

Submission
No 49

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

Organisation: Justice and Peace Office of the Catholic Archdiocese of Sydney
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21 August 2020

The Hon Adam Searle MLC

Chair

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

First.Nations@parliament.nsw.gov.au

RE: Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody and oversight and review of deaths in custody

Dear Mr Searle,

The Justice and Peace Office welcomes the opportunity to make a submission on behalf of Archbishop Anthony Fisher to the Select Committee's Inquiry into the unacceptably high level of First Nations people in custody and oversight and review of deaths in custody. We hope that the NSW Government's review into this matter is an indication of their willingness to take concrete action on a serious, systemic and widely publicised injustice in our state and our country and not merely an exercise in whitewashing.

The Justice and Peace Office is an agency of the Catholic Archdiocese of Sydney. We promote justice, peace, human rights, ecology and development through projects and activities based on the social teachings of the Catholic Church. We liaise with a number of Catholic parishes, schools, communities, social service, education and health agencies which work to help improve the dignity of First Nations peoples in Australia.

This submission will cite information and statistics relating to Indigenous Australians, First Australians and Aboriginal and Torres Strait Islander peoples as all falling under the term "First Nations people" and will use the preceding terms interchangeably throughout the submission.

The situation of our First Nations people in Australia is atrocious. They are disproportionately adversely represented in every social indicator: education, employment health and in particular their interactions with the legal system. The Australian Human Rights Commission notes that First Australians are the most incarcerated people on the planet.¹ Their treatment in custody, resulting in too many deaths is one of the starkest indicators of the disadvantage they face, which is not mitigated by our policing practices, court procedure or custody arrangements. The Jesuit Social Service Submission to the Australian Law Reform Commission ("ALRC") Discussion Paper *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* stated: "We believe the over-representation

¹Australian Human Rights Commission, "Calls to end Indigenous Deaths in Custody" *Media Release*, (3 June 2020) <<https://humanrights.gov.au/about/news/media-releases/calls-end-indigenous-deaths-custody>> (hereafter "AHRC, "Calls to end Indigenous Deaths in Custody"").

Justice, Peace, Ecology, Development

of Aboriginal and Torres Strait Islander peoples in the criminal justice system is a national disgrace.”² The Justice and Peace Office echoes these sentiments. The Australian Catholic Bishops Conference has also advocated:

Rather than incarcerating more and more vulnerable people, it would be a longer-term but less costly option to look for ways to support the most marginalised and include them in the community.³

While we welcome the Select Committee launching an inquiry into this matter, the Select Committee should also be cognisant of the fact that a recent article noted there have been at least thirteen national investigations, inquiries and reports regarding the appalling treatment of indigenous people in custody as well as broader justice issues that have an disproportionately adverse impact on indigenous people between 2009-2019 alone.⁴ This is not including the Royal Commission into Indigenous Deaths in Custody which took place between 1987-1991 or any other inquiries which took place prior to 2009.

Despite the fact that the reports have a national focus, they can inform State Governments’ responses and many have specifically included recommendations for State Governments to implement. The Australian Law Reform Commission’s report *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* is particularly worth noting as it is recent and its mandate is very similar to the purpose of this inquiry:

This Inquiry has one principal but constrained purpose. It is to inquire into the overrepresentation of Aboriginal and Torres Strait Islander people in prison and develop recommendations for reform of laws and legal frameworks to reduce their disproportionate incarceration.⁵

Despite the *Pathways to Justice Inquiry* having a national focus, it set out recommendations that all levels of Government can take. The Law Society of New South Wales has specifically called on the NSW Government to respond to the report and ideally use it as a blueprint to reduce the overrepresentation of indigenous Australians in prisons.⁶ In June 2020, the Australian Human Rights Commission also called for the recommendations of the *Pathways to Justice Inquiry* to be fully implemented.⁷

² Jesuit Social Services, *Submission to the Australian Law Reform Commission Discussion Paper: Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (September 2017) 4 <<https://jss.org.au/submission-to-the-alrc-discussion-paper-incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples/>>.

³ Australian Catholic Bishops Conference, *Social Justice Statement 2011-2012 Building Bridges Not Walls: Prisons and the Justice System* (2012) <<https://socialjustice.catholic.org.au/wp-content/uploads/2019/11/Social-Justice-Statement-2011-2012.pdf>> (hereafter “ACBC, *Building Bridges Not Walls*”).

⁴ Lorena Allam, “Legal experts call for investigations into Indigenous deaths in custody to be reopened” *The Guardian*, (10 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/10/legal-experts-call-for-investigations-into-indigenous-deaths-in-custody-to-be-reopened>> (hereafter “Lorena Allam, “Legal experts call for investigations into Indigenous deaths in custody to be reopened””).

⁵ Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples ALRC Summary Report 133* (December 2017) 23 <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-133-summary/>> (hereafter “ALRC, *Pathways to Justice*”).

⁶ Law Society of New South Wales, “Time to make reducing shameful indigenous prison rates a national priority” (March 2019) <<https://www.lawsociety.com.au/resources/news-and-media/reducing-Indigenous-prison-rates-a-national-priority>> (hereafter “Law Society of New South Wales, “Reducing shameful indigenous prison rates a national priority””).

⁷ AHRC, “Calls to end Indigenous Deaths in Custody”.

This Submission will focus on the following areas:

1. Reducing the rate of First Nations People in custody
2. Reducing the number of Children in Custody
3. Suitable programs for First Nations people in prison
4. Reducing First Nations deaths in custody and increasing accountability for mistreatment
5. Developing and Implementing Reconciliation Action Plans

These areas are discussed in more detail below.

1. Reducing the rate of First Nations people in custody

The Justice and Peace Office recommends that reducing the unacceptably high level of First Nations people in custody in New South Wales needs to be strategically addressed beginning with the measures outlined below. First Nations people in New South Wales are incarcerated at unacceptably high rate, compared to the rest of the population. According to the Australian Bureau of Statistics, as at 30 June 2019, Aboriginal and Torres Strait Islanders comprised 23% of the prisoner population in New South Wales,⁸ despite them making up only three per cent of the population.⁹

Part of the reason for the disproportionately high rate of First Nations people in custody is due to the over-policing of First Nations people and the lack of cultural sensitivity by police when dealing with First Nations people. The ALRC detailed an extensive list of Royal Commissions, reports, inquests, and inquiries documenting both the existence and adverse effects of policing practices on Aboriginal and Torres Strait Islander people and their communities.¹⁰ A reduction in the over-policing of Indigenous peoples and ensuring more culturally responsive policing, with Indigenous officers from the affected areas appointed wherever possible will go a long way towards reducing the number of indigenous people in custody. The ALRC made a number recommendations to this effect. Recommendation 11-2 stated:

Police engaging with Aboriginal and Torres Strait Islander people and communities should receive instruction in best practice for handling allegations and incidents of family violence—including preventative intervention and prompt response—in those communities.

While this recommendation referred to incidents of family violence in particular, it will also have a better effect, if applied across the board. The ALRC also recommended that

Commonwealth, state and territory governments should review police procedures and practices so that the law is enforced fairly, equally and without discrimination with respect to Aboriginal and Torres Strait Islander peoples.¹¹

This recommendation clearly recognises that at the moment, the police do not enforce the law fairly, equally and without discrimination in relation to First Nations peoples. Further recommendations by the ALRC which were specifically directed to “ensure police practices and procedures do not

⁸ Australian Bureau of Statistics, “4517.0 - Prisoners in Australia, 2019: New South Wales” (5 December 2019)

<<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2019~Main%20Features~New%20South%20Wales~21>>.

⁹ Law Society of New South Wales, “Reducing shameful indigenous prison rates a national priority”.

¹⁰ ALRC, *Pathways to Justice*, [11.50].

¹¹ ALRC, *Pathways to Justice*, Recommendation 14-1.

disproportionately contribute to the incarceration of Aboriginal and Torres Strait Islander peoples” include:

- increasing Aboriginal and Torres Strait Islander employment within police;
- providing specific cultural awareness training for police being deployed to an area with a significant Aboriginal and Torres Strait Islander population.
- providing for lessons from successful cooperation between police and Aboriginal and Torres Strait Islander peoples to be recorded and shared.¹²

The Justice and Peace Office recommends the introduction of culturally appropriate responses for minor offences, under the leadership of local Aboriginal and Torres Strait Islander elders – such as use of alcohol, minor driving offenses and offensive language. These provisions have disproportionately adverse effect on First Nations people because they are more likely to be imprisoned for these offences than other peoples. The Australian Catholic Bishops Conference has previously recognised how the numbers of Aboriginal people in custody are being driven up by over-policing with regard to offences such as unpaid fines, driving offences and petty theft.¹³ The Justice and Peace Office also advocates for the abolition of the provisions which allow for imprisonment due to unpaid fines. The ALRC has also made this recommendation stating: “Fine default should not result in the imprisonment of the defaulter” and specifically calls on State and Territory governments to abolish provisions which allow for imprisonment as a result of unpaid fines.¹⁴ The ALRC also specifically called on State and Territory governments to work with Aboriginal and Torres Strait Islander organisations to reduce the imposition of fines and infringement notices, limit the penalty amounts of infringement notices; avoid suspension of driver licences for fine default and provide alternative pathways of paying fines and infringement notices.¹⁵

The Justice and Peace Office recommends more reasonable provisions regarding bail and sentencing, particularly in relation to First Nations peoples. The ALRC also recommended that bail authorities be directed to consider “any issues that arise due to a person’s Aboriginality, including cultural background, ties to family and place, and cultural obligations” to enable those First Nations people who are accused of low level offending to be released on bail.¹⁶ The ALRC further recommended that State and Territory Governments should work with relevant First Nations organisations and peak legal bodies to develop guidelines on bail provisions to take into account a person’s Aboriginality and to develop and implement culturally appropriate bail support programs and diversion options.¹⁷ The Law Council of New South Wales has also called on the NSW Government to establish and properly resource a specialised Indigenous Sentencing Court known as the Walama Court as it would aid in diverting Indigenous offenders from custody into community programs.¹⁸ This call has been supported by Indigenous lawyers as it is also expected to reduce reoffending.¹⁹ The Australian Catholic Bishops Conference has also noted initiatives such as circle sentencing (where magistrates sit with leaders of Indigenous communities when deciding on an appropriate sentence for an offence)

¹² ALRC, *Pathways to Justice*, Recommendation 14-4.

¹³ ACBC, *Building Bridges Not Walls*, 8.

¹⁴ ALRC, *Pathways to Justice*, Recommendation 12-1.

¹⁵ ALRC, *Pathways to Justice*, Recommendation 12-2.

¹⁶ ALRC, *Pathways to Justice*, Recommendation 5-1.

¹⁷ ALRC, *Pathways to Justice*, Recommendation 5-2.

¹⁸ Law Society of New South Wales, “Reducing shameful indigenous prison rates a national priority”.

¹⁹ Michaela Whitbourn, “First Nations lawyers call for urgent action on Walama Court” *The Sydney Morning Herald*, (7 August 2020) <<https://www.smh.com.au/national/first-nations-lawyers-call-for-urgent-action-on-walama-court-20200804-p55iqq.html>>.

have been effective in combining punishment, restitution and reintegration of Indigenous offenders into the community.²⁰

The Justice and Peace Office recommends making prison sentences a last resort strategy in law enforcement in regards to First Nations people. Incarceration has proven not to be a significant deterrent to reoffending and has disproportionately adverse financial and social costs to the person incarcerated, their family, community and the State. Legal experts have noted that implementing the recommendations of previous reports could reduce the indigenous incarceration rate by 20-30%.²¹ Particularly as regards First Nations people, alternatives to prison have proven to be more effective. The Yetta Dhinnakkal Centre in Brewarrina has proved to be an excellent success. Inmates who are sent there are given training and receive qualifications which enable them to find jobs once released. The Justice and Peace Office recommends that the Yetta Dhinnakkal Centre in Brewarrina continues to operate.²²

The Justice and Peace Office recommends establishing a Justice Reinvestment body that will operate across New South Wales that will help to address many of the drivers of Indigenous imprisonment by investing in community-led, place-based alternatives to incarceration. The benefits of justice reinvestment are well documented. The ALRC also recommended State governments form independent Justice Reinvestment bodies which are overseen by a board with First Nations leadership:

Commonwealth, state and territory governments should provide support for the establishment of an independent justice reinvestment body. The purpose of the body should be to promote the reinvestment of resources from the criminal justice system to community-led, place-based initiatives that address the drivers of crime and incarceration, and to provide expertise on the implementation of justice reinvestment.²³

The Law Society of New South Wales has also specifically called on the NSW Government give more support to place based justice reinvestment projects.²⁴

2. Reducing the number of Children in Detention

Statistics for Australia show that on an average night in 2019, 53% of children in detention were of Aboriginal or Torres Strait Islander origin.²⁵ Given that Aboriginal and Torres Strait Islanders only constitute 3% of the population, the fact that the incarceration rate of indigenous children is so much higher than for Indigenous adults is an even greater disgrace. A particular focus of the NSW Government's efforts should be directed towards reducing the unacceptably high rate of Indigenous children in detention, and creating alternative ways of engaging with the needs of this group. Indigenous people need to have an active role in designing and implementing these reforms, so that

²⁰ ACBC, *Building Bridges Not Walls*, 8.

²¹ Lorena Allam, "Legal experts call for investigations into Indigenous deaths in custody to be reopened".

²² Jessie Davies, "Brewarrina jail is closing and the community warns it will have a devastating effect", *ABC News*, 20 October 2019

<<https://www.abc.net.au/news/2019-10-20/brewarrina-jail-closure-community-devastated/11618676>>;

Hannah Cross, "Successful community prison set to close mid-2020" *National Indigenous Times*

<<https://nit.com.au/successful-community-prison-set-to-close-mid-2020/>>.

²³ ALRC, *Pathways to Justice*, Recommendation 4-1.

²⁴ Law Society of New South Wales, "Reducing shameful indigenous prison rates a national priority".

²⁵ Australian Institute of Health and Welfare, *Youth detention population in Australia 2019 Summary* (February 2020) <<https://www.aihw.gov.au/getmedia/c3ba6d29-7488-4050-adae-12d96588bc37/aihw-juv-131.pdf.aspx?inline=true>>.

they are culturally appropriate and able to provide locally-based sustained support, to ensure recovery from the effects of transgenerational trauma arising from the Stolen Generations and ongoing endemically racist processes in our society.

While many of our recommendations to reduce the rate of indigenous adults incarcerated (reforms to policing, bail and sentencing, provisions regarding minor offences and non-payment of fines) can also help reduce the rate of indigenous children in detention, additional reforms that are specific to the concerns of indigenous children are also needed. The ALRC recognised the link between the high rate of removal of Aboriginal and Torres Strait Islander Children and Torres Strait Islander children into out of home care, juvenile justice and adult incarceration and recommended an inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children.²⁶ The Justice and Peace Office recommends that any such inquiry needs to be properly informed by Indigenous peak bodies, indigenous individuals, families and communities.

An even greater injustice than the high rate of indigenous children in custody is that Australia and New South Wales allow children as young as ten to be held criminally responsible for their actions and to be incarcerated.²⁷ The age of 10 for criminal responsibility is too low and should be raised to a minimum of 14 years with a view to raising it higher. This recommendation is in keeping with recommendations made by the Australian Human Rights Commission,²⁸ the Law Council of Australia²⁹ and Australia's human rights obligations under the Convention on the Rights of the Child as well as indicative of widespread community support.³⁰ Numerous organisations such as the Law Council of Australia and Royal Australasian College of Physicians have called for more support services, treatment, early intervention, prevention, justice reinvestment initiatives and community-led diversion programs, informed by indigenous culture and leaders to keep indigenous children out of detention.³¹

3. Suitable programs for First Nations people in prison

The Justice and Peace Office recommends implementing culturally appropriate programs for First Nations peoples who do end up in prison as a last resort is a major priority. These programs should be developed in consultation with First Nations communities and leaders and should be subject to their locally-based oversight, monitoring and evaluation. The ALRC also recommended that State and Territory corrective services agencies should develop prison programs with relevant Aboriginal and Torres Strait Islander organisations which address offending behaviours and prepare people for

²⁶ ALRC, *Pathways to Justice*, Recommendation 15-1.

²⁷ New South Wales Government, Department of Communities and Justice, *Review of the Minimum Age of Criminal Responsibility* <https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/review-minimum-age-of-criminal-responsibility.aspx>.

²⁸ Australian Human Rights Commission *Review of the age of criminal responsibility*, (26 February 2020) Recommendation 1, <<https://humanrights.gov.au/our-work/legal/submission/review-age-criminal-responsibility-2020>>.

²⁹ The Law Council of Australia, *Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax* (26 June 2019) <<https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>>.

³⁰ Chris Cunneen, "Ten Year Olds do not belong in detention Why Australia must raise the age of criminal responsibility" *The Conversation* (23 July 2020) <<https://theconversation.com/ten-year-olds-do-not-belong-in-detention-why-australia-must-raise-the-age-of-criminal-responsibility-142483>>.

³¹ *Ibid*.

release.³² The Australian Human Rights Commission also called for all jurisdictions to establish independent complaints and investigation mechanisms for police misconduct and use of force, appropriate monitoring of places of detention including police holding cells, and transport facilities and recognised that “robust, independent oversight and monitoring is critical to ensure accountability and public trust in the police and justice system”.³³

A particular focus should be on appropriate treatments for Indigenous women in prison, many of whom are there because they have suffered from trauma and violence, and 80% of whom are mothers.³⁴ Sending mothers of children to prison in First Nations communities also means there is a higher chance that the child will have to go into out of home care which is far more detrimental than them staying with their family. The ALRC also recommended programs and services that are delivered to Aboriginal and Torres Strait Islander women, before, during and post incarceration be developed and delivered by Aboriginal and Torres Strait Islander women, are trauma informed and culturally appropriate to take into account their particular needs, improve rehabilitation and decrease reoffending.³⁵

4. Reducing Indigenous Deaths in Custody and Increasing Accountability

The continued incidence of indigenous people dying in custody in Australia is an even greater disgrace than the high rate at which they are incarcerated, despite parliaments, the judiciary and the community being aware of the seriousness of the problem. Earlier this year the Australian Human Rights Commission lamented that nearly thirty years after the Royal Commission into Aboriginal Deaths in Custody, many of its recommendations remain unimplemented while “Indigenous people continue to die in our so-called justice system”.³⁶ A recent study pointed out that despite 432 Indigenous deaths in custody Australia, since the Royal Commission, no one has ever been charged.³⁷ While those statistics are for all of Australia, this also means given the 112 Aboriginal Deaths in Custody in NSW alone between 1995 and 2019³⁸ no one has yet been charged. Implementing the recommendations of the Royal Commission into Aboriginal Deaths in Custody would be a significant step towards reducing indigenous deaths in custody.

The Justice and Peace Office calls for independent and impartial investigations of all Indigenous deaths in custody, with Indigenous investigators working alongside justice staff. Individuals or bodies tasked with these reviews should have the power to make binding recommendations regarding prosecutions for deaths or mistreatment, and to implement systemic changes to prevent further deaths or mistreatment of Indigenous prisoners in future. The ALRC recommended that Commonwealth

³² ALRC, *Pathways to Justice*, Recommendation 9-1.

³³ AHRC, “Calls to end Indigenous Deaths in Custody”.

³⁴ Law Society of New South Wales, “Reducing shameful indigenous prison rates a national priority”.

³⁵ ALRC, *Pathways to Justice*, Recommendation 11-1.

³⁶ AHRC, “Calls to end Indigenous Deaths in Custody”.

³⁷ Alison Whittaker, “Despite 432 Indigenous deaths in custody since 1991, no one has ever been convicted. Racist silence and complicity are to blame” *The Conversation* (3 June 2020) <<https://theconversation.com/despite-432-indigenous-deaths-in-custody-since-1991-no-one-has-ever-been-convicted-racist-silence-and-complicity-are-to-blame-139873>>.

³⁸ NSW Office of the State Coroner, *Report by the NSW State Coroner into Deaths in Custody/Police Operations for the Year 2019* (30 April 2020) Table 2: Aboriginal deaths in custody/police operations 2019 <https://www.coroners.nsw.gov.au/documents/reports/158632_STATE_CORONERS_COURT_Deaths_in_Custody_2019_-_WEB_VERSION_LR.pdf>.

State and Territory Governments should review their police complaints handling mechanisms to ensure greater practical independence, accountability and transparency of investigations.³⁹

5. Developing and Implementing Reconciliation Action Plans

While our suggestions above address specific issues, broader issues can be addressed by better understanding of First Nations culture across the board. The Justice and Peace Office recommends that all NSW Justice agencies should be required to institute Reconciliation Action Plans as part of beginning to establish a culture of Respect and Acknowledgement of First Nations experiences since European arrival, leading to ongoing suffering under the justice system. The ALRC has already recommended that the Police enter into Reconciliation Action Plans with a specific view of ensuring that police practices and procedures do not disproportionately contribute to the incarceration of Aboriginal and Torres Strait Islanders.⁴⁰

In conclusion, the Justice and Peace Office recommends implementing our suggestions above as well as the recommendations of the numerous reports, investigations and inquiries into these issues that have already been conducted in particular the recommendations of the Royal Commission into Aboriginal Deaths in Custody and the *Pathways to Justice* report. Implementing these recommendations will go a long way towards reducing the number of indigenous people in custody, reducing the number of indigenous deaths and custody and increasing accountability for those deaths and preventing future deaths.

Sincerely,

Fr. Peter Smith
Justice and Peace Promoter
Justice and Peace Office
Catholic Archdiocese of Sydney

³⁹ ALRC, *Pathways to Justice*, Recommendation 14-2.

⁴⁰ ALRC, *Pathways to Justice*, Recommendation 14-4.