

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

**Organisation:** NSW Young Lawyers

**Date Received:** 24 August 2020

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# **NSW Legislative Council Select Committee Inquiry into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody**

24 August 2020

Committee Secretary  
The Department of the Legislative Council  
Parliament House  
Macquarie St  
Sydney NSW 2000

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                      Chair, NSW Young Lawyers Human Rights Committee

*This submission was composed on Gadigal country and we pay our respects to Elders past, present and emerging.*

The NSW Young Lawyers Human Rights Committee makes the following submission in response to the Select Committee Inquiry into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody.

## **NSW Young Lawyers**

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

## **The Human Rights Committee**

The NSW Young Lawyers Human Rights Committee comprises a group of over 1,200 members interested in human rights law, drawn from lawyers working in academia, for government, private and the NGO sectors and other areas of practice that intersect with human rights law, as well as barristers and law students. The objectives of the Human Rights Committee are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights and their application under both domestic and international law. Members of the Human Rights Committee share a commitment to effectively promoting and protecting human rights and to examining legal avenues for doing so. The Human Rights Committee takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and its development and support.

## **Submission**

On 24 August 2020, the NSW Young Lawyers Human Rights Committee wrote an Open Letter of Concern about First Nations Peoples and the Criminal Justice System to NSW Attorney-General, and the Minister for Police and Emergency Services.

Please find the letter attached, which forms our submission to this inquiry in relation to the following terms of reference:

- (a) the unacceptably high level of First Nations people in custody in New South Wales
- (e) any other related matter

NSW Young Lawyers and the Human Rights Committee thank you for considering this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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24 August 2020

The Hon. Mark Speakman MP, Attorney General  
The Hon. David Elliott MP, Minister for Police and Emergency Services  
GPO Box 5341  
SYDNEY NSW 2001

Dear Ministers,

### **Open Letter of Concern about First Nations Peoples and the Criminal Justice System**

*This letter was composed on Gadigal country and we pay our respects to Elders past, present and emerging.*

NSW Young Lawyer's Human Rights Committee (**the Committee**) expresses its concerns with First Nations deaths in custody and the extremely high rate of incarceration of First Nations people in NSW and Australia. Following the recent Council of Attorneys-General meeting on 26 July 2020, and the ACT Legislative Assembly's resolution calling on the ACT Government to "prepare the legislative, policy and resourcing frameworks required for an incoming government to legislate for raising of the age of criminal responsibility from 10 to 14 years of age,"<sup>1</sup> we wish to write to you to provide our support for raising the NSW age of criminal responsibility.

#### **Recommendations**

1. The Committee recommends that the NSW Government prioritise rectifying the disproportionately high and increasing rate of incarceration of First Nations people.
2. The Committee recommends that the NSW Government fund justice reinvestment initiatives across NSW, to be led by First Nations communities and which are invest in the wellbeing and mental and physical health of communities, including but not limited to responding to cognitive impairments.
3. The Committee recommends the NSW Government commit to prioritising court reform by expanding the Youth Koori Court across the state and by introducing a Walama Court (at District Court level) with the focus on culturally safe diversion programs that embrace local cultural knowledge.
4. The Committee recommends the NSW Government expand Local Court Circle Sentencing following positive outcomes on incarceration and recidivism from research by the NSW Bureau of Crime Statistics and Research.
5. The Committee recommends removing limitations on the offences for which the use of Youth Justice Conferences is permitted, and removing limitations on number of cautions available, under the *Young Offenders Act 1997* (NSW).

<sup>1</sup> Legislative Assembly for the Australian Capital Territory, 'Notice Paper No 137 Thursday, 20 August 2020' <[https://www.parliament.act.gov.au/\\_\\_data/assets/pdf\\_file/0010/1616356/NP137.pdf](https://www.parliament.act.gov.au/__data/assets/pdf_file/0010/1616356/NP137.pdf)>, 2630.

6. The Committee recommends that the NSW age of criminal responsibility be raised to 14 from 10.
7. The NSW Government should review policing methods that may systemically increase the risk of imprisonment of First Nations people, including removing search warrant quotas.
8. The Committee recommends that cultural awareness training be delivered regularly across the criminal justice system, to all police, corrective services and parole authority staff, and offered regularly to judicial officers.
9. The Committee recommends that NSW commit to more ambitious First Nations adult and young people incarceration Closing the Gap targets, in consultation with First Nations peoples in NSW.

## Background

As noted later in this letter, First Nations deaths in custody have continued in NSW and Australia since the Royal Commission on Aboriginal Deaths in Custody final report in 1991 (**RCIADIC Report**).<sup>2</sup> After nearly 30 years, a number of the recommendations from the RCIADIC Report have still not been implemented in full.<sup>3</sup> In 2015, an Amnesty International commissioned review by law firm Clayton Utz found that “the development of strategic plans to incorporate [the recommendations of the RCIADIC Report] as well as the reporting on the implementation of these strategic plans by justice agencies has been highly inconsistent.”<sup>4</sup>

The issue of the treatment of First Nations people by the police and justice system has recently had increased attention in the context of Black Lives Matter campaigning.

## Disproportionate Incarceration

Since the publication of the RCIADIC Report, increases in incarceration of First Nations’ people have led to their ‘share of the prison population [to have at least] doubled.’<sup>5</sup>

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<sup>2</sup> Royal Commission on Aboriginal Deaths in Custody, *Recommendations* (April 1991) <<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html>>. See also, Royal Commission on Aboriginal Deaths in Custody, *Regional Report of Inquiry in New South Wales, Victoria & Tasmania*, (March 1991) <<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/regional/nsw-vic-tas/>>.

<sup>3</sup> Deloitte, *Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody*, (October 2018) <<https://www2.deloitte.com/au/en/pages/economics/articles/review-implementation-recommendations-royal-commission-aboriginal-death-custody.html>>. See also the same observation reached since 2000 in: Justice Advisory Council (NSW), *Royal Commission into Aboriginal Deaths in Custody: Review of NSW government implementation of recommendations*, JAC NSW, Sydney, 2000, p8 <[http://www.lawlink.nsw.gov.au/report%5Cjpd\\_reports.nsf/pages/rc99\\_toc](http://www.lawlink.nsw.gov.au/report%5Cjpd_reports.nsf/pages/rc99_toc)>.

<sup>4</sup> Clayton Utz and Amnesty International, *Change the Record 2015, Review of the Implementation of RCIADIC* (2015) <<https://web.archive.org/web/20200317133737/changetherecord.org.au/review-of-the-implementation-of-rciadic-may-2015>> p2. Further, this report stated at page 6 “that annual reporting on the implementation of the RCIADIC Recommendations in NSW to date has been lacking.”

<sup>5</sup> Deloitte, *Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody*, (October 2018) <<https://www2.deloitte.com/au/en/pages/economics/articles/review-implementation-recommendations-royal-commission-aboriginal-death-custody.html>>.



The Australian Bureau of Statistics reports that as at June 2019, 23% of the NSW prison population was made up of First Nations people.<sup>6</sup> This is highly problematic when First Nations people represent about 3.5% of NSW's overall population.<sup>7</sup> Further, First Nations women represent only 2% of the population, but represent 34% of the female prison population.<sup>8</sup> It is these statistics that suggest First Nations people in Australia are the most incarcerated population in the world.<sup>9</sup> As regards NSW, the NSW Bureau of Crime Statistics and Research reports that in the last seven years the number of First Nations people in prison has increased by 47% and the number of Aboriginal people charged by police increased by 67%.<sup>10</sup>

In their book chapter, Chris Cunneen and Amanda Porter described the issues of disproportionate incarceration as follows:

"The RCADIC found that the high number of Indigenous deaths in custody was directly relative to the overrepresentation of Indigenous peoples in custody. The RCADIC found that the failure by custodial authorities to exercise a proper duty of care was a major issue. There was little understanding of the duty of care owed by custodial authorities. There were many system defects in relation to exercising care and many failures to exercise proper care. In many cases, both the custody and the failure to offer proper care were directly related to the person's Aboriginality. In many cases, assumptions were made that a seriously ill person was drunk, which, for example, led to the deaths of Mark Quayle and Charles Kulla Kulla. In these cases, assumptions were made that stereotyped Aboriginal people as alcohol-dependent. The failure to exercise a proper duty of care contributed to, or caused, the death in custody by failing to properly assess the health of the person in custody (Cunneen 2001)." <sup>11</sup>

Amongst people in custody, the Australian Institute of Criminology reports that First Nations people are reported to have higher levels of cognitive disability, stating:

While less is known about the prevalence of cognitive impairment among Indigenous offenders, extant findings suggest they have higher levels than non-Indigenous offenders. ... These findings reflect the health and socio-economic

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<sup>6</sup> Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander prisoner characteristics*, (June 2019) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2019~Main%20Features~New%20South%20Wales~21>>.

<sup>7</sup> Australian Institute of Health and Welfare, *Profile of Indigenous Australians*, (September 2019) <<https://www.aihw.gov.au/reports/australias-welfare/profile-of-indigenous-australians>>.

Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (June 2016) <<https://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>>

<sup>8</sup> Australian Human Rights Commission, *Imprisonment rates of Indigenous women a national shame*, (May 2018) <<http://www.austlii.edu.au/au/other/IndigLRes/rciadlc/national/vol5/5.html>>.

<sup>9</sup> Anthony, T and Baldry, E. *FactCheck Q&A: are Indigenous Australians the most incarcerated people on Earth?*, (June 2017) <<http://www.austlii.edu.au/au/other/IndigLRes/rciadlc/national/vol5/5.html>>.

<sup>10</sup> Cormack, L. *Criminal justice system 'inherently racist' towards Aboriginal people*, (June 2020) <<https://www.smh.com.au/national/nsw/criminal-justice-system-inherently-racist-towards-aboriginal-people-20200605-p5500l.html>>.

<sup>11</sup> Chris Cunneen and Amanda Porter, 'Indigenous Peoples and Criminal Justice in Australia' in Deckert A., Sarre R. (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, Cham, 2017) 667, 671.

disparities in the population. Indigenous Australians have higher rates of disability than non-Indigenous Australians across all age groups (ABS 2014a), including four times the rate of [Intellectual Disability] (ABS 2007).<sup>12</sup>

The statistics represent a failure of the NSW and Federal governments to reverse the disproportionate incarceration of First Nations people.

1. The Committee recommends that the NSW Government prioritise rectifying the disproportionately high and increasing rate of incarceration of First Nations people.

### **Recent First Nations Deaths in Custody in NSW**

Details published in a database by The Guardian in June 2020 of First Nations deaths in custody in Australia since 2008 show that First Nations deaths in custody continue in NSW.<sup>13</sup>

In 2019, there were entries in that database for 2 NSW cases. In one case, the Aboriginal Legal Service NSW/ACT “express its deepest sympathy to the family and friends of a 20-year-old Aboriginal man who tragically fell to his death, whilst being escorted from Gosford Hospital to the Kariong Correctional Centre last week.” The Aboriginal Legal Service NSW/ACT noted that “According to NSW Corrective Services, on Wednesday 6 November, the young man was being escorted by two officers when he fell approximately 10 metres from a wall, sustaining critical injuries.”<sup>14</sup>

In the other NSW case in 2019, a 21 year old man was “shot multiple times by police who were seeking to question him” when “he allegedly threatened them with a knife.” The Guardian listed the issues of police conduct that this raised as “Injured in custody, force used, mental health / cognitive impairment”.<sup>15</sup>

Please note, we do not have direct permission from the families of the deceased people to share their names.

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<sup>12</sup> Dr Stephane M Shepherd, Professor James RP Ogloff, Professor Yin Paradies and Associate Professor Jeffrey Pfeifer, ‘Trends & issues in crime and criminal justice: Aboriginal prisoners with cognitive impairment: Is this the highest risk group?’ (Australian Institute of Criminology, No. 536, October 2017) 1.

<sup>13</sup> The Guardian, *Deaths inside: Indigenous Australian deaths in custody 2020*, (June 2020) <<https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>>.

<sup>14</sup> Aboriginal Legal Service NSW/ACT Ltd, ‘ALS Expresses Condolences Over Young Man’s Death In Custody’ (Media Release, 13 November 2019) [https://interactive.quim.co.uk/2020/06/deaths-inside-sources/ALS%20MEDIA%20RELEASE%20DEATH%20IN%20CUSTODY\\_131119\\_FINAL.%20.docx](https://interactive.quim.co.uk/2020/06/deaths-inside-sources/ALS%20MEDIA%20RELEASE%20DEATH%20IN%20CUSTODY_131119_FINAL.%20.docx). See, The Guardian, *Deaths inside: Indigenous Australian deaths in custody 2020*, (June 2020) <<https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody?case=167>>.

<sup>15</sup> The Guardian, *Deaths inside: Indigenous Australian deaths in custody 2020*, (June 2020) <<https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody?case=168>>.



## Justice Reinvestment and Health and Disability

The Committee supports programs of justice reinvestment which supports safer and healthier communities, which support First Nations people with disability with culturally appropriate services, and which are community led.

In 2017, the Australian Law Reform Commission issued a Final Report in its inquiry 'Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' ('Pathways to Justice') and summarised that First Nations imprisonment was linked to:

“disadvantage caused by a lack of [Western] education and low employment rates; inadequate housing, overcrowding and homelessness; poor health outcomes, including mental health, cognitive impairment including Foetal Alcohol Spectrum Disorders (FASD) and physical disability; and alcohol and drug dependency and abuse.”<sup>16</sup>

The Australian Law Reform Commission further noted:

The ALRC's work on the Inquiry suggests that there are a number of other factors that contribute to the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples, including Aboriginal and Torres Strait Islander young people's contact with the juvenile justice system; the background and lived experiences of Aboriginal and Torres Strait Islander children put into out-of-home care; the significant proportion of Aboriginal and Torres Strait Islander prisoners who experience poor physical health, mental illness and cognitive impairment, as well as Aboriginal and Torres Strait Islander prisoners with backgrounds of physical and sexual abuse.

The First People Disability Network Australia outlined 10 priorities, including in relation to the justice system. Priority number 7 states:

“Develop and implement an access to justice strategy for First People with disability, particularly those with cognitive impairment, sensory and intellectual disability”<sup>17</sup>

The NSW Child, Family and Community Peak Aboriginal Corporation summarises the extent of disability with First Nations people stating:

“Census data shows that Aboriginal and Torres Strait Islander people have higher rates of disability than non-Indigenous people across all age groups. Our kids under the age of 14 are more than twice as likely to have a disability, and Aboriginal and Torres Strait Islander people aged 35–54 are 2.7 times as likely to have a disability as non-Indigenous people of the same age.

Hearing loss and intellectual disability are particular problems. Aboriginal and Torres Strait Islander children under 15 are 3.4 times more likely to be deaf, while all

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<sup>16</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, December 2017) 1.24.

<sup>17</sup> First Peoples Disability Network Australia, 'Ten Priorities to address disability inequity' (2018) <<https://fpdn.org.au/wp-content/uploads/2018/10/FPDN-ten-priorities-2018.pdf>>.

Aboriginal Australians are nearly four times as likely to have an intellectual disability as the general population.”<sup>18</sup>

Justice reinvestment has been reported to have positive results in Bourke from a three year trial. Sydney Criminal Lawyers reports that:

Partly as a result of the driving initiative, the number of people imprisoned in Bourke for driving offences has been the lowest in a decade. Early reports also suggest a “sharp drop” in domestic violence offences – although the figure is yet to be quantified. It is hoped that investing in housing, employment and other support programs will instill hope for the future and result in a decline in disenfranchised youth turning to crime. Alistair Ferguson, executive director of Aboriginal Community group Maranguka, is buoyed by the early results, saying “I’m confident to say that the work that’s being carried out in Bourke is becoming the catalyst for the rest of the nation”.<sup>19</sup>

Given the high rates of disability, including cognitive impairment, amongst First Nations people, and the high rates of imprisonment, the Committee recommends that the NSW Government prioritise funding of justice reinvestment initiatives across NSW, to be led by First Nations communities.

2. The Committee recommends that the NSW Government fund justice reinvestment initiatives across NSW, to be led by First Nations communities and which are invest in the wellbeing and mental and physical health of communities, including but not limited to responding to cognitive impairments.

### **Culturally appropriate diversion programs and sentencing through the Youth Koori Court, Walama Court and Circle Sentencing in the Local Court**

The Committee supports calls from the Aboriginal Legal Service (NSW/ACT) Ltd. and the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants (**Special Commission of Inquiry**), for the expansion of the Youth Koori Court to cover regional areas of NSW and for the establishment of a Walama Court to provide access to culturally appropriate diversion programs.

The Special Commission of Inquiry made recommendations in January 2020 to this effect, after commenting in its report that:

Given the close and complex relationships within and between Aboriginal communities, the nature and extent of the impact of ATS [amphetamine-type stimulants] use beyond the people who use it is uniquely damaging. Aboriginal people also face specific barriers to seeking and accessing health, treatment and rehabilitation services. These include the legacy of the Stolen Generations and fear of child removals, fear and distrust of government services, racism, the lack of

<sup>18</sup> NSW Child, Family and Community Peak Aboriginal Corporation, ‘Supporting Aboriginal People with Disability’ <<https://www.absec.org.au/supporting-aboriginal-people-with-disability.html>>.

<sup>19</sup> Sydney Criminal Lawyer, ‘Positive Results for Bourke Justice Reinvestment Trial’ (25 September 2016) <<https://www.sydneycriminallawyers.com.au/blog/positive-results-for-bourke-justice-reinvestment-trial/>>.

culturally safe services and the necessity of separating from Country and family to access AOD treatment services.”<sup>20</sup>

The Special Commission of Inquiry stated:

Given the over-representation of Aboriginal people in custody, culturally specific diversionary programs present an opportunity to improve the way the criminal justice system responds to ATS use in Aboriginal communities. Expanding the Youth Koori Court and establishing the proposed Walama Court would be significant measures toward addressing this over-representation. Both courts address the underlying factors, including ATS use, that contribute to a person’s offending”.<sup>21</sup>

The Aboriginal Legal Service (NSW/ACT) Ltd welcomed these recommendations, stating:

“We call on the NSW Government to act without delay to establish a Walama Court in NSW – an Aboriginal-specific court that can deal with drug and alcohol matters. The ALS is pleased that the Inquiry has acknowledged the need for a health-focused response to address the use of ‘Ice’.”<sup>22</sup>

The Committee supports the state-wide expansion of the Youth Koori Court and introduction of a Walama Court. This could provide appropriate support programs and diversionary options for children and adults respectively, who come into contact with the police and criminal justice system. Support programs and diversionary options should be culturally safe and cover support for a wide range of mental and physical health issues as well as culturally safe rehabilitation.

Circle Sentencing currently exists in 12 Local Courts in NSW. In April 2020, the NSW Bureau of Crime Statistics and Research reported positive results from their research into Circle Sentencing:

“We compared offenders participating in Circle Sentencing to similar (Aboriginal) offenders participating in traditional sentencing over the period 1 March 2005 to 31 August 2018. After controlling for defendant-case characteristics and the passage of time, we found that offenders undergoing Circle Sentencing:

1. Are 9.3 percentage points less likely to receive a prison sentence.
2. Are 3.9 percentage points less likely to reoffend within 12 months.
3. Take 55 days longer to reoffend if and when they do”.<sup>23</sup>

The NSW Bureau of Crime Statistics and Research summarised the benefits as follows:

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<sup>20</sup> Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants, *Report* (Volume 1a, January 2020) para. 126.

<sup>21</sup> Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants, *Report* (Volume 1a, January 2020) para. 131.

<sup>22</sup> Aboriginal Legal Service (NSW/ACT) Ltd, ‘ALS Welcomes Renewed Calls for Walama Court and Greater Support for Communities’ (28 February 2020)

<[https://www.alsnswact.org.au/als\\_welcomes\\_renewed\\_calls\\_for\\_walama\\_court\\_and\\_greater\\_support\\_for\\_communities](https://www.alsnswact.org.au/als_welcomes_renewed_calls_for_walama_court_and_greater_support_for_communities)>

<sup>23</sup> NSW Bureau of Crime Statistics and Research, ‘Circle Sentencing, incarceration and recidivism, Summary’, (Crime and Justice Bulletin No. 226, April 2020)

<<https://www.bocsar.nsw.gov.au/Publication%20Supporting%20Documents/CJB/CJB226PageSummary.pdf>>.



“To summarise, [Circle Sentencing] clearly has the potential to lower the Indigenous incarceration rate. If [Circle Sentencing] can achieve this goal, without adversely affecting recidivism, the net benefit to society is difficult to overstate.”<sup>24</sup>

The Committee recommends the NSW Government expand Local Court Circle Sentencing following positive outcomes on incarceration and recidivism from this research by the NSW Bureau of Crime Statistics and Research.

3. The Committee recommends the NSW Government commit to prioritising court reform by expanding the Youth Koori Court across the state and by introducing a Walama Court (at District Court level) with the focus on culturally safe diversion programs that embrace local cultural knowledge.
4. The Committee recommends the NSW Government expand Local Court Circle Sentencing following positive outcomes on incarceration and recidivism from research by the NSW Bureau of Crime Statistics and Research.

### **Diversions by Police**

We note NSW Police have the ability to divert young offenders under the *Young Offenders Act 1997* (NSW), subject to the eligibility requirements as provided in section 8 and in accordance with Part 5 (Youth Justice Conferences) of that Act. The Committee recommends removing limitations on the use of Youth Justice Conferences, in particular, so that any offence which can be finalised in the Children’s Court would be considered eligible for a Youth Justice Conference. In addition, the Committee recommends removal of any limit to the number of cautions which can be administered to a young person, as there is currently a limit of 3 cautions under section 20(7) of that Act.

The Committee recommends removing limitations on the offences for which the use of Youth Justice Conferences is permitted, and removing limitations on number of cautions available, under the *Young Offenders Act 1997* (NSW).

5. The Committee recommends removing limitations on the offences for which the use of Youth Justice Conferences is permitted, and removing limitations on number of cautions available, under the *Young Offenders Act 1997* (NSW).

### **Minimum Age of Criminal Responsibility**

We understand that at the Council of Attorneys- General meeting on 26 July 2020 there was consideration of raising the NSW age of criminal responsibility, and that a working group will now consider interventions and alternatives to imprisonment.<sup>25</sup> As noted above, we recommend important alternatives to imprisonment, including the expansion of justice reinvestment, and the expansion of culturally safe diversion programs and support services through an expanded Youth Koori Court and Walama Court.

<sup>24</sup> NSW Bureau of Crime Statistics and Research, ‘Circle Sentencing, incarceration and recidivism’ (Crime and Justice Bulletin No. 226, April 2020) 15.

<sup>25</sup> Nick Ralston and Michaela Whitbourn, ‘Age of criminal responsibility to remain at 10 until at least 2021’ Sydney Morning Herald (27 July 2020) <<https://www.smh.com.au/national/age-of-criminal-responsibility-to-remain-at-10-until-at-least-2021-20200727-p55fy6.html>>.



Raising the age of criminal responsibility, however, is an important reform in itself. The United Nations Committee of the Rights of the Child, to which Australia is a state party, issued General comment No. 24 (2019) on children's rights in the child justice system on 18 September 2019 and stated that:

"Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence. As the Committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses. States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age."<sup>26</sup>

General comment No. 24 replaced General Comment No. 10 which was issued in 2010. General comment No. 10 recommended a minimum age of criminal responsibility of 12.<sup>27</sup>

We note that Change the Record, which is a coalition of organisations on issues of criminal justice for First Nations people, issued a call endorsed by organisations such as Community Legal Centres Australia and the National Aboriginal and Torres Strait Islander Legal Services to "raise the age of legal responsibility from 10 to at least 14 years."<sup>28</sup>

We recommend that the NSW age of criminal responsibility be raised from 10 to 14 years old on the basis that criminalising young people who are under 14 years old is not appropriate from a health, or human rights perspective. We note that health, disability support and therapeutic programs will need to be resourced accordingly.

6. The Committee recommends that the NSW age of criminal responsibility be raised to 14 from 10.

### **Over Policing of First Nations Communities**

The Committee is also concerned about over policing of First Nations people in NSW.

The Australian Law Reform Commission, in its Pathways to Justice report noted an Aboriginal Legal Service (NSW/ACT) submission which stated that their community consultations reflected that "participants noted that police offer very little discretion when dealing with Aboriginal people, and that many communities in regional and remote NSW communities suffer from over policing."<sup>29</sup>

<sup>26</sup> Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) para. 22.

<sup>27</sup> Committee on the Rights of the Child, *General comment No. 10 (2007) Children's rights in juvenile justice*, CRC/C/GC/10 (25 April 2007) para. 32.

<sup>28</sup> Change the Record, 'Here and in America, we must end Black deaths in custody' (2 Jun 2020) <<https://changetherecord.org.au/change-the-record/posts/end-black-deaths-in-custody>>.

<sup>29</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, December 2017) 14.28.

Aboriginal Torres Strait Islander Social Justice Commissioner, June Oscar at the Australian Human Rights Commission said:

"I know there is genuine desire for change across our justice system and within the police force. But it will take the courageous leadership of our governments to commit to systems reform and not think the change we need will happen through individual actions alone".<sup>30</sup>

The Australian Human Rights Commission also stated that:

We continue to see the over-policing of Australian Indigenous people. Many are introduced to the justice system at a young age and remain in its grip for life. Over incarceration is arguably the most prominent example of generational and systemic discrimination.<sup>31</sup>

In particular, the Committee is concerned about recent reports of search warrant quota data, and is particularly concerning for the disproportionate and systemic disparities in the number of search warrants targeted in some areas with high numbers of First Nations people. The Australian Broadcasting Commission reported that:

"Officers in the Barrier Police District, which includes the communities of Broken Hill, Wilcannia and Menindee, were being asked to carry out at least 264 warrants. At almost nine warrants per 1,000 people, the quota for the district is about four times the state average."<sup>32</sup>

In their report Dr Grewcock and Dr Sentas reported that First Nations people are disproportionately affected by strip searches in NSW:

"According to the NSW Police data, approximately 10 percent of the documented strip searches in the field were conducted on Aboriginal and Torres Strait Islander peoples. Further, approximately 22 percent of the documented strip searches in police stations were conducted on Aboriginal and Torres Strait Islander peoples".<sup>33</sup>

First Nations children are also over represented in strip searches in NSW. The Guardian reported that data from 2016 to 2019 showed that:

"The data shows that about 11% of the children subjected to the controversial practice by police during the period were Indigenous despite making up about 6% of the population under the age of 18."<sup>34</sup>

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<sup>30</sup> Australian Human Rights Commission, 'Calls to end Indigenous deaths in custody' (3 June 2020) <<https://humanrights.gov.au/about/news/calls-end-indigenous-deaths-custody>>.

<sup>31</sup> Australian Human Rights Commission, 'Calls to end Indigenous deaths in custody' (3 June 2020) <<https://humanrights.gov.au/about/news/calls-end-indigenous-deaths-custody>>.

<sup>32</sup> Callum Marshall and Declan Gooch, 'Concerns raised over 'extraordinarily high' police search warrant quota in far west NSW' Australian Broadcasting Corporation (7 July 2020) <<https://www.abc.net.au/news/2020-07-07/police-warrants-extraordinarily-high-in-indigenous-communities/12429172>>.

<sup>33</sup> Dr Michael Grewcock and Dr Vicki Sentas, 'Rethinking Strip Searches by NSW Police' (UNSW Law, 2019) <[https://rlc.org.au/sites/default/files/attachments/Rethinking-strip-searches-by-NSW-Police-web\\_0.pdf](https://rlc.org.au/sites/default/files/attachments/Rethinking-strip-searches-by-NSW-Police-web_0.pdf)> p31.

<sup>34</sup> Michael McGowen, 'NSW police disproportionately target Indigenous people in strip searches' The Guardian (16 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/16/nsw-police-disproportionately-target-indigenous-people-in-strip-searches>>.

National Indigenous TV (SBS) reported concerns from the Aboriginal Legal Service (NSW/ACT) that there was undercounting of strip searches for First Nations people, with the article stating:

“Whether or not someone was recorded as Indigenous in the data was based on their “racial appearance”. A NSW police spokesperson clarified that recording racial background is not a mandatory part of strip searches and is generally based on whether a person self-identifies at the time of the search.”<sup>35</sup>

The Guardian also reported that there could be underreporting, referring to a Law Enforcement Conduct Commission inquiry as follows:

“The LECC’s inquiry and internal police documents have established that there is confusion among officers about what constitutes a strip-search, and the data did not capture a search conducted on a 10-year-old Indigenous child between 2017 and 2018.”<sup>36</sup>

In their report Dr Grewcock and Dr Sentas reported that strip searches in NSW generally are at high levels compared to Queensland:

“New South Wales strip searches its population at a per capita rate of 68 per 100,000; almost ten times the rate that Queensland does”.<sup>37</sup>

The NSW Government should review policing methods that may systemically increase the risk of imprisonment of First Nations people, including removing search warrant quotas.

7. The NSW Government should review policing methods that may systemically increase the risk of imprisonment of First Nations people, including removing search warrant quotas.

## Cultural Competence Training

Cultural Competence training is training that can “foster critical thinking, self-reflection and discussions about cultural identities, privilege, attitudes, prejudices and propensity to stereotype, challenge racism and promote anti-racism practices.” The training needs to be more than “basic courses [that] do little to bring about change either within the workplace or in the lives of Aboriginal and Torres Strait Islander peoples.”<sup>38</sup>

The Australian Law Reform Commission’s Pathways to Justice Report identified that police cultural change needs further work:

<sup>35</sup> Rachel Hocking, ‘It’s unacceptable: NSW police strip-searched 10-year-old Indigenous child’ NITV News (7 November 2019) <<https://www.sbs.com.au/nitv/article/2019/11/07/its-unacceptable-nsw-police-strip-searched-10-year-old-indigenous-child>>.

<sup>36</sup> Michael McGowen, ‘NSW police strip-searched more than 340 school-aged boys in the past three years’ The Guardian (9 December 2019) <<https://www.theguardian.com/australia-news/2019/dec/09/nsw-police-strip-searched-more-than-340-school-aged-boys-in-the-past-three-years>>.

<sup>37</sup> Dr Michael Grewcock and Dr Vicki Sentas, ‘Rethinking Strip Searches by NSW Police’ (UNSW Law, 2019) <[https://rlc.org.au/sites/default/files/attachments/Rethinking-strip-searches-by-NSW-Police-web\\_0.pdf](https://rlc.org.au/sites/default/files/attachments/Rethinking-strip-searches-by-NSW-Police-web_0.pdf)>.

<sup>38</sup> Fredericks B. and Bargallie D., ‘An Indigenous Australian Cultural Competence Course: Talking Culture, Race and Power’ in Frawley J., Russell G., Sherwood J. (eds) *Cultural Competence and the Higher Education Sector* (Springer, Singapore, 2020) <[https://doi.org/10.1007/978-981-15-5362-2\\_16](https://doi.org/10.1007/978-981-15-5362-2_16)>.



“more needs to be done to embed a cultural change within police that will ensure police practices and procedures do not contribute to the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples.”<sup>39</sup>

The Pathways to Justice Report made a specific recommendation about considering the implementation of various initiatives to improve police culture, including in particular:

“providing specific cultural awareness training for police being deployed to an area with a significant Aboriginal and Torres Strait Islander population”.<sup>40</sup>

Cultural competence training by both police and corrections staff is also listed as a data development option in the recently released National Agreement on Closing the Gap in July 2020.<sup>41</sup>

In the Committee’s opinion, cultural competence or cultural awareness training should be provided by First Nations people and should be implemented across the criminal justice system, not just to police and corrections staff.

The Committee recommends that cultural awareness training be delivered regularly across the criminal justice system, to all police, corrective services and parole authority staff, and offered regularly to judicial officers.

The Committee also notes that police training in other areas, such as in responding to domestic violence, remains crucial.

8. The Committee recommends that cultural awareness training be delivered regularly across the criminal justice system, to all police, corrective services and parole authority staff, and offered regularly to judicial officers.

### **National Agreement on Closing the Gap**

In July 2020, a new National Agreement on Closing the Gap was released. In relation to incarceration, Target 10 and Target 11 are directly relevant.<sup>42</sup> The Committee is concerned that these targets, which specify targets of reducing First Nations adult incarceration by 15% and youth incarceration by 30%, are unfortunately limited and without ambition.

The Guardian reported that Co-chair of NATSILS Cheryl Axleby stated “over-incarceration needs to be addressed urgently, but this target wouldn’t see parity in prison rates for adults until 2093.”

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<sup>39</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, December 2017) 14.95.

<sup>40</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, December 2017) Recommendation 14-4.

<sup>41</sup> ‘National Agreement on Closing the Gap’ (July 2020)

<<https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>> 26.

<sup>42</sup> ‘National Agreement on Closing the Gap’ (July 2020)

<<https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>> 26.



The Committee recommends that NSW commit to more ambitious First Nations adult and young people incarceration targets, in consultation with First Nations peoples in NSW.

10. The Committee recommends that NSW commit to more ambitious First Nations adult and young people incarceration Closing the Gap targets, in consultation with First Nations peoples in NSW.

### **United Nations Declaration on the Rights of Indigenous People**

It is the Committee's view that in failing to reduce the disproportionately high rates of incarceration of First Nations peoples, that NSW fails to meet the standard of non-discrimination in Article 2 of the United Nations Declaration on the Rights of Indigenous Peoples, which states that:

"Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their Indigenous origin or identity."<sup>43</sup>

### **NSW Young Lawyers**

NSW Young Lawyers is a division of The Law Society of New South Wales, with members comprising of. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

### **The Human Rights Committee**

The Human Rights Committee (**HRC**) comprises a group of over 1,200 members interested in human rights law, drawn from members working in academia, for government, private and the NGO sectors and other areas of practice that intersect with human rights law. The objectives of the HRC are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights and its application under both domestic and international law. Members of the HRC share a commitment to effectively promoting and protecting human rights and to examining legal avenues for doing so. The HRC takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and its development and support.

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<sup>43</sup> United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (13 September 2007).

### **Concluding Comments**

NSW Young Lawyers and the Committee thank you for considering this open letter. If you have any queries please contact the undersigned at your convenience.

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