

## **NSW Government response: Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody**

The NSW Government thanks the Select Committee for its inquiry and report into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody.

The Government recognises the trauma and grief experienced by the families and communities of Aboriginal people who have died in custody, and the continued sorrow and frustration caused by the deaths of Aboriginal people in custody still occurring today.

The Government acknowledges the contribution by individuals and organisations that participated in the inquiry, and particularly thanks families who spoke about the loss of their loved ones.

The Government is committed to reducing the number of Aboriginal people in custody and deaths in custody. It supports or supports in principle 16 of the Select Committee's recommendations, 10 recommendations are under consideration and it notes 8 recommendations. Five recommendations are not supported.

In 1991, the *Royal Commission into Aboriginal Deaths in Custody (Royal Commission)* final report concluded, "Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody ... what is overwhelmingly different is the rate at which Aboriginal people come into custody, compared with the rate of the general community".

This remains true today. It is deeply disappointing that, 30 years later, Aboriginal people continue to be significantly overrepresented in custody. There has been much work across many areas of government and the community. While important progress has been made, there is far more to do.

The Royal Commission continues to inform the work of the NSW Government. The key themes identified in the Royal Commission report remain relevant today.

Corrective Services NSW recently commenced a Thematic Review of Aboriginal Deaths in Custody (**the Thematic Review**) to examine the circumstances and findings from investigations into deaths of Aboriginal people in the custody of Corrective Services NSW from 2010 to 2021. The Thematic Review will draw on the Royal Commission's work and the Select Committee's report, guided by a reference group that includes Aboriginal members from government and the community, and chaired by an independent Aboriginal academic. The work will be informed by the expertise and experience of Aboriginal families, community groups and advocates.

The NSW Government has committed to the National Agreement on Closing the Gap, including the Closing the Gap criminal justice targets, which have been agreed nationally and in partnership between all Australian governments and the Coalition of Aboriginal and Torres Strait Islander Peak Organisations (**Coalition of Peaks**).

The National Agreement reflects an unprecedented shift in the way government works with Aboriginal people, to achieve better outcomes for Aboriginal people and their communities. It embeds principles of self-determination, empowerment and shared decision-making in the design, implementation and monitoring and evaluation of policies and programs that impact Aboriginal people.

Reducing Aboriginal overrepresentation in custody cannot be achieved purely, or even principally, through changes in the criminal justice system. As the Royal Commission recognised, it requires reforms to address factors associated with risks of future contact with the justice system, many of which relate to the entrenched disadvantage and intergenerational trauma that too many Aboriginal people currently experience. As part of the National Agreement, the NSW Government is committed to, and accountable for, four key priority reform targets and 17 socio-economic targets.

The NSW Government and NSW Coalition of Aboriginal Peak Organisations, in consultation with Aboriginal communities, have released the first NSW Implementation Plan which sets out the first year roadmap for NSW to achieve meaningful progress towards Closing the Gap. It focuses on the National Agreement's four priority reform areas and an added NSW-specific priority reform on employment, business growth and economic prosperity. Implementation of the Plan is overseen by a council jointly chaired by the Minister for Aboriginal Affairs and the NSW Coalition of Aboriginal Peak Organisations co-chairs.

The Government looks forward to continuing to work collaboratively with Aboriginal people, communities, and organisations to achieve long-term, sustainable outcomes for Aboriginal people.

## **Reducing the overrepresentation of Aboriginal people in custody**

*Supported: Recommendations 2, 4, and 7*

*Supported in principle: Recommendation 15*

*Not supported: Recommendations 3 and 14*

### **National Agreement on Closing the Gap**

1. The NSW Government has committed to the National Agreement on Closing the Gap, including the Closing the Gap criminal justice targets to:
  - By 2031, 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 (10-17 years) in detention by 30 per cent.
2. As these targets have been agreed nationally and in partnership between all Australian governments and the Coalition of Peaks the NSW Government does not support committing to an alternative target at this time as recommended by the Select Committee (recommendation 3).
3. The NSW Government has established the following oversight forums to oversee and report on progress made in relation to the National Agreement on Closing the Gap (recommendation 2):
  - The NSW Joint Council, co-chaired by the Minister of Aboriginal Affairs and co-chairs of NSW Coalition Of Aboriginal Peak Organisations, as the key decision-making group overseeing jurisdictional planning and implementation;
  - The NSW Partnership Working Group, co-chaired by the NSW Department of Premier and Cabinet Deputy Secretary and Head of the NSW Coalition of Aboriginal Peak Organisations Secretariat, who are responsible for monitoring performance and endorsing key deliverables and processes to develop the NSW Implementation Plan;
  - Working Groups, co-chaired by NSW Coalition of Aboriginal Peak Organisations and NSW Government Cluster Leads, are responsible for providing subject matter expertise to develop and progress actions towards meeting the five priority reforms and 17 socio-economic targets.
4. An annual report on progress against commitments in the NSW Implementation Plan will be prepared, tabled in Parliament and published. Nationally, the National Indigenous Australians Agency maintains an Implementation Tracker on its website that records progress against individual commitments in the National Agreement. Additionally, the Productivity Commission is responsible for maintaining a data repository on targets, a dashboard, and annual report on targets.

### **Improved data on contact with the criminal justice system**

5. The NSW Bureau of Crime Statistics and Research has developed a new quarterly [public report](#) showing performance towards reducing Aboriginal over-representation in the criminal justice system. The first report was publicly released in August. The NSW Bureau of Crime Statistics and Research is investigating ways to improve the identification of Aboriginal people in justice data and will publish a research report examining recent trends in the NSW Aboriginal female prison population by June 2022 (recommendations 6 and 7).

### **Justice reinvestment**

6. The NSW Government supports community-led justice reinvestment initiatives and has provided funding to Just Reinvest NSW and the Maranguka Justice Reinvestment Project in Bourke, committing \$300,000 in 2019-20 and a further \$320,000 in 2020-21. The Government continues to explore how justice reinvestment concepts can be applied in NSW communities (recommendation 15).

### **Arrest powers**

7. The NSW Government considers that existing laws for arrest, detention and imprisonment strike an appropriate balance between upholding personal liberty and protecting the community (recommendation 14).

## **Preventing deaths in custody**

*Supported: Recommendations 23 and 31*

*Supported in principle: Recommendation 29*

*Under consideration: Recommendation 32*

*Noted: Recommendations 1, 30 and 33*

*Not supported: Recommendations 34, 35 and 36*

## **Reviewing and improving processes**

8. Corrective Services NSW's Thematic Review will include consideration of unimplemented Royal Commission recommendations that relate to Corrective Services NSW, the Justice Health and Forensic Mental Health Network and a number of other reports (recommendations 1 and 23). One of the Thematic Review's objectives is to better understand the lived experience of families, inmates and staff when a death in custody occurs. The Thematic Review will make recommendations for change as appropriate, including in relation to Corrective Services NSW's role in communication with, and support for, families.
9. Corrective Services NSW, the NSW Police Force and Youth Justice Centres provide culturally appropriate, trauma informed training for its staff and continue to implement processes and policies that support their roles and responsibilities when there is a death in custody. In NSW Youth Justice Centres, there have been no deaths of young people for over 20 years.
10. All agencies will closely consider the recommendations of the Thematic Review.

## **Removing hanging points (recommendation 29)**

11. In NSW there are over 12,000 cells in the adult system, most of which were constructed prior to the development of anti-ligature design standards. In 2021-22, \$6 million has been allocated to remove obvious hanging points in approximately 400 cells. Corrective Services NSW will continue to seek funds to continue the removal of hanging points.
12. Corrective Services NSW screens prisoners at the point of reception and as needed to identify those at risk of self-harm or suicide. Where a prisoner is assessed to be 'at risk', an immediate support plan is put in place, including consideration of the safest cell placement option. Youth Justice Centres are designed to provide safe, secure and developmentally appropriate accommodation and an ongoing program of review and upgrade aims to ensure centres are safe and secure.

## **NSW Coroners Court**

13. Coroners have broad powers to examine and make recommendations under the *Coroners Act 2009*. Coroners regularly use this power to make recommendations for system wide improvements. The State Coroner's report into [First Nations People's Deaths in Custody](#) noted that coronial recommendations addressed a range of systemic issues, including the need for improved mental health treatment and medical care, additional training, Aboriginal staffing levels and custody notifications.
14. Under the 2021-22 State Budget, the Local Court jurisdiction received a funding boost of \$56.1 million to appoint eight extra magistrates, including a full-time coroner (recommendation 31). This will enable the pilot of centralised decision-making for regional deaths to be continued on an ongoing basis, which supports high quality decision-making and timely outcomes in these matters.
15. The funding will also enhance the Coronial Case Management Unit located at the Forensic Medicine and Coroners Complex in Lidcombe. The Coronial Case Management Unit co-locates staff from the Department of Communities and Justice, NSW Health and the NSW Police Force to collectively manage the early stages of the coronial process, for deaths referred from the greater Sydney metropolitan area. The model supports coroners to make timely, consistent and appropriate directions.

16. The Coroners Court recently established two Aboriginal Coronial Support Officer roles to provide support to the families of Aboriginal people whose deaths are reported to the coroner and enhance policies and procedures for engaging with Aboriginal families throughout the coronial process.
17. Recommendation 32 of the Select Committee's report will be considered in the context of the statutory review of the *Coroners Act 2009*.
18. The NSW Government does not support mandating Coroners to make findings related to whether the implementation of recommendations from the Royal Commission report could have reduced the risk of death (recommendation 34). Coroners should continue to have broad discretion to make recommendations as they consider necessary or desirable in relation to any matter connected with the death.
19. The NSW Government does not support expanding the functions of the Law Enforcement Conduct Commission to undertake full investigations in relation to deaths in custody, as it is not consistent with the Law Enforcement Conduct Commission's role (recommendations 35 and 36). The Government continues to support thorough, timely and independent investigations into deaths in custody as part of the coronial process.
20. The NSW Government notes that the Select Committee on the coronial jurisdiction was established in NSW on 6 May 2021 (recommendation 30). The Government will participate in this inquiry as appropriate and will consider any findings or recommendations once the Select Committee reports in December 2021.

### **Improving the health and safety of Aboriginal people in custody**

*Supported: Recommendations 24 and 27*

*Supported in principle: Recommendation 25*

*Noted: Recommendations 19, 26 and 39*

#### **Review of health services in correctional facilities**

21. The Ministry of Health and Corrective Services NSW have commissioned a review of the delivery of offender health services, including considering what commissioning and delivery models will best meet the needs of Aboriginal people, with reference to the Closing the Gap Agreement (recommendation 24).
22. Two independent reviews were conducted in 2021 and are under consideration. (1) The Inspector of Custodial Services' review of Health Services in NSW Correctional Facilities was [published](#) in March 2021.<sup>1</sup> This review is currently being considered by NSW Health. (2) The Audit Office of NSW is presently conducting an audit of access to health services in custody and transfer of care between centres and on release to the community.
23. The Justice Health and Forensic Mental Health Network has approached Winnunga Nimmityjah Aboriginal Health and Community Service to review their service model for Aboriginal patients in custody. The Justice Health and Forensic Mental Health Network has an existing formal partnership with Waminda South Coast Women's Health and Welfare Aboriginal Corporation and is also exploring partnerships with other Aboriginal Medical Services and Community Controlled Health Services to deliver similar models of contracted in-reach services to Aboriginal patients in custody.

#### **Improving support for people with disabilities (recommendation 27)**

24. In 2020 the National Disability Insurance Agency recruited three Justice Liaison Officers who support the Justice Health and Forensic Mental Health Network, Corrective Services NSW, and Youth Justice NSW staff to assist people with a disability in justice settings to ensure appropriate National Disability Insurance Scheme supports are in place at the time of exiting custody.

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<sup>1</sup> Inspector of Custodial Services, *Health services in NSW correctional facilities* (Report, March 2021) <[https://www.inspectorcustodial.nsw.gov.au/content/dam/dcj/icsnsw/documents/Health\\_Services\\_in\\_NSW\\_Correctional\\_Facilities.pdf](https://www.inspectorcustodial.nsw.gov.au/content/dam/dcj/icsnsw/documents/Health_Services_in_NSW_Correctional_Facilities.pdf)>.

25. For adults, Corrective Services NSW is currently developing an Offender Service and Programs National Disability Insurance Scheme procedure. This includes a review of existing processes and systems to identify opportunities where people with a disability can be better supported upon release. Corrective Services NSW is also planning a “National Disability Insurance Scheme champion” project at the Cessnock Complex to support people with a disability to engage with programs.
26. For young people, Youth Justice NSW has finalised a [Disability Action Plan](#) (2021-2024) that aims to strengthen Youth Justice NSW’s responsivity and support to young people with disabilities by improving staff skills, enhancing data sharing and collection, and providing a range of tools, including Aboriginal Disability Champions, to engage Aboriginal families with the National Disability Insurance Scheme, including improving transition out of detention.
27. For forensic patients with cognitive impairment, the NSW Community Safety Program facilitates the effective transition to mainstream and National Disability Insurance Scheme-funded services in the community. This is done through specialist assessment, tertiary consultation and case management.

### **Support and treatment for mental health (recommendation 25)**

28. Mental health screening for adults is primarily done by the Justice Health and Forensic Mental Health Network. Justice Health and Forensic Mental Health Network is working to continually improve its procedures, including:
  - Implementing a new reception screening tool to identify a patient’s history of mental illness and risk of self-harm or suicide. This tool informs decisions on required care and placement.
  - Working closely with Corrective Services NSW on enhancing care with new step-down beds scheduled to open in 2021. Step down beds are designated voluntary mental health beds used for inmates with complex needs who are not well enough to be placed in the general correctional setting, but do not require the level of intensive treatment and monitoring provided in mental health screening units.
29. Youth Justice NSW is responsible for mental health screening for young people. Youth Justice NSW has:
  - Recently reviewed mental health screening procedures and had all Youth Justice NSW psychologists trained in the Westerman Aboriginal Screening Checklist, the only mental health screening tool validated for use with Aboriginal people.
  - Recently reviewed its Objective Classification System Policy, which sets out how young people are classified for placement in custody and includes consideration of mental health.
30. Where Youth Justice NSW has concerns for the acute mental health of a young person in custody, it can refer them to the Justice Health and Forensic Mental Health Network adolescent unit.
31. In 2019, Youth Justice NSW opened High Risk Units to provide an individualised response for young people demonstrating escalating high-risk behaviours with a focus on security and young person wellbeing and the Enhanced Support Unit with a focus on therapeutic and trauma-informed treatment and interventions.

### **Improving support for Aboriginal people leaving custody**

*Supported: Recommendation 5*

*Supported in principle: Recommendation 28*

*Noted: Recommendation 6*

32. Corrective Services NSW, Youth Justice NSW and the Justice Health and Forensic Mental Health Network are engaging relevant agencies to ensure appropriate protocols are in place to support people upon release from custody (recommendation 28).
33. Measures already in place include:

- Corrective Services NSW has a Case Management policy including the Planning for Adjustment, Responsivity, Reintegration, Criminogenic Needs and Communication assessment to identify post-release needs. Corrective Services NSW works with inmates to develop an individualised release planning strategy.
  - Youth Justice NSW has a Case Management Policy which young people and their caseworkers use to consider the supports, resources and, skills needed to address the challenges and changes that they may encounter, the necessity to maintain continuity of service/s where relevant and facilitate young people's successful integration into their community.
  - The Justice Health and Forensic Mental Health Network has primary responsibility for supporting transfer of healthcare for those leaving custody, including those with mental illness. The Justice Health and Forensic Mental Health Network works closely with community mental health and other health services to support continuity of care for those leaving custody.
34. For women leaving custody (recommendation 6), Corrective Services NSW currently provides transitional supported accommodation for up to 20 female offenders per annum through the Funded Partnerships Initiative. Places are available to eligible Aboriginal women, and their pre-school aged children, on release from custody for up to 12 weeks to assist with reintegration and transition into longer-term housing.
35. Corrective Services NSW also works collaboratively with the Housing team within the Department of Communities and Justice to provide broader opportunities for access to housing through the Inmate Early Assessment Scheme, the Set to Go program and ongoing engagement with mutual clients post-release. From November 2020, when the Inmate Early Assessment Scheme commenced, and 31 July 2021, 46 people received housing, including five women.
36. The NSW Government also recognises the need for longer term funding for key projects and organisations that support women exiting custody, including the need for safe, suitable and stable accommodation across NSW (recommendation 5).
37. A further \$323,905 will be provided over two years to support expansion of the Miranda Project to a further location in Sydney and an additional \$60,000 to evaluate the new model, which builds on the success of the program to date. An initial evaluation in 2020 found that over 86 per cent of 90 women who engaged with the Miranda Project between 2017 – 2019 as longer-term casework clients successfully remained in the community and out of prison. Since its inception in 2017 until December 2019, 250 women received support through Miranda. Following this strong outcome, the program has recently also received funding from the private sector to continue their current service provision for multiple years.

## **Criminal justice system**

*Supported: Recommendations 18 and 37*

*Supported in principle: Recommendations 20 and 38*

*Under consideration: Recommendations 8, 9, 10, 11, 12, 13, 16, 17 and 21*

*Noted: Recommendation 22*

## **Employing Aboriginal People across the criminal justice system**

38. The [\*NSW Working together for a better future: the NSW Public Sector Aboriginal Employment Strategy 2019-2025\*](#) aims to improve the employment of Aboriginal people in the NSW public sector (recommendation 37). It builds on the success of the 2014-2017 strategy, in which the proportion of the NSW public sector workforce who identified as Aboriginal increased from 2.6 to 3.3 per cent overall by 2018.
39. Key agencies within the criminal justice system have their own programs aimed at improving employment opportunities for Aboriginal people, aligned with the 2019-2025 Strategy:
- The NSW Police Force Aboriginal Employment and Engagement Strategy 2020-2023 provides a framework which supports the active recruitment, retention and development for Aboriginal

people in the NSW Police Force. A key initiative is an Improvement Action Plan for the Indigenous Police Recruitment Our Way Delivery, which supports Aboriginal people join the NSW Police Force and other justice agencies.

- The Department of Communities and Justice's Aboriginal Employment Strategy 2021-2025 commits to a target of an Aboriginal employment rate of 7.5 per cent across the Department by 2025, including Corrective Services NSW and Youth Justice NSW. The Strategy aims to create more employment pathways and opportunities for Aboriginal people and increase representation across all divisions, salary levels and locations. It also seeks to build an inclusive, respectful and culturally capable workforce that supports and values Aboriginal people and cultures.
- Legal Aid NSW has set a target of 11 per cent Aboriginal and Torres Strait Islander employment by 2023 under its *Aboriginal Employment and Career Development Strategy*. Legal Aid is developing a Cultural Safety Framework to ensure that the work environment is safe and supports staff retention.
- The Office of the Director of Public Prosecutions NSW has a number of targeted positions across its 10 offices in various roles, legal and non-legal. In 2021, the Office of the Director of Public Prosecutions NSW launched an Aboriginal and Torres Strait Islander Internship Program which will result in employment of 3 (initially) Aboriginal and Torres Strait Islander students while they are studying law.

40. In relation to judicial appointments, the Attorney General encourages applications from qualified Aboriginal lawyers, and seeks greater diversity in the judiciary (recommendation 38).

## **Bail**

41. The *Bail Act 2013* currently requires bail authorities to consider any special vulnerability or needs the accused has, including because they are Aboriginal or Torres Strait Islander, as well as an accused person's background, including their circumstances and community ties.

42. The Department of Communities and Justice's current administrative review of the *Bail Act 2013* is considering whether a standalone provision that stipulates a bail decision maker must take into account any issues that arise due to the person's Aboriginality, should be adopted in NSW (recommendation 8).

## **Offensive language**

43. The NSW Government notes that changing the offensive language offence as recommended by the Select Committee could cause considerable overlap with existing offences that capture conduct relating to intimidating and threatening another person (recommendation 10). It could create overlap with, for example, the offences of stalking and intimidation under the *Crimes (Domestic and Personal Violence) Act 2007* and common assault under the *Crimes Act 1900*, which and can include a threat of harm without physical contact.

44. The NSW Government is therefore not proposing to amend s 4A of the *Summary Offences Act 1988* as recommended. However, the NSW Government will consider the operation of this offence, including the impact of the offence on Aboriginal persons.

## **Courts and sentencing**

45. On 17 June 2021, the NSW Government [announced](#) \$27.9 million in funding for DCJ to support the expansion of the NSW Drug Court to Dubbo. The NSW Government also committed \$7.5 million in November 2020 to boost drug and alcohol treatment services in Dubbo. The NSW Government will continue to consider the expansion of the Drug Court in other locations (recommendation 18).

46. The NSW Government is also continuing to consider the Walama Court proposal alongside other proposals that aim to reduce Aboriginal overrepresentation (recommendation 21).

47. The *Crimes (Sentencing Procedure) Act 1999* and the *Children (Criminal Proceedings) Act 1987* currently permit sentencing judges to consider background information on any social deprivation or disadvantage which may have contributed to a person's offending behaviour. The NSW

Government notes that there are currently pre-sentence reports prepared by Corrective Services NSW and background reports provided by Youth Justice NSW to assist NSW courts. Gladue-style Aboriginal Community Justice Reports will be considered to determine policy, legislative and operational implications (recommendation 9).

48. NSW offers the Circle Sentencing Program, an alternative sentencing court for adult Aboriginal offenders, in 11 regional locations across NSW. Work is underway to consider expansion of the program, including possible future sites (recommendation 17).

### **Children and young people**

49. The age of criminal responsibility is being considered at a national level and was discussed at the Meeting of Attorneys-General in March 2021. NSW supports this process, noting that any reform to the minimum age of criminal responsibility in NSW would need to be in the best interests of the community, with the safety of the community a key consideration. Appropriate alternatives to the criminal justice system would need to be available to address offending behaviour by those deemed too young to be criminally responsible for their actions (recommendations 11 and 12).
50. In August 2019, the NSW Government publicly committed to a review of the *Young Offenders Act 1997*, as part of the Government Response to the 2018 Parliamentary Inquiry into the Adequacy of Youth Diversionary Programs in NSW. In line with that response, the Department of Communities and Justice (including Youth Justice NSW) and the NSW Police Force are co-leading a targeted review of the *Young Offenders Act 1997* (recommendation 13):
- The purpose of the review is to improve the legislative framework for youth diversion in NSW to increase appropriate diversion of children and young people from the criminal justice system.
  - Expert stakeholders have been consulted throughout the review.
  - The review is expected to be finalised in 2021.
51. The Justice Health and Forensic Mental Health Network also continues to divert adults and young people away from the criminal justice system, where appropriate to do so, to community based health services through its Statewide Community and Court Liaison Service for adults and its Adolescent Court and Community Team for young people.
52. The NSW Children's Court is considering a proposal for a dedicated court listing for Aboriginal children (recommendation 16). The Children's Court is also in the process of re-establishing its Care Circles program in specific sites across NSW, which is aimed at providing Aboriginal families with culturally appropriate Alternative Dispute Resolution processes.
53. As part of its 2021 review, the Law Enforcement Conduct Commission will consider the Suspect Target Management Program as it applies to young people under the age of 14 (recommendation 22). The Law Enforcement Conduct Commission is an independent body and the Government does not direct the Law Enforcement Conduct Commission in the performance of its functions.
54. In relation to the Suspect Target Management Program:
- The NSW Police Force looks to divert young offenders wherever possible through a number of youth crime and prevention strategies, which include "Youth on Track" and "Rise Up". Elements of these programs address the needs of young people at risk of long-term involvement with the criminal justice system and demonstrate the value of positive early intervention.
  - The vast majority of young people on Suspect Target Management Programs are over the age of 14.
  - Where a child under the age of 14 is proposed for a Suspect Target Management Program, it must be approved by the Assistant Commissioner, Capability, Performance and Youth Command. This safeguard aims to ensure high-level of consideration of all relevant factors before a child under 14 is included in the Program.
  - The NSW Police Force is not presently considering removal of the program for young people under the age of 14.