



PO Box 46, Kingsford NSW 2032

The Hon. Adam Searle MLC
Chair, Select Committee on the High Level of First Nations People
in Custody and Oversight and Review of Deaths in Custody
Legislative Council

26 November 2020

Dear Mr Searle,

High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

We refer to Ngalaya Indigenous Corporation's appearance before the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody on 26 October 2020 at which Ngalaya took three questions on notice.

This letter encloses Ngalaya's responses to those questions.

Yours sincerely,

Kate Sinclair
Chairperson
Ngalaya Indigenous Corporation



Ngalya Indigenous Corporation

Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody: Responses to questions taken on notice on 26 October 2020

1 First Nations Commissioner

The Hon. NATALIE WARD: Thank you for coming along today, I am appreciative of your evidence. I have some questions around the Indigenous commissioner. Please correct me if I have the incorrect phrase. A couple of suggestions were made. It is difficult to see who was speaking, if you spoke to it can I ask you to answer the question. Firstly, does the proposal for an Indigenous commissioner exist in any other jurisdiction? If so, how does it compare, how is it going? If you want to take it on notice that is fine. Secondly, would that sit as part of the Coroners Court or did you see it sitting somewhere else?

Mr O'NEIL: Thank you, Ms Ward. I think that is referring to the suggestion of a First Nations Commissioner within the Law Enforcement Conduct Commission. I am not personally aware if that role exists in other jurisdictions. I will take that on notice to give you a proper response. There are also proposals for a First Nations stream within the Coroners Court from some submissions which might serve a similar but separate function in terms of deaths in custody, whereas the First Nations commissioner at the LECC would be addressing police conduct more generally.

Answer:

We support the establishment of an independent First Nations Commissioner to monitor and protect the rights of First Nations peoples. The First Nations Commissioner would have the power to oversee police complaints and deaths in custody involving First Nations people. Victoria has an Indigenous Commissioner for Aboriginal Children and Young People to address the discrimination against Aboriginal children and to tackle the long-standing issues for Aboriginal children in out-of-home-care. The Victorian Indigenous Commissioner for Aboriginal Children is also involved in enquiring into the over-representation of First Nations children in the Victorian youth detention system. The Victorian government has recognised

that government family services and the criminal justice system have a disproportionate impact on Indigenous children and families and have taken concrete steps to reduce that impact. South Australia has a Commissioner for Aboriginal Engagement who is involved in the government decisions made about First Nations people, including policy and reform to the criminal justice system. 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. We support the establishment of a First Nations Commissioner for this purpose and seek that such commissioner's role be expanded to oversee deaths in custody.

2 Observations on data sovereignty and First Nations control of data in the Family is Culture Review Report

The CHAIR: So in that respect it [Justice Reinvestment] is more appropriate to say it is not so much a specific program or function; it is more a state of mind about how Government engages with local communities to design a program responsive to the community's situation. When it is being done in that way it has produced—I think in the KPMG report of 2018—some quite startling positive outcomes but sourced in that local knowledge and local implementation and design. Is that correct?

Mr O'NEIL: Yes, absolutely. I think it is a very clear example of the effectiveness of community initiated, run, and focused services and what can happen if the State Government is willing to come to the table and support that kind of systemic approach.

Mr DAVID SHOEBRIDGE: Ms Sinclair, did you have something to add?

Ms SINCLAIR: Yes. If I could just add one comment about Justice Reinvestment it is that a point that we pick up in our submission is about the importance of data collection and the placement of that data with community. It centres around concepts of data sovereignty and, again, the self-determination of Indigenous people. I think in any program for Justice Reinvestment you need to have at its heart a built-in feedback loop of data collection, re-evaluation of the success of that program, adjusting, and then roll out again. The power of Justice Reinvestment is that it is flexible and able to be not only tailored to a community but also it can respond flexibly and quickly to negative feedback about the success of the program. So any program of Justice Reinvestment that this Committee may recommend or that the Government roll out across New South Wales, data has to be at the heart of that.

Mr DAVID SHOEBRIDGE: Do you endorse the observations on data sovereignty and First Nations control of data that were contained in the Family is Culture report? If you are not familiar with them, do you want to take that on notice, Ms Sinclair?

Ms SINCLAIR: To give a thorough response, I would take it on notice; but, on principle, yes I support data sovereignty located with First Nations communities.

Answer:

Yes, we endorse the observations on data sovereignty and First Nations control of data contained in the *Family is Culture* Report. In particular we draw the Committee's attention to the following statement:

"Any administrative data concerning Aboriginal people and children must be subject to rigorous stakeholder engagement and partnership, governed by frameworks and supported by infrastructure."

This statement applies to any policy area where First Nations people are disproportionately impacted. To remedy the systemic exclusion and marginalisation of First Nations people, we urge this Committee to take the necessary steps toward Indigenous data sovereignty. These steps are set out in Recommendations 1 and 2 of the *Family is Culture* Report, which we outline below for your consideration.

Recommendation 1: The Department of Communities and Justice should convene a roundtable with the Aboriginal community and stakeholders to discuss the meaning of data sovereignty and the designing, collecting and interpreting of the department's administrative data relevant to Aboriginal children and young people.

Recommendation 2: After the implementation of Recommendation 1, the Department of Communities and Justice should, in partnership with Aboriginal stakeholders and community, develop a policy which will result in improved partnership being effected in the department's design, collection and interpretation of data relevant to Aboriginal children and families.

3 Summary Offences Act 1988 (NSW), Section 4A Offensive language

The Hon. TREVOR KHAN: ... If one is to look at section 4, I notice that recommendation 3 posits two alternatives, one of which Mr Shoebridge picked up, and that is simply repealing the sections. I think that is unlikely to happen. The second alternative is to limit it in some way to abusive or threatening language. Have any of you got a view as to how you would limit it to abusive and threatening language? I am attracted by it, you see.

Mr O'NEIL: We are happy to take that on notice. We are not criminal law experts so we are not sure how we would perceive of such a section, such a new limit on that provision. At the heart of it I suppose would be the need to up the threshold above from where it is right now and to avoid situations where someone using the F word is enough to have police—

The Hon. TREVOR KHAN: I absolutely accept that. That is a pointless charging exercise and likely to lead to the trifecta. I absolutely accept that. My concern is there are vulnerable groups in society, women, the LGBTI community, we can pick a whole range, who can be the subject of abusive and threatening language which if you simply remove it may in fact leave them more vulnerable to oppressive conduct and language. That includes women in the Aboriginal community as well. I am interested in seeing a recommendation go forward that actually has a

chance of success and protects those vulnerable groups in the community who are deserving of continuing protection. Anything you can give would be greatly appreciated.

Answer:

Our central view, based on the evidence available on how section 4a of the *Summary Offences Act* is operationalised by police, is that the offence should be repealed.

Trollip, McNamara and Gibbon (2019, p. 509) conclude, based on their qualitative analysis of offensive language enforcement actions, that:

the almost exclusive enforcement of s 4A in situations where police officers are the targets or 'victims' of the language in question (typically, swearing) appears at odds with what has long been said to be the legislation's primary purpose: to protect members of the community from language which causes anger and upset in a manner that restricts access to, and enjoyment of, public space.

However, if the only alternative is to restrict the application of section 4a to 'abusive' or 'threatening' language, it would likely be in similar terms to:

- Section 61 - assault;
- Section 93Z - publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status;
- Section 61L - indecent assault; or
- Section 545B - intimidation or annoyance by violence or otherwise

of the *Crimes Act 1900*, with the kind of lower threshold appropriate for a fine-only offence, and an emphasis on the identity of, and impact on, the victim.