



THE CHIEF MAGISTRATE OF THE LOCAL COURT

20 January 2021

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

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

Dear Mr Searle

Re: Further specific questions - Inquiry into high level of First Nations people in custody and oversight and review of deaths in custody

I refer to your letter of 15 December 2020 in which 5 questions are asked seeking further information from the Local Court as part of the Select Committee's Inquiry. My response on behalf of the Local Court is set out hereunder.

1. Is there overt, covert or unconscious racism in the judicial system?

It is impossible for a Head of Jurisdiction, or indeed any member of the Court, to be capable of identifying covert or unconscious racism. Consequently I can only surmise it may or may not exist.

2. What training or instruction have magistrates received in relation to Aboriginal or Torres Strait Islanders in relation to:

- a. vulnerability
- b. alternative options to imprisonment?

The Local Court partners with the Judicial Commission of New South Wales to deliver a continuing education program for magistrates, including a minimum of 5 days of practical and interactive sessions per year. Education specific to indigenous issues is provided to magistrates through this program and has recently included the following:

- Mr Jeff Amatto, Founder, Brothers 4 Recovery and More Cultural Rehabs Less Jails, delivered a talk to magistrates titled '*Indigenous Justice – The life I live today, I dreamt of that life in addiction*' which addressed drug, alcohol and gambling addiction in the Indigenous community.

- Mr Keenan Mundine, Principal Consultant and Owner, Inside Out Aboriginal Justice Consultancy, delivered a keynote address to magistrates titled *'Life after prison – making a difference that counts'* in which he shared the personal story that led him to form his organisation, as well as the work this organisation now undertakes to lower Indigenous incarceration rates.
- Associate Professor Robert Parker, Director of Psychiatry, Top End Mental Health Services, delivered a talk to magistrates titled *'Issues for Justice Surrounding Mental Illness, Intellectual Disability and Dementia in the Aboriginal and Torres Strait Islander Population in Australia'* through which he provided an update on the health of the Indigenous population and how this affects responses to justice and rates of imprisonment.
- Mr Luke Grant, Assistant Commissioner, Corrective Services NSW delivered a talk to magistrates titled *'How Should the NSW Prison System Respond to Aboriginal Offenders?'* which covered characteristics of the NSW Indigenous inmate population, elements of social disadvantage, and factors associated with increased risk of re-offending, as well as how these factors are being addressed and what more needs to be done.

The Local Court's judicial education program also places a particular emphasis on sentencing, with regular practical and interactive workshops for magistrates covering developments in sentencing practice and procedure, as well as the availability of community based sentencing options and diversionary programs within the Local Court. There is also extensive coverage of such matters in both the *Local Court Bench Book* and the *Sentencing Bench Book* (judicial reference materials produced by the Judicial Commission and made publically available [here](#)). A number of experts have also presented to magistrates in relation to alternative sentencing options available in this jurisdiction, including a recent presentation titled *'Imposing Fines – the function of Work Development Orders'* which provided information on the availability of a world first fine reduction program for disadvantaged people (delivered by Mathew Baker, Senior Technical Advisor, Revenue NSW and Ms Meredith Osbourne, Director of Civil Law, Legal Aid NSW).

The principles to be applied in considering the sentencing of people less advantaged than the general community are also well known by magistrates. Predominantly they can be found in the decisions of the High Court in *Bugmy v R* [2013] HCA 37 and *Munda v Western Australia* [2013] HCA 38 and the NSW Court of Criminal Appeal in *Fernando v R* (1992) 76 A Crim R 58 and others. There is a lengthy history of superior court decisions which address the impact of social deprivation and disadvantage. Those issues are not confined to Indigenous people, but may be of assistance in determining the appropriate sentence for such persons.

As was highlighted in the Court's earlier submission to this Inquiry (dated 26 August 2020), magistrates also have access to a number of diversion programs in the Local Court, including Circle Sentencing. This program is unique to the Local Court (currently available at 12 Local Court locations) and is specifically targeted at providing an alternative sentencing court for adult Aboriginal offenders who plead guilty or are found guilty in this jurisdiction. The Circle Sentencing program directly involves Aboriginal people in the sentencing process, with the goal of empowering Aboriginal communities through their involvement. The 'sentencing circle' sits with the local magistrate to determine the appropriate sentence, with contributions from local Aboriginal elders, victims,

respected members of the community and the offender's family. As an alternative sentencing tool, it actively involves the local Indigenous community in the criminal justice process and provides local magistrates with an acute knowledge of the issues faced by this community. The Court has been an avid supporter of the program since its inception some 16 years ago as a valuable sentencing tool for indigenous offenders and continues to offer its support for the expansion of the program to further Local Court locations. Further information about the program is available in the 2019 Local Court Annual Report (see pp. 27-28).

In addition to the above Local Court specific judicial education program, the Judicial Commission also provides a range of resources and opportunities to judicial officers at all levels to increase their awareness of contemporary Indigenous social and cultural issues and their effect on Indigenous persons in the justice system. For example, the Ngara Yura Program (formerly the Aboriginal Cultural Awareness Program) was established by the Judicial Commission in 1992 in response to the final recommendation of the Royal Commission into Aboriginal Deaths in Custody that judicial officers receive instruction and education on matters relating to Aboriginal customs, culture, traditions and society. The Program maintains regular focus on contemporary Indigenous issues and provides cultural experience opportunities to members of the judiciary at all levels, with regular participation by magistrates. Detailed information on the various conferences, seminars and field trips facilitated by this Program is available through the Judicial Commission.

Every member of the Local Court also has access to the *Equality Before the Law Bench Book*, a cross-jurisdictional resource issued by the Judicial Commission which contains statistics and information about Indigenous values, culture, lifestyle, socioeconomic disadvantage and/or potential barriers to full and equitable participation in court proceedings, as well as guidance about how judicial officers might need to take account of this information in court. A copy of these materials is publically available [here](#).

3. Are Aboriginal and Torres Strait Islanders being imprisoned at a higher rate than non-Aboriginal and Torres Strait Islanders?

I believe this is a question better answered by the Bureau of Crime Statistics and Research. The Local Court does not keep such statistics. As a general observation however a sentence of imprisonment will be the outcome of a multiplicity of considerations. Sentencing is a complex exercise. In New South Wales it is an amalgam of superior court decisions on issues of principle and the expression of the will of parliament contained in the *Crimes (Sentencing Procedure) Act 1999*. It is important to understand that if any assessment as to the rate of imprisonment of one section of society compared to another is to be undertaken it should result in a comparison of outcomes and subjective factors for the same type of offending not just the fact of imprisonment itself.

4. Can you inform the Committee of the implications and application of section 18(1)(k) of the Bail Act 2013?

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. Subject to a court being satisfied such vulnerability is

no evidence exists of which I am aware. 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.

5. Can you inform the Committee of the implications and application of section 5(1) of the *Crimes (Sentencing Procedures) Act 1999*?

Rather than provide my own response, I direct the Committee's attention to part [3-300] of the Sentencing Bench Book (available [here](#)).

Thank you for the opportunity to provide further material to assist this inquiry. Should you wish to discuss any of the above further, please do not hesitate to contact my policy officer, Brooke Delbridge or .

Yours sincerely,

**Judge Graeme Henson AM
Chief Magistrate
Local Court of New South Wales**