

**Submission  
No 81**

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

**Organisation:** Sisters Inside Inc.

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*Sisters Inside Inc. is an independent community organisation which exists to advocate for the human rights of women in the criminal justice system*

Select Committee on First Nations People in Custody in NSW and Oversight and Review of Deaths in Custody  
Legislative Council  
Parliament of New South Wales  
(Lodged online)

24 August 2020

Dear Committee Members

Sisters Inside Inc. exists to advocate for the human rights of criminalised women, girls and their children at a local, national and international level. We also respond to gaps in services available to this cohort throughout Queensland, and support emerging organisations driven by criminalised women nationally. This submission draws on Sisters Inside's 25+ years of experience in responding to family needs, and our outstanding success in reducing prison return rates - a success that is only possible due to the powerful role of Aboriginal and Torres Strait Islander women with lived experience at all levels of our organisation.

We acknowledge the consistent frontline labour undertaken by First Nations families who have had family members die in custody. We acknowledge those with lived prison experience who continue to show up to demand justice, and speak up with determination that no other family should endure the violence and deadly consequences of the criminal punishment system in this country.

We acknowledge that First Nations people, like all people in this country, have a right to equality before the law, individualised justice, due process before the law and freedom from discrimination of any kind, in particular that based on their First Nations and/or Torres Strait Islander origin or identity.

We acknowledge and support the role of First Nations community controlled organisations in the provision of programs and in addressing the persistent criminalisation and imprisonment of Aboriginal and Torres Strait Islander people in their own country.

We acknowledge that while the Royal Commission into First Nations Deaths in Custody (RCIADIC) was a watershed document, it was actually part of a longer First Nations community discourse that had sought, since the violent invasion of this country, to reduce First Nations contact with the criminal legal system.

Please note that Sisters Inside has not consulted directly with families affected by deaths in custody, people with lived prison experience or First Nations people more widely in NSW, in developing this submission. However, we do draw on the accumulated feedback of First Nations families – in Queensland, NSW, Australia and internationally - over many years.

### **Our submission**

More than three decades ago the Royal Commission identified the primary cause of Aboriginal deaths in custody in Australia as the imprisonment of First Nations peoples. Nothing has changed in those 30 years.

If the intention of this Inquiry is to reduce the number of deaths in custody, it is critical to acknowledge that every single death in custody, including police custody, is a direct result of criminalising First Nations people and effectively *exiling* them to custody.

Over the past 30 years, the imprisonment of First Nations people and consequent deaths in custody has been the subject of endless research studies, parliamentary inquiries and, tragically, inquests. The reality is that we already know what action is needed to end the criminalisation and imprisonment of First Nations peoples – in NSW, and nationally. Too often, the primary recommendations of these investigations have been ignored, and superficial, ineffective reforms pursued instead. Meanwhile, the number of First Nations people in police cells and prisons continues to grow, as does the commensurate risk of further deaths in custody.

We are concerned that one of this Inquiry's Terms of Reference is *(the) unacceptably high level of First Nations people in custody in NSW*. Whilst other factors might contribute to deaths in custody, the only direct cause of deaths in custody is being in custody! This Term of Reference seems predicated on the assumption that there is an acceptable rate of imprisonment for First Nations people. It therefore implies that a certain number of deaths in custody is considered acceptable by the NSW Parliament. This, in turn, highlights the apparent devaluing of the lives of First Nations peoples. It suggests that First Nations' lives are considered disposable. At the very least, it indicates that the Terms of Reference are constructed in order to minimise the amount of actual change that can occur as a result of this Inquiry. This is further reinforced by the narrow focus of the remaining Terms of Reference, which are concerned with responding to deaths in custody once they have occurred, rather than preventing them.

The carceral system's ability to increase the number of First Nations people in custody is facilitated by the over-policing of Aboriginal communities and urban areas with a high First Nations population. Too often, First Nations people are targeted when congregating in public places. The targeting of young people too often sets First Nations children on a path of criminalisation from as young as 10 years old. As a result, First Nations men, women and children have higher levels of contact with the criminal legal system, than other Australians. The unjust impact of this racial targeting is then multiplied at every stage of the criminal legal system. The evidence clearly demonstrates that First Nations women compared with other women, for example, are more likely to come to the attention of police; less likely to be warned and more likely to be charged for a minor *offence*; more likely to be refused bail; more likely to get a custodial sentence; and less likely to get parole. All of this contributes to the early criminalisation of First Nations people and their overrepresentation in prisons.

The primary focus of this Inquiry should be on how to reduce the number of First Nations people in custody in NSW. Police and prison budgets have grown exponentially over recent years: over the same period funding to community-driven services has been decimated. This has facilitated racially-based targeting, over-policing and mass imprisonment of First Nations people. Sisters Inside advocates for the redirection of funding from policing and prisons, to programs and services that cultivate the safety and wellbeing of communities – particularly First Nations communities. This is not a radical proposal. It builds on existing models – wealthy suburbs with lower rates of policing and greater access to social and community services already have lower crime rates. This Inquiry should be asking: *What are things that enable people and communities currently at risk of criminalisation to thrive?* It should be advocating for redirection of funds to community building.

The imprisonment model of responding to perceived crime has failed:

1. Private prisons provide a perverse incentive to increase imprisonment rates, whilst at the same time, reducing state accountability for prisoner treatment and imprisonment outcomes (including deaths in custody, re-traumatisation and recidivism). There is no place for private prisons in a state that is committed to reducing rates of imprisonment amongst First Nations

peoples. The commoditisation of prisoners is further reflected in the possibility that private prison providers may be fined for the deaths of prisoners in their care<sup>1</sup>.

2. According to the ABS (*Prisoners in Australia 2019*), at least 1/3 of all prisoners in NSW are unsentenced, and most of these can be expected to be on remand. Too often, prisoners are refused bail as a result of failures of the state to provide essential services such as housing, health care and rehabilitation services. The massively disproportionate imprisonment of First Nations people in NSW is exacerbated by the higher rate of imprisonment for the same 'offence'. (According to a recent report, First Nations people were twice as likely to be imprisoned for the same offence as others in NSW<sup>2</sup>). Further, with 22% of sentenced First Nations prisoners in NSW serving less than 12 months, it is clear that many (particularly women) are being imprisoned for minor offences. Prisons are expensive – costing around \$300 per prisoner per night (or \$110,000 per prisoner per year). It makes far greater economic sense to provide essential services than to imprison people on remand.
3. More than 50% of all prisoners (and 87% of Aboriginal women prisoners<sup>3</sup>) in NSW have a prior experience of imprisonment. (Non-government services with this failure rate would likely be promptly defunded by the NSW government.) This alone is ample evidence of the failure of imprisonment to address crime – particularly amongst First Nations women, who are the fastest growing cohort of prisoners in NSW with a 50% increase in imprisonment over the past 6 years. It is hardly surprising that most end up returning to prison – at least 78% of women leaving prison are released without support services in place placing them at risk of homelessness, untreated mental illness and domestic violence, all of which are contributors to imprisonment.

A reformist approach to deaths in custody has also proven an abject failure. The carceral system is self-perpetuating. For as long as this system investigates itself, and the state doubles down on its carceral approach to its relationship with First Nations peoples, the risk of First Nations deaths in custody will continue. This submission calls for police and prisons to be held accountable to the wider community.

There is a place for independent oversight of policies and practices which contribute to deaths in custody, including the wide range of common prison and police practices which fall within the UN definition of *torture and other cruel, inhuman or degrading treatment or punishment*, such as use of physical restraints, chemical restraint, solitary confinement and strip-searching. (The retraumatising effect of strip searching on women, most of whom have a history of sexual assault, is of particular concern.) It is essential that NSW institutes a truly independent inspection authority with unbridled access to all areas of police and prisons, the resources to undertake thorough investigation and a mandate to regularly report directly to the Parliament of NSW.

Families deserve to know that if their loved one dies in custody they will be heard; a timely, thorough, independent investigation will occur; and they will be told of the progress of this inquiry. They deserve to witness any public investigation of their loved one's death. This includes being provided with the means to attend all hearings. Families also deserve to know that their deceased family member's body is being treated in a culturally-competent and respectful manner.

Independent oversight is also needed of all First Nations deaths in custody, to call responsible authorities and individuals to account. Not a single police officer or prison officer has ever been held responsible for any of the more than 435 deaths in custody since the Royal Commission, or the thousands of deaths that preceded that time. Investigators should be trained civilians (with no

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<sup>1</sup> As, for example, in Western Australia (see: <https://www.sbs.com.au/news/two-indigenous-men-in-the-same-prison-died-just-over-a-year-apart-their-families-want-answers#:~:text=In%20a%20statement%20provided%20to,of%20Stanley's%20death%20in%20July>)

<sup>2</sup> In the Sydney Morning Herald at <https://www.smh.com.au/national/nsw/aboriginal-people-twice-as-likely-to-get-a-jail-sentence-data-shows-20200812-p55kwj.html>

<sup>3</sup> This and other NSW-specific statistics about NSW women prisoners are from a substantial 2019 study conducted by the KWOOP Coalition – at [https://www.sydneycommunityfoundation.org.au/find\\_a\\_fund/kwoop-keeping-women-out-of-prison/](https://www.sydneycommunityfoundation.org.au/find_a_fund/kwoop-keeping-women-out-of-prison/)

current or past involvement in the military or police force), including independent medical and forensic experts, with First Nations people employed in central investigative roles. Resourcing must be adequate to enable the authority not to rely on police/prison accounts of the event. It is also essential that this independent body have the capacity to direct carceral authorities to implement policies and practices recommended by Coroners, where these are consistent with the existing legislation, and to advocate for legislative reform/review as needed.

Women are too often ignored in discussions about deaths in custody. It is important that this Select Committee specifically examine the past and possible future contributors which increase the risk of deaths in custody amongst First Nations women in NSW.

Ultimately, no amount of oversight and review will address the fundamental issue – nothing changes, if nothing changes. We cannot continue to have a situation where First Nations people live in over-policed communities, in the shadow of disproportionate surveillance by the carceral system in collaboration with other state systems. It is only when funding dollars are redirected from police and prisons to community-strengthening alternatives that the risk of deaths in custody will begin to be addressed.

## **Recommendations**

Sisters Inside recommends that the Government of NSW:

- Reduce the capacity of the NSW Police Force to undertake policing which results in the targeting of First Nations peoples, by redirecting that funding to meeting the needs of First Nations people, in particular community-controlled health, housing, youth and legal services.
- Reduce the number of people imprisoned while on remand, through a moratorium on building new prisons, or growing bed capacity and redirecting operational funding from prisons to community-controlled health, housing, youth and legal services.
- Improve the capacity of the Government of NSW to hold prisons accountable for their treatment of prisoners, including through ceasing to fund private prisons.
- Reduce the potential contributors to deaths in custody through establishing an independent inspection body with unbridled access to all areas of police and prisons, the resources to undertake thorough investigation and a mandate to regularly report directly to the Parliament of NSW.
- End the practice of police investigating police & prisons when there's a death in custody.
- Establish a credible and properly resourced authority to conduct independent investigation into every death in any type of custody, including deaths assumed to be a result of natural causes, and direct carceral authorities to implement coronial recommendations.
- Legally oblige coroners to look beyond the immediate cause and manner of death.
- Legislate to ensure that a coronial inquest cannot proceed in the absence of the deceased's family or their representatives and to ensure that they have the means to attend the inquest.
- Resource the development (jointly with First Nations legal services, health services and communities) of a protocol for the culturally appropriate and responsive resolution of questions involving the conduct of inquiries and autopsies, the removal and burial of organs and the removal and return of the body of the deceased.
- Resource an Aboriginal community-controlled study of deaths in custody of First Nations women in NSW, which identifies possible contributors to their risk of death in custody.

## **Conclusion**

This submission has argued that the mass imprisonment of First Nations people is driven by unjust laws, judicial prejudice and targeted policies, fuelled by a seemingly endless budget to grow the capacity of police and prisons to imprison First Nations people.

Sisters Inside believes that the only way to reduce the number of deaths in custody in NSW is to reduce the number of First Nations people in police and prison cells. The Government of NSW needs to recalibrate the relationship the state has with First Nations peoples, while systematically working to redress all policies and practices which lead to criminalisation, imprisonment and deaths in custody of First Nations people.

Yours sincerely

Debbie Kilroy  
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