



ALS

Aboriginal Legal Service (NSW/ACT) Limited

ABN: 93 118 431 066

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Mr Adam Searle MLC

Chair

Select Committee into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

Parliament House, Macquarie Street

Sydney NSW 2000

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

Dear Chair,

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited ('ALS') and thank you for the opportunity to provide some brief additional feedback to the Senate Committee's Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody.

The ALS is a proud Aboriginal Community Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT. The ALS currently undertakes legal work in criminal law, children's care and protection law and family law. We have 24 offices across NSW and the ACT, and we assist Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as providing broader support programs and undertaking policy and law reform work.

We provide the below comments based on our direct experience representing Aboriginal and Torres Strait Islander people who have too often been forced into the quicksand of the criminal legal system, as well as representation of many of the families that have had loved ones die in custody.

Develop an Aboriginal Justice Agreement for NSW

The ALS strongly recommends that the NSW Government work with peak Aboriginal and Torres Strait Islander organisations to develop an Aboriginal Justice Agreement (AJA), as a key mechanism to drive coordinated and concerted action to improve justice outcomes for Aboriginal people.

In 2018, the Australian Law Reform Commission (ALRC) recommended that "All State and Territory governments should renew or develop an Aboriginal Justice Agreement in partnership with relevant Aboriginal and Torres Strait Islander organisations". The ALRC stated that these Agreements should be developed in partnership with Aboriginal and Torres Strait Islander people who should be centrally involved in all policy development affecting their lives. They went on to note that AJAs should include

joint and clear justice objectives across government departments, provide measurable action plans and be independently evaluated.

From 2002-03, NSW had an Aboriginal Justice Agreement, and this was followed by an Aboriginal Justice Plan 2004-14. However there has been nothing equivalent since that time. The ALS acknowledges that the Department of Communities and Justice developed a plan called *Reducing Aboriginal Overrepresentation in the Criminal Justice System 2018-20*. However, this Plan was not developed in partnership with Aboriginal community-controlled organisations, has never been made public and there has been no public accountability for the achievement of its objectives.

AJAs are well-established in a number of Australian jurisdictions, particularly in the Victorian context where an independent evaluation found that the AJA has been “instrumental in affecting real change in terms of embedding cultural awareness and the adoption of an Aboriginal lens for the development of new strategies, policies and initiatives”.¹ In addition, the evaluation found that the Victorian AJA “has facilitated and enabled the development of strong and durable relationships between agencies and with members of the Victorian Aboriginal community. The partnership has evolved and there are now high levels of trust between the partners.”²

As has been emphasised by many people and organisations who have appeared before the Inquiry, it is critical that any future plans and policies aimed at improving justice outcomes for Aboriginal people, are designed, implemented and evaluated in partnership with Aboriginal community-controlled organisations, consistent with the principles of community control and self-determination that were first advanced by the Royal Commission into Aboriginal Deaths in Custody in 1991. The ALS considers the establishment of an AJA in NSW, underpinned by the principle of Aboriginal self-determination, to be a critical first step towards this.

Invest in Aboriginal Community Control

Throughout the public hearings for this Inquiry there has been a number of references made to increasing the number of Aboriginal people working within Government departments and institutions. Whilst this focus on increasing Aboriginal employment is positive, including through the use of Aboriginal employment targets, the ALS notes that there is also a need for significant investment outside of the very institutions that make up the justice system in NSW and instead invest in Aboriginal controlled and run organisations. Many Aboriginal people leave Aboriginal organisations due to the higher remuneration that government departments and entities use to attract Aboriginal people to the workforce, leaving them with no real choice to work in a community controlled setting.

Aboriginal community-controlled organisations are rooted in a focus on self-determination, and play a critical role in providing services to Aboriginal communities across NSW, as well as identifying and advocating for the systemic changes which are needed if we are to reduce incarceration rates and prevent any future deaths in custody. Without recognition of community control and the need for

¹ Allison F, Cuneen C. 2010, ‘The role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People’ *Sydney Law Review* vol. 32 no.4.

² *Ibid.*

systemic change, we will be having another similar inquiry into more Aboriginal deaths in custody during the next parliament. While Aboriginal employment targets are welcomed, they should not act as a substitute for appropriately resourcing Aboriginal community-controlled organisations to play a leading role in the design, control and delivery of programs and services aimed at improving justice outcomes for Aboriginal communities throughout NSW. Put simply, if the report recommendations focus on increasing the number of Aboriginal people in current institutions at the expense of significant and meaningful change, then the Inquiry will have failed.

Establish an independent First Nations body to investigate deaths in custody

One key area of discussion throughout the public hearings for this Inquiry has been a consideration of what body or agency might be best placed to provide oversight of investigations into deaths in custody.

Throughout the Inquiry process there has been significant discussion regarding whether the Law Enforcement Conduct Commission (LECC) could provide an appropriate oversight body for investigating deaths in custody. The ALS wishes to note that given the majority of deaths in custody that occur are deaths in Corrective Services custody, not in police custody, the LECC's powers would have to be expanded to Corrective Services for this to be possible. The ALS has some reservations with this approach, and we draw the Committee's attention to our previous Submission where we note the significant limitations with LECC's current resourcing and focus.

The ALS' preference is for independent First Nations body to be established to investigate deaths in custody. It is critical that the independent body/agency has a holistic understanding of the factors that lie behind deaths in custody, and has the scope to investigate the factors behind why a person is in custody in the first place, as well as the specific circumstances of their death.

If an independent First Nations led body is not established or before its established, the ALS recommends that the Coroner be provided with additional resources and powers, to enable it to independently undertake investigations.

We would welcome the opportunity to discuss this in more detail with the Committee.

End the 'blame game' of government departments

We also wish to highlight the critical evidence provided to the Inquiry by the Reynolds sisters who discussed the "blame game" that government departments often play throughout the coronial process. Despite coronial inquests being inquisitorial in nature, many of our clients' experience situations where the various parties become adversarial in an attempt to deflect blame and responsibility. In our experience, this ultimately leads to time wasting and ineffective outcomes.

For many families, a fundamental aspect of the coronial process is to ensure that similar incidents do not happen again, which would cause harm to other families that could have been avoided. This requires a cooperative approach across government departments, to ensure recommendations are fully implemented in a timely way and remedy system failings. As previously noted by Magistrate Harriet Grahame, Deputy State Coroner:

“Given the interwoven responsibilities for the provision of health services to prisoners, especially in a privately run correctional facility, consideration of implementing the recommendations will require ongoing cooperation between all of the agencies involved. A co-operative approach is required and for that reason, these recommendations will be addressed jointly to those with the capacity to drive change. Where there is a will to implement, the mechanics of service delivery will fall into place. Rather than quibble about exactly who has final responsibility for implementation, a more co-operative approach is called for. The over-arching policy framework must include commitment to equal health service whether an inmate finds him or herself in a custodial setting run by a private operator or a Government entity. Turf wars become irrelevant where there is a genuine motivation to improve current practise.”³

In our submission to this Inquiry, we made extensive recommendations regarding improvements to ensure that Governments are held accountable for implementing coronial recommendations.⁴ In our view, improvements to accountability and follow-through on coronial recommendations would greatly assist in reducing the blame shifting between government departments and support a more collaborative approach. In addition, this would also assist in developing families’ confidence in the system.

Yours sincerely,

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³ NSW Coroners Court (2017). *Inquest into the death of Keith Howlett* (File No. 2013/162787).
<https://coroners.nsw.gov.au/documents/findings/2017/Howlett%20findings.pdf>

⁴ Aboriginal Legal Service (2020). *Submission to the NSW Inquiry into High Rates of First Nations People in Custody and Deaths in Custody*, pp. 26-38