NEW SOUTH WALES
BAR ASSOCIATION

Our ref: 20/12

22 December 2020

The Hon Adam Searle MLC
Chair
Select Committee on the High Level of First Nations People in Custody
Legislative Council, Parliament House
6 Macquarie Street
SYDNEY NSW 2000

By email: First.Nations@parliament.nsw.gov.au

Dear Chair

Questions on Notice

Thank you again for the opportunity for Mr McAvoy SC to appear on behalf of the New South Wales Bar Association (**the Association**) to give evidence before the Inquiry into the high levels of First Nations People in Custody and oversight and review of deaths in custody.

During the Inquiry, the Association undertook to provide answers to three further questions on notice to assist the Committee with its important work. Please find **enclosed** the Association's responses.

Is there a systemic solution on how Coroners reports are actioned and oversighted?

The NSW Premier's Memorandum M2009-12 *Responding to Coronial Recommendations*[1] provides a process for responding to coronial recommendations directed to Ministers and NSW Government agencies. Under this process, a coroner who makes a recommendation forwards a copy to certain persons and agencies.

The Memorandum provides that a Minster or agency who receives a coronial recommendation should write to the Attorney General within six months outlining any action being taken to implement the recommendation, or give reasons if it is proposed not to implement the recommendation. The Attorney General maintains a record of all coronial recommendations made, together with the responses received from Ministers and NSW government agencies, and under the Memorandum arranges for a report to be posted on his or her Department's website in June and December of each year, summarising coronial recommendations made and the responses received from Ministers and NSW government agencies. A copy is also sent to the Coroner for information.

The Association recommends that this Inquiry give consideration to expanding the Parliament's oversight of these processes and coronial recommendations, to promote increased accountability and a mechanism to revisit and track the progress of implementation. It is rare to see state agencies being held to account about

[1] https://arp.nsw.gov.au/m2009-12-responding-coronial-recommendations

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.

Further to its earlier submissions, the Association reiterates that properly resourced and funded coronial courts are crucial to the administration of justice and to promoting confidence in the coronial process.

The relationship between the coronial system and First Nations' communities is complex. As Mr McAvoy SC noted, the coronial system often involves investigations into deaths in custody that are carried out by individuals who are members of an institution that is seen as responsible for that death. While there have been calls for a separate new body to carry out the coronial process, the Association is concerned that realistically the resources such a body would require to perform its role effectively are not readily available.

In view of this, in the current climate and mindful of resource limitations, the Association suggests that the Coroner remain the investigative body and be appropriately supported to undertake its work in an independent, unbiased and culturally competent manner. To this end, the Association reiterates the recommendations made in its substantive submission of 25 September 2020.

In addition, the Association considers that the Coroner's Court would be assisted by the development of:

a. minimum mandatory benchmarks for cases involving First Nations deaths in custody to promote earlier and more consistent, timely engagement with First Nations families and communities;

b. more regular directions hearings;

c. more specialist staff including Aboriginal Liaison Officers to communicate with families;

in addition to promoting to a greater extent culturally competent practices throughout coronial processes.

Although the Law Enforcement Conduct Commission (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 does not consider that the LECC's role should be expanded. Instead, the Association reiterates its comments at [56] of its September submission that the coronial capacity to effect positive systemic review and change in relation to deaths of First Nations People in custody could be enhanced by a resource similar to the Victorian Coroner Prevention Unit. But, if LECC's jurisdiction is expanded to include the oversight of Corrections' handling of deaths in custody, the Association is of the view that the Coroner's role in investigating custodial deaths should not be withdrawn or limited.

Further funding and resourcing of the Coroner's Court would also allow the Coroner to sit with an informed First Nations observer or participant. The presence of a First Nations commissioner would not only ensure greater cultural sensitivity and competency, but it would also give parties to the inquiry reassurance that their submissions are being heard, that they were represented, that their evidence was taken seriously and most importantly, that the inquiry was being handled with a trauma-informed lens. The Association opposes the creation of an independent organisation taking leading responsibility for First Nations Peoples' deaths in custody and instead supports a properly resourced Coroner with greater support and resources to carry out these investigations.

I ask if you could comment on what your suggestion might be for any other forum to take that place were it to be the case that the criminal age is lifted but nonetheless something occurs with a young person aged 10 to 14. Is there something that, in your view, would be ideal to have in its place? We have heard briefly about circle sentencing. Is there another policy response or should it be youth justice? Who or what entity do you see stepping in at that critical juncture?

The Association's position is that the minimum age of criminal responsibility should be raised from 10 to 14, for the reasons already outlined in our submissions. Even under the law as it currently stands, the Association strongly supports the diversion of children aged between 10 and 14 from the criminal law system, with a view to them being supported to prevent escalation, re-occurrence and promote recidivism. This would go some way to avoiding the "net widening" effect of otherwise bringing children into the criminal justice system.

Children do not belong in prison and should be kept out of state custody, even under existing law, through measures including:

- A presumption in favour of bail for all children;
- A presumption against a control order;
- Detention only as a last resort;
- No incarceration of children for more than six months, and when this occurs, incarceration should only be as a last resort.

The Association recommends that the Government should give serious consideration to introducing the above measures as soon as possible and to diverting children into non-justice pathways such as education or health to address inappropriate behaviour, instead of criminalisation.

The Association also recommends that the Government 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. The Association would welcome the opportunity to participate in assisting such a taskforce.

By raising the minimum age of criminal responsibility to 14, children are less likely to be exposed to the justice system, however, that does not mean that they will not experience consequences for their actions.

When children are equipped with robust education, holistic healthcare services and adequate housing, they are set up to succeed. The higher rates of criminalisation of First Nations children is not due to an innate criminality that they possess; instead it is due to the broken system that has set them up to fail.

It is important to note too that in the longer term raising the age of criminal responsibility would allow resources to be funnelled from the prison system, in which thousands of dollars a year are spent per child keeping them locked up, into these other areas to support therapeutic pathways.

Regarding the offensive language provisions, is there any public policy consideration in favour of retaining the offensive language provisions, and to what extent do those provisions contribute towards First Nations levels of incarceration?

The Association does not consider there are compelling public policy considerations in favour of retaining offensive language provisions, even in a restricted form. The Association advocates for these provisions to be repealed.

Offensive language provisions are disproportionately policed and contribute significantly to the over-representation of First Nations People in custody. The *Pathways to Justice Report* recognised that First Nations People remain over-represented recipients of offensive language CINs.[2] The ALRC's Report explained the impacts by reference to stakeholder submissions:[3]

> Redfern Legal Centre supported abolition of the offence of offensive language, noting that 'though ostensibly less serious than criminal proceedings, the consequences of receiving a CIN can be significant'. It argued that Aboriginal and Torres Strait Islander people are unlikely to request a review or elect to have a CIN dealt with by the court, even where it is likely that the offensive language will not satisfy the legal test. As a result, the 'overwhelming majority' of CINs issued to Aboriginal and Torres Strait Islander people for offensive language were not scrutinised by a court. In Redfern Legal Centre's view, the CIN scheme had not met its stated aims of diverting people away from the criminal justice system: it instead involved them further through fine default and involved more people through net widening.
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> The ALSWA noted that, for many Aboriginal and Torres Strait Islander people, the penalty amount of $500 in WA would be 'impossible to pay'. Kimberly Community Legal Services argued that for 'Aboriginal people, the homeless and other disadvantaged groups the imposition of such a fine is tantamount to a prison sentence in WA'.

In NSW, offensive language carries a maximum fine of six penalty units and can result in a criminal conviction. Fine default may also result in imprisonment in lieu of or as a result of unpaid fines, which also disproportionately impacts on First Nations People, in particular First Nations women, and contributes to a cycle of incarceration.

The ALRC's *2018 Pathways to Justice report* concluded "there may be value in, if not abolishing relevant offensive language provisions, then narrowing their application"[4] and recommended that:

> Recommendation 12–1 Fine default should not result in the imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of, or as a result of, unpaid fines.
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> Recommendation 12–2 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to develop options that: · reduce the imposition of fines and infringement notices; · limit the penalty amounts of infringement notices;
> …

[2] ALRC, *Pathways to Justice Report*, 425.
[3] Ibid, [12.181]-[12.183] (citations omitted).
[4] Ibid, [12.177].

> Recommendation 12–4 State and territory governments should review the effect on Aboriginal and Torres Strait Islander peoples of statutory provisions that criminalise offensive language with a view to:
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> · repealing the provisions; or
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> · narrowing the application of those provisions to language that is abusive or threatening.

The Association supports the repealing of offensive language provisions as a step in the process of reducing the number of First Nations People in custody. In a submission to the ALRC, the Association previously stated that the continued use of offensive language provisions are no longer required and bring the law into disrepute as:[5]

> Historically, the offence has been used disproportionately against Aboriginal and Torres Strait Islander people, and it is likely to continue to be so used. There is no justification for its retention. Other existing laws provide protection from verbal threats and intimidation.

Thank you again for the opportunity to contribute to this important inquiry. If the Association can be of further assistance to the Committee, our contact at first instance is our Director of Policy and Public Affairs, Elizabeth Pearson, via

Yours sincerely

Michael McHugh SC
<u>President</u>

[5] New South Wales Bar Association, Submission 88.