

**Submission
No 3**

**INQUIRY INTO HIGH LEVEL OF FIRST NATIONS
PEOPLE IN CUSTODY AND OVERSIGHT AND REVIEW OF
DEATHS IN CUSTODY**

Organisation: New South Wales Bar Association

Date Received: 27 July 2020



Our ref:20/8

27 July 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

Preliminary submission to the Select Committee on the high level of First Nations People in custody and oversight and review of deaths in custody

The New South Wales Bar Association (**the Association**) writes to provide a preliminary submission and recommendations to the Select Committee (**the Committee**), with a view to assisting the Committee to plan for and undertake this important inquiry into the high level of First Nations People in custody and oversight and review of deaths in custody (**the Inquiry**).

The Association will provide a further submission in due course and would be pleased to assist the Committee with any questions it may have or additional briefing materials in the interim.

Despite a number of reports and inquiries over some decades, First Nations People remain significantly and unacceptably over-represented in NSW prisons and the criminal justice system. As recognised in the 2018 *Uluru Statement from the Heart*, this is not because First Nations People are innately criminal. Rather, as the Statement says:

These dimensions of our crisis tell plainly the structural nature of our problem. *This is the torment of our powerlessness.*

The Association considers that this Committee is well-placed in the course of this Inquiry to advocate to the NSW Parliament that it address the inherent structural problems that remain in our criminal justice system, including by acting urgently on the numerous preceding inquiries and recommendations that have experienced significant delays in their implementation.

Accordingly, the Association offers two preliminary recommendations to assist the Committee to plan and undertake this Inquiry:

Recommendation 1: That the Committee inform itself and build upon the work of previous reports and inquiries into First Nations People in custody, including but not limited to the:

- i. 1991 [Royal Commission into Aboriginal Deaths in Custody Final Report](#) (RCIADIC Report);¹
- ii. Australian Law Reform Commission's (ALRC) 2018 [Pathways to Justice—An Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples—Final Report](#) (ALRC Report);²
- iii. Senate Finance and Public Administration References Committee 2016 [Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services](#) Report (Senate Finance Report);³
- iv. [Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory 2017 Final Report](#);⁴
- v. PwC's Indigenous Consulting 2017 [Indigenous Incarceration: Unlock the Facts report](#) (PwC Report);⁵
- vi. [Closing the Gap Report 2020](#) (Closing the Gap Report)⁶; and
- vii. NSW Law Reform Commission's 2000 [Sentencing of Aboriginal Offenders \(Report 26\)](#).

Recommendation 2: That the Committee need not wait until its reporting date of March 2021 to advocate to the Parliament that it respond to and implement recommendations of the ALRC Report, including the following 10 urgent priorities:

- i. the establishment of an independent justice reinvestment body, overseen by a Board with Aboriginal and Torres Strait Islander leadership, and the initiation of justice reinvestment trials to promote engagement in the criminal justice system;
- ii. the establishment of properly resourced specialist Aboriginal and Torres Strait Islander sentencing courts to be designed and implemented in consultation with Aboriginal organisations, including the Walama Court in the NSW District Court;
- iii. repeal of mandatory or presumptive sentencing regimes which have a disproportionate effect on Aboriginal offenders;
- iv. the expansion of culturally appropriate community-based sentencing options, resourced and supported by the State Government;
- v. the diversion of resources from the criminal justice system to community based initiatives that aim to address the causes of Indigenous incarceration;
- vi. the revision of bail laws to require bail authorities to consider cultural issues that arise due to a person's Aboriginality;

¹ *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 1998).

² Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples – Final Report* (2017, ALRC Report 133).

³ Senate Finance and Public Administration References Committee, Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (27 April 2015).

⁴ *The Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Final Report.

⁵ PwC Indigenous Consulting, *Indigenous Incarceration: Unlock the Facts* (Report, 2017).

⁶ Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap)* (Annual Report, 2020).

- vii. raising the minimum age of criminal responsibility and the minimum age of children in detention to 14;
- viii. the abolition or restriction of offences relating to offensive language to genuinely threatening language;
- ix. fine default should not result in imprisonment in lieu of or as a result of unpaid fines; and
- x. the introduction of specific sentencing legislation to allow courts to take account of unique systemic and background factors affecting Indigenous peoples.

The Association strongly supports the central involvement of Aboriginal and Torres Strait Islander organisations in relation to bail support, diversion, female offenders, non-custodial and community sentencing options, community corrections, mental health and drug and alcohol services. We urge the Committee to engage and meaningfully consult with First Nations People and First Nations organisations throughout the course of this Inquiry.

This submission has been greatly assisted by the expertise of the Association's Joint Working Party on the Over-representation of Indigenous people in the NSW Criminal Justice System (**Joint Working Party**). The Joint Working Party consists of members of each of the Association's First Nations, Criminal Law and Human Rights Committees, in addition to external judges and academics with relevant experience, knowledge and expertise.

The Association, together with the Joint Working Party, will provide a detailed substantive submission as the Inquiry proceeds but in the interim would be pleased to assist the Committee with any questions it may have.

Further information on these issues is also contained in the Association's [2017 submission to the ALRC Inquiry](#) and [2020 submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group Review](#).

If you would like to discuss this preliminary submission, our contact at first instance is the Association's Director of Policy and Public Affairs, Elizabeth Pearson, via

Thank you for your consideration.

Yours sincerely

Tim Game SC
President