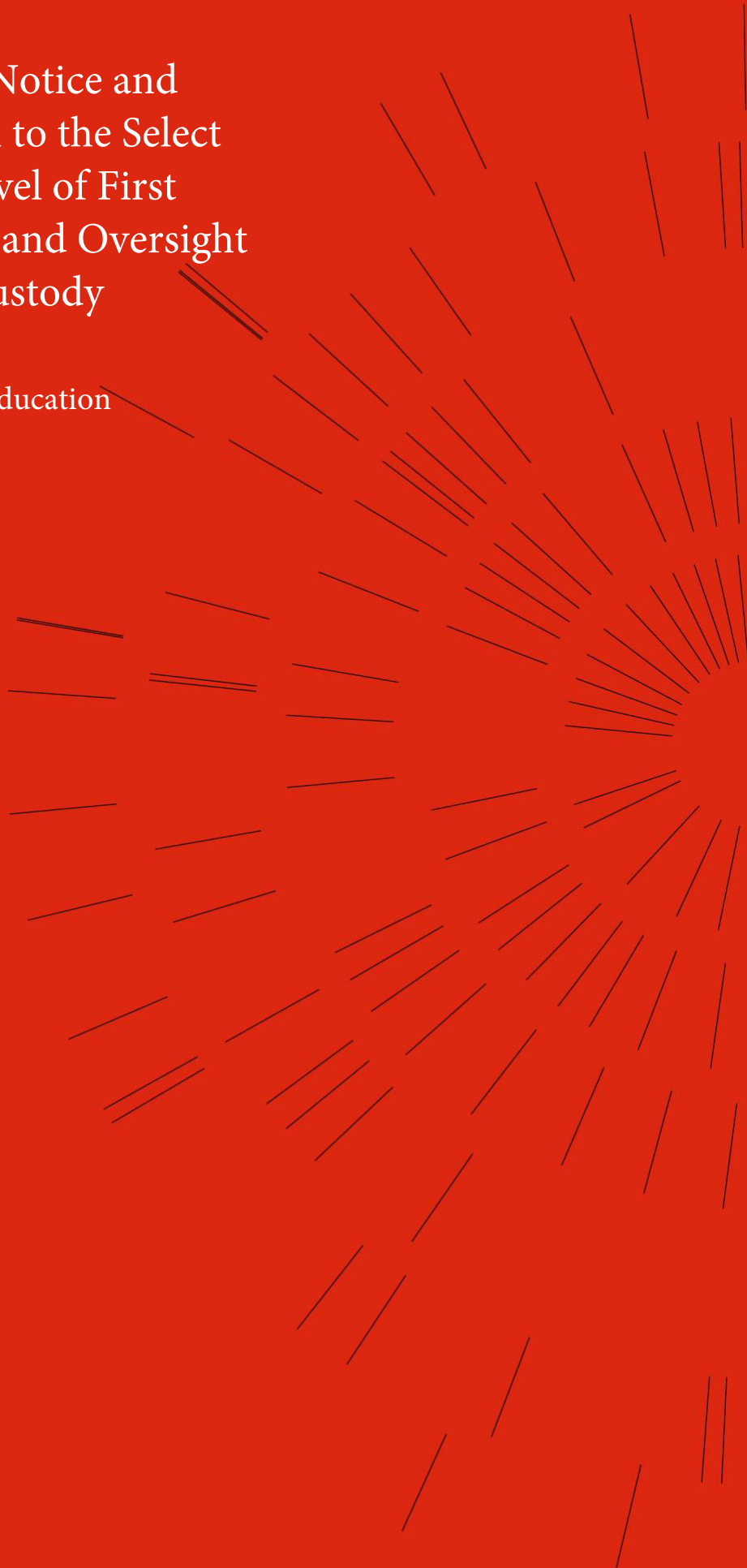


# Response to Questions on Notice and Supplementary Submission to the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

Jumbunna Institute of Indigenous Education  
and Research, Research Unit  
2 December 2020



By email: [First.Nations@parliament.nsw.gov.au](mailto:First.Nations@parliament.nsw.gov.au)

**2 December 2020**

Dear Sirs,

We refer to your email of 5 November 2020 and enclose our responses to questions on notice and further submissions.

We have not identified any corrections to be made to the transcript provided.

Sincerely

Distinguished Professor  
Larissa Behrendt

Professor Lindon Coombes

Craig Longman

**Questions on notice further to 27 October 2020**

We thank the Committee for the chance to offer further remarks to our oral and written submissions. Below we have both sought to clarify some of the comments made by Jumbunna Staff when they appeared before the Committee on 27 October 2020.

**Response to Question on Notice**

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1. The following question was taken on notice in response to a proposal raised by the Committee of the reform of the existing Law Enforcement Conduct Commission (LECC) including, appointing an Indigenous Commissioner to the LECC as a mechanism for overseeing police and prison investigations and the process leading up to the inquest:

**Mr DAVID SHOEBRIDGE:** What if you added to the model a First Nations commissioner? You have three commissioners: you have the chief commissioner, then you have a First Nations commissioner whose job is to provide that First Nations input and direction for both the policing aspect and for the correctives aspect; so you consciously build the First Nations commissioner into the model.

**Professor BEHRENDT:** I would suspect, just adding to what my colleague has said, that again I think that would be seen as a reform, but I think at the end of the day there is a long history of deaths in custody that have left communities and families with a lot of questions, both where deaths have occurred in police custody and in prison, and while those reforms would be positive I think you will not engender the trust until we see a change in the outcomes through the system.
2. In our view, whilst the utilisation of an amended LECC as a vehicle for improving accountability would be an improvement upon the status quo, it 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. It is only with that substantial long-term reform that one could expect to see transformative improvement in the outcomes of accountability and the consequent improvement in trust of First Nations in the capacity of the state to hold those responsible for First Nation Deaths in Custody to account.
3. It should also be noted that the mere use of First Nations leadership is not a substitute for long-term reform of accountability institutions to reflect First Nations values. Ultimately, the structural and cultural reforms needed in our view cannot substantially be addressed into the future merely by changing the cultural positioning of the persons tasked with working in them. Attempts to do so with other institutions, for instance the appointing of Indigenous judges, magistrates and tribunal members, have not resulted in wholesale improvements in the law to the interests of First Nations peoples and 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. It would be essential to pursue, at the same time, substantive systemic reform.
4. 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.

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.

5. Such an amended LECC would also require, even as an interim model, addressing a number of the short comings of the current operations of LECC. The evidence is that currently LECC has limited efficacy in providing Police oversight. In both our original submissions and the submissions of many others, the evidence is that LECC investigates only a minority of the complaints that are made against Police, has limited jurisdiction and narrow powers to compel evidence, has limited transparency and has no independent enforcement options. The LECC is also clad by a number of standing publication prohibitions that may actually impede independent media reporting in the lead up to and following an inquest — and a standing referral of investigations for oversight by an Indigenous Commissioner may have a chilling or minimising effect on public advocacy, one of the few existing effective tools that families have. Moreover, current limitations on funding would need to be addressed to ensure any First Nations Commissioner has the resources to conduct their task properly.<sup>1</sup>
6. In our submission, whilst resource limitations might initially mean that the function of LECC was one of oversight over Police investigations conducted on behalf of the Coroner, as quickly as possible the function of LECC should change to the conduct, under the First Nations Commissioner's guidance, of the investigations themselves on behalf of the Coroner. It is only when Police are removed entirely from the conduct of such investigations that a significant change may be possible in the trust of First Nations in the accountability of individuals in deaths in custody. Evidently, placing independent Indigenous oversight over a police investigation is not itself capacity to investigate, and what is within the purview of an Indigenous Commissioner to oversee will be almost unilaterally determined by an investigating officer's own way of thinking and doing things, including their interpretation of the scope of investigations on the vexed question in deaths in custody. As described in our original submission, this process overall is vulnerable to 'epistemic capture' — by adding supplementary oversight to a police process rather than a distinct investigation in its own right, this is just another site for that capture.
7. Even on the basis of this more limited version of oversight, it is necessary to ensure that LECC officers are present immediately 'on the ground' at the scene of the death and during the investigation to ensure real oversight over any investigating Police. It would need the capacity to guide the investigation and to examine and verify the brief of evidence before going to the Coroner for review.
8. In addition to the above considerations, any establishment of such a specialised oversight arm would need to grapple with the issue recognised by Dr Scott-Bray in her submission that inquiries (and therefore effective oversight of) into First Nations death in custody are highly 'multidisciplinary'. They involve a number of investigative actors and interested parties beyond the oversight of the LECC — including Justice Health, hospitals, private individuals and private organisations.
9. With respect, we suggest that this will not only be ineffective in securing independent Indigenous oversight, but it would squander the current will for independent oversight.

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<sup>1</sup> See The Public Accountability Committee, Legislative Council of New South Wales, *Budget Process for independent oversight bodies and the Parliament of New South Wales Report No 5 – First report* (March 2020) [3.21-3.24], [3.95].

10. In conclusion, ultimately, we remain of the view that what is needed in the long term is 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. That body should be developed from the ground up with input from First Nation communities and families.

## **Additional Comments**

### *Offensive Language and Offensive Conduct*

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11. Further to item 7(c) of Appendix B of our Submission, we reiterate our position that the offences of offensive language and offensive conduct should be abolished and note that many stakeholders have expressed similar views.
12. If that approach is not adopted however, in our view the NSW Parliament should legislate to amend the existing offences to require proof of some actual harm. This shift the offences from ones that seek to criminalise mere public behaviour, to offences that look to the protection of a victim from harm, an object in our view more appropriate for the criminal law.
13. One option is to amend both offences to require proof of actual psychological or physical harm resulting from the language or conduct. The offence would then require:
  - a. Offensive conduct or language that would need to be calculated to wound feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person;
  - b. Done in a public place; and
  - c. Actually establishing that the conduct or language did in fact cause some physical or psychological harm (requiring proof that someone in fact subjectively experienced a psychological impact).
14. Under such an amendment, those complaining of the behaviour would have to prove that someone actually experienced some impact from the language or conduct, rather than the language or conduct being criminal per se.

## **Clarifying Comments**

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### **On informing families**

15. During his oral evidence Mr Longman (at page 49 of the provided transcript) made the following comments in relation to the experience of some families in receiving little information from the Coronial process until some-time after the death of their loved ones:

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.
16. It occurs to us on reflection that comment may carry an inference that perceived distrust by families of the processes is irrational or has no basis in fact. To the extent the

evidence might be read in that way, we wish to clarify that community 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. These are not matters that can be treated as communications or transparency problems with the process. Investigations must proceed with the deliberate scepticism required of a death within contested sites that often involve a high level of state control. Most critically from our perspective, they must accept community and family concerns on their face value and engage with them seriously.

### On intergenerational impacts and models

17. In his oral evidence, Dr Gray made the following comments regarding the development of executive functioning and the implications for later life, including parenting (at page 56).

**Dr GRAY:** Absolutely, and I think the intergenerational element of this is worth thinking about as well. My background before moving into the policy space was as a psychologist in the system. I am very interested in those developmental elements and the ways that our early experiences—and if that is an early experience of care—impacts our behaviours later in life and the way that in turn impacts our executive functioning, which is a really core part of being an effective parent. If we are not willing to intervene in the care and protection space more effectively, in a way that reduces the contact of families with the care space and some of the social determinants of that contact, then we are going to continue to see this intergenerational cycle of children and families coming into contact with systems that are not really achieving the outcomes that we want to see for them.

18. To clarify, developmental models emphasise the impact of early experiences on cognitive and behavioural processes, including emerging executive functioning and emotion regulation, rather than behavioural impacts “in turn” impacting on executive functioning. Cognitive processes of emotion regulation and executive functioning develop throughout childhood, are actively scaffolded through ‘serve and return’ relationships with caregivers, and influence or engagement with the social and physical world, including through our behaviours.

19. The Center on the Developing Child at Harvard University notes that “early in life, the experience of severe, frequent stress directs the focus of brain development **toward** building the capacity for rapid response to threat and **away** from planning and impulse control. In adulthood, significant and continuous adversity can overload the ability to use existing capacities that are needed the most to overcome challenges.”<sup>2</sup> The implications of this early developmental context persist over the lifetime:

‘As a result, many adults who have been raised in conditions of significant stress—or who are currently undergoing acute stress—struggle to keep track of the multiple problems in their lives, analyze those problems, explore options for dealing with them, and set priorities for how best to move ahead. Stress also hijacks our good intentions and increases the likelihood that we will be swept away by our impulses or automatic responses. So, even if we manage to develop a good plan, we will find it harder to stick to it if we are under a pile-up of stress.’<sup>3</sup>

20. As stated in our submission to the inquiry, the *Family is Culture* review outlined an intergenerational cycle of care-criminalisation. Improved policies and programs are needed for children and young people in out-of-home care at risk of, or currently involved with the criminal justice system, to intervene in this cycle. Such approaches should be

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<sup>2</sup> <https://developingchild.harvard.edu/science/deep-dives/adult-capabilities/>

<sup>3</sup> <https://developingchild.harvard.edu/science/deep-dives/adult-capabilities/>

trauma-informed, drawing on existing developmental literature as well as Aboriginal social and emotional wellbeing frameworks which reflect holistic approaches to health and wellbeing, position individuals within a broader social, historical and political context, and emphasise interconnected and interdependent elements of connectedness – to self, to family and community, and to culture and Country – in promoting wellbeing.

21. The diagram below represents the model outlined by Gee et al. (2014), cited in Dudgeon et al. (2020):



22. In outlining this framework, Dudgeon et al. (2020) explains:

‘The SEWB model acknowledges the multiple and interrelated social, cultural, historical and political determinants of Indigenous mental health and wellbeing. The determinants impact individuals differently at different transition points across the life course. They include risk factors associated with marginalization, exclusion, forced removal from Family and Country, assimilation, racism and discrimination. These determinants also include protective factors such as active engagement in cultural practices related to Country and community self-determination associated with a sense of connection to Country and kin for individual and collective identity. These unique cultural protective factors are a source of strength and resilience for Indigenous communities. Programs and services that strengthen Indigenous self-determination and governance, support traditional cultural practices, and enhance these protective factors are crucial to Indigenous SEWB.’<sup>4</sup>

23. Further, it is noted that “intervening in the care and protection space more effectively” is not to say intervening to remove and sever Aboriginal children and young people from their families, communities and culture. Past and ongoing experiences and outcomes demonstrate that the removal of Aboriginal children from their families and communities only perpetuate cycles of harm. Contemporary forced removals cannot address issues created by historic forced removals.

<sup>4</sup> Dudgeon, P., Bray, A., Darlaston-Jones, D., and Walker, R. (2020) *Aboriginal Participatory Action Research: An Indigenous Research Methodology strengthening decolonisation and Social and Emotional Wellbeing*, Discussion Paper, The Lowitja Institute, Melbourne

24. Rather, systems, programs and practice must be developed that address the social determinants of risk, are responsive to needs of families, particularly those experiencing crisis, and operate across generations to strengthen families. Such approaches should aim to build and maintain responsive, supportive relationships for children and adults, address sources of stress in the lives of children and their families, and strengthen core capabilities of self-regulation and executive functioning.<sup>5</sup> Service systems should alleviate the stress associated with poverty, fulfil basic needs for families, and ensure that service access does not exacerbate the family's experience of stress.<sup>6</sup> The evidence further notes the protective benefits of culture.<sup>7</sup>
25. In a recent review, LaBoucane-Benson, Sherren and Yerichuk similarly noted the enduring impacts of colonisation and destruction of families and cultures, and the need for healing. The authors argued that there are “three conditions for the building and maintaining of family and community resilience and for healing from the effects of historic trauma: reclaiming an interconnected relationships-based worldview and legal tradition; reconciliation of damaged relationships; and recovering the power to respectfully self-determine.”<sup>8</sup>
26. Healing programs for Indigenous peoples operate both at the community and individual level, restoring community governance and centring Aboriginal worldviews, strengthening inter-personal relationships and community connections, contextualising the individual's experience and motivating personal healing:  
 healing programs must create an environment where individuals can situate their behaviour within the context of colonial and family history, understand (be responsible for) their own historic trauma informed behaviours, as well as create the desire to make amends and move forward on their own long-term healing journey.<sup>9</sup>
27. These elements of healing programs are relevant not only in strengthening Aboriginal families and addressing the disproportionate rate of removals of Aboriginal children by statutory child protection authorities, but also in addressing the over-incarceration of Aboriginal and Torres Strait Islander people.<sup>10</sup>
28. Consistent with these frameworks, the *Family is Culture* review emphasised two key structural reforms that the Review concluded would, if implemented adequately, “go a significant way to addresses the entrenched problem of the over-representation of Aboriginal children in the statutory child protection system”<sup>11</sup>: greater recognition and implementation of the principle of self-determination, specifically ‘strong forms’ of self-determination such that Aboriginal communities design and administer these systems themselves, and improved mechanisms for oversight and accountability, including the establishment of an independent Child Protection Commission, with an Aboriginal

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<sup>5</sup> Center on the Developing Child at Harvard University (2017). *Three Principles to Improve Outcomes for Children and Families*. <http://www.developingchild.harvard.edu>

<sup>6</sup> <https://developingchild.harvard.edu/innovation-application/key-concepts/adult-capabilities/>

<sup>7</sup> <https://developingchild.harvard.edu/science/key-concepts/resilience/>

<sup>8</sup> LaBoucane-Benson, P., Sherren, N., Yerichuk, D. (2017). Trauma, Children Development, Healing and Resilience: A review of literature with focus on Indigenous peoples and communities. PolicyWise for Children and Families. Edmonton, Alberta. Page 4

<sup>9</sup> Ibid. pp. 93

<sup>10</sup> Australian Law Reform Commission (2017) *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No. 133

<sup>11</sup> David, M. (2019) *Family is Culture Final Report: Independent Review into Aboriginal Out-of-Home Care in NSW*, pp. XXXII



commissioner and community reference group (see page 127 of the *Family is Culture* review). These elements have not been adequately addressed in the government's response.

29. There are key differences between the vision for an independent Child Protection Commission, including functions and powers, and the government's decision to appoint an Aboriginal Deputy Children's Guardian. Some of the challenges of simply including an Aboriginal staff member within existing inadequate systems have been discussed in our oral evidence and in response to questions on notice, below, including the imperative and expectation of communities to hold these systems to account. In particular, the proposed oversight of a Deputy Guardian is largely limited in focus to the standard of care provided when in out-of-home care, but is unlikely to meet community expectations for strengthened oversight and accountability of the way the Department of Community and Justice exercise their significant powers to intervene in Aboriginal families in the first place. The Family is Culture review made a number of recommendations relevant to these issues that should be actioned, in genuine partnership with Aboriginal communities, towards achieving meaningful systemic change.