 to specifically deal with delays to inquests resulting from deaths in police operations'. However, it noted that 'without additional resourcing it is unlikely that the Court itself will be able to achieve compliance with its own Practice Note'. Legal Aid NSW therefore recommended 'that a broad-based working group should be established to address ongoing operational issues, including delay and other processes within the coronial jurisdiction' and include all relevant stakeholders, including organisations that can speak on behalf of families'.⁴⁷⁹

⁴⁷⁶ Submission 115, Jumbunna Institute of Indigenous Education and Research, pp 25-26; Coroners Court of New South Wales, *Inquest into the death of Nathan Reynolds* (11 March 2021).

⁴⁷⁷ Submission 117, Legal Aid NSW, p 75.

⁴⁷⁸ Submission 117, Legal Aid NSW, p 77.

⁴⁷⁹ Submission 117, Legal Aid NSW, pp 76-77.

6.17 Adjunct Professor Dillon noted that the Local Court's coronial time standards require 95 per cent of inquests to be completed within 12 months and 100 per cent of inquests to be completed within 18 months. Adjunct Professor Dillon conducted his own review of the data concerning the timeframes for the completion of inquests and found that 'specialist coroners for the period 2015-2018 were unable to meet the Local Court time standards and the performance declined over that four-year period'. He added that this sits alongside data that shows 'the sharp downward trend in numbers of inquests being conducted' and 'an apparent trend, by 2018, for increasing numbers of inquests to take 30-48 months to complete'.⁴⁸⁰

6.18 Further, Adjunct Professor Dillon reflected on the reasons why inquests are taking so long:

The practice when I was a Coroner was before anything was done to wait for the post-mortem report and wait for the police are brief to come in. ... It could be ages, yes. Post-mortem reports can take a year, maybe longer. The police brief can take a year or longer. Then having got the two big documents, the Coroner sits down and analyses those, writes to the Crown Solicitor's Office and says, "I would like you to assist me. These are the issues that I identify for inquest." Then they brief counsel, and they take further time because they are busy, and so on and so forth. So you can see how this thing gets out of hand and how files get left on desks and families are left in the dark about what is going on.⁴⁸¹

6.19 Adjunct Professor Dillon highlighted that the report of the *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) recommended that within 48 hours after receiving advice of a death in custody the State Coroner should appoint a solicitor or barrister to assist the Coroner. Adjunct Professor Dillon commented that he thinks this is a 'brilliant idea', where discussions between the Coroner and Crown's Solicitors office could commence straight away and contact with the family made to find relevant information about the person who has passed. He stated: "The sooner you get started, the sooner families are included, the sooner that phenomenon of people inventing their own stories is suppressed, the sooner real information starts coming out and the sooner you can get on with the job of finding out what happened—truth-seeking, making sense of the story...".⁴⁸²

Structural issues

6.20 Two structural issues in the current coronial system were highlighted by Adjunct Professor Dillon as compounding the issues relating to resourcing and timeliness of inquests. The first was the structure whereby magistrates have both the function of conducting criminal proceedings and coronial investigations, and the second was the division of this workload across a two-tier system between regional and metropolitan New South Wales.

6.21 Adjunct Professor Dillon argued that the current coronial system creates a 'strange paradox' where 'the Local Court of New South Wales, Australia's largest criminal court, is also the court responsible for conducting inquests into deaths in custody'. He said that 'magistrates imprison people and other magistrates investigate those deaths', and 'regardless of the quality of the

⁴⁸⁰ Submission 104, Adjunct Professor Hugh Dillon, pp 13-15.

⁴⁸¹ Evidence, Adjunct Professor Hugh Dillon, Ex-Deputy State Coroner and Ex-Magistrate of the NSW Local Court and member of the Faculty at University of New South Wales Law School, 27 October 2020, p 52.

⁴⁸² Evidence, Adjunct Professor Dillon, 27 October 2020, p 52.

coroners and their undoubted integrity, there must be something wrong in principle with that picture'.⁴⁸³ He added that this 'demonstrates the desirability of separating the coronial function from the criminal courts in both physical and legal senses'.⁴⁸⁴

6.22 Secondly, Adjunct Professor Dillon indicated that 'a major design flaw is a two-tier system of coronial services – one for the metropolitan area and another for regional areas'. He explained that only a small number of magistrates work exclusively on coronial investigations and are all based in Sydney, with the remaining magistrates managing this function alongside a busy criminal workload:

A small number of magistrates function as coroners exclusively (all based at the Lidcombe coronial and forensic medicine complex), but the vast majority of working coroners in NSW are the country and regional magistrates of whom there are approximately 40. Although only about 35% of the population of NSW live outside the Sydney metropolitan area, about 45% of deaths reported to coroners in NSW are reported to regional magistrates. This arrangement flows from the facts (a) that the system, historically, has been decentralised and (b) that, since 2010, overworked, undertrained, and under-resourced country magistrates have had coronial jurisdiction added to their already onerous workloads.⁴⁸⁵

6.23 Adjunct Professor Dillon argued that this creates a number of issues, including:

- a competing workload between coronial services and the high-volume work of the specialist criminal court, where the criminal court usually taking precedence over everything else
- regional magistrates, who are heavily engaged in their local court work, have limited opportunities to undertake specialist training and professional development in relation to coronial work
- due to the relatively low volumes of coronial work magistrates conduct they are unable to develop the specialists skills by way of experience and this is compounded with the regular rotation of magistrates in and out of the coronial jurisdiction
- given coroners are only empowered to make death preventative recommendations when conducting inquests, most regional inquests of any complexity are referred to city-based 'specialist coroners', therefore, these five full-time specialist positions in Sydney carry out most of the significant coronial work conducted in this state⁴⁸⁶
- in regional areas, Local Court magistrates must work separately to the police during criminal proceedings, however when conducting coronial investigations they must direct and work with a local police prosecutor who performs the role of Counsel Assisting, and this can create conflicting types of relationships.⁴⁸⁷

6.24 Adjunct Professor Dillon emphasised that 'the design flaws I have identified, especially when combined with chronic under-resourcing of the coronial system, indirectly, but quite adversely,

⁴⁸³ Evidence, Adjunct Professor Dillon, 27 October 2020, p 42.

⁴⁸⁴ Submission 104a, Adjunct Professor Hugh Dillon, p 20.

⁴⁸⁵ Submission 104, Adjunct Professor Hugh Dillon, pp 6-7.

⁴⁸⁶ Submission 104, Adjunct Professor Hugh Dillon, pp 7-8 and 10

⁴⁸⁷ Submission 104a, Adjunct Professor Hugh Dillon, p 22.

affect the capacity of NSW senior coroners and many other actors in the coronial system from performing optimally in investigating Indigenous deaths in custody'.⁴⁸⁸

- 6.25** Therefore, Adjunct Professor Dillon recommended that the NSW Government recognise the need for a specialist coronial system and design it accordingly, including a specialist Coroners Court of NSW.⁴⁸⁹ He highlighted that 'a Parliamentary inquiry in Victoria in 2006, and a report by the Western Australian Law Reform Commission, were both highly critical of arrangements in those states which mirrored the current NSW system'. Further, Adjunct Professor Dillon noted that 'as a result of the 2006 inquiry, in 2008 Victoria established a standalone specialist court separate from the Victorian magistracy'.⁴⁹⁰
- 6.26** Legal Aid NSW also raised concerns with the NSW Coroners Court being part of the NSW Local Court structure. It said that this 'has proven to be a major limitation on the functions of the court, and its capacity to adapt and reform so as to provide an effective death prevention function, and to cater adequately for families of the deceased'. Legal Aid NSW also recommended that 'serious consideration ought to be given to establishing the NSW Coroners Court as a separate court, as has occurred in Victoria, Queensland, South Australia and Western Australia'.⁴⁹¹

Timeliness of the provision of information

- 6.27** The timeliness in providing the brief of evidence and provisions of information to families was a particular issue raised by stakeholders.
- 6.28** Ms Kelly Warner, Chief Executive Officer, Aboriginal Legal Service (NSW/ACT), claimed that they 'are not served with briefs until the week before this goes to the Coroners Court' and 'it puts us and the families on the back foot for so many years'.⁴⁹²
- 6.29** Likewise, Mr Craig D. Longman, Head, Legal Strategies and Senior Researcher, Jumbunna Institute for Indigenous Education and Research, Research Unit, expressed his frustration with information being provided by the relevant department to the Coroner and the families so late in the process:

So frustratingly what we see in a lot of inquests is you have a two- or three-year run-up to the inquest, and in the second week the Coroner or the family is starting to investigate issues. Then suddenly these institutional organisations might dump thousands of pages of evidence that they could have brought forth earlier but they did not.⁴⁹³

⁴⁸⁸ Submission 104, Adjunct Professor Hugh Dillon, p 9.

⁴⁸⁹ Submission 104, Adjunct Professor Hugh Dillon, p 22.

⁴⁹⁰ Submission 104, Adjunct Professor Hugh Dillon, p 8.

⁴⁹¹ Submission 117, Legal Aid NSW, pp 89-90.

⁴⁹² Evidence, Ms Kelly Warner, Chief Executive Officer, Aboriginal Legal Service (NSW/ACT), 26 October 2020, p 41.

⁴⁹³ Evidence, Mr Craig D. Longman, Head, Legal Strategies and Senior Researcher, Jumbunna Institute for Indigenous Education and Research, Research Unit, University of Technology Sydney, 27 October 2020, pp 44-45.

- 6.30** Further, Mr Longman advised that in between the time of a death occurring and the provision of the brief of evidence, the family is provided with 'very little information out of the Coroner's office'. He indicated that 'they might get information out of the autopsy report, but they are rarely going to have any insight into what happened, and that could last 18 months to two years'. Mr Longman claimed that 'what happens often in those circumstances is those 18 months to two years they then become filled with hearsay and innuendo and theories of the family as to what happened, because no-one is giving them any information'.⁴⁹⁴
- 6.31** Adjunct Professor Dillon was 'shocked' that families 'would only get a brief a week before an inquest', commenting that 'for families to only see the full picture as is known to the Coroner at that point is unusual'. He said that he did not know what the explanation for this might be and although he hesitated to criticise anyone he argued that 'it is problematic'.⁴⁹⁵
- 6.32** Mr Evenden from Legal Aid NSW was of the view that the timing of the brief of evidence and provision of information to families can vary, commenting that 'in some cases we have had Aboriginal death in custody matters with some Coroners falling over themselves to get information to the families quickly', and 'in other matters you might not get a very large brief until six weeks before the inquest'. Mr Evenden advised that 'there are definite improvements in providing information to families that could happen all through the system'.⁴⁹⁶
- 6.33** Legal Aid NSW further argued that when families receive a brief of evidence only four to six weeks before the inquest it provides insufficient time to discuss the evidence in the brief with the family and properly prepare for the inquest. It also advised that 'the Court does not provide regular updates to families, who are often left to repeatedly make requests for information', and often these requests for documentation are denied.⁴⁹⁷
- 6.34** Dr Fiona Allison and Professor Chris Cunneen from the Indigenous Law and Justice Hub, Jumbunna Institute for Indigenous Education and Research, and Ms Melanie Schwartz, Deputy Head of School, Law, University of Technology Sydney, emphasised the importance of families being informed along the process:
- Families also need access to information as early as possible to help alleviate their inevitably high levels of grief and distress and to ensure appropriate levels of participation throughout the investigation process. This includes information about processes and about potential outcomes in advance of court proceedings. They ought also to be advised of a death in custody in a culturally safe and timely fashion.⁴⁹⁸
- 6.35** Some of the family members who have lost a loved one in custody and those who supported these families commented on the delays in receiving information and how this impacted them.
- 6.36** Adjunct Professor Newhouse, who supported the Dungay Family, told the committee that after being notified of a death 'essentially families have to wait 12 to 18 months before they really

⁴⁹⁴ Evidence, Mr Longman, 27 October 2020, p 49.

⁴⁹⁵ Evidence, Adjunct Professor Dillon, 27 October 2020, pp 52-53.

⁴⁹⁶ Evidence, Mr Evenden, 26 October 2020, p 42.

⁴⁹⁷ Submission 117, Legal Aid NSW, p 78.

⁴⁹⁸ Submission 108, Dr Fiona Allison and Professor Chris Cunneen from the Indigenous Law and Justice Hub, Jumbunna Institute for Indigenous Education and Research, and Ms Melanie Schwartz, Deputy Head of School, Law, University of Technology Sydney, p 7.

hear anything'. Adjunct Professor Newhouse suggested that the 'secrecy of the investigation needs to be punctured', commenting that 'it is not a therapeutic pathway'.⁴⁹⁹

6.37 Mr Paul Silva, nephew of David Dungay Jr who died in custody, stated that 'we were basically blind and we did not know what really happened to David until the coronial inquiry'. He said that in between being notified of the death and the coronial inquest they were shown the video of what had occurred and had a meeting with the Justice Health Staff and Corrective Services staff in Sydney but that was all.⁵⁰⁰

6.38 Mr Padraic Gibson, Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, and friend of the Chatfield Family, said that the family 'felt "kept in the dark" about crucial information in the long period between his death in September 2017 and the time they were provided with the brief of evidence for the inquest by their legal counsel, in the week before the inquest was set to start almost three years later'. Mr Gibson commented that 'I believe that in the case of Tane Chatfield, having an independent investigation team, dedicated to both involving the family of the deceased and pursuing evidence with due rigour, would have saved the considerable extra trauma suffered by the family, who spent many years without basic facts, suspecting foul play'.⁵⁰¹

6.39 Ms Taleah Reynolds, sister of Nathan Reynolds, told the committee that 'it was not until the brief was handed over that I knew what any of the evidence was' and this was 'some six to nine months' following the death.⁵⁰²

6.40 The Reynolds Family felt that they were 'lucky' to have a detective working on the investigation who showed compassion and went the extra mile to keep them informed as the investigation progressed. However, the Reynolds Family said that even with the support of this detective it was difficult not being provided information in a timely manner:

With that said, the waiting time between Nathan's death and inquest has been traumatic. There are times when the drip-feeding of information drags out our pain. Our lives are a series of meetings about this and we aren't even at inquest yet. It should not be up to the whim of an individual officer as to whether families are kept in the loop of an investigation's progress into their loved ones' death in custody. It should be standard procedure. Every First Nations family should be able to take for granted that they will be informed, and that they can trust the transparency and sensitivity of the review into their loved one's death.⁵⁰³

Impact of timeframes on families

6.41 The committee heard that the greatest impact of the lack of resourcing of the NSW Coroners Court and the extended lengths of time it takes for an inquest to be completed was on the families involved in the inquest.

⁴⁹⁹ Evidence, Adjunct Professor Newhouse, 26 October 2020, p 64.

⁵⁰⁰ Evidence, Mr Paul Silva, nephew of David Dungay Jr, 26 October 2020, p 65.

⁵⁰¹ Submission 115, Jumbunna Institute of Indigenous Education and Research, p 17.

⁵⁰² Evidence, Ms Taleah Reynolds, sister of Nathan Reynolds, 7 December 2020, p 11.

⁵⁰³ Submission 124, Reynolds Family, p 7.

- 6.42** The Hon Lea Drake, Commissioner Integrity, Law Enforcement Conduct Commission, told the committee that 'the difficulty in this area is the entrenched resentment and sorrow that people feel because of the delay'. She highlighted that 'if you were to lose a child in these circumstances and the coronial inquest was years later, you would feel—as I have met people who feel this way—bereft, suspicious and aggrieved'. Commissioner Drake stated 'that sorrow can only be dealt with by independent and speedy resolution of the issue', and even if no misconduct was found it is better to find this out early on.⁵⁰⁴
- 6.43** The National Justice Project stated that the lengthy delays within the coronial process, 'only service to re-traumatise families of victims'. It explained that 'long delays disrupt the own emotional grieving of families and hinders their ability to achieve closure after the death of a loved one'.⁵⁰⁵
- 6.44** Legal Aid NSW highlighted that the two to three or more years of delays following a death 'impacts on the quality of the evidence, causes great distress to the family, and can diminish the utility of any recommendations'. It indicated that 'the State Coroner's latest annual report refers to "unavoidable delays in hearing inquests", but does not raise any issue with the impacts of these delays on the coronial process and family members of the deceased'. Legal Aid NSW noted that in their experience in representing family members 'these delays cause unacceptable levels of prolonged grief and suffering'.⁵⁰⁶
- 6.45** Along similar lines, Adjunct Professor Dillon advised that 'studies have demonstrated that lengthy delay in conducting inquests causes significant distress to bereaved families'. He said that 'the attrition of evidence, financial strain and prolonged grieving, as well as the enforced experience of recounting information years after a fatal event are of particular concern'. Adjunct Professor Dillon also highlighted that 'it may be even more traumatic for Indigenous families', given 'they have, as a people, always had troubled relationships with courts and a justice system imposed on them'. He went on to say that 'delay, which is endemic in the NSW coronial system, must afflict them with an added burden of grief and perhaps amplify their sense of injustice'.⁵⁰⁷
- 6.46** Further, Adjunct Professor Dillon noted that 'the second major detriment of prolonged delay in the coronial system is that the "topicality" of the fatal event passes, and with it, often, the incentive to take remedial action in respect of preventable deaths'. He explained that 'if coronial action is slow, inquests may come too late to provide worthwhile recommendations, thereby draining the death preventive potential from the investigative effort'. Adjunct Professor Dillon stated that 'this also has adverse impact on family members' as 'for many mourners, the idea that a life has not been lost in vain but will contribute to preventing future deaths is the only source of solace they can find'.⁵⁰⁸
- 6.47** Dr Allison, Professor Cunneen and Ms Schwartz noted that the delays in the coronial system is an impact for all who have experienced a death, not just First Nations families and communities. However, they highlighted that 'problems of significant delay in the NSW coronial system may

⁵⁰⁴ Evidence, The Hon Lea Drake, Commissioner Integrity, Law Enforcement Conduct Commission, 7 December 2020, pp 37-38.

⁵⁰⁵ Submission 102, National Justice Project, p 19.

⁵⁰⁶ Submission 117, Legal Aid NSW, p 75.

⁵⁰⁷ Submission 104, Adjunct Professor Hugh Dillon, pp 17-18.

⁵⁰⁸ Submission 104, Adjunct Professor Hugh Dillon, p 18.

be exacerbated for First Nations peoples for a number of reasons, including the prevalence of deaths in custody hearings in First Nations communities, and community members' perceptions of being locked out of, feeling distrustful of, and/or being treated differently (in a negative sense) within the coronial system'.⁵⁰⁹

6.48 Likewise, the Jumbunna Institute of Indigenous Education and Research noted that 'whilst we imagine these delays apply to all Coronial matters in New South Wales, they have, in our experience, particular and damaging impacts on First Nations families who are more likely to have a distrust of both the institutions in which the deaths occur and those tasked currently to investigate the deaths'. The Jumbunna Institute explained that for First Nations families this can lead to an even greater sense that the state is 'indifferent to these deaths and the families who suffer as a result' and/or 'there is an intention to "cover up" what happened'.⁵¹⁰

6.49 The Jumbunna Institute of Indigenous Education and Research also quoted from the following family members who have lost a loved one in custody on how the delays made them feel:

- Ms Taleah Reynolds, sister of Nathan Reynolds, said 'there's no timeline for anything ... It just goes on and on. I went to a funeral last week and I sat there and thought, once you have a funeral, that's your closure. But because of what's happened, there's no closure. We've never had the time to mourn Nathan'.
- Ms Leetona Dungay, mother of David Dungay Jr, said: 'We have waited so long for an inquest date to be set. Why must I live in pain not knowing? ... we want to know the truth. As a mother, I deserve to know the truth and will not rest until I know why my son died. I'm incredibly upset and stressed, with my family here with me, about the lengthy delay that's taken to get us here today. I hoped and prayed for closure from this inquest, but now we have to wait another year in our fight for justice, to again hear from all those responsible that they don't "recall" what happened to my son'.⁵¹¹

6.50 In terms of the impact timeframes have on the families and what could be done to improve their experience, Judge Henson informed the committee that the State Coroner was currently developing a Practice Note specific to the management of all First Nations deaths in custody. He advised that the objectives of this Practice Note will be to ensure:

- coronial investigations and mandatory inquests in these matters are conducted in a timely and proper manner
- the family of the deceased are provided with appropriate information and material on the status of the investigation and the coronial process in a culturally appropriate, timely and proper manner.⁵¹²

6.51 Judge Henson advised that 'the Practice Note is currently in the consultation phase' and 'once finalised, it will be gazetted and made publicly available on the Coroners Court website'.⁵¹³

⁵⁰⁹ Submission 108, Dr Fiona Allison, Professor Chris Cunneen and Ms Melanie Schwartz, p 5.

⁵¹⁰ Submission 115, Jumbunna Institute of Indigenous Education and Research, p 26.

⁵¹¹ Submission 115, Jumbunna Institute of Indigenous Education and Research, pp 26-27.

⁵¹² Submission 100, Chief Magistrate of the Local Court of New South Wales, p 11.

⁵¹³ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 12.

Cultural considerations of the coronial system

6.52 Stakeholders gave evidence that the coronial system currently lacks cultural considerations that would create a culturally safe process for First Nations families going through the process. This section outlines the need for First Nations staff to be employed by the NSW Coroners Court and other cultural and therapeutic options. Separate to this, evidence was received on the need for First Nations staff to be employed across the criminal justice system as a whole, and this is discussed in chapter 7.

First Nations staff

6.53 Many stakeholders called for an Aboriginal Liaison Officer and/or First Nations staff to be employed by the NSW Coroners Court to ensure culturally safe engagement with First Nations families.

6.54 The Reynolds Family, Ms Warner from the Aboriginal Legal Service (NSW/ACT), Dr Danielle McMullen, President, Australian Medical Association, and the NSW Nurses and Midwives' Association, all advocated for an Aboriginal Liaison Officer in the NSW Coroners Court.⁵¹⁴

6.55 Distinguished Professor Larissa Behrendt AO, Director, Jumbunna Institute for Indigenous Education and Research, Chair in Indigenous Research, went one step further, not only calling for the appointment of a First Nations Liaison Officer but also the appointment of a First Nations Elder to assist the Coroner, and First Nations Coroners and Counsels Assisting.⁵¹⁵

6.56 Mr Tony McAvoy SC, Chair of the NSW Bar Association's First Nations Committee, and Member, Joint Working Party on the Over-representation of Indigenous People in Custody in New South Wales, suggested that 'having an Aboriginal Liaison Officer in the court who is able to speak with the family of the deceased' would assist with the inquest process. In addition, Mr McAvoy suggested that the NSW Coroners Court 'mirror the provisions in the *Land and Environment Court Act*, which provide for an Aboriginal Commissioner to sit with the Judge in the Land and Environment Court or the Coroner in the Coroners Court'.⁵¹⁶

6.57 Mr Evenden highlighted that a great number of deaths reported to the Coroner each year impact First Nations families and this justifies the need for the employment of First Nations staff:

But for Aboriginal families—I mean, there are 6,000 reportable deaths every year and 99 or 98 per cent of them are not going to inquest. A large proportion—we do not even know how many—are Aboriginal families and Aboriginal deceased. There is a real need for the court to actually become more culturally competent—to employ Aboriginal staff, to have an Aboriginal liaison and to do those sorts of things which will mean we can lessen this divide which exists. It is no doubt exists between the Aboriginal

⁵¹⁴ Submission 124, Reynolds Family, p 7; Evidence, Ms Warner, 26 October 2020, p 31; Evidence, Dr Danielle McMullen, President, Australian Medical Association, 3 December 2020, p 31.

⁵¹⁵ Evidence, Distinguished Professor Larissa Behrendt AO, Director, Jumbunna Institute for Indigenous Education and Research, Chair in Indigenous Research, 27 October 2020, p 41.

⁵¹⁶ Evidence, Mr Tony McAvoy SC, Chair of the NSW Bar Association's First Nations Committee, and Member, Joint Working Party on the Over-representation of Indigenous People in Custody in New South Wales, 26 October 2020, p 7.

community and what is happening in terms of deaths in custody and other matters, and it is really a fault of the system that it is there.⁵¹⁷

- 6.58** The National Justice Project stated that 'there needs to be an Aboriginal Liaison Officer within the Coroner's Court', and such a role 'would be able to assist and help Aboriginal families navigate through the process after the death of their loved one and facilitate their engagement in the process'. It quoted Ms Leetona Dungay and Ms Christine Dungay, family members of David Dungay Jr, on their calls for 'an Aboriginal Coroner and Investigators in NSW, alongside better First Nations representation in employment throughout the entire criminal justice system'. The Dungay Family acknowledged 'that this would have improved their own experience in the Coroner's Court and would help them to build some level of trust in the system, which is exceptionally low'.⁵¹⁸
- 6.59** Adjunct Professor Dillon informed the committee that the NSW Coroners Court and Forensic Medicine Service currently does not have any Indigenous staff. He said that 'the Koori Engagement Unit established by the Victorian Coroners Court and staffed by Indigenous officers is a model that could be emulated in NSW'. Adjunct Professor Dillon explained that this unit could support not only Indigenous deaths in custody but other Indigenous deaths that are reported to the Coroner each year and would work with Aboriginal Medical Services and Aboriginal Legal Services to ensure families in remote parts of New South Wales are provided support and information in a culturally safe way.⁵¹⁹
- 6.60** Likewise, Legal Aid NSW advised that 'there are currently no Aboriginal or Torres Strait-Islander-identified positions within the NSW Coroners Court'. Further, it advised that 'the Coronial Information and Support Program has never had any Aboriginal or Torres Strait Islander staff, and we are not aware of any Aboriginal or Torres Strait Islander staff ever filling any positions within the counselling services provided by Department of Forensic Medicine'. Legal Aid NSW also pointed to the Victorian Koori Family Engagement Unit as a model to be adopted in New South Wales to 'act as a point of contact for Aboriginal and Torres Strait Islander families, provide support to the families during the process, and help build trust and informed participation in the system'. It added that 'this should be developed in consultation with Aboriginal and Torres Strait Islander community groups'.⁵²⁰
- 6.61** Dr Allison, Professor Cunneen and Ms Schwartz likened the current coronial system to 'having a domestic violence service and not employing any women'. They said that many of the problems identified with the system 'can be resolved, to a significant degree, through employment of First Nations liaison persons within the coronial system, including at the Coroner's Court'. They also suggested that the Victorian Koori Engagement Unit be considered as a model in New South Wales 'as a priority'.⁵²¹
- 6.62** In regards to such a role being established in the NSW Coroners Court, Judge Henson advised that at present the State Coroner is working with the Department of Communities and Justice 'to identify options to provide support to Aboriginal families throughout the coronial process,

⁵¹⁷ Evidence, Mr Evenden, 26 October 2020, p 40.

⁵¹⁸ Submission 102, National Justice Project, pp 19-20.

⁵¹⁹ Submission 104a, Adjunct Professor Hugh Dillon, pp 14-15.

⁵²⁰ Submission 117, Legal Aid NSW, pp 80-81.

⁵²¹ Submission 108, Dr Fiona Allison, Prof Chris Cunneen and Melanie Schwartz, p 9.

including the possible establishment of Aboriginal Liaison Officer positions in the Coroners Court'. He indicated that 'such a role would be of substantial value and assistance in relation to the deaths of all Aboriginal persons, but particularly deaths in custody, and would go towards implementing the Royal Commission's recommendations aimed at making the coronial process more culturally appropriate'.⁵²²

- 6.63** In this regard, Mr Coutts-Trotter from the Department of Communities and Justice advised that he is aware of work being done by the NSW Coroners Court on a new Practice Note 'that would really set and change policy and procedure for how the Coroner deals with the deaths of First Nations people'. He added that 'we are in discussions at the moment with the Coroner to provide what would be described as Aboriginal family support officers through the coronial court to provide better support to Aboriginal families and to adopt potentially some of the ways of working that are clearly having an impact in Victoria'.⁵²³
- 6.64** In this regard, the NSW State Coroner, Magistrate Teresa O'Sullivan, later confirmed that two Aboriginal Liaison Officer roles have recently been created, with recruitment to commence shortly.⁵²⁴

A therapeutic and culturally safe approach

- 6.65** Stakeholders called for a more therapeutic approach in the coronial system, highlighting that the coronial process is re-traumatising for families and lacks cultural consideration and support.
- 6.66** The Aboriginal Legal Service (NSW/ACT) stated that 'the current coronial system can often re-traumatise families because of the formality and complexity of the process', describing the elements of the system that particularly impact on families:

In particular, the severe delays that can arise between the time of death and the release of coroner's findings can lead to a great deal of uncertainty and grief for families. This is often combined with a lack of understanding about what to expect from coronial proceedings, as well as a high level of formality in the manner and style of communications from the court. There is also a lack of clarity about the role of the police, who often act as preliminary investigators and can be seen in discussion with Counsel Assisting and the coroner. In addition, families often feel that barriers exist for their voice to be heard in coronial proceedings. The importance to families of telling their story cannot be understated.⁵²⁵

- 6.67** In addition, the Aboriginal Legal Service (NSW/ACT) highlighted that 'there are also significant social, emotional and financial costs to families being able to meaningfully engage and participate in the coronial process'. It also noted that further issues often arise when the coroner's findings are handed down and families are not able to see how recommendations are being monitored or implemented, or systemic issues addressed. The Aboriginal Legal Service (NSW/ACT) therefore recommended 'that families are provided with wraparound support

⁵²² Submission 100, Chief Magistrate of the Local Court of New South Wales, pp 10-11.

⁵²³ Evidence, Mr Coutts-Trotter, 7 December 2020, pp 51-52.

⁵²⁴ Correspondence from Magistrate Teresa O'Sullivan, NSW State Coroner, to Chair, 24 March 2021.

⁵²⁵ Submission 120, Aboriginal Legal Service (NSW/ACT), p 33.

throughout the process', noting that their organisation could be best placed to do this with adequate funding.⁵²⁶

6.68 Adjunct Professor Newhouse stated that families 'are re-traumatised through the process' and that it is not therapeutic nor culturally safe. He explained that families come to an inquest 'hoping that they will hear the truth and that they will get justice', but are 'often disappointed'. Adjunct Professor Newhouse reflected on his work in supporting the Dungay Family, where he was able to guide the family through the process, but commented that 'if you come at this process cold, it is incredibly alienating'.⁵²⁷

6.69 Mr Raul Bassi, Secretary, Indigenous Social Justice Association, told the committee that simple things like the location of the inquest hearings and available transport to those hearings, as well as even the food available can make a big difference. He explained that there used to be coronial inquests held in regional towns that would make it much easier for the families to travel there, however now they are only held in Lidcombe. Mr Bassi outlined that their organisation provides support to families by way of accommodation and travel to attend these hearings in Sydney. Even getting to Lidcombe Court on the day, Mr Bassi explained that there is only one bus every hour from the railway station and so their organisation also supports the families by providing cars to pick people up from the station. Further, Mr Bassi said that there is only one coffee shop within the NSW Coroners Court and it is very expensive, so again their organisation will prepare food for the families. He stated: 'It is absolutely organised to stop the family from coming'.⁵²⁸

6.70 In addition, Mr Bassi highlighted the need for supporting family members on the day of hearings given the trauma that they would be subjected to:

I do not know if you have been in some inquests, they start to talk about the death of a person you love and repeat it, and here the voice of the person is in the recording. You see the case of David Dungay when the guards are jumping on him and pushing him down and the guy saying he can't breathe. That killed the family. The family of Eric Whittaker, when he is dying with a brain haemorrhage, asking for support, asking for family and the guard in the office is saying, "You have to wait two hours", and they have to hear that. Put in your mind what is the outcome of an inquest.⁵²⁹

6.71 Dr Rebecca Scott Bray, Associate Professor of Criminology and Socio-Legal Studies, University of Sydney, and Emeritus Professor Phil Scraton, School of Law, Queen's University, Belfast, also provided evidence about the harrowing experience families are put through when attending the court hearings:

The explicit detail of fatal injury is delivered via often terrifying pieces and disturbing detail. The violence of inquiry becomes visceral as the bereaved are subjected to repeated audio and visual evidence of the last moments of their loved one's life, are subjected to different iterations of that evidence, and consistently, staunchly, attend court. Disconcertingly, uniformed rank and file police or corrections officers directly involved in the death sit close to family members in the public gallery. While the inquisitorial process claims that it is non-adversarial regarding deaths in contested

⁵²⁶ Submission 120, Aboriginal Legal Service (NSW/ACT), pp 33-34.

⁵²⁷ Evidence, Adjunct Professor Newhouse, 26 October 2020, p 63.

⁵²⁸ Evidence, Mr Raul Bassi, Secretary, Indigenous Social Justice Association, 27 October 2020, pp 63 and 65.

⁵²⁹ Evidence, Mr Bassi, 27 October 2020, p 63.

circumstances, lawyers adopt often aggressive tactics, including the demonisation of the deceased, to deflect accountability from those they represent. It can be a hurtful, damaging process for the bereaved, not least when those involved in the death offer condolences to families. The 'adversarial wolf in inquisitorial sheep's clothing' is absent from coronial findings, but it has lasting, destructive impact on the lives of the bereaved and on the communities in which they live.⁵³⁰

- 6.72** The sisters of Nathan Reynolds described their experience when attending the NSW Coroners Court hearings for the inquest into their brother's death. They said that 'it was disappointing and upsetting having to walk past the Correctional Officers that were on duty the night Nathan died, every day of the inquest'. They also spoke of having to hear 'the officers giving excuses, not remembering events and showing little remorse from their lack of care/response to Nathan's call for help'. They suggested that 'staff that were witnesses to the death should not be allowed in the corridor where families have to see them'.⁵³¹
- 6.73** In particular, Ms Taleah Reynolds described how their family was made to feel unwelcome when attending the hearing days, commenting that 'we have to be quiet, we have to keep our mouths shut'. She said that it was difficult organising with other members of the family to attend the hearings and in the end 'we were arguing with family not to come because we had to try to not make out that we were being intimidating to the witnesses who were taking the stand that day'.⁵³²
- 6.74** Other stakeholders also highlighted the lack of cultural considerations within the structure of the coronial process and advocated for a more therapeutic and culturally safe approach.
- 6.75** Mr Brendan Thomas, Chief Executive Officer, Legal Aid NSW, told the committee that 'when these families come before the coronial system there is also untapped potential for something else—for healing and reconciliation—but most of the time, unfortunately, that does not happen'. He noted that 'Aboriginal families of those dying in custody, or elsewhere, are not well served by the current coronial system', that do not employ Aboriginal staff or undertake investigations in a culturally appropriate way. Mr Thomas said that 'there is enormous distrust in the correctional system and police and the result is a lack of confidence in the process and the outcomes and often an alienation with both'. He suggested that 'Aboriginal controlled organisations [can] play a vital role in the changes that we need to make' to the system.⁵³³
- 6.76** Further, Legal Aid NSW noted that 'there are no specific provisions in the Coroners Act that make provision for cultural considerations, particularly in relation to Aboriginal and Torres Strait Islander people'. It highlighted that New South Wales and South Australia are the only jurisdictions that do not make specific provisions in this regard. In particular, Legal Aid NSW noted that the New South Wales Act makes no provision for cultural considerations when dealing with investigation directions and exhumations, and with the exercise of post-mortem investigative functions, as well as considerations of the definition of 'relative' and 'senior next of kin'. Legal Aid NSW supported reforms to the Coroners Act to ensure coronial processes 'specifically accommodate cultural needs and considerations'.⁵³⁴

⁵³⁰ Submission 125, Associate Professor Rebecca Scott Bray and Emeritus Professor Phil Scraton, pp 16-17.

⁵³¹ Additional information, Reynolds Family, 9 February 2021, p 1.

⁵³² Evidence, Ms Taleah Reynolds, 7 December 2020, p 11.

⁵³³ Evidence, Mr Brendan Thomas, Chief Executive Officer, Legal Aid NSW, 26 October 2020, p 30.

⁵³⁴ Submission 117, Legal Aid NW, p 81.

- 6.77** Adjunct Professor Dillon stated that 'when the facts of a case are generally agreed, and testing of evidence in respect of the cause or circumstances of the death is not necessary, there appears to be considerable potential for more therapeutic, less formal, less complex procedures to be adopted for mandatory inquests'. He pointed to some suggestions made by other stakeholders, including 'holding inquests on country, incorporating cultural ceremonies such as smoking ceremonies, commencing inquests with a Welcome to Country or Acknowledgement of the Elders and people, placement of Indigenous symbols or significant objects in the inquest room and "recognition mentions"'. Adjunct Professor Dillon noted that the Coroners Act permits flexibility in this regard and 'with sensitivity and respect, they may be appropriate in some cases'.⁵³⁵
- 6.78** Dr Allison, Professor Cunneen and Ms Schwartz stated that 'the coronial system must consider how it can ensure substantive equality for First Nations peoples'. They said that 'various adaptations to the coronial system are required to ensure that these are attained through mechanisms and with end-results that accord with First Nations perspectives and needs'. They noted that by 'creating a culturally safe and respectful process in which families have a sufficient degree of input and control' will ensure the coronial process is therapeutic for First Nations people.⁵³⁶
- 6.79** In this regard, Dr Allison, Professor Cunneen and Ms Schwartz recommended that the NSW Government establish as a priority a First Nations Engagement Unit in the NSW Coroners Court, and as part of the work of the Unit, consideration should be given to:
- how restorative justice processes, such as a conference between families and those involved in a death in custody, including where held at an early stage in terms of coronial processes, might improve First Nations experiences of the coronial system
 - processes through which family and community participation can be prioritised through every stage of the coronial process
 - developing processes through which respect for culture and ensuring cultural safety is prioritised within the coronial system.⁵³⁷
- 6.80** The Jumbunna Institute of Indigenous Education and Research commented that 'reforms that focus on therapeutic jurisprudence in the coronial jurisdiction have the capacity to improve the experience of First Nation communities within the Inquest process'. The Jumbunna Institute suggested changes such as the appointment of First Nations staff, a greater opportunity for family members to have a voice during the process, adequate and appropriate spaces be provided to First Nations families during the inquest, providing financial support for families to attend the hearings, and adopting some of the principles of circle sentencing. The Jumbunna Institute therefore recommended that 'the NSW Coroner's Court should incorporate and prioritise the principles of therapeutic jurisprudence, subject to the guidance of First Nation communities, Liaison Officers and Elders'.⁵³⁸
- 6.81** Relevant to this, the Aboriginal Legal Service (NSW/ACT) drew to the committee's attention a Practice Direction issued in September 2020 by the Victorian State Coroner in relation to First

⁵³⁵ Submission 104a, Adjunct professor Hugh Dillon, pp 18-19.

⁵³⁶ Submission 108, Dr Fiona Allison, Professor Chris Cunneen and Ms Melanie Schwartz, p 4.

⁵³⁷ Submission 108, Dr Fiona Allison, Professor Chris Cunneen and Ms Melanie Schwartz, p 19.

⁵³⁸ Submission 115, Jumbunna Institute of Indigenous Education and Research, pp 43-44 and 51.

Nations deaths in custody. The Practice Direction aims to enhance the implementation of Recommendation 8 of the *Royal Commission into Aboriginal Deaths in Custody*, relating to the development of a protocol for the conduct of coronial inquiries into deaths in custody. In particular, it will provide directions regarding cultural considerations and standards in the investigation of deaths of First Nations people in custody in Victoria. The Aboriginal Legal Service (NSW/ACT) recommended that New South Wales adopt a similar model.⁵³⁹

Accountability mechanisms

- 6.82** This section will discuss several concerns in relation to accountability mechanisms, including implementation of Coroner's recommendations, referral of matters to the Director of Public Prosecutions (DPP) and the limited review of systemic failures.

Accountability of Coroners recommendations

- 6.83** As outlined in chapter 4, the Coroner will make findings and recommendations at the conclusion of an inquest into a death in custody. These are provided to the relevant Minister, government departments and the Attorney General, who under a memorandum is to respond to the recommendations within six months outlining any action being taken. Stakeholders gave evidence that this process could be strengthened to ensure the relevant government departments are held more accountable to the implementation of Coroners recommendations.
- 6.84** The Aboriginal Legal Service (NSW/ACT) noted that under section 82 of the *Coroners Act 2009* the Coroner may make recommendations in relation to any matter connected with the death, including matters of public health and safety. However, it advised that the Act 'currently does not impose any obligation on a government entity or public statutory authority to respond to the recommendations made by the coroner', and 'this is a crucial area where reform is needed in NSW'. It highlighted that the Premier's Memorandum exists, however noted that this has deficiencies as it makes it discretionary for a Minister to respond to coronial recommendations and does not have the force of law.⁵⁴⁰
- 6.85** Similarly, the Jumbunna Institute of Indigenous Education and Research highlighted that in New South Wales there is 'no statutory requirement that a Coroners' recommendations be read and responded to by state agencies or private organisations'. It noted that currently government agencies are only bound by the Premier's Memorandum which was due for review in 2014, but is yet to be amended or reviewed. The Jumbunna Institute commented that the response from government agencies to coronial recommendations under this memorandum is not 'a publicly-performed function', and although the Attorney General reports on the responses, those that are published online show various level of detail, with health organisations tending to be more extensive than the responses from the NSW Police Force and Corrective Services NSW. It therefore recommended that the *Coroners Act 2009* be amended to 'embed a mandatory requirement for Government departments and private institutions to respond to, and report on the implementation of, recommendations made'.⁵⁴¹

⁵³⁹ Correspondence, Aboriginal Legal Service (NSW/ACT) to Chair, 17 March 2021.

⁵⁴⁰ Submission 120, Aboriginal Legal Service (NSW/ACT), pp 29-30.

⁵⁴¹ Submission 115, Jumbunna Institute of Indigenous Education and Research, Research Unit, pp 21-22 and 52.

- 6.86** Legal Aid NSW also raised concerns that despite the operation of the Premier's Memorandum there has been 'declining levels of adherence' over recent years and a 'potential for lack of proper consideration and attention to coronial recommendations by NSW Government agencies, particularly as they relate to deaths in custody'. It reiterated that 'there should be a legislative requirement for the provision and publication of a government agency response to coronial findings and recommendations'. It also stated that the Coroner should be 'empowered to call for further explanations or information as required, including reports on further action taken in relation to recommendations'.⁵⁴²
- 6.87** The Aboriginal Legal Service (NSW/ACT) highlighted that the RCIADIC made a recommendation that within three calendar months of publication of the Coroners findings and recommendations the relevant agency must provide a response, in writing, including whether any action has been taken or is proposed to be taken. It indicated that this has been adopted in Victoria and specified in its Coroners Act. The Aboriginal Legal Service (NSW/ACT) asserted that 'this has not been fully implemented in NSW, and the legislation should be amended in order to do so'.⁵⁴³
- 6.88** Likewise, the NSW Aboriginal Land Council noted concerns 'about the limited enforceability for Coroner's Court recommendations, and limited mechanisms to make sure that the government acts on those recommendations'. It also looked to the practice in Victoria where 'the government has to make a written response to a coroner's report within three months, which provides a degree of public accountability'. The Council also suggested that Coroners should be 'empowered to provide commentary on the extent to which the government has implemented their recommendations'.⁵⁴⁴
- 6.89** The NSW Bar Association said that 'it is rare to see state agencies being held to account about their response to coronial recommendations and it would be a very welcome development if more action was taken at the parliamentary level to question why so few coronial recommendations are implemented'. In this regard, the Association made the recommendation that the Parliament's oversight role of these processes and coronial recommendations be expanded to 'promote increased accountability and a mechanism to revisit and track the progress of implementation'.⁵⁴⁵
- 6.90** Judge Henson also made comment about the lack of requirement for government to respond to recommendations:
- Given the time and resources invested in undertaking coronial investigations and inquests, it seems illogical that there is no statutory requirement for NSW Government to officially respond to these recommendations, particularly in those scenarios, such as deaths in custody, where the inquest which assisted in forming the recommendations was mandatory. Further development in this area appears to be sensible.⁵⁴⁶
- 6.91** Associate Professor Scott Bray added that although mandating responses to coronial recommendations is important, inquests require dedicated research support. She indicated that

⁵⁴² Submission 117, Legal Aid NSW, pp 86-87.

⁵⁴³ Submission 120, Aboriginal Legal Service (NSW/ACT), pp 29-30.

⁵⁴⁴ Submission 98, NSW Aboriginal Land Council, p 5.

⁵⁴⁵ Answers to questions on notice, NSW Bar Association, 22 December 2020, pp 1-2.

⁵⁴⁶ Submission 100, Chief Magistrate of the Local Court of New South Wales, pp 9-10.

'Coroners should have the capacity to make informed, targeted recommendations of quality and feasibility within a clear time frame for implementation' and there should be state and national oversight of these findings and the implementation of the recommendations. Associate Professor Scott Bray commented that 'this would enable an appropriate circuit of accountability' and 'if we fail to follow through on this fundamental aspect of coronial practice, bereaved families and their communities will endure further hurt'.⁵⁴⁷

- 6.92** Adjunct Professor Dillon held a similar view, stating that Coroners need to be 'developing high-quality, robust practical recommendations' and this could be achieved by building relationships between coroners and people, such as at specialist university units, who can look at where things have worked in the past, the potential risks and solutions. Adjunct Professor Dillon also said that you need Coroners to be 'educated and specialist enough to recognise systemic problems when they see it and seek expert help'. In addition, he said you need a system which requires a response not just from government but from everybody involved. Adjunct Professor Dillon said that Victoria has a good model, but 'it is not a perfect solution because it still requires good, quality recommendations to be made', commenting 'if you require people to respond within three months to wishy-washy recommendations, that is not an answer really'.⁵⁴⁸

Referral to the Director of Public Prosecutions

- 6.93** Section 78 of the *Coroners Act 2009* provides for the Coroner to suspend an inquest and refer a matter to the DPP, if the Coroner forms the opinion that:
- the evidence is capable of satisfying a jury beyond reasonable doubt that a known person has committed an indictable offence
 - there is a reasonable prospect that a jury would convict the known person of the indictable offence
 - the indictable offence would raise the issue of whether the known person caused the death, suspected death, fire or explosion with which the inquest or inquiry is concerned.⁵⁴⁹
- 6.94** Stakeholders reported that referral to the DPP under these circumstances very rarely occurs, often resulting in lack of criminal accountability.
- 6.95** The Aboriginal Legal Service (NSW/ACT), the National Justice Project, the Justice and Peace Office of the Catholic Archdiocese of Sydney, the Australian Medical Association and St Vincent de Paul Society of NSW reported that since the RCIADIC no criminal charges have been laid against an individual involved in a First Nations death in custody, and therefore no-one has been held criminally responsible.⁵⁵⁰

⁵⁴⁷ Evidence, Dr Rebecca Scott Bray, Associate Professor of Criminology and Socio-Legal Studies, University of Sydney, 27 October 2020, p 43.

⁵⁴⁸ Evidence, Adjunct Professor Dillon, 27 October 2020, p 46.

⁵⁴⁹ *Coroners Act 2009*, s 78.

⁵⁵⁰ Submission 120, Aboriginal Legal Service (NSW/ACT), p 26; Submission 49, Justice and Peace Office of the Catholic Archdiocese of Sydney, p 7; Submission 102, National Justice Project, p 22; Submission 103, Australian Medical Association, p 5; Submission 121, St Vincent de Paul Society of NSW, p 10.

6.96 Ms Taleah Reynolds, sister of Nathan Reynolds, told the committee that she has not seen anyone held accountable for a death in custody and until this occurs these deaths will keep occurring:

I have seen over and over that no-one is held accountable for a death in custody. They know they can hide behind a system. Therefore, these deaths will continue to happen until someone is held accountable and the precedent put out there that they cannot hide behind a system and they will be held accountable.⁵⁵¹

6.97 Dr Allison, Professor Cunneen and Ms Schwartz highlighted that 'many First Nations peoples experiencing the death of a loved one in custody may want accountability, but this rarely occurs through the inquest process'. They said that although 'Coroners may identify wrongdoing during an inquest, prosecution is not an inevitability, including because (commonly) coroners do not refer matters to the DPP'. They noted that this situation creates an environment where advocates need to continually manage families expectations about what an inquest will deliver, with families usually experiencing 'a failure of justice'.⁵⁵²

6.98 Mr Longman said that it is often not made clear to those involved in an inquest that it is an inquisitorial process and not an adversarial process that would lead to criminal accountability. He commented on these expectations from families involved and how criminal accountability has never occurred in relation to a First Nations death in custody:

So very often families will get this evidence, they will see witness statements come in, they will go to court and they will expect that if something comes out in this process that seems to be criminally negligent or seems to indicate homicide, that what happens then is someone goes to jail, and the reality is in Australia in First Nations deaths in custody that does not happen and has never happened.⁵⁵³

6.99 In its submission, the Jumbunna Institute for Indigenous Education and Research stated that 'there have been multiple instances across Australia and in New South Wales in which the DPP has exercised its discretion not to prosecute matters in which there is substantial evidence'. It said that 'the failure to refer matters to the DPP, and inaction by the DPP, are at the core of why First Nation communities view the inquest system and the broader legal system as incapable of holding individuals involved in deaths in custody accountable'.⁵⁵⁴

6.100 Further, the Jumbunna Institute explained that currently there is no statutory nor guideline requirement that the DPP consult with families about a decision as to whether or not to prosecute, and there is no requirement to provide public reasons for not proceeding with a prosecution of a death in custody. The Jumbunna Institute therefore recommended that:

- the DPP guidelines be amended to:
 - require Prosecutors to consult with families about decisions not to prosecute individuals involved in First Nation deaths where there has been a referral by a NSW Coroner

⁵⁵¹ Evidence, Ms Taleah Reynolds, 7 December 2020, p 9.

⁵⁵² Submission 108, Dr Fiona Allison, Prof Chris Cunneen and Melanie Schwartz, p 15.

⁵⁵³ Evidence, Mr Longman, 27 October 2020, pp 49-50.

⁵⁵⁴ Submission 115, Jumbunna Institute of Indigenous Education and Research, pp 24 and 29.

- require Prosecutors to give written reasons to families where it refuses to consider prosecution of, or makes a determination not to prosecute, individuals involved in a First Nation death in custody.
 - the NSW Government establish an independent merits review process to review decisions of Prosecutors not to investigate and/or prosecute deaths of First Nations people.⁵⁵⁵
- 6.101** Other stakeholders suggested amendments to the Act to improve this process. The NSW Bar Association recommended that section 78 of the *Coroners Act 2009* be amended. It said that 'currently, the high threshold imposed creates an impediment to appropriate referrals to the DPP, one which duplicates the DPP's function'. It explained that the provision for the Coroner to form an opinion that 'there is a reasonable prospect a jury would convict' should be removed as this is 'superfluous to a coroner's modern functions' and removal would enable referrals to the DPP to occur earlier.⁵⁵⁶
- 6.102** The Association highlighted that the 'terms of section 78 may reflect former committal processes under the common law and the predecessors of *Coroners Act 2009* (NSW) whereby a Coroner would commit a person for trial directly from a coronial inquest'. It outlined that the Coroner no longer has this power and should not be required to make this assessment for referral. Further, the Association advised that 'the rules of admissibility of evidence do not apply in coronial proceedings, yet section 78 requires a coroner to assess the prospects of conviction by a jury based upon admissible evidence and anticipating legal directions which form no part of a Coroner's function'.⁵⁵⁷
- 6.103** Mr Jason O'Neil, Executive Director, Ngalaya Indigenous Corporation, agreed with the NSW Bar Association's recommendation that 'the threshold should be lowered and that the Coroner should be greater empowered to make those referrals' to the DPP.⁵⁵⁸ In addition, the Ngalaya Indigenous Corporation commented that 'increased personal accountability at all levels, from the Minister and Police Commissioner down to individual officers working for NSW Police and Correctional Services is necessary to combat deaths in custody'. It stated that 'where death is a result of negligence, there must be personal accountability for that negligence and systemic change to ensure it cannot be repeated'.⁵⁵⁹

Examining systemic issues

- 6.104** Taking a step further, stakeholders raised concerns that Coroners are not effectively fulfilling their role in addressing systemic failures and therefore preventing further deaths in custody.
- 6.105** Legal Aid NSW stated that 'none of the inquest findings and recommendations are the subject of further systematic review or analysis by any NSW agency or body, in particular with a view to preventing or reducing the likelihood of further deaths in custody'.⁵⁶⁰

⁵⁵⁵ Submission 115, Jumbunna Institute of Indigenous Education and Research, pp 25 and 52.

⁵⁵⁶ Submission 3a, NSW Bar Association, p 13.

⁵⁵⁷ Submission 3a, NSW Bar Association, p 13.

⁵⁵⁸ Evidence, Mr Jason O'Neil, Executive Director, Ngalaya Indigenous Corporation, 26 October 2020, p 22.

⁵⁵⁹ Submission 84, Ngalaya Indigenous Corporation, p 11.

⁵⁶⁰ Submission 117, Legal Aid NSW, p 87.

- 6.106** The Indigenous Social Justice Association stated that 'the role currently played by the NSW Coroner in regard to deaths in custody still provides a veneer of hope for the families as if significant change is possible'. However, it argued that it has 'become such a regular part of the system that the coroner is now simply providing a rubber stamp at the end of the custody deaths process'. The Association said that 'coroners should be encouraged to deliver findings that could lead to reforms, rather than simply support the status quo', including making 'recommendations to change procedures, and follow up with the relevant and responsible authorities'.⁵⁶¹
- 6.107** Adjunct Professor Newhouse gave evidence that Coroners 'really want to find a cause of death but they are not prepared to look at systemic failures', commenting that 'it is very hard to get Coroners to look at systemic prejudice'. He was of the view that 'there is scope to broaden the Coroner's jurisdiction' in this area and noted that this was looked at in the RCIADIC.⁵⁶²
- 6.108** Further, the National Justice Project provided an example in the case of David Dungay Jr where the family made submissions to the inquest advocating for the need to examine systemic failures in relation to the treatment of diabetes and mental health of inmates. However, the National Justice Project advised that the Coroner determined that these broader issues relating to the management of mental health fell outside of the parameters of the inquest. The National Justice Project indicated that the Dungay Family felt 'that this central issue was not meaningfully or adequately addressed, which highlights the limitations of the Coronial process and the failure of the NSW Government to implement the recommendations of RCIADIC'.⁵⁶³
- 6.109** Adjunct Professor Dillon advised that 'thoroughly conducted coronial inquiries hold the potential to identify systemic failures in custodial practices and procedures which may, if acted on, prevent future deaths in similar circumstances'. However, he noted that 'since the early 1990s, the death preventive function and potential of the NSW coronial system have never been fully explored by the NSW Government, its agencies and departments, or the Local Court'. Adjunct Professor Dillon said that 'power must be exercised effectively and be responded to with genuine intent to mitigate risk of death and injury', stating that 'we have some way to go in NSW before we can be confident our system is operating optimally'.⁵⁶⁴
- 6.110** Adjunct Professor Dillon also highlighted that currently 'due to lack of experience, training and professional development, not all part-time coroners have the capacity to think in terms of systems or can readily identify an issue in a complex system, much less formulate a practicable recommendation to solve a systems issue'. He reflected on his time as a Coroner, advising that during his nine years in the role he did not receive any 'training in the skills of analysing systems failure or writing recommendations', and obtained these skills on the job. Adjunct Professor Dillon stated that 'in NSW, much more could be done, especially in terms of enhancing the coronial system's capacity to develop robust recommendations for preventing death', and pointed to Victoria, who have established an in-house research unit and collaborates with specialist university centres to work on death prevention.⁵⁶⁵

⁵⁶¹ Submission 122, Indigenous Social Justice Association, pp 5-6.

⁵⁶² Evidence, Adjunct professor Newhouse, 26 October 2020, p 64.

⁵⁶³ Submission 102, National Justice Project, p 19.

⁵⁶⁴ Submission 104, Adjunct Professor Hugh Dillon, pp 2-4.

⁵⁶⁵ Submission 104, Adjunct Professor Hugh Dillon, pp 20-21.

- 6.111** Other stakeholders also suggested that the New South Wales Coroners capacity to examine systemic issues could be enhanced by adopting the model within Victoria, where it has established a Coroners Prevention Unit. This Unit, as described by the NSW Bar Association, is 'a specialist service to strengthen coroners' prevention role and provide them with expert assistance in reviewing deaths, collecting and analysing data, and developing prevention-focused recommendations'. The NSW Bar Association recommended that a similar resource be established in New South Wales and be adequately resourced to undertake this role.⁵⁶⁶ Dr Allison, Professor Cunneen, Ms Schwartz, Associate Professor Scott Bray and Emeritus Professor Scraton also made this recommendation.⁵⁶⁷
- 6.112** Alongside the establishment of a Coroners Prevention Unit in New South Wales, Legal Aid NSW also recommended that a specialist death review team with a statutory basis be established, similar to the Domestic Violence Death Review Team, 'to monitor and inform policy and systemic change for all deaths in custody, particular Aboriginal and Torres Strait Islander deaths'. It also suggested that if the Coroners Prevention Unit or Death Review Team is not established the Inspector of Custodial Services could be given a specific function to monitor coronial findings and recommendations, and report on those publicly in its annual report, however noted that this 'would require significant investment of resources'.⁵⁶⁸
- 6.113** The NSW Ombudsman suggested that 'consideration could be given to conferring an express statutory function on the Coroner or other existing external oversight body to undertake systemic research and reviews of deaths in custody'. It advised that currently that statutory function does not exist and could enhance the important role of the Coroner in monitoring deaths in custody. The NSW Ombudsman said that this 'would include establishing and maintaining a public register of deaths and a role to track trends and identify systemic issues', which 'may enhance the Coroner's ability to make recommendations in a report to Parliament, including progress on implementation of previous recommendations'.⁵⁶⁹
- 6.114** In relation to a public register of deaths, Justice Action suggested that a broader database be established that include 'coronial findings on deaths in custody and recommendations from all Australian jurisdictions, distributed nationwide as well as published responses from state and federal authorities who are affected by the recommendations'. It noted that currently on a national level the National Coronial Information System and the Australian Institute of Criminology collate some of this data, however Justice Action advised 'it is not updated regularly and has restricted access'. Justice Action stated that the establishment of a new database system that includes data from all states and is regularly updated and can be accessed by the public 'would promote accountability among government authorities to address recurring issues that endanger the lives of incarcerated individuals'.⁵⁷⁰
- 6.115** Likewise, the Aboriginal Legal Service (NSW/ACT) suggested that a national database to monitor the implementation of coronial recommendations be established. It clarified that this would entail developing a 'centralised information hub containing coronial findings on deaths

⁵⁶⁶ Submission 3a, NSW Bar Association, p 13.

⁵⁶⁷ Submission 108, Dr Fiona Allison, Professor Chris Cunneen and Ms Melanie Schwartz, p 20; Submission 125, Associate Professor Rebecca Scott Bray and Emeritus Professor Phil Scraton, p 2.

⁵⁶⁸ Correspondence from Legal Aid NSW, to Chair, 8 February 2021.

⁵⁶⁹ Submission 111, NSW Ombudsman, pp 10-11.

⁵⁷⁰ Submission 130, Justice Action, p 37.

in custody and recommendations from all Australian jurisdictions, as well as published responses from state and federal authorities, individuals and communities who are affected by the recommendations'.⁵⁷¹

- 6.116** Associate Professor Scott Bray and Emeritus Professor Scraton also recommended the creation of a 'publicly accessible centralised database of deaths in custody coronial findings, including recommendations made, and responses to recommendations, to enable accountability, oversight and review'.⁵⁷²

Review of the coronial system

- 6.117** Stakeholders suggested a number of specific changes that could be made to the coronial system to improve the effectiveness of investigations into deaths in custody by the Coroner. However, on a broader scale stakeholders called for a much overdue review of the coronial system, instead of piecemeal changes.
- 6.118** Adjunct Professor Dillon highlighted that the coronial system has not been independently reviewed since the Law Reform Commission reviewed it in 1975. He advised that 'in 2014, the Justice Department began a review of the Coroners Act', however reported that at the time of writing his submission 'the review remains incomplete'. Adjunct Professor Dillon was not aware of the reasons 'for the government's apparent reluctance to finish it'. Although, he emphasised the urgency of such a review, stating that the *Coroners Act 2009* is 'poorly drafted', with many flaws and in need of a 'complete rewrite'.⁵⁷³
- 6.119** Therefore, Adjunct Professor Dillon advocated for a proper review of the coronial system that 'should address structural problems in the system which have been identified by reviews in Victoria, Western Australia and Queensland in the past decade'. He added that 'in any event, I submit that the Select Committee should conduct its own independent review of the NSW coronial system, taking on board the free lessons provided in those interstate reviews'.⁵⁷⁴
- 6.120** Legal Aid NSW also considered that 'there is a need for a broader independent review or audit of how the coronial inquest system operates in NSW with the aim of ensuring that the NSW model has a greater focus on preventing deaths'. It noted that a similar review was conducted in 2018 of the Queensland coronial system, which found 'significant systemic issues'. Legal Aid NSW also acknowledged that 'the NSW Government has previously undertaken statutory reviews of the Coroners Act, however we consider that these reviews have not undertaken a holistic, systemic review of the coronial system'. It therefore recommended that such a review be undertaken of the New South Wales coronial system.⁵⁷⁵
- 6.121** Likewise, Associate Professor Scott Bray called for 'a root and branch review of New South Wales coronial law and practice consistent with that undertaken in other States and territories and which must involve First Nations peoples'. She cautioned that 'a statutory review of the

⁵⁷¹ Submission 120, Aboriginal Legal Service (NSW/ACT), p 37.

⁵⁷² Submission 125, Associate Professor Rebecca Scott Bray and Emeritus Professor Phil Scraton, p 2.

⁵⁷³ Submission 104, Adjunct Professor Hugh Dillon, p 4; Evidence, Adjunct Professor Dillon, 27 October 2020, p 42.

⁵⁷⁴ Submission 104, Adjunct Professor Hugh Dillon, p 4.

⁵⁷⁵ Submission 117, Legal Aid NSW, p 89.

legislation and piecemeal reforms will be insufficient'. Associate Professor Scott Bray added that although a large scale review is not within this inquiries terms of reference, the evidence received will 'offer important insights especially as the Committee is committed to significant reform'.⁵⁷⁶

- 6.122** In terms of involving First Nations people in such a review, Dr Allison, Professor Cunneen and Ms Schwartz suggested that 'a whole new First Nations system of inquiring into a death is required, developed from the ground up, by and with First Nations peoples' input'. In this regard, they suggested that a new model should be informed by seeking input from the families who have been involved in previous coronial inquests over the last 10 years. They also suggested drawing from models such as the Koori Court in Victoria and circle sentencing already in New South Wales.⁵⁷⁷

Committee comments

- 6.123** It is clear to the committee that the coronial system is in need of a root and branch review. This inquiry did not set out to undertake such a review, however it has shed a light on a number of areas in need of attention. The fact that the coronial system has not been thoroughly looked at since 1975 is concerning and demonstrates a dire need of modernisation. Given a more comprehensive review is warranted, we recommend that this committee be re-purposed to undertake an inquiry into the coronial system.

Recommendation 30

That the New South Wales Legislative Council establish a Select Committee to conduct an inquiry into the New South Wales coronial system.

- 6.124** Although we recommend that a proper review of the coronial system be undertaken, there are a number of changes that can be implemented in the meantime to specifically address the concerns raised by stakeholders during this inquiry.

- 6.125** Firstly, it is unquestionable that the funding and resourcing of the NSW Coroners Court needs to be improved. As we have heard, it is having a significant impact on the length of time to complete an inquest, which in turn is causing undue stress on the families involved. Having lost a loved one is hard enough, but then having to wait two, three or even four years for answers is inconceivable. In this regard, we recommend that the NSW Government allocate additional resources, including adequate funding and staffing, to ensure that the NSW Coroners Court can effectively undertake its role in investigating deaths in custody in a timely manner.

Recommendation 31

That the NSW Government allocate additional resources, including adequate funding and staffing, to ensure that the NSW Coroners Court can effectively undertake its role in investigating deaths in custody in a timely manner.

⁵⁷⁶ Evidence, Associate Professor Scott Bray, 27 October 2020, p 43.

⁵⁷⁷ Submission 108, Dr Fiona Allison, Professor Chris Cunneen and Ms Melanie Schwartz, p 17.

- 6.126** The committee recognises that the employment of First Nations people in the NSW Coroners Court is critical to supporting First Nations families who come into contact with the court and ensuring that the court operates in a culturally appropriate manner. We note that the NSW State Coroner has recently created two Aboriginal Liaison Officer positions and will be recruiting for these roles shortly. We commend the NSW State Coroner for creating these roles.
- 6.127** In relation to accountability, we agree with stakeholders that the system lacks concrete mechanisms to hold the relevant government departments and correctional centres to account in implementing recommendations that are made by the Coroner in relation to deaths in custody. We are not saying that these government departments and correctional centres are not taking action following a death to improve their policies and procedures, however there seems to be limited oversight, monitoring and follow-up of these actions.
- 6.128** The committee therefore recommends that the NSW Government amend the *Coroners Act 2009* to ensure that the relevant government department and correctional centre respond in writing within six months of receiving a Coroner's report the action being taken to implement the recommendations, or if no action is taken the reasons why, with this response tabled in the NSW Parliament.

Recommendation 32

That the NSW Government amend the *Coroners Act 2009* to ensure that the relevant government department and correctional centre respond in writing within six months of receiving a Coroner's report, the action being taken to implement the recommendations, or if no action is taken the reasons why, with this response tabled in the NSW Parliament.

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- 6.129** What is also evident is the limited focus on broader systemic failures as part of the coronial process. We note that some Coroners make recommendations in this regard and others do not. The committee acknowledges the model in Victoria, which has been set up to focus on addressing systemic flaws found during inquests. We believe that this model should be considered as part of the future inquiry into the coronial system.
- 6.130** However, in the meantime the committee considers that the remit of the Coroner should be legislatively strengthened so that where appropriate they make findings and recommendations on systemic reforms and create consistency across the board. We note that this would apply for all deaths in custody. We therefore recommend that the NSW Government amend the *Coroners Act 2009* to stipulate that the Coroner is required to examine whether there are systemic issues in relation to a death in custody, in particular for First Nations people, with the Coroner provided with the power to make recommendations for system wide improvements.

Recommendation 33

That the NSW Government amend the *Coroners Act 2009* to stipulate that the Coroner is required to examine whether there are systemic issues in relation to a death in custody, in particular for First Nations people, with the Coroner provided with the power to make recommendations for system wide improvements.

- 6.131** Further, the committee agrees with the recommendation put forward by the Jumbunna Institute of Indigenous Education and Research that the *Coroners Act 2009* should be amended to mandate Coroners to make findings on whether implementation of any, some or all of the *Royal Commission into Aboriginal Deaths in Custody* report recommendations could have reduced the risk of death in all cases where a First Nations person has died in custody.

Recommendation 34

That the NSW Government amend the *Coroners Act 2009* to mandate Coroners to make findings on whether the implementation of any, some or all of the recommendations from the *Royal Commission into Aboriginal Deaths in Custody* report could have reduced the risk of death in all cases where a First Nations person has died in custody.

- 6.132** The committee also notes that a number of other issues were raised during this inquiry, including the structure of the coronial system, the training of coroners, referrals to the Director of Public Prosecutions, and ways in which the system could be improved to provide a more culturally safe and therapeutic approach. We consider that these should all be looked at again during the committee's inquiry into the coronial system.
- 6.133** Finally, on a separate point, we note the reluctance of judicial officers to provide written or oral evidence to parliamentary inquiries generally, including this inquiry. The committee understands the historical basis for this, however we feel that it would have been extremely valuable for the NSW Coroners Court to come and speak with the committee. In our view, this was a lost opportunity to create a dialogue for potential changes that could assist all parties. Times have changed, and the Parliament regularly engages with independent bodies and other organisations about how systems are working and what changes are needed. Noting the likelihood for an inquiry into the coronial system in the near future, we strongly encourage the NSW Coroners Court, and all judicial heads, to reconsider their approach in participating in parliamentary inquiries moving forward.

Chapter 7 The need for reform

This chapter will consider whether the current structure for investigating and/or reviewing deaths in custody in New South Wales is effective. It begins by outlining stakeholder's key concerns about the current system, relating to independence, resourcing, the lack of systemic oversight and the lack of First Nations people involved in oversight processes. It will then examine stakeholder's views on the most appropriate oversight body to undertake this role and the committee's conclusions on an effective way forward.

Key concerns with the current system

- 7.1 The committee received evidence from stakeholders on the limitations of the current oversight bodies involved in reviewing deaths in custody.
- 7.2 While this section will set out key concerns with the oversight system as a whole, it is important to note that specific concerns relating to the internal investigations carried out by Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Network (Justice Health) are outlined in chapter 4. Specific concerns relating to the role of the Coroner in investigating deaths in custody are also discussed in chapter 6.
- 7.3 In particular, this section will consider particular limitations in relation to the external oversight bodies, including the remit of the Law Enforcement Conduct Commission (LECC), Inspector of Custodial Services and the Independent Commission Against Corruption (ICAC).

Ambiguity of arrangements and concerns about independence

- 7.4 There were concerns that the oversight arrangements for deaths in custody lack clarity and that investigating agencies lack independence. Stakeholders connected these issues to a lack of confidence individuals felt in the transparency of investigation and review processes.
- 7.5 The NSW Bar Association noted that multiple agencies are involved in overseeing deaths in custody and suggested that the 'fragmentation of functions concerning reviews of deaths in custody ... carries real risks of ineffectualness and counter-productivity'. The Association commented that the 'functions intended to protect and support First Nations Peoples in relation to deaths in custody, and incarceration generally, should be concentrated and consolidated in agencies with appropriate depth of expertise and resources'.⁵⁷⁸
- 7.6 The Law Society of NSW also contended that there is ambiguity as to the responsibilities of the various oversight bodies in respect of deaths in custody, and ambiguity as to how the roles of the various agencies touch different points in the criminal justice system. It also noted the limited remits of certain agencies. For example, it noted that the Coroner can only investigate and make recommendations after a death, and that the LECC can only get involved if there is suspected misconduct of police. Reflecting on this, the Law Society of NSW stated: 'Each of the listed bodies has its own mandate, and the very fact that Parliament is requesting

⁵⁷⁸ Submission 3a, NSW Bar Association, p 12.

commentary in respect of the suitability of each body suggests that the responsibility attached to each body regarding this issue is not clear'.⁵⁷⁹

7.7 One of the strongest concerns voiced about the existing framework was that investigations are not independent. Mr James Christian, Chief Executive Officer, NSW Aboriginal Land Council, highlighted this as an issue, asserting that the investigative bodies 'do not seem to be sufficiently independent'. In his view, the role of multiple investigative bodies is 'hampered' as they are not sufficiently empowered to oversee institutions that investigate their own conduct. He commented: 'In many cases, whether it is legislative or procedural, they [the investigating bodies] are required to step back until the relevant agencies review their own conduct. I think in anyone's assessment, that would simply be seen as totally inadequate and inappropriate'.⁵⁸⁰

7.8 The Australian Lawyers for Human Rights also expressed concerns in this regard. It suggested that by the NSW Police Force and Corrective Services NSW playing key roles in investigating deaths in custody 'the independence of such investigations is impaired'. It stated that 'urgent reform of the current framework for investigating deaths in custody is required to bring justice for the deceased, families and the wider community; to improve standards of custodial care, and to prevent further deaths'.⁵⁸¹

7.9 Emphasising the importance of having independent investigations of deaths in custody to promote confidence in the system, the Australian National University Law Reform and Social Justice Research Hub contended that none of the oversight bodies tasked with investigating deaths in custody have the capacity to send independent investigators in to obtain evidence. It argued that having this capacity 'is crucial to the realisation of justice for the families involved and build confidence in the oversight bodies'.⁵⁸²

7.10 The Deadly Connections Community and Justice Services also commented on the lack of independence and the conflict of interest that arises with 'police investigating police':

The lack of independent investigations into deaths in custody undermines outcomes and accountability and confidence in the process. It weakens the independence of coronial and criminal investigations. ... In NSW, the prosecution work hand in hand with the police in preparing potential criminal cases. This creates distinct problems when police or prison guards are suspects in death in custody matters. Aboriginal families and organisations have claimed that the current process amounts to a conflict of interest because it involves "police investigating police". It lends itself to processes and outcomes that are biased against First Nations victims.⁵⁸³

7.11 Ms Gail Thorne, Community Access Worker, First Nations Women's Legal Program, Women's Legal Service NSW, had a similar view, commenting that she does 'not think it should be police investigating police and Corrective Services investigating the Corrective Services'. She added

⁵⁷⁹ Submission 113, The Law Society of NSW, p 14.

⁵⁸⁰ Evidence, Mr James Christian, Chief Executive Officer, NSW Aboriginal Land Council, 27 October 2020, p 22.

⁵⁸¹ Submission 116, Australian Lawyers for Human Rights, p 16.

⁵⁸² Submission 109, Australian National University Law Reform and Social Justice Research Hub, p 9.

⁵⁸³ Submission 126, Deadly Connections Community and Justice Services, p 33.

'that itself puts us off track straight away; we do not have any confidence in the system because of that reason' and recommended that it be an external body investigating deaths in custody.⁵⁸⁴

- 7.12** According to Sisters Inside Inc., 'it is essential that NSW institutes a truly independent inspection authority with unbridled access to all areas of police and prisons, the resources to undertake thorough investigation and a mandate to regularly report directly to the Parliament of NSW'. It outlined that independent oversight is needed to ensure families of a loved one who dies in custody are heard and that a timely, thorough and independent investigation will occur with the responsible authorities and individuals held to account.⁵⁸⁵
- 7.13** Along similar lines, the Justice and Peace Office of the Catholic Archdiocese of Sydney called for 'independent and impartial investigations of all Indigenous deaths in custody, with Indigenous investigators working alongside justice staff'. It also recommended that 'individuals or bodies tasked with these reviews should have the power to make binding recommendations regarding prosecutions for deaths or mistreatment, and to implement systemic changes to prevent further deaths or mistreatment of Indigenous prisoners in future'.⁵⁸⁶
- 7.14** However, one inquiry participant noted the difficulty in ensuring that the oversight of deaths is truly independent. Adjunct Professor Hugh Dillon, Ex-Deputy State Coroner and Ex-Magistrate of the NSW Local Court and member of the Faculty at University of New South Wales Law School, indicated that 'transparent, independent investigation is, in practical terms, the most difficult problem to solve'. He commented that 'the current system is not trusted by Indigenous people' and 'that makes investigating deaths in custody thoroughly and professionally even more important than it might be in other cases'. Adjunct Professor Dillon raised a number of considerations in this regard, including the capacity and currently available expertise to meet the calls for Indigenous investigators to investigate deaths in custody.⁵⁸⁷

Resourcing constraints

- 7.15** Another issue raised in relation to the current oversight framework for reviewing deaths in custody was the limited resourcing provided to existing oversight bodies.
- 7.16** The Public Service Association of NSW noted that the oversight bodies 'are currently seeing a minimum of three per cent annual budget cuts to their organisations, with most having experienced efficiency dividend budget cuts for the last decade'. The Association explained what the impact of these budget constraints has meant for these oversight bodies:

All operate with a heavy reliance on labour costs to undertake the work they do, leading to job cuts as the most likely area that the cuts can be realised. The Association has anecdotally seen significant reports from the members in these agencies of increased workload. The Association whilst representing members has also observed greater reluctance for these oversight bodies to investigate some matters.⁵⁸⁸

⁵⁸⁴ Evidence, Ms Gail Thorne, Community Access Worker, First Nations Women's Legal Program, Women's Legal Service NSW, 26 October 2020, p 53.

⁵⁸⁵ Submission 81, Sisters Inside Inc., p 3.

⁵⁸⁶ Submission 49, Justice and Peace Office of the Catholic Archdiocese of Sydney, p 7.

⁵⁸⁷ Submission 104a, Adjunct Professor Hugh Dillon, p 15.

⁵⁸⁸ Submission 118, Public Service Association of NSW, p 23.

- 7.17 Ms Christina Hey-Nguyen, NSW Convenor, Australian Lawyers for Human Rights, also raised a concern that oversight bodies are inadequately resourced,⁵⁸⁹ as did Dr Louis Schetzer, Policy and Advocacy Manager, Australian Lawyers Alliance, who stated that 'any independent oversight of this procedure requires adequate resourcing' and that 'it should go without saying but the capacity to provide that independent investigatory function does require sufficient resourcing for it to be effective'.⁵⁹⁰

Limited remit of existing external oversight bodies

- 7.18 Relevant to whether the existing oversight arrangements in place are adequate, the committee also considered the role and remit of the external oversight bodies, and how this may limit the systemic oversight provided for deaths in custody more broadly. In particular, the specific mandate of the Coroners Court, LECC, Inspector of Custodial Services and the ICAC were considered.
- 7.19 As explained earlier, the role of the NSW Coroners Court role in investigating deaths in custody is discussed in detail in chapter 6. However, in relation to its suitability as an oversight body, the Chief Magistrate of the Local Court of New South Wales, Judge Graeme Henson AM, summarised how the effectiveness of coronial investigations is underscored by the courts independence and judicial expertise:

Coronial investigations into deaths in custody are an important tool for monitoring standards of custodial care and provide a window for the making and implementation of carefully considered coronial recommendations. As you would appreciate, deaths in prisons have for centuries been recognised as sensitive matters warranting independent scrutiny. The suitability of the NSW Coroners Court as a vehicle for undertaking the function of an oversight body for Aboriginal deaths in custody is tied to the necessary independence and judicial expertise of the magistrates charged with undertaking coronial functions.⁵⁹¹

- 7.20 However, Judge Henson highlighted resourcing and funding constraints affecting the Coroners Court, noting that these are impacting the timeliness of coronial inquests and the level of support provided by the surrounding administrative structure. He also noted the lack of cultural sensitivities within the coronial process, commenting 'I cannot stress too highly the years of insensitivity visited upon members of the Aboriginal community through either a failure to comprehend or unwillingness to apply a culturally sensitive outcome to a persistent cause of criticism of both the Court and the government'.⁵⁹²

- 7.21 The LECC's role was also discussed, noting its role in monitoring critical incident investigations for deaths in police custody or during police operations. The Hon Lea Drake, Commissioner, Integrity, LECC, highlighted that the LECC is unable to control, supervise, direct or interfere with an investigation, per its legislated mandate. As she explained, a LECC officer 'would stay

⁵⁸⁹ Evidence, Ms Christina Hey-Nguyen, NSW Convenor, Australian Lawyers for Human Rights, 26 October 2020, p 17.

⁵⁹⁰ Evidence, Dr Louis Schetzer, Policy and Advocacy Manager, Australian Lawyers Alliance, 26 October 2020, p 8.

⁵⁹¹ Submission 100, Chief Magistrate of the Local Court of New South Wales, p 10.

⁵⁹² Submission 100, Chief Magistrate of the Local Court of New South Wales, pp 10-11.

out of the way and listen and not interfere with the investigations', which would usually include not sitting in on interviews. Commissioner Drake stated that 'our presence sometimes impedes the frankness of the interview that might take place' and so investigators are usually listening to the transcripts or watching from outside.⁵⁹³

- 7.22** The Inspector of Custodial Services also has a specific legislative mandate, being to inspect custodial centres and oversee the Official Visitors scheme. The Inspector of Custodial Services does not have the power to investigate individual complaints, suspected criminal conduct, misconduct and corruption, and deaths in custody.⁵⁹⁴ The Inspector can refer complaints to the NSW Ombudsman and is obliged to refer alleged misconduct or corruption to the ICAC or the LECC.⁵⁹⁵ Most of the visits undertaken by the Inspector of Custodial Services are also announced.⁵⁹⁶
- 7.23** In terms of the role the Inspector could undertake in respect of deaths in custody, Ms Fiona Rafter, Inspector of Custodial Services, advised that 'to the extent that such deaths raise systemic or thematic issues of concern, it can fall within my jurisdiction, [and] I can make them a focus of my inspections or I could conduct a thematic review and report to Parliament in relation to them'. Ms Rafter also noted that she receives notification from Corrective Services NSW when a death in custody occurs and will monitor the Coroner's findings and recommendations surrounding deaths in correctional facilities.⁵⁹⁷
- 7.24** The Australian Lawyers for Human Rights contended, however, that 'the Inspector of Custodial Services is an unsuitable body to provide the standard of oversight necessary to conduct inquiries into deaths in custody'. It highlighted that despite its independence and accountability to the NSW Parliament, conducting these types of inquiries would not align with the Inspectors purpose and focus on conducting inspections to monitor standards instead of investigating individual cases. The Australian Lawyers for Human Rights commented that monitoring deaths in custody has not been the focus of the Inspector, evidenced in the fact that none of the publicly available inspection reports or the past Annual Reports for the period from 2014 to 2019 address deaths in custody.⁵⁹⁸
- 7.25** Along similar lines, the Australian National University Law Reform and Social Justice Research Hub pointed out that the Inspector of Custodial Services 'has never published a report on Indigenous deaths in custody, or even a report which focuses specifically on Indigenous Australians in custody'. Further, the Research Hub noted that the Inspectors Annual reports for each financial year also does 'not substantially mention Indigenous deaths in custody'. The Research Hub recommended that 'the Inspector of Custodial Services should report to

⁵⁹³ Evidence, Hon Lea Drake, Commissioner, Integrity, Law Enforcement Conduct Commission, 7 December 2020, pp 42-43.

⁵⁹⁴ Submission 99, Inspector of Custodial Services, p 4.

⁵⁹⁵ Evidence, Ms Fiona Rafter, Inspector of Custodial Services, 8 December 2020, p 42.

⁵⁹⁶ See Evidence, Ms Rafter, 8 December 2020, p 43 and Answers to questions on notice, Inspector of Custodial Services, 27 January 2021, p 4.

⁵⁹⁷ Evidence, Ms Rafter, 8 December 2020, p 44.

⁵⁹⁸ Submission 116, Australian Lawyers for Human Rights, p 5.

Parliament specifically on Indigenous deaths in custody in its annual reports and make relevant recommendations based on its findings'.⁵⁹⁹

- 7.26** The role of the ICAC as an independent body in this space was also examined. While the committee did not receive evidence directly from the ICAC on its role, several stakeholders highlighted its limited legislative remit in this space.
- 7.27** Legal Aid NSW noted that the ICAC's main role is to investigate corruption in the public sector, which means it 'has no oversight function in relation to deaths in custody'.⁶⁰⁰ Likewise, the Australian Lawyers for Human Rights noted that the ICAC has limited jurisdiction in relation to deaths in custody, due to 'its narrow focus and jurisdiction in investigating, exposing or preventing corruption'. It also noted that the 'ICAC has suffered repeated cuts to its funding and is now one of the smallest commissions of its kind in Australia'.⁶⁰¹
- 7.28** The Australian National University Law Reform and Social Justice Research Hub suggested that the ICAC could be given a role in evaluating and addressing systemic racism in the NSW Police Force, to consider Indigenous deaths in custody and police corruption on a 'holistic, systems' level. In its view, 'systemic racism is a form of corruption' and that 'the disproportionate incarceration of Indigenous Australians and the ongoing issue of Indigenous deaths in custody demonstrates that the problem is systemic - not merely a case of a few "bad apples"'.⁶⁰²

Lack of a systemic oversight mechanism

- 7.29** Given that multiple agencies can be involved in oversighting a death in custody, there were concerns that the existing framework does not provide for more effective systemic oversight, particularly relating to First Nations deaths in custody.
- 7.30** As mentioned in chapter 6, the Coroners role in reviewing systemic issues during coronial investigations is limited. Stakeholders raised concerns that some Coroners will make findings surrounding systemic issues and others will not and that it is often the case that Coroners are not provided with the training, professional development and support to make practicable recommendations in this regard. Stakeholders called for a Coroners Prevention Unit to be established in the NSW Coroners Court, similar to in Victoria, to examine systemic issues.
- 7.31** In a broader sense, the Law Society of NSW stated that 'given that the overarching issue is the disproportionate rate of Indigenous people going into custody, we note that effective oversight of the entire process, starting at initial contact with the criminal justice system and ending with a death in custody, is critical'. It suggested that any 'such oversight must include effective feedback into the relevant systems', including 'the timely rectification of any systemic reasons'.⁶⁰³

⁵⁹⁹ Submission 109, Australian National University Law Reform and Social Justice Research Hub, pp 7-8.

⁶⁰⁰ Submission 117, Legal Aid NSW, p 72.

⁶⁰¹ Submission 116, Australian Lawyers for Human Rights, pp 7-8.

⁶⁰² Submission 109, Australian National University Law Reform and Social Justice Research hub, pp 10-11.

⁶⁰³ Submission 113, The Law Society of NSW, p 14.

7.32 Mr Paul Miller, the Acting NSW Ombudsman, highlighted the importance of two functions relating to deaths in custody – the monitoring of investigations and systemic reviews, including 'looking at the pattern of deaths over a period of time'.⁶⁰⁴ Ms Monica Wolf, Acting Deputy Ombudsman, stated:

In our view, it is really good to have agencies reviewing their practice and policy in how they responded to a person prior to a death in care or in custody. But to give confidence in that process, we also see it's really important to oversight that process. In addition to that, it would be really good practice to look holistically at deaths, as we do in children in care or reviewable deaths—look systemically at what could change in that system to prevent future deaths.⁶⁰⁵

7.33 Further, Mr Miller had some suggestions on how to avoid overlap and duplication of systemic oversight roles across the Inspector of Custodial Services and the NSW Ombudsman, by merging these offices together. Mr Miller advised that not only will this enhance the structural independence of the Inspector, it will also avoid overlap and duplication of roles, reduce confusion for people in custody and staff, and enable the Inspector to have access to data and resources. It would also ensure that New South Wales can commence implementation of becoming compliant with the Optional Protocol to the Convention against Torture (OPCAT).⁶⁰⁶ Mr Miller said that 'in our view, the inspectorate, in its current form, lacks essential qualities that would be essential if it is to lead the OPCAT inspection functions', and that by merging the Inspector of Custodial Services into the NSW Ombudsman's office the NSW Government could potentially have one National Preventative Mechanism covering all aspects of custodial oversight.⁶⁰⁷

7.34 However, Ms Rafter provided evidence to the committee that the Inspector of Custodial Services 'has the necessary statutory powers and independence and meets the requirements of a National Preventative Mechanism' as assessed by the Commonwealth Ombudsman, and 'is therefore OPCAT compliant'. Ms Rafter clarified that a statutory review of her office was currently being undertaken by the Corrective Services Minister and as part of this review she has requested some practical changes to the Inspectors role to ensure National Preventative Mechanism requirements. Ms Rafter also noted that it was 'highly likely that there would be multiple National Preventative Mechanisms for New South Wales' to cover places of detention beyond her jurisdiction.⁶⁰⁸

Lack of First Nations staff involved in oversight processes

7.35 Many stakeholders highlighted the lack of First Nations staff employed in the investigative teams within these oversight bodies, and more generally across the justice system.

⁶⁰⁴ Evidence, Mr Paul Miller, Acting NSW Ombudsman, 3 December 2020, pp 4-5.

⁶⁰⁵ Evidence, Ms Monica Wolf, Acting Deputy Ombudsman, 3 December 2020, p 4.

⁶⁰⁶ The OPCAT 'is an international treaty designed to strengthen protections for people in situations where they are deprived of their liberty and potentially vulnerable to mistreatment or abuse'. The OPCAT requires the establishment of a system of independent monitoring for places of detention through domestic bodies known as National Preventative Mechanisms. Submission 111, NSW Ombudsman, p 12.

⁶⁰⁷ Submission 111, NSW Ombudsman, p 11; Evidence, Mr Miller, 3 December 2020, pp 3 and 6-7.

⁶⁰⁸ Evidence, Ms Rafter, 8 December 2020, pp 42, 49 and 51.

- 7.36** In relation to the investigation of a death in custody, Ms Thorne advised that 'you need to have Aboriginal First Nations people involved in the investigation to give the community and the family some confidence that it is going to be done right, it is going to be done fair and it is going to be done in a culturally appropriate way'. She said that currently 'there are no Aboriginal people involved in these investigations' and that is a problem.⁶⁰⁹
- 7.37** The National Justice Project said that 'the use of First Nations investigators as senior members of investigatory teams should be encouraged in all cases where there is a First Nations death'. It explained that 'although NSW police investigations may be subject to oversight by professional standards and disciplinary boards, this is no substitute for ensuring that initial investigations are properly conducted'. It suggested that 'when protocols are not being adhered to, and the investigation is conducted by a party with a vested interest, the integrity of the investigation is automatically questionable'.⁶¹⁰
- 7.38** Adjunct Professor Dillon gave evidence to the committee that 'the current system is not trusted by Indigenous people'. He said that 'calls have been made for Indigenous investigators to investigate deaths in custody', however highlighted that it was not immediately apparent where these investigators would come from. He noted that 'investigative skills are largely the domain of trained detectives, ex-detectives and other professional investigators', and it is 'common knowledge that NSW has few Indigenous police officers'. Adjunct Professor Dillon also questioned the practicalities around giving non-police independent investigators the necessary powers to conduct investigations.⁶¹¹
- 7.39** Adjunct Professor Dillon put forward one solution in this regard. He suggested that an investigative unit be established within the NSW Coroners Court that would be staffed by trained investigators, who may or may not be Indigenous, but would work closely with Indigenous officers of the Coroners Court when investigating deaths in custody. He said 'this could be a NSW Police unit or a unit like the ICAC investigation unit'. He outlined that 'the Indigenous officers would work with the investigators to liaise with families, provide them information, and incorporate Indigenous voices in the process to ensure that the family's concerns were properly addressed'. He added that this 'may be able to generate trusting relationships with family members and also provide a high standard of investigative expertise'.⁶¹²
- 7.40** Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force, discussed the proposition put forward by stakeholders during this inquiry for First Nations people to be involved in the investigation process. He indicated that it would be problematic, as 'Aboriginal community liaison officers are just that: They are not investigators'. He said that 'we would have to have people that understand investigative processes and could do a proper review'. Assistant Commissioner Crandell added that detective inspectors would on average have about 20 years' experience as a police officer and then at an absolute minimum 10 years as an investigator. He further emphasised the skill set that would be needed in an investigative role:

The skills to properly investigate that are not something you simply acquire overnight. It takes a great deal of time and effort to gather that experience and that know-how,

⁶⁰⁹ Evidence, Ms Thorne, 26 October 2020, p 55.

⁶¹⁰ Submission 102, National Justice Project, p 17.

⁶¹¹ Submission 104a, Adjunct Professor Hugh Dillon, p 15.

⁶¹² Submission 104a, Adjunct Professor Hugh Dillon, p 15.

particularly if you are performing an oversight role or an overview of what has occurred and what investigative processes have been undertaken ... If we were to be serious about it then we would have to have experienced investigators. Whether from the Aboriginal community or otherwise, they would need some experience in relation to investigative practices and processes.⁶¹³

- 7.41** However, Adjunct Professor George Newhouse, Director and Principal Solicitor, National Justice Project, argued that 'there are Aboriginal lawyers and Aboriginal police officers who can fill these roles', stating 'it is not that they are not available'. He added that it would at least provide an understanding of the lived experience of these families and others and perhaps encourage some faith in the system.⁶¹⁴
- 7.42** Commissioner Drake was of the view 'that involvement of Aboriginal persons in the investigative branch of any body would be a good thing'.⁶¹⁵ However, Commissioner Drake advised that currently there is only one member of staff of the LECC who identifies as a First Nations person and that this officer works in the general staffing area.⁶¹⁶ When asked if the LECC should have a strategy to employ and engage First Nations people in the work that they do, Commissioner Drake replied that 'every employer should have, not just the LECC'. She noted the importance of particular agencies having this requirement, like the NSW Police Force.⁶¹⁷
- 7.43** Other stakeholders highlighted the need for the employment of First Nations staff across the whole criminal justice system. For example, Legal Aid NSW said that the system as whole, including the NSW Police Force, Forensic Medicine, the Coroners Court and other service providers, need 'to become more culturally competent, through employment of Aboriginal staff, cultural training, and special protocols which are culturally specific and will improve experiences for First Nations families'.⁶¹⁸
- 7.44** Mr Jason O'Neil, Executive Director, Ngalaya Indigenous Corporation, said that 'there is a lack of First Nations control and involvement throughout the system that contributes to the lack of accountability' and recommended that 'First Nations people should have a role at every level and stage as prosecutors, defence lawyers, coroners, counsel assisting, independent investigators and judicial officers'.⁶¹⁹ Community Restorative Centre and the Public Service Association NSW also recommended that First Nations workers be appointed at all stages of the justice system.⁶²⁰

⁶¹³ Evidence, Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force, 7 December 2020, pp 21 and 30.

⁶¹⁴ Evidence, Adjunct Professor George Newhouse, Director and Principal Solicitor, National Justice Project, 26 October 2020, p 62.

⁶¹⁵ Evidence, Commissioner Drake, 7 December 2020, p 37.

⁶¹⁶ Answers to questions on notice, Hon Lea Drake, Commissioner, Integrity, Law Enforcement Conduct Commission, 22 January 2021, p 1.

⁶¹⁷ Evidence, Commissioner Drake, 7 December 2020, p 41.

⁶¹⁸ Correspondence from Legal Aid NSW, to Chair, 8 February 2021, p 8.

⁶¹⁹ Evidence, Mr Jason O'Neil, Executive Director, Ngalaya Indigenous Corporation, 26 October 2020, p 17.

⁶²⁰ Submission 71, Community Restorative Centre, p 13; Submission 118, Public Service Association of NSW, p 19.

- 7.45** However, Ms Ann Weldon, Aboriginal Liaison Officer, Public Service Association of NSW, cautioned that it is hard for First Nations people to work within corrections:

As far as the Aboriginal workers that work for Corrections or even in police and even in the Department of Family and Community Services, I commend them because it is hard. It is extremely difficult for you to be an Aboriginal person and be employed within those particular organisations—government agencies. So they go in there with the endeavours to help bring about change within the system and then educate non-Aboriginal people that work within it so that we as one can help turn things around.⁶²¹

- 7.46** Dr Paul Gray, Associate Professor, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, also had some reservations, noting that by 'adding an Aboriginal staff member into the system, regardless of the level of that staff member, does not actually fix the fact that it is the system that is broken, and it also places a lot of responsibility on that individual to carry'. He said that trying to match expectations of the community with what a role actually has the power to do can be difficult, and highlighted the importance of involving 'Aboriginal communities and Aboriginal representatives in actually constructing the system in which those positions will operate as it is important to actually having those voices at the table'.⁶²²

- 7.47** Stakeholder specifically called for the appointment of Aboriginal Liaison Officers within the NSW Coroners Court, as discussed in chapter 6. There were also calls for the appointment of a First Nations Commissioner within the LECC, which is discussed later in this chapter.

A way forward

- 7.48** Taking into account stakeholders views about the inadequacy of existing oversight arrangements, consideration was given to potential reforms that could improve the oversight and review of all deaths in custody. In particular there were four proposals raised during the inquiry – with this section considering each in turn.

Expanding the role of the NSW Ombudsman

- 7.49** One of the proposals put forward was for the NSW Ombudsman's role to be expanded to oversight all internal investigations into deaths in custody currently conducted by Corrective Services NSW or Youth Justice NSW and the Justice Health.
- 7.50** Currently, the NSW Ombudsman does not have an express function to pro-actively monitor internal investigations in deaths in custody. It can only be involved if it suspected an internal investigation was being conducted in a manner which involved conduct to which section 26 of the *Ombudsman Act 1974* applies, for example, if it was being carried out contrary to law or in an unjust or improperly discriminatory way.⁶²³

⁶²¹ Evidence, Ms Ann Weldon, Aboriginal Liaison Officer, Public Service Association of NSW, 7 December 2020, p 3.

⁶²² Evidence, Dr Paul Gray, Associate Professor, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, 27 October 2020, p 55.

⁶²³ Submission 111, NSW Ombudsman, p 7.

7.51 The NSW Ombudsman stated that 'increased independent oversight of internal investigations would provide external assurance that internal investigations are conducted appropriately and in accordance with policy and protocol'. The NSW Ombudsman went on to describe the importance of this:

Internal review by CSNSW and/or the JH&FMHN [Justice Health and Forensic Mental Health Network] following the death of a person in their custody is an important process. Internal review should identify, for example, whether all protocols were adhered to by staff, whether and how circumstances of custody contributed to a death, and if they did, what should be done to prevent this in future. It is equally important that such processes should be transparent and open to scrutiny.⁶²⁴

7.52 The NSW Ombudsman also noted that publicly available information about current internal investigations is limited, and that the Corrective Services NSW policy and procedures document in this regard is not up to date and heavily redacted. It also noted that the Justice Health 'appears to maintain a separate policy in respect of the management of a death'.⁶²⁵

7.53 The NSW Ombudsman recommended that consideration be given to enact legislation to confer the functions of the NSW Ombudsman, or another existing external oversight body, to undertake independent statutory oversight and monitoring of internal investigations of all deaths in custody. It also recommended that this body, whether the NSW Ombudsman or not, be given adequate resources to undertake this role.⁶²⁶

7.54 The NSW Ombudsman argued that it was best placed to undertake this role given its independence, and its current role and experience in overseeing custodial services, conducting death reviews and capabilities in overseeing and investigations more broadly. The NSW Ombudsman also said this proposal would align with its existing jurisdiction over these departments and would be marry with its existing functions under Part 3B of the *Ombudsman Act 1974*, which involves monitoring and reporting on Aboriginal programs.⁶²⁷

7.55 In terms of how the expanded role could be structured, the NSW Ombudsman suggested modelling it on the police critical incident monitoring function, which was a function of the NSW Ombudsman before it was moved to the LECC. Essentially, the key features would include:

- being notified of a death in custody
- monitoring adherence to relevant internal guidelines and protocols for investigation
- power to require information for monitoring purposes
- power to make comments during an internal investigation
- power to take action such as, commencement of an investigation in respect of any conduct or administrative issues identified

⁶²⁴ Submission 111, NSW Ombudsman, p 7.

⁶²⁵ Submission 111, NSW Ombudsman, p 7.

⁶²⁶ Submission 111, NSW Ombudsman, p 7.

⁶²⁷ Submission 111, NSW Ombudsman, pp 7-8.

- a requirement to report to Parliament on this role.⁶²⁸

- 7.56** The NSW Ombudsman highlighted the importance of any agency tasked with this function having detailed knowledge of the custodial system and the functions of the relevant departments and well-established connections. It also emphasised the importance of having the trust and respect of First Nations communities. The NSW Ombudsman also suggested that 'near misses' or serious incidents involving serious injury, including self-harm, also be reviewable, however it noted that this would require substantial additional resources.⁶²⁹
- 7.57** Several inquiry participants also supported this proposal. Ms Hey-Nguyen told the committee that 'we agree with the NSW Ombudsman's recommendation for an independent agency to be explicitly authorised to monitor internal investigations of all deaths in custody'. Ms Hey-Nguyen explained that the 'oversight role should include the ability to conduct an independent inquiry or investigation, including the ability to collect evidence, they should be able to make recommendations, including disciplinary or criminal proceedings'.⁶³⁰
- 7.58** Further, the Australian Lawyers for Human Rights agreed that the NSW Ombudsman is a suitable body to be tasked with inquiries into deaths in custody more broadly 'due to its experience in conducting investigations in custodial settings and reviewing the deaths of children in juvenile justice facilities'. It explained that the NSW Ombudsman already 'has a significant investigatory role in custodial settings which strengthens its suitability as a body', as well as its pre-existing resources, independence and accountability. In particular, the Australian Lawyers for Human Rights highlighted that the NSW Ombudsman is 'an independent integrity agency that holds NSW Government agencies, including Corrective Services NSW to account' and 'reports directly to Parliament through its annual reports and is subject to the scrutiny of the Parliamentary Oversight Committee'.⁶³¹
- 7.59** The Australian National University Law Reform and Social Justice Research Hub also suggested that the NSW Ombudsman role be expanded 'to include the ability to conduct independent investigations with mandated communication procedures into Indigenous deaths in custody'. It also recommended that 'Indigenous deaths in custody be included in the list of "reviewable deaths" under the jurisdiction of the NSW Ombudsman'. The Research Hub explained that the NSW Ombudsman already 'has a special corrective services unit that is staffed by those with thorough knowledge of the correctional systems' and a procedure in place to review and monitor 'reviewable deaths' for children that could be expanded to all deaths in custody.⁶³²
- 7.60** The committee questioned the Commissioner of Corrective Services NSW on this proposal. While Commissioner Severin contended that internal investigations are robust and that they are already scrutinised by other agencies, he was open to further oversight if needed:

I am very confident that the internal review and monitoring and the assurance is robust. We do have other ways of actually being—we do get scrutinised in other ways, through official visitors, through the Inspector of Custodial Services. The Coroners Court has a

⁶²⁸ Submission 111, NSW Ombudsman, pp 8-9.

⁶²⁹ Submission 111, NSW Ombudsman, p 9.

⁶³⁰ Evidence, Ms Hey-Nguyen, 26 October 2020, p 18.

⁶³¹ Submission 116, Australian Lawyers for Human Rights, pp 6-7.

⁶³² Submission 109, Australian National University Law Reform and Social Justice Research hub, pp 8-9.

representative on that oversight deaths in custody committee, so I am quite confident that the scrutiny and the rigour is robust. That is not to say that I would not be quite amenable to consider any suggestion to strengthen that or to augment that in a meaningful way. I am very open to that.⁶³³

Enhancing the role of the NSW Coroner's Court

- 7.61** Currently, the NSW Coroner is responsible for reviewing a death in custody. In practice, a Senior Coroner undertakes this role, and may give police directions concerning the criminal investigation into the death.
- 7.62** Looking more broadly at how oversight of deaths in custody could be improved, several options were put forward relating to the role of the Coroner. Taking into account current concerns regarding inadequate resourcing at the Coroners Court, one suggestion was to ensure sufficient resourcing is provided moving forward. Another suggestion, which would require enhanced resourcing, was for an independent unit to be established within the Coroner's Court to undertake investigations, potentially with staff from that unit undertaking the investigations themselves, instead of police.
- 7.63** The NSW Bar Association noted that the office of the NSW State Coroner and the coronial system, when properly resourced, 'are most appropriate to provide independent oversight and conduct inquiries into deaths in custody'. The Association highlighted a number of important features that already exist within the NSW Coroner's Court to enable this, including:
- an established and unique capacity to marshal resources from different disciplines, test hypotheses and robustly analyse disquieting facts in connection with deaths
 - an established and independent oversight role, with Coroners able to discharge independent and flexible judicial power and functions
 - the system being inquisitorial and investigatory, both important to enable effective inquiry in these circumstances
 - the very purpose of the jurisdiction includes satisfying the concern of the public in the proper administration of prisons and other institutions, and the care of persons in custody
 - it is preventative, with potential to identify systemic failures in custodial practices and procedures which may, if acted upon, prevent future deaths in similar circumstances.⁶³⁴
- 7.64** While the NSW Bar Association noted that the 'relationship between the coronial system and First Nations' communities is complex' and that 'the coronial system often involves investigations that are carried out by individuals who are members of an institution that is seen as responsible for that death', it did not support the establishment of a new body to carry out the coronial process. It stated that 'realistically the resources such a body would require to perform its role effectively are not readily available'.⁶³⁵

⁶³³ Evidence, Commissioner Severin, 7 December 2020, p 62.

⁶³⁴ Submission 3a, NSW Bar Association, p 12.

⁶³⁵ Answers to questions on notice, NSW Bar Association, 22 December 2020, p 2.

- 7.65** Instead, the NSW Bar Association supported 'a properly resourced Coroner with greater support and resources to carry out these investigations'.⁶³⁶ It also suggested several ways the coroner's functions could be enhanced while investigating deaths in custody, as discussed earlier in chapter 6.
- 7.66** Mr David Evenden, Solicitor Advocate, Coronial Inquest Unit, Legal Aid NSW, also agreed that 'the way to fix the system is by better resourcing the Coroners Court'. Mr Evenden reflected that the investigations currently being conducted by the Coroners Court 'are in many cases very good investigations', with engaged solicitors ensuring that all lines of inquiry are looked at, and for the 'larger cases there is almost invariably a very detailed review of what took place'. Mr Evenden gave evidence that 'if we want to improve the experience of Aboriginal families, in my view better resourcing of the Coroners Court—making it something that is adapted so that it can service the needs of Aboriginal families—is far more important'. He suggested that consideration needs to be given to the resourcing of the Coroners Court and a reduction in current delays.⁶³⁷
- 7.67** To better address the needs of First Nations families, St Vincent de Paul Society recommended that 'the NSW Government should consider establishing an independent body, located within the NSW Coroner's Office, with responsibility for all investigations into Aboriginal deaths in custody'.⁶³⁸ At a hearing, Mr Jack de Groot, Chief Executive Officer, St Vincent de Paul Society NSW, commented on the importance of an oversight body that could provide an access point to Aboriginal families to have their say, explaining that the Coroners Court could do just that:
- I think that the court is a very important point of connection with all sorts of peoples within Aboriginal communities throughout New South Wales. To actually have the respect of the court to family representatives and to the community is an important part. There needs to be a really strong presence of families within the court telling their story, having advocate of those who have died. We think that there needs to be that sort of access to the court, presence within the court and an equality. We are not opposed to an outside body, but we think that daily presence, that daily part of the system of the coronial court, could be a very important point of access and equality for families as they go into that setting.⁶³⁹
- 7.68** Along these lines, Adjunct Professor Dillon told the committee that one solution could be the establishment of an investigative unit within the Coroners Court. He explained that it could be structured similar to a NSW Police unit or the ICAC investigation unit and staffed by trained investigators. Adjunct Professor Dillon suggested that Indigenous Officers could work with these investigators 'to liaise with families, provide them information, and incorporate Indigenous voices in the process to ensure that the family's concerns were properly addressed'.⁶⁴⁰
- 7.69** Adjunct Professor Dillon noted that 'the question of transparent, independent investigation by coroners arose in some submissions' to this inquiry, including concerns that 'Indigenous people

⁶³⁶ Answers to questions on notice, NSW Bar Association, 22 December 2020, p 2.

⁶³⁷ Evidence, Mr David Evenden, Solicitor Advocate, Coronial Inquest Unit, Legal Aid NSW, 26 October 2020, p 40.

⁶³⁸ Submission 121, St Vincent de Paul Society, p 3.

⁶³⁹ Evidence, Mr Jack de Groot, Chief Executive Officer, St Vincent de Paul Society NSW, 27 October 2020, pp 27-28.

⁶⁴⁰ Submission 104a, Adjunct Professor Hugh Dillon, p 15.

tend to see all courts as part of the same system'. He stated that 'a question of apprehended bias may arise, especially if inquests are being conducted in the same courthouses and courtrooms as are used for criminal proceedings'. However, Adjunct Professor Dillon was of the opinion that by 'separating the current nexus between the criminal and coronial functions by establishing a separate Coroners Court would be a step towards paying due respect to Indigenous people and their perspectives at relatively small cost'.⁶⁴¹

7.70 Ms Rafter, the Inspector of Custodial Services, also supported the proposal to provide the Coroner with additional resources to undertake investigation functions into critical incidents. Ms Rafter stated that the Coroner 'is the appropriate jurisdiction, [and] has the power to hear sworn evidence, [and] should be resourced to have the proper investigative powers'.⁶⁴² Ms Rafter also added that the Aboriginal Legal Service 'plays a really important role' and should be provided additional funding to assist⁶⁴²

7.71 While the Australian Lawyers for Human Rights recognised the current role of the NSW Coroner in reviewing deaths in custody and the strong accountability mechanisms it has in place, Ms Hey-Nguyen provided a number of reasons why expanding the role of the NSW Coroner's Court as it currently stands was not the most suitable proposal:

While we recognise that the New South Wales State Coroner does have the ability to conduct independent investigations into all deaths in custody, there are shortcomings at the moment, ranging from lack of resources, the timeliness of investigations, as we have heard earlier, the ability for the NSW State Coroner to direct the police to conduct that. There are a range of elements in there, it is not that an independent function does not exist, it is the way it is being implemented in practice at the moment.⁶⁴³

Expanding the role of the Law Enforcement and Conduct Commission

7.72 Another proposal put forward to potentially enhance the oversight and review of deaths in custody was to expand the LECC's functions to undertake full investigations into deaths in custody.

7.73 The key stakeholder suggesting this proposal was the Australian Lawyers for Human Rights. As mentioned earlier, the Australian Lawyers for Human Rights noted some limitations with the current Coroner's functions. In its view, 'the current framework in NSW for investigating deaths in custody lacks independence and meets neither community expectations nor relevant international human rights law standards'. Given these issues, it recommended that 'an independent body be tasked with investigating deaths in custody and be given powers to obtain evidence and actively manage and oversee all aspects of the investigation'. In this regard, it supported this function being given to the LECC.⁶⁴⁴

7.74 At a hearing Ms Hey-Nguyen elaborated on this proposal. She noted that currently there are a range of shortcomings across all of the existing New South Wales oversight bodies, including independence, mandate, resources, and the ability to conduct full investigations. Having looked at each oversight body, Ms Hey-Nguyen explained that with reforms to the LECC's function it

⁶⁴¹ Submission 104a, Adjunct Professor Hugh Dillon, pp 16-17.

⁶⁴² Evidence, Ms Rafter, 8 December 2020, pp 44 and 53.

⁶⁴³ Evidence, Ms Hey-Nguyen, 26 October 2020, p 18.

⁶⁴⁴ Submission 116, Australian Lawyers for Human Rights, p 2.

could be tasked with the role of investigating deaths in custody. Ms Hey-Nguyen outlined some of the reforms that are needed to the LECC, including:

- the expansion of the LECC's mandate to ensure they have the power to investigate the whole process of custody and what led to the death in custody itself
- full investigative powers to enable the LECC to conduct an independent investigation, not just monitor an investigation, with the involvement outside of the police and the ability to collect evidence
- the ability to make recommendations and findings that are released publicly, with follow up by the appropriate body and a response to those findings within a reasonable time
- the ability to undertake a systemic review of what has led to deaths in custody, if there are any patterns emerging and recommendations to address these.⁶⁴⁵

7.75 Further, the Australian Lawyers for Human Rights suggested that amendments to the *Law Enforcement Conduct Commission Act 2016* be introduced to broaden the types of conduct it can investigate, to ensure that there is accountability in respect of all aspects of policing. It also suggested that investigation of critical incidents should be undertaken by the LECC, and not by the NSW Police Force with only monitoring by the LECC, and 'if this is not accepted, then at the very least, the LECC's monitoring role in a critical incident should be mandatory'. In addition, it suggested that the legislation be amended so that the Commissioner of Police 'must' declare an incident to be a critical incident, if it meets the criteria, instead of 'may'.⁶⁴⁶

7.76 The Ngalaya Indigenous Corporation also supported this proposal. Ms Kate Sinclair, Chairperson, added that it is 'critical' that improvements are made to the LECC in regards to the expansion of powers, improvement to data collection, and improvement to the feedback loop to require decisions 'to be funneled back to the police officers at the heart of an investigation'.⁶⁴⁷

7.77 Mr O'Neil also commented on other areas where the LECC's functions would need to be considered if it was to take on this further investigative role:

Obviously, while LECC may be able to serve that function quite well, I think there are important considerations around, obviously it's resourcing and its reliance on police evidence and in its investigation of police. It is important to note that LECC relies very much on the voluntary participation of police in its investigations and there may be perhaps a culture or an appearance that LECC's relationship with police, if it is not given greater powers to make binding decisions that could influence its independence and the success of its investigations. I also think there is a point to note that obviously a lot of deaths in custody happen within Corrective Services, so it would require an expansion of LECC. ... But there is also, thinking systemically, there may be situations where there is a death in custody in a medical facility that would benefit from an independent investigation that the Coroners Court may be able to deal with that LECC may not be able to do for First Nations people in terms of systemic issues.⁶⁴⁸

⁶⁴⁵ Evidence, Ms Hey-Nguyen, 26 October 2020, pp 22-23.

⁶⁴⁶ Submission 116, Australian Lawyers for Human Rights, pp 13-15.

⁶⁴⁷ Evidence, Ms Kate Sinclair, Chairperson, Ngalaya Indigenous Corporation, 26 October 2020, p 21.

⁶⁴⁸ Evidence, Mr O'Neil, 26 October 2020, pp 23-24.

- 7.78** Some stakeholders, however, did not agree that the LECC should be expanded to have the investigative role for all deaths in custody.
- 7.79** Noting that its preference was for the Coroner to undertake this role, the NSW Bar Association commented that 'although the LECC was established as an independent investigative body to oversee law enforcement, it does not have powers to investigate Corrections or Justice Health, let alone the underlying social drivers of incarceration, including poverty, housing, drug or alcohol issues'. The Association contended that if the LECC's jurisdiction is expanded 'the Coroner's role in investigating custodial deaths should not be withdrawn or limited'.⁶⁴⁹
- 7.80** As a hearing, Mr Tony McAvoy SC, Chair of the NSW Bar Association's First Nations Committee, and Member, Joint Working Party on the Over-representation of Indigenous People in Custody in New South Wales, was further questioned on the proposal to expand the LECC's function in relation to reviewing deaths in custody. Mr McAvoy highlighted that 'the only difficulty might be in lines of command—who is directing the investigation and how the commission, for instance, would communicate with the Coroner'. He emphasised that 'the Coroner would have to maintain the ultimate oversight'. However, Mr McAvoy stated: 'I do not say that the Law Enforcement Conduct Commission concept would not work—I think that it may—I am just unsure of how the lines of responsibility would work'.⁶⁵⁰
- 7.81** Adjunct Professor Dillon was also not persuaded on the idea of the LECC taking on the function of investigating deaths in custody, noting that the lack of trust from First Nations people may still be an issue:
- In my view, giving the Law Enforcement Conduct Commission (LECC) the role of overseeing investigations of Indigenous deaths is not a satisfactory answer. Even if given further power to oversee investigation of deaths in custody, or an Indigenous Commissioner were to be appointed, or both, this would not solve the immediate problem of lack of trust between investigating police on the ground and Indigenous families. The LECC has little, if any, current ability to oversee the system. It has two main functions – investigating suspected serious misconduct, maladministration and corruption in law enforcement agencies, and handling serious complaints against law enforcement officers and agencies. My understanding is that its oversight of Critical Incident investigations has little practical impact on those investigations and operates merely as a weak safeguard against incompetence.⁶⁵¹
- 7.82** Legal Aid NSW also noted that while the LECC has expertise in complaint handling and assessing of misconduct, it lacks experience in relation to Corrective Services NSW and custodial settings, given its focus is more in law enforcement. It also highlighted that currently LECC staff do not attend regional Critical Incidents and 'when they do attend, LECC staff listen to investigations by NSW Police, observe what is happening, but do not investigate themselves'.⁶⁵²

⁶⁴⁹ Answers to questions on notice, NSW Bar Association, 22 December 2020, p 2.

⁶⁵⁰ Evidence, Mr Tony McAvoy SC, Chair of the NSW Bar Association's First Nations Committee, and Member, Joint Working Party on the Over-representation of Indigenous People in Custody in New South Wales, 26 October 2020, p 8.

⁶⁵¹ Submission 104a, Adjunct Professor Hugh Dillon, p 16.

⁶⁵² Correspondence from Legal Aid NSW, to Chair, 8 February 2021.

- 7.83** Mr Miller also noted a number of limitations to what the LECC can do in respect of critical incidents. Firstly, Mr Miller explained that currently 'even a death in a police operation is not automatically a critical incident that the LECC overlooks' as an incident must first be declared a critical incident by the police for the LECC to be able to investigate. Secondly, Mr Miller advised that the LECC has the power to observe the examination of witnesses, however this 'power can only be exercised with the consent of both the investigating officer and the witness'. Mr Miller commented that 'in practice, my understanding is that police witnesses never give consent to the LECC observing that'. Finally, Mr Miller highlighted that the LECC reports on critical incidents once the investigation is over and this is again left to police discretion on when an incident is closed.⁶⁵³
- 7.84** The Ngalaya Indigenous Corporation also made the same observations as the Acting Ombudsman in relation to the LECC's current limitations. It stated:
- It is clear that the LECC has insufficient power and influence to hold individual officers accountable for wrongdoing, or to create systemic change in the police force. We cannot rely on the current police complaints process to protect First Nations peoples from police misconduct.⁶⁵⁴
- 7.85** While the Jumbunna Institute of Indigenous Education and Research preferred the establishment of a separate independent body to investigate and review deaths in custody, it acknowledged that using LECC as a 'vehicle for improving accountability would be an improvement upon the status quo' and 'should be considered to be an interim, short-term model intended to improve the experience of First Nations families and communities whilst substantial, long-term systemic reform is undertaken'.⁶⁵⁵
- 7.86** The Jumbunna Institute stressed the importance of having LECC officers 'present immediately "on the ground" at the scene of the death and during the investigation to ensure real oversight over any investigating Police'. It also suggested that LECC have 'the capacity to guide the investigation and to examine and verify the brief of evidence before going to the Coroner for review'.⁶⁵⁶
- 7.87** Like the NSW Ombudsman and a number of other stakeholders, the Redfern Legal Centre also highlighted a number of key issues with the current oversight provided by the LECC in terms of deaths in police custody, including its ability to make binding recommendations and findings, its limited investigative powers and lack of resourcing. The Redfern Legal Centre made the following recommendations to improve the oversight mechanism offered by the LECC:
- that the LECC be given the power to make its own binding findings of misconduct
 - that the NSW Government report annually on the number of police complaints made by or in relation to the treatment of First Nations People, and the nature of and outcome of these complaints

⁶⁵³ Evidence, Mr Miller, 3 December 2020, p 5.

⁶⁵⁴ Submission 84, Ngalaya Indigenous Corporation, pp 10-11.

⁶⁵⁵ Answers to questions on notice, Jumbunna Institute of Indigenous Education and Research, 2 December 2020, p 3.

⁶⁵⁶ Answers to questions on notice, Jumbunna Institute of Indigenous Education and Research, 2 December 2020, p 4.

- that funding to the LECC be increased significantly so that complaints are not declined for investigation due to funding constraints
- that in deciding whether to exercise its investigative powers in respect of a complaint, the LECC consider whether the complainant identifies as a First Nations person
- that the LECC exercise its oversight powers in respect of all complaints made by First Nations people
- body-worn video should be mandated in all interactions with First Nations people.⁶⁵⁷

7.88 Noting that the LECC would need increased funding, given reports of previous funding cuts, Ms Samantha Lee, Solicitor, Redfern Legal Centre, highlighted that the LECC is 'facing \$6 million in funding cuts' and last year assessed 'over 2,500 complaints against police, but was only able to properly investigate two per cent of those matters'.⁶⁵⁸

7.89 In a similar vein, the Australian Lawyers for Human Rights noted that adequate resourcing is essential for the LECC to effectively and efficiently undertake its functions. It also noted a recent Legislative Council committee report⁶⁵⁹ where the LECC raised serious concerns with its current funding, including:

- that its initial budget was not capable of funding the structure of its inherited work and its new function of critical investigation monitoring
- that its funding model was inconsistent with the view in the Tink review
- due to its underfunding, there had been significant delays in investigations and focus on simple and straight forward matters for investigation
- that the increase in the size of the NSW Police Force was not matched with the provision of additional resources to the LECC.⁶⁶⁰

7.90 Commissioner Drake discussed with the committee the proposal for the LECC's functions to be potentially expanded in relation to reviewing deaths in custody.

7.91 Noting that the Chief Commissioner of the LECC, the Hon Reginald Blanch AM QC, was open to the LECC performing this function if Parliament wished it to, Commissioner Drake stated: '...we are not here touting for work, but everyone agrees that this function is best performed by an organisation that is independent and that has judicial expertise'. She noted that the LECC fulfills these objectives and emphasised the readiness of the LECC to take on this role:

We already have the police oversight. I think Corrective Services NSW is a similar organisation: it is paramilitary, and it has a hierarchical structure similar to that of the police. The NSW Police Force is already involved in investigations of deaths in custody and serious injury with the police, so there is already some crossover. There is a bit of a gap, if police are investigating a Corrective Services NSW death, in us finding out about any misconduct in that investigation. To have both jurisdictions together would

⁶⁵⁷ Submission 112, Redfern Legal Centre, pp 4-5.

⁶⁵⁸ Evidence, Ms Samantha Lee, Solicitor, Redfern Legal Centre, 26 October 2020, pp 44 and 55.

⁶⁵⁹ NSW Legislative Council, Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of New South Wales - First Report* (March 2020).

⁶⁶⁰ Submission 116, Australian Lawyers for Human Rights, p 15.

not be a strain for us. We have an existing court with a proper physical structure. We have two judicial officers who can perform that function, and we have a team of analysts, investigators and oversight specialists who perform that function already.⁶⁶¹

- 7.92** Commissioner Drake noted that while this proposal would require legislative amendments and some additional staffing, the work could be absorbed into its existing functions. Commissioner Drake noted that she and Mr Blanch would have capacity to undertake the work, and that the LECC would only require 'some minimal funding for additional officers', as well as 'the involvement of an Aboriginal liaison officer'.⁶⁶²

Appointing a First Nations Commissioner

- 7.93** To protect the rights of First Nations people and increase confidence in the system, some stakeholders discussed a proposal to appoint a First Nations Commissioner, who would have a role in overseeing deaths in custody. This option was also specifically discussed in the context of the LECC being given expanded functions in relation to investigating deaths in custody.
- 7.94** The Ngalaya Indigenous Corporation supported the 'establishment of an independent First Nations Commissioner to monitor and protect the rights of First Nations peoples', with 'the power to oversee police complaints and deaths in custody involving First Nations people'. The Corporation highlighted that Victoria has an Indigenous Commissioner for Aboriginal Children and Young People and South Australia has a Commissioner for Aboriginal Engagement. It also noted that 'the *Family is Culture Report* recommends the appointment of an independent and empowered Aboriginal Commissioner focused on Aboriginal children and young people to provide oversight and accountability' and they supported the establishment of this role with it 'expanded to oversee deaths in custody'.⁶⁶³
- 7.95** Adjunct Professor Dillon also expressed some support for this proposal, noting 'the unhappy relationship between the Indigenous community and the NSW Police'. He agreed there is merit in appointing an Indigenous Commissioner or Assistant Commissioner to ensure that complaints against police by Indigenous people or organisations are investigated appropriately, but suggested that this 'is a different issue from investigations of deaths in custody or police operations and should be dealt with separately'.⁶⁶⁴
- 7.96** Ms Thorne contended that if the LECC was to take on the function of overseeing deaths in custody there would need to be engagement of First Nations people in the process. She highlighted the importance of this:

You need to have Aboriginal First Nations people involved in the investigation to give the community and the family some confidence that it is going to be done right, it is going to be done fair and it is going to be done in a culturally appropriate way. You need to be talking to the families. You need to be listening to the community. They are the ones who should be leading or involved in the investigation, not just police officers,

⁶⁶¹ Evidence, Commissioner Drake, 7 December 2020, p 37.

⁶⁶² Evidence, Commissioner Drake, 7 December 2020, p 37.

⁶⁶³ Answers to questions on notice, Ngalaya Indigenous Corporation, 26 November 2020, pp 1 -2.

⁶⁶⁴ Submission 104a, Adjunct Professor Hugh Dillon, p 16.

Corrective Services and LECC. There are no Aboriginal people involved in these investigations.⁶⁶⁵

- 7.97** Similarly, Adjunct Professor Newhouse highlighted the benefit of First Nations people being involved, 'to at least understand the lived experience of these family members and others and perhaps encourage some faith in the system'.⁶⁶⁶
- 7.98** In appointing a First Nations Commissioner, Ms Hey-Nguyen argued that 'it should not be a tick the box exercise, it should not be put in there as a place holder or a name'. Mr Hey-Nguyen advised that 'comprehensive consultation needs to take place on how best to fulfil that' with First Nations people.⁶⁶⁷
- 7.99** The Jumbunna Institute of Indigenous Education and Research emphasised the importance of systemic and cultural reforms, stating that 'the mere use of First Nations leadership is not a substitute for long-term reform of accountability institutions to reflect First Nations values'. The Jumbunna Institute argued that the reforms needed cannot be addressed 'by changing the cultural positioning of the persons tasked with working with them' and attempts to do this in other institutions 'have not resulted in wholesale improvements in the law to the interests of First Nations peoples'. It stated that 'there is no way to be certain, nor any reason to believe that an Indigenous Commissioner at the LECC tasked with overseeing deaths in custody would necessarily change anything' and 'it would be essential to pursue, at the same time, substantive systemic reform'.⁶⁶⁸
- 7.100** Further, the Jumbunna Institute of Indigenous Education and Research commented that 'the proposed model will need to address the risk that a First Nation Commissioner will face institutional and interpersonal racism and could be made responsible for a number of traumatic matters that could be dealt with by any LECC staff, but would then be siloed into an under-resourced Indigenous unit without full institutional support or mandate'. The Jumbunna Institute added that 'they would be, as other Indigenous professionals in this space are, made accountable in their communities for any structural failure of the LECC to live up to the promise of Indigenous oversight'.⁶⁶⁹
- 7.101** At a hearing, Commissioner Drake was asked if there was merit in appointing a First Nations Commissioner to the LECC. Commissioner Drake had some reservations about the proposal due to budget constraints and the potential there is insufficient workload:

Mr Blanch and I have looked at our workload and our budget and we could do this work already and would be happy to do it if the Parliament wanted us to. But I do not have any objection per se to there being an Aboriginal commissioner but I would not want to hire one just to hire one. I would have to find particular work. I do not know what the numbers of work would be if we took off a commissioner on the Corrective Services work. That would have to be looked at and in that case, if there was enough

⁶⁶⁵ Evidence, Ms Thorne, 26 October 2020, p 55.

⁶⁶⁶ Evidence, Adjunct Professor Newhouse, 26 October 2020, p 62.

⁶⁶⁷ Evidence, Ms Hey-Nguyen, 26 October 2020, p 25.

⁶⁶⁸ Answers to questions on notice, Jumbunna Institute of Indigenous Education and Research, 2 December 2020, p 3.

⁶⁶⁹ Answers to questions on notice, Jumbunna Institute of Indigenous Education and Research, 2 December 2020, pp 3-4.

work for such a commissioner an Aboriginal person would be perfect. But this is a workload budget matter and I do not want to say yes we should do that if I do not know what the workload is.⁶⁷⁰

- 7.102** On the assumption that such a role was fully funded, Commissioner Drake expressed support, reflecting on how this reform might improve credibility. Commissioner Drake noted that the role would need to be filled by a First Nations person that 'was independent and judicially trained, or legally trained in any event'.⁶⁷¹

Establishment of a new independent oversight body

- 7.103** A number of stakeholders called for the establishment of a new independent oversight body that is First Nations-led and provided with the appropriate powers to independently investigate First Nations deaths in custody.

- 7.104** A key advocate for the establishment of this new independent oversight body was the Jumbunna Institute of Indigenous Education and Research. It told the committee that the investigation of a death in custody should be conducted completely separate to the NSW Police Force:

In our view it is essential for accountability that any investigations of alleged misconduct, discriminatory exercises of power, human rights breaches, or criminal behaviour (including a death or injury in custody) are conducted by organisations that are institutionally, practically culturally and politically independent of the Police Force. This requirement is in keeping with International Law obligations.⁶⁷²

- 7.105** Emphasising the importance of independence in terms of public perceptions and the investigations themselves, the Jumbunna Institute of Indigenous Education and Research stated:

Given the need for a genuinely independent organisation, we submit that a mere oversight body that is tasked with overseeing an internal investigation is insufficient to prevent conflicts of interest or the influence of a strong police culture of collegiality and loyalty, and address the opportunities that arise for collusion and the tainting of evidence at the time of an event.⁶⁷³

- 7.106** Consequently, the Jumbunna Institute recommended 'a new, indigenous-informed and led investigative and prosecutorial institution in relation to First Nation Deaths in Custody that is tasked with the investigation, on behalf of the NSW Coroner, of First Nation Deaths in Custody'. It added that the 'body should be developed from the ground up with input from First Nation communities and families',⁶⁷⁴ and include the following mechanisms:

- powers and training to investigate complaints in a rigorous, timely and effective matter, including the powers to conduct the investigation as a standard criminal investigation and

⁶⁷⁰ Evidence, Commissioner Drake, 7 December 2020, pp 41-42.

⁶⁷¹ Evidence, Commissioner Drake, 7 December 2020, p 42.

⁶⁷² Submission 115, Jumbunna Institute of Indigenous Education and Research, p 39.

⁶⁷³ Submission 115, Jumbunna Institute of Indigenous Education and Research, pp 39-40.

⁶⁷⁴ Answers to questions on notice, Jumbunna Institute of Indigenous Education and Research, 2 December 2020, p 5.

interview Police officers, with officers required to co-operate, subject to standard common law rules against self-incrimination

- the ability to institute and conduct criminal prosecutions
- a statutory basis as an independent statutory body, being properly funded and resourced.⁶⁷⁵

- 7.107** In relation to the oversight body being First Nations-led, Distinguished Professor Larissa Behrendt AO, Director, Jumbunna Institute for Indigenous Education and Research, Chair in Indigenous Research, told the committee that 'there is good evidence to support the fact that when institutions such as this—if one were created—are Indigenous-led then they provide better outcomes for Indigenous people for a range of reasons'. She stated: 'Any other attempt would really be seen as trying to fix a system that is already systemically disadvantaging Indigenous viewpoints'.⁶⁷⁶
- 7.108** The committee heard from a number of legal and community groups that also supported this proposal, including the Redfern Legal Centre, Western NSW Community Legal Centre and Western Women's Legal Support and Aboriginal Legal Service (NSW/ACT).⁶⁷⁷
- 7.109** At a hearing, Ms Lee supported this proposal, noting that it would improve the confidence First Nations people have in the system. Ms Lee also highlighted that 'there is no other government-led professional body that is actually investigated by itself', and gave the examples of health with the Health Services Commission and lawyers with the Office of the Legal Services Commissioner.⁶⁷⁸
- 7.110** Likewise, the Western NSW Community Legal Centre and Western Women's Legal Support supported the proposal, stating that 'in the interests of truth and justice, the body should be given broad investigative powers, including the power to enter correctional facilities and police stations and the power to require a range of witnesses (including inmates and police and correctional officers) to give evidence'.⁶⁷⁹
- 7.111** The Aboriginal Legal Service (NSW/ACT) also preferred this proposal in comparison to others put forward during the inquiry. The Legal Service stated that it is 'critical that the independent body/agency has a holistic understanding of the factors that lie behind deaths in custody, and has the scope to investigate the factors behind why a person is in custody in the first place, as well as the specific circumstances of their death'. It suggested, however, that the Coroner be provided with additional resources and powers until this body is established.⁶⁸⁰

⁶⁷⁵ Submission 115, Jumbunna Institute of Indigenous Education and Research, p 40.

⁶⁷⁶ Evidence, Distinguished Professor Larissa Behrendt AO, Director, Jumbunna Institute for Indigenous Education and Research, Chair in Indigenous Research, 27 October 2020, p 44.

⁶⁷⁷ Submission 112, Redfern Legal Centre, p 6; Submission 123, Western NSW Community Legal Centre and Western Women's Legal Support, p 11; Correspondence from Aboriginal Legal Service (NSW/ACT), to Chair, 22 January 2021.

⁶⁷⁸ Evidence, Ms Lee, 26 October 2020, p 54.

⁶⁷⁹ Submission 123, Western NSW Community Legal Centre and Western Women's Legal Support, p 11.

⁶⁸⁰ Correspondence from Aboriginal Legal Service (NSW/ACT), to Chair, 22 January 2021.

- 7.112** Ngalaya Indigenous Corporation also indicated its support for an independent First Nations-led body, noting 'there is capacity within NSW amongst First Nations legal practitioners, academics, medical practitioners, psychologists and police and correctional officers to support and develop' this model. It stated that 'such an approach would not give First Nations people a privileged status or race-based rights within the criminal justice system, rather it would empower First Nations people to ensure that their communities are policed with respect, accountability and in accordance with the law'.⁶⁸¹
- 7.113** Along similar lines, Professor Thalia Anthony, Deadly Connections Community and Justice Services, also called for the establishment of an independent body, stating 'that only with accountability, with independence in the process and with the self-determination of Aboriginal families, communities and organisations can there be justice and accountability'. She went on to say 'only then will we no longer have First Nations deaths in custody into the future'.⁶⁸²
- 7.114** Sisters Inside Inc. argued that to reduce the potential contributors to deaths in custody an independent inspection body should be established 'with unbridled access to all areas of police and prisons, the resources to undertake thorough investigation and a mandate to regularly report directly to the Parliament of NSW'.⁶⁸³ It therefore suggested 'a fully funded, permanent legislated fixture, staffed with Aboriginal people trained and deputised to conduct independent investigations into deaths in custody'.⁶⁸⁴
- 7.115** Family representatives who have lost a loved one in custody also called for the establishment of a new independent oversight body, including Ms Taleah Reynolds, sister of Nathan Reynolds⁶⁸⁵ and Ms Lizzie Jarrett and Mr Paul Silva, niece and nephew of David Dungay Jr.⁶⁸⁶ Ms Jarrett stated:
- '... [P]lease listen to us: an independent body that is Aboriginal led is the ideal, but an independent body to look over the police investigating. If it is not all blacks, at least if it is independent we can have a little bit of faith as a family in the system that keeps letting us down, because somebody independent outside the police, outside of Justice Health and outside of this system, that would be a win for me and my family, personally'.⁶⁸⁷
- 7.116** Those providing support to these families also emphasised the need for an independent oversight body. For example, Mr Padraic Gibson, Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, and friend of the Chatfield Family, commented that this body needs to be first on the scene and engaging with the families:

⁶⁸¹ Submission 84, Ngalaya Indigenous Corporation, p 9.

⁶⁸² Evidence, Professor Thalia Anthony, Deadly Connections Community and Justice Services, 27 October 2020, p 11.

⁶⁸³ Submission 81, Sisters Inside Inc., p 4.

⁶⁸⁴ Answers to questions on notice, Sisters Inside Inc., 3 February 2021, p 1.

⁶⁸⁵ Evidence, Ms Taleah Reynolds, sister of Nathan Reynolds, 7 December 2020, pp 10 and 12.

⁶⁸⁶ Evidence, Ms Lizzie Jarrett, niece of David Dungay Jr, and Mr Paul Silva, nephew of David Dungay Jr, 26 October 2020, pp 60 and 67.

⁶⁸⁷ Evidence, Ms Lizzie Jarrett, niece of David Dungay Jr, 26 October 2020, p 67.

What we need is a body that is completely independent of the police and the corrections system that can actually be first on the scene responding to a death in custody. They can be the ones collecting evidence, taking the statements that actually engage with the family and make sure that they are engaged from day one with the investigation process and are fed in.... That is why we say it must be independent, Aboriginal-led and able to actually engage with families if we are ever to find peace and there is ever to be something that resembles justice following a death in custody.⁶⁸⁸

7.117 Likewise, the National Justice Project, who gave evidence alongside the Dungay Family, advocated for the government to 'properly fund and establish a culturally appropriate, First Nations staffed, independent oversight and investigative body into deaths in custody with a statutory focus on accountability and reform of the justice system'. It provided the following key features of this independent body, including:

- the power to examine the death of a First Nations person while under the control of state officials, whether those officials are working in prisons, corrective services, transport, health or police
- real powers to make recommendations, including to refer for prosecution and to undertake regular prison and youth detention inspections
- jurisdiction to oversee and inquire into the variety of custodial environments where First Nations people are held in custody, such as prisons, police cells, healthcare, as well as inquiring into the interrelated decisions made by these various bodies
- apply to any circumstances where custody is unclear, such as in transportation from one facility to another by Ambulance or Police vehicle, or hospitals within prisons.⁶⁸⁹

Committee comments

7.118 The key focus of this inquiry has been to look at the suitability of the oversight bodies involved when a death in custody occurs. The committee acknowledges that the existing structure is not ideal, and that the current arrangements and responsibilities are fragmented, not clearly set out, and involve some overlap. We also acknowledge that there are concerns relating to a lack of independence and transparency in the system, and insufficient resourcing particularly with the NSW Coroners Court. We also note that the current structure has limitations in terms of addressing broader systemic issues, particularly with respect to First Nations people. We note that there are different streams of thought on how to resolve these issues and ensure effective oversight of deaths in custody.

7.119 Many stakeholders have recommended that a new First Nations-led investigative body be established to undertake this role. We acknowledge these calls and are sympathetic to the arguments in support of this proposal. However, in our view, this type of body would take longer to establish and require greater legislative reform. It would also be hampered from the beginning by the weight of undeliverable expectations. Instead, we see benefit in utilising

⁶⁸⁸ Evidence, Mr Padraic Gibson, Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, and friend of the Chatfield Family, 3 December 2020, p 49.

⁶⁸⁹ Submission 102, National Justice Project, pp 19-20.

existing structures to ensure the gaps and issues identified in relation to the oversight of deaths in custody is addressed in a more timely fashion.

- 7.120** Of the currently available institutional options the NSW Coroners Court would seem the most appropriate body to have expanded functions in relation to deaths in custody. However, given the current resourcing constraints and delays, and reforms needed to the coronial system, as discussed in chapter 6, we are not convinced that this is the best way forward at this time. We also note that if this function was given to the NSW Coroners Court, it would take some time to implement, particularly given that it is a jurisdiction which is overdue for a review and in the committee's view, much needed reform.
- 7.121** The committee notes that there is a range of views among stakeholders as to the best vehicle for this new or expanded function, including that the Ombudsman fulfil this role. However, based upon the evidence and the submissions we received during the conduct of this inquiry, and unless or until the Coroner's Court is made fit for this purpose, the committee considers that expanding the LECC's functions to include the investigation of deaths in custody is the most reasonable and achievable approach moving forward. We believe that the LECC can provide a reasonable level of independence and transparency, without reinventing the wheel. The LECC currently has oversight when a death occurs in police custody. It seems practical for this to be expanded so the LECC can have oversight over deaths in a youth justice or adult correctional facility.
- 7.122** As to what this model would encompass, there are potentially two approaches – the first being that the LECC is given power to oversight all internal reviews of deaths in custody, or the second being that it instead specifically takes on full responsibility of investigating all deaths in custody.
- 7.123** The committee notes that with this first approach, there may still be transparency and independence concerns, and that the definition of a critical incident would need to be reviewed and adjusted to suit the circumstances around deaths in custody. We also note that there was a proposal for the NSW Ombudsman to oversight the internal investigations conducted by Youth Justice NSW, Corrective Services NSW and the Justice Health. While this has some merit, in our view it does not address all of the concerns put forward by stakeholders.
- 7.124** In terms of the second approach, which is that the LECC take on full responsibility for investigating a death in custody, we acknowledge that this may require the creation of a new independent division or investigative body within the LECC to investigate a death in custody from day one, alongside the criminal investigation conducted by the NSW Police Force and internal review conducted by the appropriate facility. This function would not interfere with the Coronial inquest of a death in custody but would be involved in preparing the brief for the Coroner.
- 7.125** Noting the limitations of the LECC's current oversight role of police critical incidents and the calls for greater independence in overseeing deaths in custody, particularly First Nations deaths in custody, we consider that this is the best approach. We also support the LECC to be fully resourced to undertake this role.

Recommendation 35

That the NSW Government expand the functions of the Law Enforcement Conduct Commission to undertake full investigations in relation to deaths in custody, with appropriate resourcing and support.

- 7.126** The committee acknowledges calls for First Nations people to be involved in the design and implementation of a system which better reflects the lived experiences of First Nations people. In particular, we recognise the calls for a First Nations Commissioner to be appointed to the LECC as part of its new function to oversight deaths in custody.
- 7.127** The committee acknowledges that this would be a difficult role to undertake, particularly in terms of undertaking investigations of First Nations deaths in custody. Given the over-representation of First Nations people in both the work of police and corrective services there is a powerful case to be made for a distinct First Nations representative in the LECC. Whether this position is a third Commissioner or some other senior officer is a matter that needs to be considered with a close eye to how this position would function in the LECC. It may be that a senior alternative role is more appropriate and allows for the flexibility to work across the two distinct divisions of a reformed and expanded LECC. Either way, we firmly believe that a senior dedicated First Nations position is essential to give First Nations people a clear signal that their culture and concerns are being addressed at the heart of the organisation. Given this, we recommend that a First Nations senior position be established within the LECC. We consider that this position may not necessarily be involved in individual investigations, but would be a senior position tasked with undertaking engagement across the organisation and review policies to ensure it is genuinely approachable and culturally safe.
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Recommendation 36

That the NSW Government amend the *Law Enforcement Conduct Commission Act 2016* to include a senior statutory First Nations position to undertake engagement across the organisation and review policies and case work, and to ensure it is genuinely approachable and culturally safe.

- 7.128** In a broader sense, we believe it is critical that First Nations people are employed across the criminal justice system as a whole. This is particularly important given the high level of First Nations people who are in contact with the system and the need for services, departments, agencies, and oversight bodies to be more culturally competent. We believe that appointing more First Nations staff across the system will assist in building the confidence and trust of First Nations families and communities. We therefore recommend that the NSW Government implement a program to actively employ a greater number of First Nations staff across all areas of the criminal justice system.
- 7.129** In particular, the committee believes that there should be greater representation in the police force, the prosecution services and the judiciary, given they not only apply the law but exercise enormous discretions in how the law is enforced. While we agree that cultural awareness training will better the system overall, we also need people with lived experience in these important positions.
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Recommendation 37

That the NSW Government implement a program to actively employ a greater number of First Nations staff across all areas of the criminal justice system.

Recommendation 38

That the Attorney General consider appointing significantly more suitably experienced and qualified First Nations people to the judiciary.

- 7.130** The committee still considers that the NSW Ombudsman plays a significant role in overseeing complaints within the custodial system and the capacity to review systemic issues. We also note that the Inspector of Custodial Services has the ability to undertake systemic reviews of deaths in custody, although to date this has never been done. In the committee's view, we can see merit in the proposal to merge the Inspector of Custodial Services functions with the Ombudsman's office, so as to reduce existing overlap and prepare for the Optional Protocol to the Convention against Torture across New South Wales. We recommend that the NSW Government consider this proposal in more detail.
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Recommendation 39

That the NSW Government consider merging the functions of the Inspector of Custodial Services into the NSW Ombudsman's office.

Appendix 1 Submissions

No.	Author
1	Mr Grant Mistler
2	Mr Paul Hammett
3	New South Wales Bar Association
3a	New South Wales Bar Association
4	Mr Warren Grant-Vest
5	Ms Jusinta Collins
6	Ms Jo Faith
7	Mr David Edwards
8	Confidential
9	Name suppressed
10	Mr Andrew Snelgar
11	Mr Matthew Abourizk
12	Mr William Kemp
13	Ms Natalie Burns
14	Ms Prudence Mogg
15	Ms Frankie Lee
16	Name suppressed
17	Mrs Faikah Behardien
18	Ms Ysabella Schneider
19	Miss Shannon Donohoe
20	Ms Laura Guan
21	Name suppressed
22	Ms Mila Heneck
23	Mr James Godfrey
24	Ms Carol Sparks
25	Ms Marci Katz
26	Miss Kasey Tyson
27	Name suppressed
28	Name suppressed
29	Mr Poamo Tuialii

No.	Author
30	Miss Ashleigh Stower
31	Name suppressed
32	Ms Sue Short
33	Name suppressed
34	Name suppressed
35	Miss Kooriana Boney
36	Name suppressed
37	Name suppressed
38	Ms Juliet Green
39	Ms Laura Fogarty
40	Ms Natasha Ploskodniak
41	Name suppressed
42	Ms Lindsay McCabe
43	Australia's National Research Organisation for Women's Safety
44	Law Enforcement Conduct Commission
44a	Law Enforcement Conduct Commission
45	Yfoundations
46	Name suppressed
47	Ms Lisa J Ryan
48	Professor Eileen Baldry
49	Justice and Peace Office of the Catholic Archdiocese of Sydney
50	Mr Christopher De Souza
51	Ms Jenny Rae
52	Mr Peter Strong
53	Dr Bronwyn Hanna
54	Ms Lisa Selsby
55	Miss Melissa Prior
56	Name suppressed
57	Name suppressed
58	Mr Jorj Lowrey
59	Mr Ben Watson
60	Ms Elizabeth Counihan
61	Name suppressed
62	Ms Erin Hodge

No.	Author
63	Ms Mary Ann Gourlay
64	Miss Isabella Kalucy
65	New England Greens Armidale Tamworth
66	Office of the NSW Advocate for Children and Young People
68	Name suppressed
69	Keeping Women Out of Prison
70	Mr Christopher Puplick AM and signatories
71	Community Restorative Centre
72	Kath McFarlane Consulting
73	Armidale ANTAR
74	Dr John Gerofi
75	Mrs Pamela Evans
76	NSW Young Lawyers
77	Dr Bronwen Evans
78	Ms Leanne Archer
79	Ms Tiani Chillemi
80	Ms Nikki McCoy
81	Sisters Inside Inc.
82	Mrs Alice Cairns
83	Ms Kate Constantine
84	Ngalaya Indigenous Corporation
85	Name suppressed
86	Australian Lawyers Alliance
87	Ms Therese Hedwards
88	Mrs Jill Bott
89	Mr Peter Mahoney
90	Name suppressed
91	Mr Mark Gillespie, Ms Caroline Andersen, Ms Rachel Evans and Gay EGG
92	Mrs Jane Scott
93	Miss Kate Robinson
94	Dr Angela Williams
95	Name suppressed
96	Ms Inga Lie
97	Miss Hayleigh Hedley

No.	Author
98	NSW Aboriginal Land Council
99	Inspector of Custodial Services
100	Chief Magistrate of the Local Court of New South Wales
101	First People with Disability Network (Australia)
102	National Justice Project and the Dungay Family
103	Australian Medical Association (NSW) Ltd
104	Adjunct Professor Hugh Dillon
104a	Adjunct Professor Hugh Dillon
104b	Adjunct Professor Hugh Dillon
105	The Royal Australian and New Zealand College of Psychiatrists (RANZCP)
106	Ms Sue Davis
107	Change the Record
108	Dr Fiona Allison, Professor Chris Cunneen and Ms Melanie Schwartz
109	Australian National University Law Reform and Social Justice Research Hub
110	Community Legal Centres NSW
111	NSW Ombudsman
112	Redfern Legal Centre
113	Law Society of NSW
114	Public Interest Advocacy Centre
114a	Public Interest Advocacy Centre
115	Jumbunna Institute of Indigenous Education and Research, Research Unit
116	Australian Lawyers for Human Rights
117	Legal Aid NSW
118	Public Service Association of NSW
119	Women's Legal Service NSW
120	Aboriginal Legal Service (NSW/ACT)
121	St Vincent de Paul Society NSW
122	Indigenous Social Justice Association (ISJA)
123	Western NSW Community Legal Centre Inc. (WNSWCLC) and Western Women's Legal Support (WWLS)
124	Reynolds Family
125	Associate Professor Rebecca Scott Bray and Emeritus Professor Phil Scraton
126	Deadly Connections Community and Justice Services Limited
127	Just Reinvest NSW

No.	Author
128	Chatfield Family
129	New South Wales Nurses and Midwives' Association
130	Justice Action, Deaths In Custody Team
131	Assistant Commissioner Anthony Crandell APM, NSW Police Force - Introductory address for the purpose of giving evidence to the committee
132	Mr John Nicholson SC

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Monday 26 October 2020 Macquarie Room Parliament House, Sydney	Mr Tony McAvoy SC	Chair of the NSW Bar Association's First Nations Committee and Member, Joint Working Party on the Over-representation of Indigenous People in Custody in New South Wales
	Ms Sarah Crellin	Member of the Law Society's Indigenous Issues Committee
	Mr Simon Bruck	Vice-President, NSW Young Lawyers
	Dr Louis Schetzer	Policy and Advocacy Manager, Australian Lawyers Alliance
	Ms Verity Smith	Solicitor, Public Interest Advocacy Centre
	Mr Alastair Lawrie	Senior Policy Officer, Public Interest Advocacy Centre
	Ms Christina Hey-Nguyen	NSW Convenor, Australian Lawyers for Human Rights
	Ms Kate Sinclair	Chairperson, Ngalaya Indigenous Corporation
	Mr Jason O'Neil	Executive Director, Ngalaya Indigenous Corporation
	Mr Brendan Thomas	Chief Executive Officer, Legal Aid NSW
	Mr David Evenden	Solicitor Advocate, Coronial Inquest Unit, Legal Aid NSW
	Ms Julie Tongs	Chief Executive Officer, Winnunga Nimmityjah Aboriginal Health Service
	Ms Karly Warner	Chief Executive Officer, Aboriginal Legal Service NSW-ACT
	Mr Jeremy Styles	Managing Advocate, Aboriginal Legal Service NSW-ACT
	Mr Tim Leach	Executive Director, Community Legal Centres NSW
Ms Emily Hamilton	Policy & Advocacy Manager, Community Legal Centres NSW	
Ms Samantha Lee	Solicitor, Redfern Legal Centre	

SELECT COMMITTEE ON THE HIGH LEVEL OF FIRST NATIONS PEOPLE IN CUSTODY AND
OVERSIGHT AND REVIEW OF DEATHS IN CUSTODY

Date	Name	Position and Organisation
	Ms Gail Thorne	Community Access Worker, First Nations Women's Legal Program, Women's Legal Service NSW
	Ms Yasmine Khan	Community Access Worker, First Nations Women's Legal Program, Women's Legal Service NSW
	Ms Carolyn Jones	Senior Solicitor, Women's Legal Service NSW
	Mr Patrick O'Callaghan	Principal Solicitor, Western NSW Community Legal Centre Inc and Western Women's Legal Support
	Ms Melissa Shennan	Aboriginal Support Worker, Western Women's Legal Support
	Ms Leetona Dungay	Mother of David Dungay Junior
	Ms Lizzie Jarrett	Niece of David Dungay Junior
	Ms Cynthia Dungay	Sibling of David Dungay Junior
	Mr Paul Silva	Nephew of David Dungay Junior
	Adjunct Professor George Newhouse	Director and Principal Solicitor, National Justice Project
Tuesday 27 October 2020 Macquarie Room Parliament House, Sydney	Ms Ashlee Kearney	Disability Role Commission Project Manager, First Peoples Disability Network
	Ms Sophie Trevitt	Executive Officer, Change the Record
	Professor Thalia Anthony	Deadly Connections Community and Justice Services
	Mr Keenan Mundine	Co-Founder and Ambassador, Deadly Connections Community and Justice Services
	Mr James Christian	Chief Executive Officer, NSW Aboriginal Land Council
	Dr Mindy Sotiri	Program Director Advocacy, Policy and Research, Community Restorative Centre
	Ms Kelly Parker	Senior Case Manager with the Miranda Project, Community Restorative Centre
	Ms Melissa Merritt	Senior Youth Transition Worker, Community Restorative Centre
	Ms Sarah Hopkins	Co-Chair of Just Reinvest NSW

Date	Name	Position and Organisation
	Mr Daniel Daylight	Member of the Executive Committee, Just Reinvest NSW
	Mr Jack de Groot	Chief Executive Officer, St Vincent de Paul Society NSW
	Mr Jake Robertson	Team Leader, Housing and Homelessness Services, St Vincent de Paul Society NSW
	Mr Craig D. Longman	Head, Legal Strategies and Senior Researcher, Jumbanna: Institute for Indigenous Education and Research (JIER), Research Unit
	Distinguished Professor Larissa Behrendt AO	Director, Jumbanna: Institute for Indigenous Education and Research, Chair in Indigenous Research
	Dr Paul Gray	Associate Professor, Jumbanna: Institute for Indigenous Education and Research, University of Technology Sydney
	Adjunct Professor Hugh Dillon	Ex-Deputy State Coroner and Ex-Magistrate of the NSW Local Court and member of the Faculty at University of New South Wales Law School
	Dr Rebecca Scott Bray	Associate Professor of Criminology and Socio-Legal Studies, University of Sydney
	Emeritus Professor Phil Scraton	School of Law, Queen's University, Belfast
	Mr Raul Bassi	Secretary, Indigenous Social Justice Association
	Ms Faith Black	Spokesperson, Indigenous Social Justice Association
	Ms Gail Hickey	Mother of TJ Hickey for Families of Deaths in Custody
Thursday 3 December 2020 Macquarie Room Parliament House, Sydney	Witness A (<i>in camera</i>)	
	Mr Paul Miller	Acting NSW Ombudsman
	Mr Danny Lester	Deputy Ombudsman (Engagement and Aboriginal Programs)
	Ms Monica Wolf	Acting Deputy Ombudsman (Projects and Systemic Reviews)
	Ms Carla Ware	Manager (Aboriginal Inclusion and Community Engagement)

SELECT COMMITTEE ON THE HIGH LEVEL OF FIRST NATIONS PEOPLE IN CUSTODY AND
OVERSIGHT AND REVIEW OF DEATHS IN CUSTODY

Date	Name	Position and Organisation
	Ms Jennifer Agius	Manager (Detention and Custody)
	Ms Rosalind Strong AM	Convenor, Keeping Women out of Prison Coalition
	Ms Helen Easson	Keeping Women out of Prison Coalition Member and Founder and Chief Executive Officer of Nelly's Healing Centre
	Ms Eleni Psillakis	Keeping Women out of Prison Coalition Member and Program Manager Success Works, Part of Dress for Success Sydney
	Ms Debbie Kilroy	Chief Executive Officer, Sisters Inside Inc
	Ms Tabitha Lean	Lived experience abolition activist, Sisters Inside Inc
	Dr Heather Nancarrow	Chief Executive Officer, Australia's National Research Organisation for Women's Safety
	Ms Michele Robinson	Director, Evidence to Action, Australia's National Research Organisation for Women's Safety
	Ms Zoë Robinson	Acting Advocate for Children and Young People, Office of the NSW Advocate for Children and Young People
	Dr Elizabeth Watt	Senior Policy and Research Lead, Yfoundations
	Dr Danielle McMullen	President, Australian Medical Association
	Dr Calum A Smith	Chair, the Royal Australian and New Zealand College of Psychiatrists NSW Forensic Subcommittee
	Ms Nioka Chatfield	Mother of Tane Chatfield
	Mr Colin Chatfield	Father of Tane Chatfield
	Ms Jasmine Lesley Vale	Grandmother of Tane Chatfield
	Ms Nulla Chatfield	Sister of Tane Chatfield
	Ms Merinda Connor	Partner of Tane Chatfield
	Mr Padraic Gibson	Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of

Date	Name	Position and Organisation
		Technology Sydney, and friend of the family
Monday 7 December 2020 Macquarie Room Parliament House, Sydney	Mr Shay Deguara	Industrial Manager, Public Service Association of NSW
	Ms Ann Weldon	Aboriginal Liaison Officer, Public Service Association of NSW
	Ms Taleah Reynolds	Sister of Mr Nathan Reynolds
	Ms Makayla Reynolds	Sister of Mr Nathan Reynolds
	Assistant Commissioner Anthony Crandell APM	Commander, State Intelligence Command, NSW Police Force
	The Hon Lea Drake	Commissioner Integrity, Law Enforcement Conduct Commission
	Mr Gary Kirkpatrick	Executive Director, Law Enforcement Conduct Commission
	Mr Michael Coutts-Trotter	Secretary, Department of Communities and Justice
	Mr Peter Severin	Commissioner, Corrective Services NSW
	Mr Luke Grant	Deputy Commissioner, Corrective Services NSW
	Mr Carlo Scasserra	Assistant Commissioner, Governance and Continuous Improvement, Corrective Services NSW
	Mr Paul O'Reilly	Executive Director, Youth Justice NSW
	Mr Mike Wheaton	Director, Policy and Practice, Youth Justice NSW
	Ms Candice Neilson	Director, Strategy and Engagement, Youth Justice NSW
Tuesday 8 December 2020 Macquarie Room Parliament House, Sydney	Ms Jackie Fitzgerald	Executive Director, NSW Bureau of Crime Statistics & Research (BOSCAR)
	Ms Lillian Gordon	Head of Aboriginal Affairs NSW
	Mr Matthew Trindall	Director, Aboriginal Strategy and Culture, Justice Health and Forensic Mental Health Network
	Ms Wendy Hoey	Executive Director, Clinical Operations, Justice Health and Forensic Mental Health Network

SELECT COMMITTEE ON THE HIGH LEVEL OF FIRST NATIONS PEOPLE IN CUSTODY AND
OVERSIGHT AND REVIEW OF DEATHS IN CUSTODY

Date	Name	Position and Organisation
	Ms Fiona Rafter	Inspector of Custodial Services

Appendix 3 Minutes

Minutes no. 1

Thursday 2 July 2020

Select Committee on the high level of First Nations people in custody and oversight and review of deaths in custody

Room 1254 and via teleconference, 2.35 pm

1. Members present

Mr Searle, *Chair*

Mr Khan

Mr Roberts

Ms Sharpe

Mr Shoebridge

2. Apologies

Mrs Ward

3. Tabling of resolution establishing the committee

The Chair tabled the resolution of the House establishing the committee on 17 June 2020, which reads as follows:

- (1) That a select committee be established to inquire into and report on First Nations people in custody in New South Wales, and in particular
 - (a) the unacceptably high level of First Nations people in custody in New South Wales,
 - (b) the suitability of the oversight bodies tasked with inquiries into deaths in custody in New South Wales, with reference to the Inspector of Custodial Services, the NSW Ombudsman, the Independent Commission Against Corruption, Corrective Services professional standards, the NSW Coroner and any other oversight body that could undertake such oversight,
 - (c) the oversight functions performed by various State bodies in relation to reviewing all deaths in custody, any overlaps in the functions and the funding of those bodies,
 - (d) how those functions should be undertaken and what structures are appropriate, and
 - (e) any other related matter.
- (2) That, notwithstanding anything to the contrary in the standing orders, the committee consist of six members comprising:
 - (a) two government members,
 - (b) two opposition members, and
 - (c) two crossbench members, one from The Greens and one from another crossbench party.
- (3) That the Chair of the committee be an opposition member and the Deputy Chair be a crossbench member.
- (4) That, unless the committee decides otherwise:

- (a) submissions to the inquiry are to be published, subject to the Committee Clerk checking for confidentiality and adverse mention and, where those issues arise, bringing them to the attention of the committee for consideration,
- (b) the Chair's proposed witness list is to be circulated to provide members with an opportunity to amend the list, with the witness list agreed to by email, unless a member requests the Chair to convene a meeting to resolve any disagreement,
- (c) the sequence of questions to be asked at hearings is to alternate between government, opposition and crossbench members, in order determined by the committee, with equal time allocated to each,
- (d) transcripts of evidence taken at public hearings are to be published,
- (e) supplementary questions are to be lodged with the Committee Clerk within two days, excluding Saturday and Sunday, following the receipt of the hearing transcript, with witnesses requested to return answers to questions on notice and supplementary questions within 21 calendar days of the date on which questions are forwarded to the witness, and
- (f) answers to questions on notice and supplementary questions are to be published, subject to the Committee Clerk checking for confidentiality and adverse mention and, where those issues arise, bringing them to the attention of the committee for consideration.

(5) That the committee report by the final working day in March 2021.

4. Election of Deputy Chair

The Chair called for nominations for Deputy Chair.

Mr Shoebridge nominated to be elected Deputy Chair of the committee.

There being no further nominations, the Chair declared Mr Shoebridge elected Deputy Chair.

5. Conduct of committee proceedings – media

Resolved, on the motion of Mr Khan: That unless the committee decides otherwise, the following procedures are to apply for the life of the committee:

- the committee authorise the filming, broadcasting, webcasting and still photography of its public proceedings, in accordance with the resolution of the Legislative Council of 18 October 2007
- the committee webcast its public proceedings via the Parliament's website, where technically possible
- the committee adopt the interim guidelines on the use of social media and electronic devices for committee proceedings, as developed by the Chair's Committee in May 2013
- media statements on behalf of the committee be made only by the Chair.

6. Conduct of the inquiry

The Chair briefed the committee on his proposals for the conduct of the inquiry.

7. Proposed timeline

Resolved, on the motion of Mr Shoebridge: That the committee adopt the following timeline for the administration of the inquiry:

- Submission closing date: Monday 24 August 2020.
- Hearings: days in September/October 2020, including possibly during the weeks formerly set aside for budget estimates in August and September 2020, with possible further hearings in February 2021 if needed.

- Report deliberative: March 2021.
- Tabling: March 2021.

8. Stakeholder list

Resolved, on the motion of Mr Roberts: That the following parties be invited to make a submission to the inquiry:

Oversight Bodies/Government

- Law Enforcement Conduct Commission
- Inspector of Custodial Services
- Mr Michael Barnes, NSW Ombudsman
- Independent Commission Against Corruption
- Corrective Services
- NSW Coroner
- NSW Police
- Department of Communities and Justice
- Judicial Commission of NSW
- NSW Bureau of Crime Statistics and Research

Courts

- Heads of the courts in New South Wales through the Attorney General.

Legal & Policy organisations

- Aboriginal Justice Advisory Council (NSW)
- Aboriginal Legal Service
- NSW Aboriginal Land Council
- Aboriginal Law Reform Commission
- Public Interest Advocacy Centre
- National Justice Project
- Australian Law Reform Commission
- Community Legal Centres NSW
- Change the Record
- Indigenous Human Rights Network Australia (IHRNA)
- Australian Institute of Criminology
- Women's Legal Service NSW
- Women's Justice Network
- Keeping Women out of Prison Coalition
- The Law Society of NSW
- NSW Bar Association
- Australian Lawyers Alliance
- Australian Lawyers for Human Rights
- Contact from the Royal Commission/Deloitte 2018 review

NSW Universities

- Jumbunna Institute for Indigenous Education and Research, UTS
- Indigenous Law Centre, UNSW

Unions and associations

- Unions NSW
- Public Service Association
- United Workers Union
- Police Association.

Resolved, on the motion of Mr Roberts: That members have until COB Wednesday 8 July 2020 to nominate additional stakeholders.

9. Advertising

All inquiries are advertised via Twitter, Facebook, stakeholder letters and a media release distributed to all media outlets in New South Wales.

10. Note on website and media release

Resolved, on the motion of Mr Roberts: That the secretariat add the following note on the committee's webpage (and in its initial media release): Parties to the inquiry are advised that the focus of this inquiry is on the operations and functions of the oversight bodies tasked with reviewing deaths in custody in New South Wales. The committee is not in a position to directly review individual cases.

11. Adjournment

The committee adjourned at 2.51 pm, *sine die*.

Stephen Frappell
Clerk to the Committee

Minutes no. 2

Thursday 15 October 2020

Select Committee on the high level of First Nations people in custody and oversight and review of deaths in custody

Room 1043, Parliament House, Sydney at 1.39 pm

1. Members present

Mr Searle, *Chair*
Mr Shoebridge, *Deputy Chair (via teleconference until 2.04 pm)*
Mr Khan
Mr Roberts (*from 1.42 pm*)
Ms Sharpe
Mrs Ward

2. Previous minutes

Resolved, on the motion of Ms Sharpe: That draft minutes no. 1 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 22 July 2020 – Email from Rani Young, A/Manager Compliance and Performance, Corrective Services NSW, Department of Communities and Justice, to secretariat, requesting a three week extension for the submission from the NSW Government
- 29 July 2020 – Email from Rani Young, A/Manager Compliance and Performance, Corrective Services NSW, Department of Communities and Justice, to secretariat, advising that there will be no NSW Government submission to the inquiry

- 31 July 2020 – Letter from the Hon Mark Speakman MP, Attorney General and Minister for the Prevention of Domestic Violence, to the Chair, advising he had forwarded information about the inquiry to the Chief Justice of the Supreme Court, Chief Judge of the District Court, Chief Magistrate, President of the Children's Court and the NSW State Coroner, to advise them of the opportunity to make a submission
- 28 August 2020 – Email from Ms Sue Davis, to Chair, requesting the committee extend the submission closing date by 21 days
- 31 August 2020 – Email from Mr Mark Gillespie, author of submission 91, to secretariat, requesting that Ms Caroline Anderson, mother of Wayne 'Fella' Morrison who died in custody, appear as a witness at an upcoming public hearing
- 8 September 2020 – Email from Michele Esteves, Researcher, Compass, to secretariat, seeking permission for ABC Compass to attend and record the hearings on 26 and 27 October
- 18 September 2020 – Letter from Ms Sarah Hopkins, Co-Chair, Just Reinvest NSW, to Chair, requesting to appear as a witness at an upcoming public hearing
- 22 September 2020 – Email from Ariane Dozer, National Justice Project, to secretariat, requesting that the Dungay Family appear as witnesses at an upcoming public hearing
- 1 October 2020 – Email from Petta Chua, on behalf of the Chatfield Family, to secretariat, advising that the pdf document and power point presentation that form part of their submission be kept confidential and the video links can be made public
- 3 October 2020 – Email from Mr Paul O'Reilly, Executive Director, Youth Justice NSW, to Chair, advising that Youth Justice NSW will not be making a submission to the inquiry
- 7 October 2020 – Email from Mr David Evenden, Solicitor Advocate, Coronial Inquest Unit, Legal Aid NSW, to secretariat, requesting that Ms Julie Tongs, CEO of Winnunga Nimmityjah Aboriginal Health Service in Canberra give evidence to the committee
- 7 October 2020 – Email from Ms Liz Snell, Law Reform and Policy Coordinator, Women's Legal Service NSW, to secretariat, confirming witnesses at the upcoming hearing and requesting that they visit Parliament House the week prior to the hearing and see the room that the hearing will be held in and also if appropriate to meet with the Chair
- 15 October 2020 – Email from Mr Raul Bassi, Secretary, Indigenous Social Justice Association, to secretariat, requesting that three witnesses appear at the hearing on 27 October, including Ms Gail Hickey, mother of TJ Hickey.

Sent:

- 9 July 2020 – Letter from Chair, to the Hon Mark Speakman MP, Attorney General and Minister for the Prevention of Domestic Violence, requesting that he forward information about the inquiry to the Heads of Jurisdictions
- 28 September 2020 – Email from Chair, to Aboriginal Affairs NSW, inviting the department to make a submission to the inquiry by 23 October
- 29 September 2020 – Email from Chair, to Youth Justice NSW, inviting the department to make a submission to the inquiry by 23 October.

4. Public submissions

Resolved, on the motion of Mr Khan: That the committee authorise the publication of submission nos. 1-7, 10-15, 17-20, 22-26, 29, 30, 32, 35, 38-40, 42, 44, 45, 47-55, 58-60, 62-67, 69-84, 86-89, 91-94, 96-123, 125-127.

5. Name suppressed submissions

Resolved, on the motion of Ms Sharpe: That the committee keep the following information confidential, as per the request of the author: author names in submission nos. 16, 21, 27, 28, 31, 33, 34, 36, 37, 41, 46, 56, 57, 61, 68, 85, 90, 95.

6. Confidential submissions

6.1 Submission no. 8

Resolved, on the motion of Mrs Ward: That the committee keep submission no. 8 confidential, as per the request of the author.

6.2 Submission no. 43

The committee noted that the authors of submission no. 43 have requested that their submission remain confidential until late October/early November 2020 as some information is provided under embargo until a research report is released.

Resolved, on the motion of Mr Khan: That the committee:

- keep submission no. 43 confidential at this stage, as per the request of the author, as some information contained in the submission is provided under embargo until a research report is released
- at the end of October/early November 2020 publish submission no. 43, on receipt of advice from the submission author that the research report has been released.

6.3 Submission no. 124

The committee noted that the authors of submission no. 124 have requested that their submission remain confidential until the end of October 2020 as the case is currently before an inquest.

Resolved, on the motion of Ms Sharpe: That the committee:

- keep submission no. 124 confidential at this stage, as per the request of the authors, as the case is currently before an inquest
- at the end of October 2020 publish submission no. 124, on receipt of advice from the submission authors that the submission can be published.

7. Attachments to submissions

Resolved, on the motion of Mrs Ward: That the committee authorise the publication of attachments to submission nos. 1 - attachment 1, 48 - attachment 2, 69 - attachment 4.

8. Submission no. 128

Resolved, on the motion of Ms Sharpe: That the committee:

- authorise the publication of submission no. 128
- keep the two attachments to submission no. 128 confidential, as per the request of the author, as it contains sensitive information.

9. Invitation to make a submission

The committee noted that the Department of Aboriginal Affairs and Youth Justice NSW (Juvenile Justice) were missed from the list of stakeholders to be invited to make a submission. An invitation from the Chair was sent to both of these departments to provide a submission by Friday 23 October 2020. The committee has received correspondence from Mr Paul O'Reilly, Executive Director, Youth Justice NSW, advising that Youth Justice NSW will not be making a submission to the inquiry.

Resolved, on the motion of Mr Khan: That the Chair write to Youth Justice NSW inviting them to comment specifically on the issue of incarceration rates and the age of criminal responsibility.

10. Additional hearings

Resolved, on the motion of Mr Khan: That the committee:

- have hearings on 3, 7 and 8 December
- invite the proposed witnesses/panelled groups, as outlined in the circulated hearing schedules
- invite representatives of the Dungay Family to the October hearings, and invite representatives from the Chatfield Family and the Reynolds Family to the December hearings, with these witnesses appearing potentially alongside any organisation those families are working with
- communicate to the Chatfield Family and Reynolds Family that they will be invited to appear at the hearings to be held in December 2020.

11. Request to appear from the author of submission 91

The committee noted that the author of submission 91 has requested that Ms Caroline Anderson, mother of Wayne 'Fella' Morrison who died in custody, appear as a witness at an upcoming public hearing. The committee also noted that Mr Morrison's case is a South Australian case.

Resolved, on the motion of Mrs Ward: That the Chair write to the author of submission 91 to advise that Ms Anderson is not being invited to give evidence as the inquiry is specific to New South Wales, noting that Ms Anderson can provide any additional information she may wish to provide to the committee.

12. Request from stakeholder

The secretariat briefed members on a request from a stakeholder who would like to give evidence at an *in camera* hearing instead of providing a written submission, due to the sensitivities of their evidence. The committee deferred consideration of this request until the next meeting.

13. ABC Compass request to film hearings

The committee noted the correspondence from Ms Michele Esteves, Researcher, Compass, seeking permission for ABC Compass to attend and record the hearings on 26 and 27 October for a documentary they are making with members of the Dungay Family.

Resolved, on the motion of Mr Roberts: That the committee approve the request from ABC Compass to attend and record the hearings on 26 and 27 October 2020, provided that they sign an undertaking to abide by the requirements of the Broadcasting Resolution.

14. Legal Aid NSW requested witness

The committee noted the correspondence from Mr David Evenden, Solicitor Advocate, Coronial Inquest Unit, Legal Aid NSW, requesting Ms Julie Tongs, CEO of Winnunga Nimmityjak Aboriginal Health Service, give evidence alongside the Legal Aid NSW representative at the upcoming hearing.

Resolved, on the motion of Mr Khan: That the committee agree to the request from Mr David Evenden, Solicitor Advocate, Coronial Inquest Unit, Legal Aid NSW, for Ms Julie Tongs, CEO of Winnunga Nimmityjak Aboriginal Health Service, to give evidence alongside the Legal Aid NSW representative at the hearing on Monday 26 October 2020.

15. Women's Legal Service NSW request to meet with the Chair

The committee noted the correspondence from Ms Liz Snell, Law Reform and Policy Coordinator, Women's Legal Service NSW, confirming that two of their First Nations community access workers would like to give evidence to the committee at the upcoming hearings. They have requested to ensure cultural safety that these witnesses visit Parliament House the week prior to the hearing to view the room the hearing will be held in and also if appropriate to meet with the Chair.

Resolved, on the motion of Ms Sharpe: That the committee agree to the request from Ms Liz Snell, Law Reform and Policy Coordinator, Women's Legal Service NSW, that the two First Nations witnesses visit Parliament House the week prior to the hearing to view the room the hearing will be held in and meet with the Chair.

16. Links to previous reports

The committee noted that links to the following relevant reports to the inquiry have been uploaded to the committee inquiry webpage:

- The 1991 Report of the Royal Commission into Aboriginal Deaths in Custody
- The 2001 Report of the Australian Institute of Criminology entitled *Deaths in Custody: 10 Years on from the Royal Commission*
- The 2018 Deloitte review of implementation of the Royal Commission recommendations
- The 2019 Report of the Australian Institute of Criminology entitled *Indigenous deaths in custody: 25 years since the Royal Commission into Aboriginal Deaths in Custody*.

17. Additional resources

The committee noted that Mr Khan, at the request of the Chair, has provided several resources concerning the overrepresentation of Indigenous people in custody, specifically in relation to bias in sentencing. The secretariat to request copies of these resources from the library and circulate to members with consideration of publication of these resources to be determined at a later meeting.

18. Aboriginal cultural awareness training

Resolved, on the motion of Mrs Ward: That the secretariat investigate options for the committee to either undertake refresher Aboriginal cultural awareness training or if this is not possible due to time constraints and availability of members arrange resources or reading material to be sent to members about communicating with Aboriginal people.

Mr Shoebridge left the meeting at 2.04 pm.

19. Indigenous Social Justice Association witnesses

The committee noted the correspondence from Mr Raul Bassi, Secretary, Indigenous Social Justice Association, to secretariat, requesting that three witnesses appear at the hearing on 27 October 2020, including Ms Gail Hickey, mother of TJ Hickey.

Resolved, on the motion of Ms Sharpe: That the Indigenous Social Justice Association appear individually and not as part of a panel for the duration of one hour on Tuesday 27 October.

20. Adjournment

The committee adjourned at 2.08 pm, until 9.00 am Monday 26 October 2020 (public hearing).

Sarah Dunn

Clerk to the Committee

Minutes no. 3

Monday 26 October 2020

Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

Macquarie Room, Parliament House, 9.21 am

1. Members present

Mr Searle, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Khan (*until 9.45 am, from 12.15 pm*)

Mr Roberts

Ms Sharpe

Mrs Ward (*via videoconference*)

2. Previous minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 2 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- 15 October 2020 – Email from Ms Michelle Esteves, Researcher, Compass, Entertainment & Specialist, to secretariat, providing the signed copy of the broadcasting media guidelines
- 20 October 2020 – Email from Mr Mark Gillespie, to secretariat, providing additional information to the committee

- 20 October 2020 – Letter from Nerita Waight and Cheryl Axleby, Co-Chairs of the National Aboriginal and Torres Strait Islander Legal Service, to committee, endorsing the submission made to the inquiry from the Aboriginal Legal Service (NSW/ACT)
- 22 October 2020 – Email from the Australian National University Law Reform and Social Justice Research Hub, to secretariat, declining the invitation to appear at the hearing on 27 October 2020
- 23 October 2020 – Email from Mr Paul O'Reilly, Executive Director, Youth Justice NSW, to Chair, providing a response to the committee's request to comment on the age of criminal responsibility in NSW
- 25 October 2020 – Email from Mr George Newhouse, Director, National Justice Project, to secretariat, requesting that the annexure to their submission be published as part of the submission.

Sent

- 19 October 2020 – Correspondence from Chair to Youth Justice NSW, regarding a request for information about incarceration rates and the age of criminal responsibility
- 19 October 2020 – Correspondence from Chair to Mr Mark Gillespie, regarding giving evidence at the hearings
- 15 October 2020 – Email to Ms Michelle Esteves, Researcher, Compass, Entertainment & Specialist, from secretariat, advising that the committee has approved the request for the ABC Compass Crew to attend and record the hearings on Monday 26 and Tuesday 27 October

4. Cultural awareness resources

The committee noted that cultural awareness resources were distributed to members via email.

5. Research material

The committee noted that the following resources were distributed to members via email:

- Effect of Indigenous status on sentence outcomes for serious assault offences (BOCSAR link)
- Indigenous Imprisonment in NSW – A closer look at the trend (BOCSAR link)
- What's causing the growth in Indigenous imprisonment in NSW (BOCSAR link)
- Uberto Gatti, Richard E. Tremblay, and Frank Vitaro, 'Iatrogenic effect of juvenile justice', (2009) *Journal of Child Psychology and Psychiatry*, 50:8, 996
- Andrew McGrath, 'Intersections of Indigenous status, sex and age in sentencing decisions in New South Wales Children's Court' (2016) 49(1) *Australian & New Zealand Journal of Criminology* 90, 90
- Michael Weinrath, 'Sentencing Disparity: Aboriginal Canadians, Drunk Driving and Age' (2007) 8(2) *Western Criminology Review* 16, 16
- Nancy Rodriguez, 'The Cumulative Effect of Race and Ethnicity in Juvenile Court Outcomes and Why Preadjudication Detention Matters' (2010) 47(3) *Journal of Research in Crime and Delinquency* 391, 406.

6. Request to give evidence

Resolved, on the motion of Ms Sharpe: That Witness A be invited to give in camera evidence on one of the future hearing dates.

7. Chatfield and Reynolds Family

Resolved, on the motion of Mr Shoebridge: That the committee invite the Chatfield Family and Reynolds Family to appear and give evidence on the same hearing day in December 2020.

8. Request for support

The committee noted that the Women's Legal Service NSW appearing at the hearing today has requested that one of their colleagues sit behind them on the advisers table during the hearing to provide support to their witnesses. They will not be giving evidence or needing to be sworn in.

9. Allocation of questioning

Resolved, on the motion of Mr Shoebridge: That the sequence of questions to be asked at the hearings on 26 and 27 October be determined by the Chair.

10. Attachment to submission 102

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of the attachment to submission no. 102.

11. Public hearing

The committee proceeded to take evidence in public.

Witnesses were admitted in person and via video link.

The Chair made an opening statement regarding the broadcasting of proceedings, adverse mention and other matters.

The following witnesses were sworn:

- Mr Tony McAvoy SC, Chair of the NSW Bar Association's First Nations Committee and member of the Association's Joint Working Party on the over-representation of Indigenous people in custody in NSW
- Ms Sarah Crellin, Member of the Law Society's Indigenous Issues Committee (*via videoconference*)
- Mr Simon Bruck, Vice-President, NSW Young Lawyers
- Dr Louis Schetzer, Policy and Advocacy Manager, Australian Lawyers Alliance (*via videoconference*).

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn:

- Ms Verity Smith, Solicitor, Public Interest Advocacy Centre
- Mr Alastair Lawrie, Senior Policy Officer, Public Interest Advocacy Centre (*via videoconference*)
- Ms Christina Hey-Nguyen, NSW Convenor, Australian Lawyers for Human Rights
- Ms Kate Sinclair, Chairperson, Ngalaya Indigenous Corporation
- Mr Jason O'Neil, Executive Director, Ngalaya Indigenous Corporation.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn:

- Mr Brendan Thomas, Chief Executive Officer, Legal Aid NSW
- Mr David Evenden, Solicitor Advocate, Coronial Inquest Unit, Legal Aid NSW
- Ms Julie Tongs, Chief Executive Officer, Winnunga Nimmityjah Aboriginal Health Service (*via videoconference*)
- Ms Karly Warner, Chief Executive Officer, Aboriginal Legal Service NSW-ACT
- Mr Jeremy Styles, Managing Advocate, Aboriginal Legal Service NSW-ACT.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn:

- Mr Tim Leach, Executive Director, Community Legal Centres NSW
- Ms Emily Hamilton, Policy & Advocacy Manager, Community Legal Centres NSW

- Ms Samantha Lee, Solicitor, Redfern Legal Centre
- Ms Gail Thorne, Community Access Worker, First Nations Women's Legal Program, Women's Legal Service NSW
- Ms Yasmine Khan, Community Access Worker, First Nations Women's Legal Program, Women's Legal Service NSW
- Ms Carolyn Jones, Senior Solicitor, Women's Legal Service NSW
- Mr Patrick O'Callaghan, Principal Solicitor, Western NSW Community Legal Centre Inc and Western Women's Legal Support (*via videoconference*)
- Ms Melissa Shennan, Aboriginal Support Worker, Western Women's Legal Support (*via videoconference*).

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn:

- Ms Leetona Dungay, Mother of David Dungay Junior
- Ms Lizzie Jarrett, Niece of David Dungay Junior
- Ms Cynthia Dungay, Sibling of David Dungay Junior
- Mr Paul Silva, Nephew of David Dungay Junior
- Mr George Newhouse, Director and Principal Solicitor, National Justice Project.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.45 pm.

12. Adjournment

The committee adjourned at 5.45 pm until Tuesday 27 October 2020 (public hearing).

Sarah Dunn

Clerk to the Committee

Minutes no. 4

Tuesday 27 October 2020

Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

Macquarie Room, Parliament House, 9.21 am

1. Members present

Mr Searle, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Khan

Mr Roberts

Ms Sharpe

Mrs Ward (*via videoconference until 4.00 pm*)

2. Request for support

The committee noted that the witnesses from Jumbanna Institute for Indigenous Education and Research had four of their colleagues sit behind them on the advisers table during the hearing to provide support.

3. Chair's statement to witnesses

The committee noted that the Chair would make a statement to the witnesses appearing at the final session, on the purpose of the committee's inquiry, noting that the committee does not have the ability to investigate individual cases.

4. Public hearing

The committee proceeded to take evidence in public.

Witnesses, media and the public were admitted in person and via video link.

The Chair made an opening statement regarding the broadcasting of proceedings, adverse mention and other matters.

The following witness was sworn:

- Ms Ashlee Kearney, Disability Role Commission Project Manager, First Peoples Disability Network.

The witness was examined by the committee.

The evidence concluded and the witness withdrew.

The following witnesses were sworn:

- Ms Sophie Trevitt, Executive Officer, Change the Record
- Professor Thalia Anthony, Deadly Connections Community and Justice Services
- Mr Keenan Mundine, Co-Founder and Ambassador, Deadly Connections Community and Justice Services.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The following witness was sworn:

- Mr James Christian, Chief Executive Officer, NSW Aboriginal Land Council (*via videoconference*).

The witness was examined by the committee.

The evidence concluded and the witness withdrew.

The following witnesses were sworn:

- Dr Mindy Sotiri, Program Director Advocacy, Policy and Research, Community Restorative Centre
- Ms Kelly Parker, Senior Case Manager with the Miranda Project, Community Restorative Centre
- Ms Melissa Merritt, Senior Youth Transition Worker, Community Restorative Centre
- Ms Sarah Hopkins, Co-Chair of Just Reinvest NSW
- Mr Daniel Daylight, Member of the Executive Committee, Just Reinvest NSW
- Mr Jack de Groot, Chief Executive Officer, St Vincent de Paul Society NSW
- Mr Jake Robertson, Team Leader, Housing and Homelessness Services, St Vincent de Paul Society NSW.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn:

- Mr Craig D. Longman, Head, Legal Strategies and Senior Researcher, Jumbanna: Institute for Indigenous Education and Research (JIER), Research Unit
- Distinguished Professor Larissa Behrendt AO, Director, Jumbanna: Institute for Indigenous Education and Research, Chair in Indigenous Research

- Adjunct Professor Hugh Dillon, Ex-Deputy State Coroner and Ex-Magistrate of the NSW Local Court and member of the Faculty at University of New South Wales Law School
- Dr Rebecca Scott Bray, Associate Professor of Criminology and Socio-Legal Studies, University of Sydney
- Emeritus Professor Phil Scraton, School of Law, Queen's University, Belfast (*via videoconference*).

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The committee proceeded to a private deliberative meeting and witnesses, public and the media withdrew.

5. Request to take photos during the hearing

The committee noted the request from the Indigenous Social Justice Association to take photos during the last session of the hearing.

Resolved, on the motion of Mr Shoebridge: That photographers with the Indigenous Social Justice Association be permitted to take photographs for the first two minutes of proceedings.

6. Public hearing

Witnesses, public and the media were re-admitted.

The following witnesses were sworn:

- Mr Raul Bassi, Secretary, Indigenous Social Justice Association
- Ms Faith Black, Spokesperson, Indigenous Social Justice Association
- Ms Gail Hickey, Mother of TJ Hickey for Families of Deaths in Custody.

Ms Hickey tendered the following documents:

- Email from Mr Mark Speakman to Mr David Blunt, Clerk of the Parliaments, regarding TJ Hickey petition
- Fact sheet regarding petitions in the Upper House
- Opening statement to the committee.

Mr Bassi tendered the following document:

- Document titled 'Ten Recommendations to Stop Deaths in Custody and one to make them illegal 2020', dated 27 November 2019.

Ms Black tendered the following documents:

- Letter from Kirsten Booring to the committee, dated 20 October 2020.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.56 pm.

Witnesses, media and the public withdrew.

7. Tendered documents

The committee deferred consideration of the documents tendered during the hearing.

8. Witness briefings

The committee asked the secretariat to re-iterate to witnesses appearing at future hearings the focus of the inquiry, including that the committee does not have the ability to investigate individual cases.

9. Adjournment

The committee adjourned at 6.06 pm, until Thursday 3 December 2020 (public hearing).

Sarah Dunn

Clerk to the Committee

Minutes no. 5

Wednesday 11 November 2020

Select Committee on the high level of First Nations people in custody and oversight and review of deaths in custody

Members Lounge, Parliament House, Sydney at 6.33 pm

1. Members present

Mr Searle, *Chair*

Mr Khan

Mr Roberts

Ms Sharpe

Mrs Ward

2. Apologies

Mr Shoebridge, *Deputy Chair*

3. Previous minutes

Resolved, on the motion of Ms Sharpe: That draft minutes nos. 3 and 4 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 27 October 2020 – Email from Mr Nathan Martin, Manager, Planning and Coordination, Aboriginal Affairs, to secretariat, advising that Aboriginal Affairs does not intend on making a submission to the inquiry
- 27 October 2020 – Email from Mr John Nicholson SC, to Chair, providing an article on the inadequacy of the Closing the Gap – Indigenous Incarcerations Outcome aspirations
- 27 October 2020 – Email from Mr Tim Ginty, Digital Communications and Fundraising Specialist, National Justice Project, requesting a copy of the video recording of the Dungay Family and Mr George Newhouse appearance on 26 October hearing
- 4 November 2020 – Email from Dr Marlene Longbottom, Aboriginal Postdoctoral Research Fellow, Ngarruwan Ngadju First Peoples Health and Wellbeing Research Centre, Australian Health Services Research Institute, to secretariat, advising the committee of a research project underway relating to systemic entrapment.

Sent:

- 30 October 2020 – Letter from Chair, to Mr Mark Morey, Secretary, Unions NSW, inviting them to make a submission to the inquiry and/or give evidence at one of the hearings
- 30 October 2020 – Letter from Chair, to Mr Pat Gooley, Secretary, Police Association of NSW, inviting them to make a submission to the inquiry and/or give evidence at one of the hearings
- 30 October 2020 – Letter from Chair, to Mrs Mel Gatfield, Secretary, United Worker's Union, inviting them to make a submission to the inquiry and/or give evidence at one of the hearings
- 30 October 2020 – Letter from Chair, to Mr Brett Holmes, Secretary, Nurses and Midwives Association, inviting them to make a submission to the inquiry and/or give evidence at one of the hearings
- 30 October 2020 – Letter from Chair, to Mr Gerard Hayes, Secretary, Health Services Union, inviting them to make a submission to the inquiry and/or give evidence at one of the hearings.

5. Tendered documents – 27 October hearing

Resolved, on the motion of Ms Sharpe: That the committee accept and publish the following documents tendered during the public hearing on 27 October 2020:

- Document titled 'Ten Recommendations to Stop Deaths in Custody and one to make them illegal 2020', dated 27 November 2019, tendered by Mr Raul Bassi, Secretary, Indigenous Social Justice Association
- Opening statement to the committee, tendered by Ms Gail Hickey, Mother of TJ Hickey
- Letter from Kirsten Booring to the committee, dated 20 October 2020. Tendered by Ms Faith Black, Spokesperson, Indigenous Social Justice Association
- Email from Mr Mark Speakman to Mr David Blunt, Clerk of the Parliaments, regarding TJ Hickey petition, tendered by Ms Gail Hickey, Mother of TJ Hickey
- Fact sheet regarding petitions in the Upper House, tendered by Ms Gail Hickey, Mother of TJ Hickey.

6. Request for video footage

Resolved, on the motion of Ms Sharpe: That the committee decline the request from the National Justice Project for a copy of the video recording of the Dungay Family and Mr George Newhouse appearance on 26 October hearing, and that the secretariat respond advising of the committee's decision.

7. Request to give evidence – Mr Don Craigie

The committee noted that Mr Don Craigie has requested that he provide evidence to the committee at one of the December hearings.

Mr Roberts moved: That the Chair write to Mr Don Craigie to advise that he will not be invited to give evidence to the inquiry as his case does not fall under the terms of reference.

Mr Khan declared an interest that:

- my former partner acted for the deceased nephew of Mr Don Craigie (from time to time) and I believe acted for the family at the inquest into the death. I am unsure whether that was during the time we were in partnership,
- I have acted for Mr Don Craigie, and
- I am a friend of the detective who I believe headed the original investigation into the death.

Question of Mr Roberts put and agreed to.

8. Unions – Invitation to participate

The committee noted that the Chair has invited the following unions and associations to make a submission to the inquiry and/or come and give evidence and they have been added to the December hearing schedules:

- Mark Morey, Secretary of Unions NSW
- Mr Pat Gooley, Secretary, Police Association of NSW
- Ms Mel Gatfield, Secretary, United Workers' Union
- Mr Brett Holmes, Secretary, Nurses and Midwives Association
- Gerard Hayes, Secretary, Health Services Union.

9. BOSCAR – Invite to give evidence

Resolved, on the motion of Mr Khan: That the committee invite BOSCAR to give evidence to the committee at one of the December 2020 hearings.

10. December hearing schedules

The committee noted the updated December hearing schedules and that due to the number of witnesses to hear from on these days the hearings will conclude at 6.00 pm.

11. Adjournment

The committee adjourned at 6.40 pm, until Thursday 3 December 2020 (public hearing).

Sarah Dunn

Clerk to the Committee

Minutes no. 6

Thursday 3 December 2020

Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

Macquarie Room, Parliament House, 8.55 am

1. Members present

Mr Searle, *Chair*

Mr Shoebridge, *Deputy Chair* (from 9.07 am)

Mr Khan (until 10.00 am, from 11.35 am)

Mr Roberts (from 9.00 am)

Ms Sharpe (from 9.00 am)

Mrs Ward (via videoconference)

2. Timeframes for answers to questions on notice

Resolved, on the motion of Mr Khan: That the committee request a response to any questions taken on notice from the public hearings on 3, 7 and 8 December 2020 to be provided by Friday 22 January 2021.

3. Allocation of questioning

Resolved, on the motion of Mr Khan: That the allocation of questions at the hearings on 3, 7 and 8 December be determined by the Chair.

4. Invitation to the Registrar of the NSW Coroners Court

Resolved, on the motion of Mr Khan: That the committee invite the Registrar of the NSW Coroners Court to give evidence at a public hearing.

5. Confidentiality of Witness A hearing

Resolved, on the motion of Mr Khan: That the committee keep confidential the fact that Witness A is giving *in camera* evidence to the committee.

Mr Roberts, Ms Sharpe and Mr Shoebridge joined the meeting.

6. Previous minutes

Resolved, on the motion of Ms Sharpe: That draft minutes no. 5 be confirmed.

7. Correspondence

The committee noted the following items of correspondence:

Received:

- 17 November 2020 – Email from Ms Jackie Fitzgerald, Executive Director, NSW Bureau of Crime Statistics & Research, accepting the committees invitation to attend the hearing and offering to respond to any specific statistical questions the members may have prior to the hearing
- 17 November 2020 – Email from Ms Brooke Delbridge, Policy Officer, Chief Magistrate's Office, to secretariat, declining the invitation for the Chief Magistrate to attend the hearing on 8 December
- 17 November 2020 – Email from Mr Chris D'Aeth, Executive Director & Principal Registrar, Supreme Court of New South Wales, declining the invitation for the Chief Justice to attend the hearing on 8 December
- 18 November 2020 – Email from Ms Ashlee Kearney, Disability Royal Commission Project Manager, First Peoples Disability Network, to secretariat, seeking an extension to provide a response to questions taken on notice from the hearing on 27 October 2020

- 18 November 2020 – Email from Mr Mark Webb, Producer – COMPASS, to secretariat, asking if the recording of the hearing on 26 October can be used for the ABC program and be shared with the National Justice Project and Dungay Family
- 19 November 2020 – Email from Ms Mel Gatfield, NSW Secretary, United Workers Union, declining the invitation to attend the hearing on Monday 7 December 2020
- 19 November 2020 – Email from Ms Teresa O'Sullivan, NSW State Coroner, to secretariat, declining the invitation to attend the hearing on 8 December
- 20 November 2020 – Email from Ms Lisa Freeman, Associate to his Honour Justice D Price AO, to secretariat, declining the invitation to attend the hearing on 8 December
- 20 November 2020 – Email from Mr Mark Morey, Secretary, Unions NSW, to secretariat, advising that they will not be making a submission or attending the hearing on 7 December
- 20 November 2020 – Email from Ms Donna Austin, Research Officer, Health Services Union, to secretariat, declining the invitation to attend the hearing on 3 December
- 22 November 2020 – Letter from Ms Roxanne Moore, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services, providing their "Black Lives Matter: always have, always will" Policy Statement
- 23 November 2020 – Email from Ms Emma Buxton-Namisnyk, Office of the NSW State Coroner, advising that they are working on a report looking at First Nations peoples' deaths in custody and will provide this to the committee once tabled in Parliament early next year
- 24 November 2020 – Email from Mr Brett Holmes, General Secretary, New South Wales Nurses and Midwives' Association, to secretariat, advising that they are not available to attend the hearing on 3 December
- 25 November 2020 – Email from Ms Maria Polydoropoulos, Acting Executive Assistant to the Chief Commissioner and the Commissioners, NSW Independent Commission Against Corruption, advising that the Chief Commissioner is unavailable to attend the hearings in December
- 26 November 2020 – Email from Mr Pat Gooley, Secretary, Police Association of NSW, to secretariat, advising that they will not be making a submission and declining the invitation to attend the hearing on 7 December 2020
- 2 December 2020 – Email from Mr Ernest Schmatt AM PSM, Chief Executive, Judicial Commission of New South Wales, to secretariat, declining the invitation to attend the hearing on 8 December 2020.

Sent:

- 12 November 2020 – Email from secretariat, to Mr Tim Ginty, Digital Communications and Fundraising Specialist, National Justice Project, advising of the committee's decision that they will not be providing the requested video footage
- 16 November 2020 – Letter from Chair, to Mr Don Craigie, advising of the committee's decision to not invite him to an upcoming hearing
- 19 November 2020 – Email from secretariat, to Ms Ashlee Kearney, Disability Royal Commission Project Manager, First Peoples Disability Network, advising that the Chair has approved the request for an extension to provide a response to questions taken on notice from the hearing on 27 October 2020
- 23 November 2020 – Email from secretariat, to Mr Mark Webb, Producer – COMPASS, advising that they are able to use the footage from 26 October hearing for their ABC program and suggesting that this not be shared with other stakeholders
- 25 November 2020 – Email from secretariat, to Ms Jackie Fitzgerald, Executive Director, NSW Bureau of Crime Statistics & Research, providing statistical based questions from the committee prior to the hearing on 8 December.

8. Public submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 129 and 130.

9. Public answers to questions on notice

The committee noted that the following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- additional information from Mr George Newhouse, National Justice Project, received 26 October 2020
- answer to a question taken on notice from Ms Christina Hey-Nguyen, Australian Lawyers for Human Rights, received 16 November 2020
- answers to questions on notice and five attachments from Ms Thalia Anthony, Deadly Connections Community and Justice Services, received 16 November 2020
- answers to questions on notice from Mr George Newhouse, National Justice Project, received 20 November 2020
- answers to questions on notice from Ms Samantha Lee, Redfern Legal Centre, received 23 November 2020
- answers to questions on notice from Ms Sophie Trevitt, Change the Record, received 25 November 2020
- answers to questions on notice from Mr Simon Bruck, NSW Young Lawyers, received 26 November 2020
- answers to questions on notice from Ms Kate Sinclair, Ngalaya Indigenous Corporation, received 26 November 2020
- answers to questions on notice from Ms Sarah Crellin, Law Society of NSW, received 26 November 2020
- answers to questions on notice from Ms Liz Snell, Women's Legal Service NSW, received 26 November 2020
- answers to questions on notice from Ms Verity Smith, Public Interest Advocacy Centre, received 26 November 2020.

Resolved, on the motion of Ms Sharpe: That the committee authorise the publication of the article titled *The Experience of Aboriginal and Torres Strait Islander Participants in Australia's Colonial Inquest System* provided by Mr George Newhouse, Director, National Justice Project, on 26 October 2020, as part of his answers to questions on notice.

10. Questions to the Chief Justice, Chief Judge, Chief Magistrate and NSW State Coroner

The committee noted the correspondence from the Chief Justice of the Supreme Court, Chief Judge of the District Court, Chief Magistrate and the NSW State Coroner declining the invitation to appear at the hearing and advising that they would be happy to provide a response to any written questions the committee may wish to ask.

Resolved, on the motion of Mr Roberts: That:

- committee members provide any written questions for the Chief Justice of the Supreme Court, Chief Judge of the District Court, Chief Magistrate and the NSW State Coroner to the secretariat by COB Wednesday 9 December
- the Chair write to the Chief Justice of the Supreme Court, Chief Judge of the District Court, Chief Magistrate and the NSW State Coroner seeking a response to the committee's questions by Friday 22 January 2021.

11. Reporting timeline

Resolved, on the motion of Mr Shoebridge: That the committee table its report as per the following timeline:

- Monday 15 March 2021 – report to members
- Monday 22 March 2021, 10.00 am – report deliberative
- Wednesday 31 March 2021 – Report tabled.

12. In camera hearing

The committee proceeded to take evidence *in camera*.

Persons present other than the committee: Ms Sarah Dunn, Ms Taylah Cauchi, Ms Angeline Chung, Ms Sharon Ohnesorge and Hansard reporters.

The following witness was sworn and examined:

- Witness A.

The evidence concluded and the witness withdrew.

The *in camera* hearing concluded at 11.00 am.

13. Public hearing

The committee proceeded to take evidence in public.

Witnesses, media and the public were admitted in person and via video link.

The Chair made an opening statement regarding the broadcasting of proceedings, adverse mention and other matters.

The following witnesses were sworn:

- Mr Paul Miller, Acting NSW Ombudsman
- Mr Danny Lester, Deputy Ombudsman (Engagement and Aboriginal Programs)
- Ms Monica Wolf, Acting Deputy Ombudsman (Projects and Systemic Reviews)
- Ms Carla Ware, Manager (Aboriginal Inclusion and Community Engagement)
- Ms Jennifer Agius, Manager (Detention and Custody).

The witnesses were examined by the committee.

Mr Miller tendered the following documents:

- Summary of previous reports by the NSW Ombudsman relevant to the work of the committee.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn:

- Ms Rosalind Strong AM, Convenor, Keeping Women out of Prison Coalition
- Ms Helen Easson, Keeping Women out of Prison Coalition Member and Founder and Chief Executive Officer of Nelly's Healing Centre
- Ms Eleni Psillakis, Keeping Women out of Prison Coalition Member and Program Manager Success Works, Part of Dress for Success Sydney
- Ms Debbie Kilroy, Chief Executive Officer, Sisters Inside Inc. (*appeared via videoconference*)
- Ms Tabitha Lean, Lived experience abolition activist, Sisters Inside Inc. (*appeared via videoconference*)
- Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety
- Ms Michele Robinson, Director, Evidence to Action, Australia's National Research Organisation for Women's Safety.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn:

- Ms Zoë Robinson, Acting Advocate for Children and Young People, Office of the NSW Advocate for Children and Young People

- Dr Elizabeth Watt, Senior Policy and Research Lead, Yfoundations.

The witnesses were examined by the committee.

The evidence concluded and the witnesses, media and the public withdrew.

14. Tendered documents

Resolved, on the motion of Mr Shoebridge: That the committee accept and publish the following document tendered during the public hearing:

- Summary of previous reports by the NSW Ombudsman relevant to the work of the committee, tendered by Mr Paul Miller, Acting NSW Ombudsman.

15. Public hearing

The public hearing re-commenced.

Witnesses, media and the public were admitted.

The following witnesses were sworn:

- Dr Danielle McMullen, President, Australian Medical Association
- Dr Calum A Smith, Consultant Forensic Psychiatrist, Justice Health & Forensic Mental Health Network, Chair, the Royal Australian and New Zealand College of Psychiatrists NSW Forensic Subcommittee.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn:

- Ms Nioka Chatfield, Mother of Tane Chatfield
- Mr Colin Chatfield, Father of Tane Chatfield
- Ms Jasmine Lesley Vale, Grandmother of Tane Chatfield
- Ms Nulla Chatfield, Sister of Tane Chatfield
- Ms Merinda Connor, partner of Tane Chatfield
- Mr Padraic Gibson, Senior Researcher, Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney, and friend of the family.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.33 pm.

Witnesses, media and the public withdrew.

16. Adjournment

The committee adjourned at 4.33 pm, until 8.55 am, Monday 7 December 2020 (public hearing).

Sarah Dunn

Clerk to the Committee

Minutes no. 7

Monday 7 December 2020

Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

Macquarie Room, Parliament House, 9.07 am

1. Members present

Mr Searle, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Khan (*from 1.25 pm*)

Mr Roberts

Ms Sharpe

Mrs Ward (*via videoconference, until 2.30 pm*)

2. Correspondence

The committee noted the following items of correspondence:

Received:

- 4 December 2020 – Email from Ms Ann Lambino, Registrar, NSW Coroners Court, to secretariat, declining the invitation to give evidence at a public hearing.

Sent:

- 3 December 2020 – Email from secretariat, to Ms Ann Lambino, Registrar, NSW Coroners Court, inviting her to give evidence at a public hearing.

3. Advisors at the table

The committee noted that Mr Paul O'Reilly from Youth Justice NSW is appearing at the hearing today and has requested that two of his colleagues Mr Mike Wheaton and Ms Candice Neilson sit behind him on the advisers table during the hearing to provide advice.

4. Public hearing

The committee proceeded to take evidence in public.

Witnesses, media and the public were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings, adverse mention and other matters.

The following witnesses were sworn:

- Mr Shay Deguara, Industrial Manager, Public Service Association of NSW
- Ms Ann Weldon, Aboriginal Liaison Officer, Public Service Association of NSW.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn:

- Ms Taleah Reynolds, Sister of Mr Nathan Reynolds
- Ms Makayla Reynolds, Sister of Mr Nathan Reynolds.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The following witness was sworn:

- Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force.

The witness was examined by the committee.

Assistant Commissioner Crandell tendered the following document:

- Introductory address for the purpose of giving evidence to the committee.

The evidence concluded and the witness withdrew.

Resolved, on the motion of Ms Sharpe: That the committee accept and publish as a submission the introductory address tendered by Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force.

Mr Searle and Mr Shoebridge noted that they have separately appeared before Hon Lea Drake in their capacity as Barristers.

The following witnesses were sworn:

- The Hon Lea Drake, Commissioner Integrity, Law Enforcement Conduct Commission
- Mr Gary Kirkpatrick, Executive Director, Law Enforcement Conduct Commission.

The witnesses were examined by the committee.

The Hon Lea Drake tendered the following document:

- Memo from Prevention & Education Team to Chief Commissioner Blanch and Commissioner Drake, Law Enforcement Conduct Commission, dated 23 November 2020.

The evidence concluded and the witnesses withdrew.

Resolved, on the motion of Mr Khan: That the committee accept and publish as a supplementary submission the document tendered by the Hon Lea Drake, a Memo from Prevention & Education Team to Chief Commissioner Blanch and Commissioner Drake, Law Enforcement Conduct Commission, dated 23 November 2020.

The following witnesses were sworn:

- Mr Michael Coutts-Trotter, Secretary, Department of Communities and Justice
- Mr Peter Severin, Commissioner, Corrective Services NSW
- Mr Luke Grant, Deputy Commissioner, Corrective Services NSW
- Mr Carlo Scasserra, Assistant Commissioner, Governance and Continuous Improvement, Corrective Services NSW
- Mr Paul O'Reilly, Executive Director, Youth Justice NSW
- Mr Mike Wheaton, Director, Policy and Practice, Youth Justice NSW
- Ms Candice Neilson, Director, Strategy and Engagement, Youth Justice NSW.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.50 pm.

Witnesses, media and the public withdrew.

5. **Tendered documents**

Mr Shoebridge tendered the following document:

- NSW Justice, Aboriginal Strategy & Policy Unit, Aboriginal Death in Custody.

Resolved, on the motion of Mr Khan: That the committee accept and publish the document tendered during the public hearing by Mr Shoebridge titled NSW Justice, Aboriginal Strategy & Policy unit, Aboriginal Death in Custody.

6. **Adjournment**

The committee adjourned at 5.55 pm, until 10.40 am, Tuesday 8 December 2020 (public hearing).

Minutes no. 8

Tuesday 8 December 2020

Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

Macquarie Room, Parliament House, 10.45 am

1. Members presentMr Searle, *Chair*Mr Shoebridge, *Deputy Chair (until 12.30 pm, from 1.41 pm)*

Mr Khan

Mr Roberts

Ms Sharpe

Mrs Ward (*in person and then via videoconference from 1.15 pm*)**2. Correspondence**

The committee noted the following items of correspondence:

Received:

- 7 December 2020 – Email from Mr Randall Stewart, Senior Policy and Project Officer, Office of the Commissioner, NSW Police Force, to secretariat, making clear that the opening statement is not a submission and would like it labelled as such with an updated version to be provided to the committee
- 8 December 2020 – Email from Mr Randall Stewart, Senior Policy and Project Officer, Office of the Commissioner, NSW Police Force, to secretariat, providing an updated version of Assistant Commissioner Anthony Crandell APM opening statement for publication.

Sent:

- 7 December 2020 – Email from secretariat, to Assistant Commissioner Anthony Crandell APM, Commander, State Intelligence Command, NSW Police Force, advising that the committee have resolved to publish the opening statement as a submission to the committee.

3. Advisors at the table

The committee noted that representatives from NSW Health are appearing at the hearing today and they have requested that Mr Gary Forrest, Chief Executive, Justice Health and Forensic Mental Health Network sit behind those giving evidence on the advisers table during the hearing to provide advice.

4. Public hearing

The committee proceeded to take evidence in public.

Witnesses, media and the public were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings, adverse mention and other matters.

The following witness was sworn:

- Ms Jackie Fitzgerald, Executive Director, NSW Bureau of Crime Statistics & Research (BOSCAR).

The witness was examined by the committee.

Ms Fitzgerald tendered the following documents:

- Aboriginal Justice Snapshot, entitled *Aboriginal over-representation in the NSW Criminal Justice System*, dated June 2020
- Over-representation of Aboriginal adults and juveniles in the NSW Criminal Justice System, dated June 2020
- PowerPoint presentation, entitled *Aboriginal over-representation in the Justice System*

- Data regarding number of juveniles and adults in custody on the last day of the month, dated March 2013 to February 2020
- Data tables nos. 1-8 regarding NSW Custody and Crime Statistics, dated March 2013 to February 2020.

The evidence concluded and the witness withdrew.

Resolved, on the motion of Ms Sharpe: That the committee accept and publish the following documents tendered by Ms Jackie Fitzgerald, BOSCAR, during the public hearing:

- Aboriginal Justice Snapshot, entitled *Aboriginal over-representation in the NSW Criminal Justice System*, dated June 2020
- Over-representation of Aboriginal adults and juveniles in the NSW Criminal Justice System, dated June 2020
- PowerPoint presentation, entitled *Aboriginal over-representation in the Justice System*
- Data regarding number of juveniles and adults in custody on the last day of the month, dated March 2013 to February 2020
- Data tables nos. 1-8 regarding NSW Custody and Crime Statistics, dated March 2013 to February 2020.

Mr Shoebridge tendered the following document:

- Open letter on the death of David Dungay Jr.

Resolved, on the motion of Ms Sharpe: That the committee accept and publish the document tendered by Mr Shoebridge titled Open letter on the death of David Dungay Jr.

The following witnesses were sworn:

- Ms Lillian Gordon, Head of Aboriginal Affairs NSW
- Mr Matthew Trindall, Director, Aboriginal Strategy and Culture, Justice Health and Forensic Mental Health Network
- Ms Wendy Hoey, Executive Director, Clinical Operations, Justice Health and Forensic Mental Health Network.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

Witnesses, media and the public withdrew.

Mr Shoebridge and Mrs Ward departed.

5. **Tendered documents**

Ms Sharpe tendered the following document:

- NSW Justice Health & Forensic Mental Health Network, Network Patient Health Survey – Aboriginal People's Health Report 2015.

Resolved, on the motion of Mr Khan: That the committee accept and publish the document tendered by Ms Sharpe entitled NSW Justice Health & Forensic Mental Health Network, Network Patient Health Survey – Aboriginal People's Health Report 2015.

6. **Chatfield family right of reply**

Resolved, on the motion of Mr Roberts: That the Chair:

- write to the Chatfield family providing the extract from the evidence received from Mr Luke Grant, Deputy Commissioner, Corrective Services NSW at the 7 December 2020 hearing, seeking their right of reply
- write to Mr Luke Grant, Deputy Commissioner, Corrective Services NSW, advising that the committee will be providing his evidence to the Chatfield family for a response.

7. Public hearing

Mr Shoebridge and Mrs Ward returned.

The committee proceeded to take evidence in public.

Witnesses, media and the public were admitted.

The following witness was sworn:

- Ms Fiona Rafter, Inspector of Custodial Services.

The witness was examined by the committee.

Ms Rafter tendered the following documents:

- Opening statement to the committee made by Ms Rafter
- NSW oversight bodies, as at 8 December 2020.

The evidence concluded and the witness withdrew.

The public hearing concluded at 4.10 pm.

Witnesses, media and the public withdrew.

8. Tendered documents

Resolved, on the motion of Ms Sharpe: That the committee accept and publish the following documents tendered by Ms Fiona Rafter, Inspector of Custodial Services, during the public hearing:

- Opening statement to the committee made by Ms Rafter
- NSW oversight bodies, as at 8 December 2020.

9. Adjournment

The committee adjourned at 4.19 pm, *sine die*.

Sarah Dunn

Clerk to the Committee

Minutes no. 9

Thursday 4 February 2021

Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

Room 814/815, Parliament House, 10.07 am

1. Members present

Mr Searle, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Khan

Mr Roberts

Ms Sharpe

Mrs Ward (*until 12.08 pm*)

2. Draft minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes nos. 6, 7 and 8 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 7 December 2020 – Email from Dr Louis Schetzer, Policy and Advocacy Manager, Australian Lawyers Alliance, to secretariat, advising that he has nothing further to add to his answer in response to the question from Ms Ward highlighted on page 11 of the transcript from the hearing on 26 October 2020
- 11 December 2020 – Email from Ms Petta Chua, to secretariat, requesting a copy of the video footage from the Chatfield family appearance before the committee on 3 December 2020
- 14 December 2020 – Email from Ms Angela Boland, Senior Project Officer, Law Enforcement Conduct Commission, to secretariat, requesting that her name be redacted from the memo tabled during the public hearing on 8 December 2020
- 16 December 2020 – Email from Dr Rebecca Scott Bray, Associate Professor of Criminology and Socio-Legal Studies, University of Sydney, to secretariat, requesting a copy of the video footage from her appearance before the committee on 27 October 2020
- 18 December 2020 - Email from Dr Rebecca Scott Bray, Associate Professor of Criminology and Socio-Legal Studies, University of Sydney, to secretariat, providing a signed copy of the broadcasting guidelines and confirming that she will not use the requested video footage from the hearing in any public forum
- 19 January 2021 – Email from Mr Gary Kirkpatrick, Executive Director Operations, Law Enforcement Conduct Commission, to secretariat, advising that they are unable to respond to the supplementary questions as it requires a level of detail not available to them
- 19 January 2021 – Letter from Hon Justice D Price AO, Chief Judge of the District Court, to Chair, providing a response to questions from the committee
- 19 January 2021 – Email from Mr Chris D'Aeth, Executive Director & Principal Registrar, Supreme Court of NSW, to Chair, providing a response from the Hon Tom Bathurst, Chief Justice of the Supreme Court to questions from the committee
- 20 January 2021 – Email from Judge Graeme Henson AM, Chief Magistrate, to Chair, providing a response to questions from the committee
- 22 January 2021 – Letter from Ms Karly Warner, Chief Executive Officer, Aboriginal Legal Service NSW/ACT, to Chair, providing a response to questions from the committee
- 22 January 2021 – Email from Ms Kate Smithers, Executive Strategy Officer, NSW Ombudsman, to secretariat, providing a link to the Australian Government Productivity Commission Report on Government Services 2021
- 22 January 2021 – Email from Ms Rani Young, Department of Communities and Justice, to secretariat, requesting that question seven of their answers to questions on notice be kept confidential
- 27 January 2021 – Email from Dr Louis Schetzer, Policy and Advocacy Manager, Australian Lawyers Alliance, to secretariat, advising that they have no further comments or additional information to provide relating to the inquiry
- 27 January 2021 – Email from Ms Sarah Crellin, Principal Solicitor, Law Society of NSW, to secretariat, advising that they have no further comments or additional information to provide relating to the inquiry
- 28 January 2021 – Email and attachment from Mr John Nicholson SC, to Chair, providing a late submission to the inquiry
- 28 January 2021 – Email from Mr Simon Bruck, President, NSW Young Lawyers, advising that they have no further comments or additional information to provide relating to the inquiry
- 4 February 2021 – Email from Mr David Shoebridge MLC, to committee, attaching an email from Ms Anna Butler, NSW State Coroners Court, advising that the State Coroner is currently preparing a monograph regarding First Nations deaths in custody and a protocol to assist First Nations families who have had a loved one die in custody, and that both of these will be provided to the committee once finalised.

Sent:

- 15 December 2020 – Letter from Chair, to Hon Justice D Price AO, Chief Judge of the District Court, seeking a response to questions from the committee
- 15 December 2020 – Letter from Chair, to Hon Tom Bathurst, Chief Justice of the Supreme Court, seeking a response to questions from the committee

- 15 December 2020 – Letter from Chair, to Judge Graeme Henson AM, Chief Magistrate, seeking a response to questions from the committee
- 15 December 2020 – Letter from Chair, to Mr Luke Grant, Deputy Commissioner, Corrective Services NSW, advising that the committee will be seeking a response from the Chatfield Family in relation to statements made during their evidence on 7 December 2020
- 16 December 2020 – Email from secretariat, to Ms Angela Boland, Senior Project Officer, Law Enforcement Conduct Commission, advising that the committee agrees with her request and her name has been redacted from the memo tabled during the public hearing on 8 December 2020
- 16 December 2020 – Email from secretariat, to Ms Petta Chua, advising that the committee have declined the request for a copy of the video footage from the Chatfield Family appearance before the committee on 3 December 2020
- 16 December 2020 – Letter from Chair, to Mrs Nioka and Mr Colin Chatfield, offering the family the opportunity to respond in writing to the statements made by Corrective Services NSW at a public hearing on 7 December 2020
- 17 December 2020 – Letter from Chair, to Ms Karly Warner and Mr Jeremy Styles, Aboriginal Legal Service NSW-ACT, seeking further comments or additional information relating to the evidence received at the last three December hearings
- 17 December 2020 – Letter from Chair, to Mr Brendan Thomas and Mr David Evenden, Legal Aid NSW, seeking further comments or additional information relating to the evidence received at the last three December hearings
- 17 December 2020 – Letter from Chair, to Dr Louis Schetzer, Australian Lawyers Alliance, seeking further comments or additional information relating to the evidence received at the last three December hearings
- 17 December 2020 – Letter from Chair, to Mr Simon Bruck, NSW Young Lawyers, seeking further comments or additional information relating to the evidence received at the last three December hearings
- 17 December 2020 – Letter from Chair, to Ms Sarah Crellin, Law Society of NSW, seeking further comments or additional information relating to the evidence received at the last three December hearings
- 17 December 2020 – Letter from Chair, to Mr Tony McAvoy, NSW Bar Association, seeking further comments or additional information relating to the evidence received at the last three December hearings
- 17 December 2020 – Letter from Chair, to Ms Jackie Fitzgerald, Executive Director, BOSCAR, requesting further information on bail refusal date by Police and by the Courts
- 18 December 2020 – Email from secretariat, to Dr Rebecca Scott Bray, Associate Professor of Criminology and Socio-Legal Studies, University of Sydney, advising that the committee has agreed to her request for video footage from her appearance and seeking a signed broadcasting guideline
- 28 January 2021 – Email from secretariat, to Ms Rani Young, Department of Communities and Justice, seeking a response to supplementary questions and a question on notice that was missed by the secretariat in the earlier request.

Resolved, on the motion of Mrs Ward: That the committee authorise the publication of correspondence from:

- Hon Justice D Price AO, Chief Judge of the District Court, to Chair, providing a response to questions from the committee (previously circulated), received 19 January 2021
- Mr Chris D'Aeth, Executive Director & Principal Registrar, Supreme Court of NSW, to Chair, providing a response from the Hon Tom Bathurst, Chief Justice of the Supreme Court to questions from the committee, received 19 January 2021
- Judge Graeme Henson AM, Chief Magistrate, to Chair, providing a response to questions from the committee, received 20 January 2021
- Ms Karly Warner, Chief Executive Officer, Aboriginal Legal Service NSW/ACT, to Chair, providing a response to questions from the committee, received 22 January 2021.

4. Request for video footage – Chatfield family

The committee noted correspondence from the Chatfield Family, on 11 December 2020, requesting a copy of the video footage from their appearance at the public hearing on 3 December 2021 to provide to family members that could not watch it live. As agreed to via email, the secretariat responded to the Chatfield Family advising that the committee had declined the request due to parliamentary privilege not covering the footage and the nature of the evidence.

Mr Khan moved: That the committee formally decline the request from the Chatfield Family for a copy of the video recording of their appearance at the public hearing on 3 December 2020, due to the nature of evidence and it not being protected by parliamentary privilege.

The committee divided.

Ayes: Mr Khan, Mr Roberts, Mr Searle, Ms Sharpe, Mrs Ward.

Noes: Mr Shoebridge.

Question resolved in the affirmative.

5. Late submission to the inquiry

The committee noted the correspondence received on 28 January 2021 from Mr John Nicholson SC providing a late submission to the inquiry.

Resolved, on the motion of Mr Shoebridge: That the committee accept and authorise the publication of the article provided by Mr John Nicholson SC, on 28 January 2021, as a late submission to this inquiry.

6. Public answers to questions on notice and supplementary questions

The committee noted that the following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice and additional information from Jumbunna: Institute for Indigenous Education and Research, received 2 December 2010
- answers to questions on notice from First People with Disability Network, received 4 December 2020
- answers to questions on notice from the NSW Bar Association, received 22 December 2020
- answers to questions on notice from the Australia's National Research Organisation for Women's Safety, received 4 December 2020 and 20 January 2021
- answers to a question on notice from The Royal Australian and New Zealand College of Psychiatrists, received 22 December 2020 and 21 January 2021
- answers to questions on notice and supplementary questions from the NSW Bureau of Crime Statistics & Research, received 15 January 2021
- answers to questions on notice from the NSW Ombudsman, received 21 January 2021
- answers to questions on notice from Yfoundations, received 22 January 2021
- answers to questions on notice from the Law Enforcement Conduct Commission, received 22 January 2021
- answers to questions on notice from Aboriginal Affairs NSW, received 22 January 2021
- answers to questions on notice from the Department of Communities and Justice on behalf of Aboriginal Affairs NSW, received 22 January 2021
- answers to questions on notice from the NSW Police Force, received 25 January 2021
- answers to questions on notice from the Inspector of Custodial Services, received 27 January 2021.

7. Answers to questions on notice – Just Reinvest

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of the answers to questions on notice from Just Reinvest, received 2 December 2020.

8. Answers to questions on notice – Department of Communities and Justice

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of the answers to questions on notice from the Department of Communities and Justice, received 22 January 2021, with the exception of the response to Question 7 which contains sensitive information and is to remain confidential, as per the request of the author.

9. Transcript clarifications

Resolved, on the motion of Mrs Ward: That a footnote be included in the transcript of 3 December 2020 noting the clarification received by Mr Calum Smith, the Royal Australian and New Zealand College of Psychiatrists.

Resolved, on the motion of Mr Khan: That a footnote be included in the transcript of 8 December 2020 noting the clarifications received by Ms Fiona Rafter, Inspector of Custodial Services.

10. Partially confidential submission no. 44a

Resolved, on the motion of Ms Sharpe: That the committee keep the name of the author of the memo from the Law Enforcement Conduct Commission, processed as supplementary submission no. 44a, confidential, as per the request of the author.

11. Request for video footage – Dr Rebecca Scott Bray

The committee noted the correspondence from Dr Rebecca Scott Bray, University of Sydney, on 16 December 2020, requesting a copy of the video footage from her appearance at the public hearing on 27 October 2020. Ms Bray has a hearing disability and has requested to review the recording for personal reasons. As agreed to via email, the secretariat provided a copy of the video footage to Ms Bray on the provision that the broadcasting guidelines be adhered to and the video not be used in any public forum.

Resolved, on the motion of Mr Khan: That the committee provide Dr Rebecca Scott Bray, University of Sydney, a copy of the video recording of her session before the committee at the public hearing on 27 October 2020, on the provision that she adheres to the broadcasting guidelines and the video not be used in any public forum.

12. Reporting timeframe

Resolved, on the motion of Mr Khan: That the Chair seek an extension from the House to extend the reporting date to Thursday 15 April 2021 and that the report deliberative be re-scheduled for Monday 12 April 2021.

13. Recording the meeting

Resolved, on the motion of Mr Roberts: That the secretariat record the roundtable discussion for the purposes of incorporating members discussion in the final report, and that the recording be destroyed once the report is drafted.

14. Round table discussion

Committee members discussed the report and potential recommendations.

15. Adjournment

The committee adjourned at 12.20 pm, until 10.00 am, Monday 12 April 2021 (report deliberative).

Sarah Dunn

Clerk to the Committee

Draft minutes no. 10

Monday 12 April 2021

Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

Room 814/815, Parliament House, 10.03 am

1. Members present

Mr Searle, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Franklin (*substituting for Mr Khan*)

Mr Roberts

Ms Sharpe (*via videoconference*)

Mrs Ward (*via videoconference*)

2. Draft minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 9 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 8 February 2021 – Letter from Mr Brendan Thomas, Chief Executive Officer, Legal Aid NSW, to Chair, providing a response to questions from the committee
- 19 February 2021 – Email from Ms Elizabeth Pearson, Director of Policy and Public Affairs, NSW Bar Association, to secretariat, advising that Mr Tony McAvoy SC has no further comments to make in relation to the last three hearings of evidence
- 26 February 2021 – Email from Ms Verity Smith, Solicitor, Public Interest Advocacy Centre, to secretariat, requesting to provide a short supplementary submission on BOCSAR material which has been revised since the hearings
- 17 March 2021 – Letter from Ms Karly Warner, Chief Executive Officer, Aboriginal Legal Service (NSW/ACT), to Chair, providing an additional recommendation to the committee in relation to a Practice Direction for the NSW Coroner's Court
- 19 March 2021 – Email from Ms Justine Simpkins, Manager Prevention, Law Enforcement Conduct Commission, confirming the timeframe for completing the review of the NSW Police Force's STMPHII
- 22 March 2021 – Email Ms Justine Simpkins, Manager Prevention, Law Enforcement Conduct Commission, confirming that the email in relation to the NSW Police Force's STMPHII review can be made public
- 24 March 2021 – Letter from Magistrate Teresa O'Sullivan, State Coroner, to Chair, providing information on a number of initiatives underway to ensure the court's processes and practices are culturally safe and attaching a review of deaths in custody of First Nations people
- 25 March 2021 – Email from Mr Don McLennan, Executive Officer to the NSW State Coroner, to secretariat, confirming that the cover letter from the State Coroner can be made public
- 30 March 2021 – Email from Mr Don McLennan, Executive Officer to the NSW State Coroner, to secretariat, confirming the anticipated date of tabling the report on the review of deaths in custody of First Nations people
- 1 April 2021 – Email from Ms Jacinta Haywood, Executive Officer, Chief Magistrate's Office, to secretariat, clarifying an earlier response in correspondence to the committee dated 20 January 2021
- 12 April 2021 – Email from Mr Don McLennan, Executive Officer to the NSW State Coroner, to secretariat, confirming the State Coroner is happy for the committee to use sections of the report entitled 'First Nations People's Deaths in Custody in NSW 2008-2018' which is not yet published.

Sent:

- 8 February 2021 – Email to Ms Angela Boland, Senior Project Officer, Law Enforcement Conduct Commission, from secretariat, confirming the anticipated due date for their review of the third subject target management plan
- 1 March 2021 – Email from secretariat, to Ms Verity Smith, Solicitor, Public Interest Advocacy Centre, advising that the Chair has approved their request to provide a short supplementary submission on BOCSAR material which has been revised since the hearings
- 7 April 2021 – Email to Mr Don McLennan, Executive Officer to the NSW State Coroner, from secretariat, seeking agreement to use sections of the confidential report entitled 'First Nations People's Deaths in Custody in NSW 2008-2018' in the committee's report.

4. Publication of correspondence

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of the following items of correspondence:

- letter from Mr Brendan Thomas, Chief Executive Officer, Legal Aid NSW, to Chair, providing a response to questions from the committee, received 8 February 2021
- letter from Ms Karly Warner, Chief Executive Officer, Aboriginal Legal Service (NSW/ACT), to Chair, providing an additional recommendation to the committee in relation to a Practice Direction for the NSW Coroner's Court, received 17 March 2021
- email from Ms Justine Simpkins, Manager Prevention, Law Enforcement Conduct Commission, confirming the timeframe for completing the review of the NSW Police Force's STMPHII, received 19 March 2021.

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of the email received 1 April 2021, from Ms Jacinta Haywood, Executive Officer, Chief Magistrate's Office, to secretariat, clarifying an earlier response in correspondence to the committee dated 20 January 2021.

5. Correspondence from the State Coroner

Resolved, on the motion of Ms Sharpe: That the committee:

- authorise the publication of the covering letter received 24 March 2021 from Magistrate Teresa O'Sullivan, State Coroner, to Chair, providing information on a number of initiatives underway to ensure the court's processes and practices are culturally safe
- keep confidential the attachment to the letter, entitled 'First Nations People's Deaths in Custody in NSW 2008-2018', until it is tabled in Parliament, except for the information which the State Coroner has agreed for the committee to include in the report.

6. Answers to questions on notice and supplementary questions

The committee noted that the following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice from Keeping Women out of Prison, received on 29 January 2021
- answers to questions on notice from the Australian Medical Association, received on 1 February 2021
- answers to supplementary questions from Sisters Inside Inc., received on 3 February 2021
- answers to questions on notice from the Justice Health and Forensic Mental health Network, received on 3 February 2021
- answers to questions on notice from Ms Taleah and Ms Makayla Reynolds, received on 9 February 2021
- answers to questions on notice and supplementary questions from the Department of Communities and Justice, received on 12 February 2021.

7. Answers to questions on notice

The committee noted that the secretariat has not received answers to questions taken on notice from the following stakeholders, despite numerous attempts to follow up:

- the Chatfield Family
- NSW Public Service Association
- Witness A.

8. Supplementary submission from PIAC

The committee noted that supplementary submission no. 114a from PIAC, received on 6 April 2021, was published by the committee clerk under the authorisation of the resolution appointing the committee.

9. Final report to families

Resolved, on the motion of Mr Shoebridge: That the Chair send a hard copy of the committee's final report to each of the First Nations families that appeared before the committee and gave evidence, with a letter thanking them for their participation.

10. Consideration of Chair's draft report

The Chair submitted his draft report, entitled *'High level of First Nations people in custody and oversight and review of deaths in custody'*, which, having been previously circulated, was taken as being read.

Chapter 1

Resolved, on the motion of Ms Sharpe: That paragraph 1.1 be amended by inserting 'Given significant community concerns over the last 30 years and in recent times through the Black Lives Matter movement' before 'This inquiry was primarily established'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.83 be amended by inserting 'and angered' after 'stakeholders are frustrated'.

Resolved, on the motion of Ms Sharpe: That paragraph 1.84 be amended by:

- a) inserting 'the impact of child removal' after 'housing,'
- b) omitting 'solutions put forward, it is evident that we have failed' and inserting instead 'solutions put forward, we have failed'
- c) omitting 'First Nations people and communities' and inserting instead 'First Nations people and the entire New South Wales community'.

Resolved, on the motion of Ms Sharpe: That paragraph 1.85 be amended by omitting 'we still do not have a clear line of sight over' and inserting instead 'there remains no clear, transparent monitoring or reporting on'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.86 be amended by inserting 'and through a desktop analysis without input from First Nations community members or First Nations organisations' after 'on the basis of a self-assessment'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.90 be amended by omitting 'we do not have the evidence or any proper foundation to determine more ambitious targets at the state level' and inserting instead 'reflect that fact. However a rate of change that would not see parity in incarceration rates until the end of this century should not be accepted. This is a genuine crisis and it must be seen as such and appropriate political will and resources directed to address it with real urgency'.

Resolved, on the motion of Ms Sharpe: That paragraph 1.92 be amended by omitting 'we understand that' before 'more meaningful and effective change'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.93 be amended by omitting 'the government may need to shift' and inserting instead 'the government will need to shift'.

Resolved, on the motion of Ms Sharpe: That paragraph 1.93 be amended by omitting 'we encourage the NSW Government' and inserting instead 'we urge the NSW Government'.

Chapter 2

Resolved, on the motion of Mr Shoebridge: That paragraph 2.41 be amended by omitting 'In stark contrast to the statistics for First Nations males in custody,' and inserting instead 'Of equal or greater concern'.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.86 be amended by inserting 'grossly' before 'over-represented'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 2.87:

'Even though the rates of increase have been comparable, given so many more First Nations people are in jail as a proportion of the population what seems like a comparable rate of increase actually reaches far deeper into First Nations communities. These real world impacts in First Nations communities can sometimes be obscured by these figures and the sheer number of First Nations families impacted cannot be ignored.'

Resolved, on the motion of Ms Sharpe: That paragraph 2.90 be amended by omitting 'While we acknowledge stakeholders concerns that this may be attributed to women being misidentified as perpetrators in domestic and family violence contexts, the evidence the committee received was impressionistic, and while valuable, did not have the precision the committee requires on the causes and issues to be able to address this effectively through public policy' and inserting instead 'Many stakeholders raised concerns that one of the reasons for the increasing rate of women's incarceration was a result of women being misidentified as perpetrators in domestic and family violence contexts. There has however been little direct research in relation to this issue'.

Resolved, on the motion of Ms Sharpe: That the following new committee comments be inserted after paragraph 2.90:

'The committee notes that the way First Nations women come into contact with the criminal justice system and the drivers of their incarceration are different to First Nations men. The impact of women's incarceration, especially for short periods of time leads to removal of their children and loss of housing that leads to significant challenges post release and continues the cycle of intergenerational disadvantage.

The committee believes that these issues must be considered when a woman is charged and sentenced with all non-custodial options being explored. The committee urges the government to increase the funding and support for post release programs such as the Miranda Project

The committee is especially concerned that women are giving addresses for bail and parole that mean they are going back to live in unsafe households.'

Resolved, on the motion of Ms Sharpe: That the following new recommendations be inserted after paragraph 2.90:

'Recommendation x

The NSW Government ensure long-term funding for projects such as the Miranda Project and other post release support programs for women who have been in prison, including expansion to rural, regional and remote areas.

Recommendation x

The NSW Government urgently expand the number of post release housing beds for First Nations women coming out of prison that can support women and their children to find long-term housing.'

Chapter 3

Resolved, on the motion of Mr Shoebridge: That paragraph 3.10 be amended by inserting 'which states 'any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment' is to be considered as part of an assessment,' after 'Reflecting on section 18(1)(k) in the Bail Act 2013 (NSW)'.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.15 be amended by omitting 'Gladue style reporting in New South Wales Courts, to ensure that an individual's background and community is considered when they are being sentenced for an offence.', and inserting instead 'Pre-sentencing and bail reports, similar to that used in Canada, that expressly address the circumstances and needs of First Nations offenders. This is known as Gladue Style reporting.'

Mr Roberts moved: That Recommendation 6 be omitted: 'That the NSW Government amend the *Bail Act 2013* to include a standalone provision that stipulates a bail decision maker must take into account any issues that arise due to the person's Aboriginality, similar to section 3A of the *Bail Act 1977(Vic)*.'

The committee divided.

Ayes: Mr Roberts, Mrs Ward.

Noes: Mr Franklin, Mr Searle, Ms Sharpe, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.143 be amended by omitting 'identifying repeat offenders and disrupting their criminal behaviour' and inserting instead 'identifying potential offenders and disrupting any criminal behaviour'.

Mr Roberts moved: That Recommendation 8 be amended by inserting 'except if the offensive language is used in or near or within hearing of a school' after 'and/or an actual threat of harm'.

The committee divided.

Ayes: Mr Franklin, Mr Roberts, Mr Searle, Ms Sharpe, Mrs Ward

Noes: Mr Shoebridge.

Question resolved in the affirmative.

Mr Roberts moved: 'That Recommendation 9 be omitted: ' That the NSW Government raise the minimum age of criminal responsibility and the minimum age of children in detention to at least 14'.

The committee divided.

Ayes: Mr Roberts, Mrs Ward.

Noes: Mr Franklin, Mr Searle, Ms Sharpe, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mr Roberts: That Recommendation 10 be amended by omitting 'instead of a criminal justice approach' after 'between the ages of 10 and 14'.

Mr Roberts moved: That Recommendation 11 be omitted: 'That the NSW Government, in consultation with key stakeholders, amend the *Young Offenders Act 1997* to expand the offences in which the legislation can apply and remove the caps on the number of cautions young people can be given.'

The committee divided.

Ayes: Mr Roberts, Mrs Ward.

Noes: Mr Franklin, Mr Searle, Ms Sharpe, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mr Roberts: That the following new committee comments be inserted after paragraph 3.174:

'While it was not the subject of specific evidence before us, the committee understands that there are not enough places at the drug treatment centre at Parklea jail, both for inmates and for those serving suspended sentences who currently attend the treatment program there.'

The committee therefore also recommends that the drug treatment centre at Parklea jail be expanded to meet the need.'

Resolved, on the motion of Ms Sharpe: That Recommendation 16 be omitted: 'That the NSW Government expand the Drug Courts across New South Wales to more regional, rural and remote areas', and the following new recommendation be inserted instead:

'Recommendation x

That the NSW Government immediately expand the Drug Court to Dubbo and make plans for further expansion into other regional, rural and remote areas.'

Ms Sharpe moved: That:

- a) paragraph 3.176 be amended by omitting 'We therefore do not make any recommendations on this program at this point, particularly given that' before 'the LECC will be undertaking a further review of STMP-III'
- b) the following new recommendation be inserted after paragraph 3.176:

'Recommendation x

That in the reviews of the Suspect Target Management Program, there be consideration of the removal of the program for under 14 year olds.'

The committee divided.

Ayes: Mr Franklin, Mr Searle. Ms Sharpe, Mr Shoebridge, Mrs Ward.

Noes: Mr Roberts.

Question resolved in the affirmative.

Chapter 4

Resolved, on the motion of Ms Sharpe: That a paragraph at the beginning of Chapter 4 be drafted by the secretariat, in consultation with the Chair, and circulated to members for agreement:

- a) acknowledging the trauma experienced by First Nations families who have lost a loved one in custody and the courage of the families in contributing to the inquiry
- b) acknowledging the frustration families feel in terms of investigations into deaths in custody and the inquiry's limited remit to examine those investigations, beyond looking at what those cases have demonstrated in terms of systemic issues.

Resolved, on the motion of Mr Shoebridge: That a sentence be drafted by the secretariat, in consultation with the Chair, and circulated to members for agreement, noting the evidence provided by the mother of TJ Hickey and the emotionally difficult experience that would have been giving evidence for her.

Resolved on the motion of Mr Shoebridge: That paragraphs 4.10, 4.11 and 4.12 be omitted, including Figures 12 and 13, and the following new paragraphs and graphs be inserted instead:

'The most up to date and comprehensive information provided in relation to First Nations deaths in custody in New South Wales was provided by the NSW State Coroner close to the commencement of this inquiry. The information will soon be publicly released as part of the State Coroner's report into *First Nations People's Deaths in Custody in NSW 2008-2018*.

According to the NSW State Coroner, there were 250 deaths in custody in New South Wales between 1 January 2008 and 31 December 2018. Of this, 34 were First Nations deaths, accounting for 13.6 per cent of all deaths in custody. A majority of these deaths (31) were First Nations males. The figure below, shows the trend in New South Wales deaths in custody by Indigenous status by year.

Figure 6: NSW deaths in custody by Indigenous status by year (n = 250)

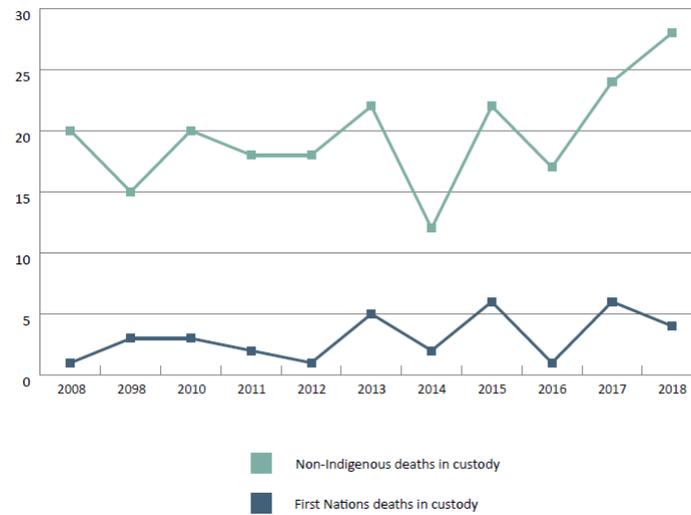


Figure 7: Table of NSW deaths in custody by Indigenous status by year (n = 250)

Year	Total deaths in custody in NSW	First Nations people's deaths in custody in NSW	Non-Indigenous people's deaths in custody in NSW
2008	21	1	20
2009	18	3	15
2010	23	3	20
2011	20	2	18
2012	19	1	18
2013	27	5	22
2014	14	2	12
2015	28	6	22
2016	18	1	17
2017	30	6	24
2018	32	4	28
TOTAL	250	34	216

The majority of deaths in custody were the consequence of natural causes, although the proportion of First Nations people who died due to external causes was slightly higher than the proportion of non-Indigenous people who died due to external causes (44 per cent for First Nations people compared with 39 per cent for non-Indigenous people).

According to the NSW State Coroner, the proportion of deaths in custody attributed to self-harm was similar between First Nations people and non-Indigenous people. Of the First Nations people who died in custody due to intentional self-harm all had a prior history of mental health issues.

Based on the 34 First Nations deaths between 2008 to 2018, the NSW State Coroner noted:

- that the average age of non-Indigenous people who died in custody is 52 years, whereas for First Nations people it is 41 years
- the majority of First Nations deaths were sentenced prisoners (59 per cent), as compared to those on remand or those who died in custody in other lawful custody
- 31 First Nations people died in government run prisons, whereas 3 died in private-run prisons
- over half of the First Nations people who died in custody had been incarcerated for less than 12 months
- many of the First Nations people who died in custody had moved correctional facilities multiple times during their period of incarceration.

[FOOTNOTE: NSW State Coroner, *First Nations People's Deaths in Custody in NSW 2008-2018*, unpublished report, pp 7-11.]

Resolved, on the motion of Mr Shoebridge: That paragraph 4.13 be amended by omitting 'Reflecting on the data during a hearing' and inserting instead 'Reflecting on the rates of death for First Nations people, compared to non-Indigenous people,'.

Resolved, on the motion of Mr Shoebridge: That recommendation 19 be amended by omitting in the third bullet point 'including referrals to counselling and support services' and inserting instead 'including the provision of counselling and support services up to and including the coronial hearing'.

Chapter 5

Resolved on the motion of Ms Sharpe: That:

- a) the following new recommendation be inserted in the committee comments section of Chapter 5:

'Recommendation x

That Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Health Network review mental health screening procedures, with particular attention given to the placement of prisoners with mental health conditions'.

- b) the secretariat draft a sentence, in consultation with the Chair, and circulate it to members for agreement, reflecting the information from the Coroner's recent report noting the connection between First Nations deaths caused by intentional self-harm and previous attempts at suicide.

Resolved, on the motion of Mr Shoebridge: That in the committee comments section of Chapter 5 the secretariat draft a sentence, in consultation with the Chair, and circulate it to members for agreement, reflecting the recent publication of a report from the Inspector of Custodial Services.

Resolved, on the motion of Ms Sharpe: That the following new recommendation be inserted in the committee comments section of Chapter 5:

'Recommendation x

That the NSW Government increase the funding to support mental health assessment, management and treatment of prisoners'.

Resolved, on the motion of Mr Shoebridge: That recommendation 20 be amended to insert at the end ', with a focus on incorporating Aboriginal Community Controlled health services'.

Resolved, on the motion of Mr Roberts: That the following new paragraph be inserted before 5.70:

'The committee further notes that persons with a disability and other inmates would also benefit from greater access to and co-ordination with other government agencies prior to their release from prison. Without being exhaustive these would include the Aboriginal Housing Office, Child Protection, Housing NSW, TAFE NSW, providers of mental health services and Centrelink. The committee notes that housing insecurity, poor mental health and a lack of job skills and readiness are key contributors to those released from prison not being able to function in the outside world and are among the reasons many reoffend and return to prison.'

Resolved, on the motion of Mr Franklin: That the following new recommendation be inserted after the amendment inserted by Mr Roberts above, before 5.70:

'Recommendation x

That Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Health Network also engage with the Aboriginal Housing Office, Child Protection, Housing NSW, TAFE NSW, providers of mental health services and Centrelink to establish timely, clear and comprehensive protocols for supporting people with a disability and others in custody to access support upon release.' Resolved, on the motion of Mr Shoebridge: That:

- a) the following new paragraph be inserted after paragraph 5.70:

'It is now thirty years since the *Royal Commission into Aboriginal Deaths in Custody* report recommended the removal of hanging points in prison cells, this cannot wait decades more to be finally addressed. Not

only must there be a plan but it must have a clear and publicly state timetable for the full implementation of that plan to remove hanging points in New South Wales prison cells.'

- b) Recommendation 22 be amended by inserting 'and timetable' after 'develop a detailed plan'.

Chapter 6

Resolved, on the motion of Ms Sharpe: That Recommendation 24 be amended by inserting 'in a timely manner' after 'investigating deaths in custody'.

Resolved, on the motion of Ms Sharpe: That paragraph 6.127 be amended by inserting ', monitoring' after 'there seems to be limited oversight'.

Chapter 7

Resolved, on the motion of Mr Shoebridge: That paragraph 7.120 be amended by:

- a) omitting 'If we were designing a system from scratch' and inserting instead 'Of the currently available institutional options,'
- b) omitting 'most appropriate jurisdiction' and inserting instead 'most appropriate body'.

Resolved, on the motion of Mr Shoebridge: That paragraph 7.121 be amended by:

- a) omitting 'The committee therefore considers' and inserting instead 'The Committee notes that there is a range of views among stakeholders as to the best vehicle for this new or expanded function, including that the Ombudsman fulfil this role. However, based upon the evidence and the submissions we received during the conduct of this inquiry, and unless or until the Coroner's Court is made fit for this purpose, the committee considers'
- b) inserting 'and achievable' after 'is the most reasonable'.

Resolved, on the motion of Mr Shoebridge: That:

- a) paragraph 7.127 be amended by omitting 'We also accept Commissioner Drake's concerns that the workload may not be sufficient to justify a third Commissioner. However, we do agree that it is important that there is a First Nations role within the LECC to build trust with the First Nations community.', and inserting instead 'Given the overrepresentation of First Nations people in both the work of police and corrective services there is a powerful case to be made for a distinct First Nations representative in the LECC. Whether this position is a third Commissioner or some other senior officer is a matter that needs to be considered with a close eye to how this position would function in the LECC. It may be that a senior alternative role is more appropriate and allows for the flexibility to work across the two distinct divisions of a reformed and expanded LECC. Either way, we firmly believe that a senior dedicated First Nations position is essential to give First Nations people a clear signal that their culture and concerns are being addressed at the heart of the organisation.'
- b) Recommendation 29 be omitted: 'That the Law Enforcement Conduct Commission establish a senior dedicated First Nations position to undertake engagement across the organisation and review policies to ensure it is genuinely approachable and culturally safe.', and the following new recommendation be inserted instead:

'Recommendation x

That the NSW Government amend the Law Enforcement Conduct Commission Act 2016 to include a senior statutory First Nations position to undertake engagement across the organisation and review policies and case work, to ensure it is genuinely approachable and culturally safe.'

Mr Roberts moved: That Recommendation 31 be omitted: 'That the Attorney General consider appointing suitably experienced and qualified First Nations people to the judiciary.'

The committee divided.

Ayes: Mr Roberts, Mrs Ward.

Noes: Mr Franklin, Mr Searle, Ms Sharpe, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mr Shoebridge: That Recommendation 31 be amended by inserting 'significantly more' before 'suitably experienced and qualified'.

Resolved, on the motion of Mr Shoebridge: That the draft report, as amended, be the report of the committee and that the committee present the report to the House, subject to those amendments the committee resolved to be drafted by the secretariat, in consultation with the Chair, and agreed to by members via email.

Resolved, on the motion of Ms Sharpe: That:

- The transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat by 5.00 pm Tuesday 13 April 2021;
- The secretariat table the report at 9.30 am, Thursday 15 April 2021.

11. Adjournment

The committee adjourned at 12.06 pm, *sine die*.

Sarah Dunn

Clerk to the Committee

Appendix 4 Dissenting statement

Hon Rod Roberts MLC, Pauline Hanson's One Nation

Overall, I strongly support this report and a vast number of recommendations contained within it. It is a good report and for the most part there was a consensus among committee members on certain aspects.

This dissenting statement however addresses four recommendations that One Nation does not support.

The inclusion of the following recommendations cause us concern. I moved to have these recommendations omitted but my motions were not supported by the majority of the committee.

RECOMMENDATION 8.

It is my assertion and position that the *Bail Act 2013* already adequately covers this issue. Section 18 (1) (k) states inter alia, that a bail authority is to consider any special vulnerability or needs of the accused person including being Aboriginal or Torres Strait Islander. Any further changes are unnecessary and purely symbolic.

RECOMMENDATION 11.

In my opinion the committee was NOT provided with sufficient evidence to justify the inclusion of this recommendation. It should be noted that this was not in the terms of reference and submissions were not called for in this regard. The only qualified medical practitioner in the field of forensic psychiatry that we received evidence from was Dr Callum Smith. As compelling as Dr Smith's evidence was, he is not a specialist in the field of Child or Adolescent forensic psychiatry. Other evidence provided by witnesses, could only be described as hearsay at best. Dr Smith himself said as recorded at 3.56 of this report 'it is clear that it is not as simple as just changing the age of criminal responsibility'.

RECOMMENDATION 13.

One Nation cannot support this recommendation. The *Young Offenders Act 1997* already allows for three cautions under certain circumstances to be afforded to juvenile offenders. This is more than adequate. To remove the cap on the number of cautions a young person is given would not meet community expectations. After three cautions a young offender needs to learn there is a consequence for criminal behaviour and the need to take personal responsibility for their actions.

RECOMMENDATION 38.

This is a recommendation I cannot support. One Nation does not support identity politics and believes in meritocracy. There are current and former members of the judiciary that identify as First Nations people, they have been appointed on their merit. The belief and expectation that justice is blind should prevail.

Despite these areas of disagreement, I would like to thank the other members of the committee and the secretariat for the work in producing this important report.

The Hon. Rod Roberts MLC

