Submission No 84

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

Organisation: Ngalaya Indigenous Corporation

Date Received: 24 August 2020

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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
Legislative Council

24 August 2020

Dear Mr Searle,

High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

We appreciate this opportunity to make the enclosed submission to the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody in respect of its inquiry into the unacceptably high level of First Nations people in custody in New South Wales.

Ngalaya (nar-lee-ah) is the peak body representing over 750 First Nations lawyers, and law students, across New South Wales. Ngalaya was founded in 1997 to advocate for increased representation within the legal profession and a more just legal system. Ngalaya's membership ranges from our most senior First Nations lawyers to our first and second year law students. Despite our diversity, we share a common commitment to a fair and equitable legal system for all Australians.

In our experience, First Nations people have an incredible impact on their workplaces and on the legal profession. Royal commissions, independent inquiries and law reform commissions have consistently recommended increased self-determination for First Peoples. We argue that a clear, evidence-based method to reduce the over-incarceration of First Nations people is to increase the control and involvement of First Peoples at every stage and level of the criminal justice system.

We welcome the Select Committee's report due in March 2021.

Yours sincerely,

Kate Sinclair
Chairperson
Ngalaya Indigenous Corporation

Ngalaya Indigenous Corporation

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

Background

The data on the over-representation of First Nations people in the criminal justice system is overwhelming. As of March 2020, First Nations people represent approximately 25 percent of adults in custody in NSW.[1] In the quarter leading up to March 2020, 31% of new prisoners in NSW were First Nations.[2] In 2018, First Nations people in NSW were 11.6 times more likely than non-Aboriginal people to be imprisoned.[3] Of those in NSW prisons in 2018, 67% of First Nations people had been imprisoned previously, compared with 46% of non-Aboriginal people.[4] These figures represent a consistent and harmful trend of over-incarceration of First Nations people in NSW. This over-incarceration is directly linked to the criminalisation of First Nations people and hundreds of First Nations deaths in custody.

Ngalaya Indigenous Corporation is the peak body for over 400 First Nations lawyers and 350 First Nations law students across New South Wales. As a collective we are committed to creating a more just and equitable legal system, and supporting the self-determination of First Nations. First Peoples are incredibly diverse, with a myriad of cultural, political and economic differences. Central to all First Peoples' culture, however, is a connection to Country, kin and community. We believe that all levels of the criminal justice system would benefit from increased First Nations involvement, and a commitment to the First Nations' principles of community-centeredness, care and accountability.

The over-incarceration of First Nations people in the criminal justice system is of national and state concern. This was recognised by the Joint Council on Closing the Gap's inclusion of justice targets for the first time in Closing the Gap (**CTG**)'s 12 year history. The targets require a

[1] BOCSAR, *New South Wales Custody Statistics* (Quarterly Update, March 2020).
[2] Ibid.
[3] Aboriginal Affairs NSW, *Key data: NSW Aboriginal people* (Research and Evaluation fact sheet, January 2018) 1.
[4] Ibid.

15% reduction in the rate of over-incarceration of First Nations people by 2028.[5] While the inclusion of justice targets is a significant result for the Coalition of Peaks, we join the chorus of First Nations lawyers arguing that more ambitious targets are both practicable and necessary. The Aboriginal Legal Service NSW/ACT demonstrated, using the latest BOCSAR data,[6] that the NSW and ACT Governments can do much better than parity in incarceration by 2090.[7] Parity in imprisonment is achievable by 2030 in New South Wales.

Central to a long-term, sustainable reduction of incarceration and deaths in custody for First Nations people is increased support and involvement of First Nations experts, Elders and legal practitioners at all levels of the criminal justice system: diversion, policing, prosecution, defence, sentencing and rehabilitation. In this submission, we argue for an increase in the:

1. Role of First Nations people in shaping policing frameworks and policies;
2. Role of First Nations judges and legal practitioners in the justice system;
3. Role of First Nations people in the sentencing process; and
4. Role of First Nations people in accountability for the criminal justice system.

Role of First Nations people in shaping policing frameworks and policies

Working with First Nations people to reshape policing

A number of reports have commented on the need to improve relations between First Nations people and the police. In the 1991 Report of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**), the Commission recommended that "different jurisdictions pursue their chosen initiatives for improving relations between police and Aboriginal people".[8] The Australian Law Reform Commission's (**ALRC**) 1986 report on the Recognition of Aboriginal Customary Laws similarly noted the need for "better communication between police and local Aboriginal communities about policing arrangements for those communities".[9] Police aide schemes were recommended by both the Royal Commission and the ALRC as temporary measures to work toward a long-term goal of self-policing.

The emphasis on self-policing is designed to build the capability of First Nations. Capability-building can only be achieved through policies that respect and promote self-determination. A community-based approach involves First Nations in the design, implementation and evaluation of policy. Community-based initiatives promote

[5] Closing the Gap, *National Agreement on Closing the Gap* (July 2020).
[6] BOCSAR, *New South Wales Custody Statistics* (Quarterly Update, June 2020).
[7] Aboriginal Legal Service (NSW/ACT) Limited 2020, 'ALS urges NSW and ACT governments to lead, adopting 10 year justice targets to end imprisonment' (Media release, 7 August 2020) https://www.alsnswact.org.au/als_urges_nsw_and_act_governments_to_lead_adopting_10_year_justice_targets_to_end_imprisonment.
[8] RCIADIC (Final Report, April 1991) Recommendation 231.
[9] ALRC, *Recognition of Aboriginal Customary Laws* (ALRC Report 31, June 1986) [872].

self-determination by giving community ownership and control over initiatives and enable the creation of culturally appropriate solutions designed specifically for the individuals and communities that are impacted. The current criminal justice system is not culturally appropriate and it does not promote self-determination.

Justice reinvestment

We support justice reinvestment as a strategy for increasing the role of First Nations people in shaping policing frameworks and policies. Justice reinvestment refers to directing funding towards addressing the underlying causes of crime in communities with high levels of incarceration. Justice reinvestment is place-based, in that it involves working with a community to design localised solutions to address the local drivers of contact with the criminal justice system, as identified by that community. It also relies on a distinct data-driven method to inform the development of options for reform. Central to the success of the justice reinvestment in the United States has been technical assistance to analyse data and develop policy options for reducing contact with the criminal justice system.

Several major reports have endorsed justice reinvestment. These include:

- in 2018, the ALRC's report, *Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*;
- in 2016, the Finance and Public Administration References Committee report, *Aboriginal and Torres Strait Islander experience of law enforcement and justice services*;
- in 2013, the Senate Standing Committee on Legal and Constitutional Affairs report, *Value of a justice reinvestment approach to criminal justice in Australia*;
- in 2011, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' report, *Doing Time - Time for Doing - Indigenous youth in the criminal justice system*;
- in 2010, Noetic Solutions Pty Limited's report, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister of Juvenile Justice*; and
- in 2009, the Australian Human Rights Commission's *Aboriginal and Torres Strait Islander Social Justice Commissioner: 2009 Social Justice Report*.

Evidently, there is no shortage of consideration or analysis of justice reinvestment as an option for reducing the high rates of incarceration of First Nations people. We do not seek to repeat the many arguments in support of justice reinvestment outlined in these reports. However, we are concerned that the NSW Government has not implemented the recommendations to fund the expansion of justice reinvestment in NSW.

Justice reinvestment is an opportunity to involve First Nations people in the design and implementation of policies to reduce contact with the criminal justice system. The success of the Maranguka Justice Reinvestment project in Bourke demonstrates the potential of justice reinvestment for reducing rates of crime, recidivism and incarceration.

KPMG's Impact Assessment of the Maranguka Justice Reinvestment Project shows the measurable benefits of justice reinvestment. KPMG analysed raw data collected between 2015

and 2017, following the implementation of the justice reinvestment project. The analysis demonstrates significant outcomes including a:[10]

- 23% reduction in police recorded incidence of domestic violence;
- 19% drop in rates domestic violence reoffending reported to police;
- 38% reduction in charges across the top five juvenile offence categories;
- 14% reduction in bail breaches; and
- 42% reduction in days spent in custody.

Importance of data

Access to data is a key challenge to the successful implementation of justice reinvestment. This includes whether the appropriate data for analysis is currently captured, as well as the accessibility of this data. In its submission to the *Pathways to Justice* inquiry, the National Congress of Australia's First Peoples argued that there are "many inadequacies in data collection in the Australian criminal justice system, especially on a national level" and noted that the "collection, availability and sharing of data is essential to the successful implementation of a justice reinvestment approach. The first step of analysis and mapping requires standardised and efficient data collection about offending and offenders".[11]

Through community-led justice reinvestment initiatives, communities can be supported to identify their own data needs. The Maranguka Justice Reinvestment Project team collected and tabled the raw data used in KPMG's analysis with the Bourke Tribal Council, ensuring community oversight of data. Data is crucial to evaluating outcomes and identifying areas for improvement. Justice reinvestment is an iterative process of identifying areas for improvement and testing, trialling and adapting based on evidence. Savings are measured and tracked based on outcomes and those savings are reinvested for further improvements. A key challenge for the Maranguka Justice Reinvestment Project was the collection of community level data from the government to produce the Snapshot for Life for Aboriginal Children & Young People in Bourke. For communities to be able to effectively implement data-informed strategies, access to government data must improve.

Role of First Nations judges and legal practitioners in the justice system

Ngalaya was founded in 1997 by a group of young First Nations lawyers and law students at the University of New South Wales to support First Nations people to join the legal profession and advocate for a more just legal system. In 2018 there were 395 solicitors who identified as Aboriginal and/or Torres Strait Islander in New South Wales, accounting for 1.2% of the

[10] KPMG 2018, *Maranguka Justice Reinvestment Project: Impact Assessment* (27 November) 11; 22.
[11] First Peoples, Submission No 73 to ALRC, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (September 2017) 16.

profession.[12] While this number is continuing to grow significantly due to the continued support of law schools and universities across the state,[13] First Nations people are underrepresented across the legal profession. This is particularly true for the bar and judiciary.

In our experience, First Nations lawyers and law students make an incredible contribution to the community. They serve their clients and families, and contribute to the culture and success of their law schools and workplaces. They are principal solicitors and thought-leaders, leaders of national conversations around law reform and advocacy. First Nations lawyers carry a commitment to justice and equality throughout their careers. This is a commitment and wealth of experience that could be drawn on to positively influence the criminal justice system as a whole.

In 2015, Legal Aid NSW announced a First Nations employment target of 6%, 'well ahead of the public sector target' of 2.6%.[14] Four years later, Legal Aid NSW increased this target to 11%.[15] This demonstrates Legal Aid NSW's commitment to serving its large First Nations client base, and reflecting that client base across the organisation. This commitment should be reflected across the criminal bar and judiciary, with increased support for the development of First Nations criminal law barristers, prosecutors and members of the judiciary.

Pathways to the NSW Bar and judiciary

The NSW Bar Association supports First Nations law students and lawyers through the Indigenous Barristers' Trust - The Mum Shirl Fund with the purpose of increasing the number of First Nations barristers at the NSW Bar.[16] Increased exposure to practice at the bar is essential to encouraging First Nations students and junior practitioners to consider and pursue their own practice as a barrister.

There is currently no coordinated effort to increase the representation of First Nations people in the judiciary. We believe that, like skilled criminal defence lawyers and prosecutors, judicial officers play an integral role in the application and development of criminal law. It is essential that First Nations people are represented in the judiciary. We believe long-term and strategic steps are necessary to support the appointment of First Nations judicial officers. This may include formal or informal targets for First Nations appointments, support for increased partnerships and collaboration between the Governor-in-Council and the Indigenous Barristers'

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[12] Urbis, *2018 National Profile of Solicitors* (Law Society of NSW, July 2019) https://www.lawsociety.com.au/advocacy-and-resources/gender-statistics/profiles-surveys-and-statistics.

[13] See, for e.g., Harry Hobbs and George Williams 2019, 'The Participation of Indigenous Australians in Legal Education, 2001-18' 42(4) *UNSW Law Journal* 1294.

[14] Legal Aid NSW 2015, 'New Aboriginal employment target' (Media release, 2 June 2015) https://www.legalaid.nsw.gov.au/about-us/media-and-newsletters/general-news/2015/media-release-new-aboriginal-employment-target.

[15] Legal Aid NSW 2019, 'Aboriginal Employment and Career Development Strategy launches in NAIDOC Week' (Media release, 10 July 2019) https://www.legalaid.nsw.gov.au/for-lawyers/news/news-for-lawyers/aboriginal-employment-and-career-development-strategy-launches-in-naidoc-week.

[16] New South Wales Bar Association, *Indigenous Lawyers* (web page) https://nswbar.asn.au/becoming-a-barrister/indigenous-lawyers.

Trust, and increased support for the development of First Nations lawyers and barristers in NSW.

Role of First Nations people in criminal justice and sentencing: the Walama Court

In July 2020, dozens of First Nations lawyers came together through Ngalaya to call for the establishment of the Walama Court to address the over-incarceration of First Nations people.[17] The Walama Court is an opportunity for the NSW Government to demonstrate its commitment to the Closing the Gap Justice targets. The over-incarceration of First Nations people in New South Wales requires urgent and decisive action. We strongly recommend the Walama Court as a keystone policy for reducing the over-incarnation of First Nations people.

The Walama Court model

The Walama Court is an Indigenous-specific court to deal with the sentencing of First Nations people in NSW. The Walama Court proposal involves a hybrid model incorporating aspects of the Victorian Koori Court and the NSW Drug Court. The proposal is that the Walama Court be established by legislative instrument as part of the District Court exercising its criminal jurisdiction. Using the existing District Court framework, jurisdiction would be conferred on the Walama Court to deal with sentencing of First Nations people and allow a trial judge to refer a person to the Walama Court.

The Walama Court model seeks to address the cause of First Nations people entering the criminal justice system. The Walama Court proposal involves Indigenous communities and the legal profession in a conversation at the point of sentence and, specifically, it allows the community to have input into sentencing. This dialogue enables an examination of the causes of offending and recidivism including, for example, disconnection with community, trauma and intergenerational trauma.

The Walama Court emphasises accountability of the offender during sentencing and post-sentencing. The proposed model includes wraparound services, post-sentence supervision and a more intensive monitoring role during both the sentence proceedings and post-sentence. Elders, as the cultural authority within Indigenous communities, are involved in the process to incorporate culturally appropriate narratives and solutions. This holistic approach is critical for the effective delivery of services, which leads to better outcomes for offenders and reduced recidivism.

[17] Michaela Whitbournm ‘First Nations lawyers call for urgent action on Walama Court’ *The Sydney Morning Herald* (online, 7 August 2020) https://www.smh.com.au/national/first-nations-lawyers-call-for-urgent-action-on-walama-court-20200804-p55igq.html.

Benefits of the Walama Court

The establishment of the Walama Court is supported by evidence of the success of the Victorian Koori Court, the NSW Drug Court, and Circle Sentencing. A 2020 study from BOCSAR found that Aboriginal people who participate in Circle Sentencing are 9.3% less likely to receive a prison sentence and 3.9% less likely to reoffend within 12 months, compared to similar Aboriginal people sentenced in the conventional way.[18]

The Victorian Koori Court allows for Elders, Indigenous family members, and a 'Koori Court Officer' to engage and influence court processes during a hearing. The County Koori Court and the Victorian Department of Justice's 2011 evaluation of the Victorian Koori Court model showed that culturally relevant and appropriate justice leads to improved experiences within the justice system.[19] Of the 15 Accused interviewed in preparation of this evaluation, 14 agreed that the Koori Court process was 'more engaging, inclusive and less intimidating than the mainstream court'.[20]

The Drug Court of NSW is a specialist court that takes referrals from the NSW Local Court or the District Court of NSW. It was implemented to address drug dependencies related to criminal offending. In 2008, the BOCSAR evaluation showed the Drug Court to be more cost effective than prison, which included a 38% decrease in recidivism for a drug offence and a 30% decrease for a violent offence.[21]

In 2017, the ALRC supported the establishment of the Walama Court in NSW.[22] The ALRC's support was based on its research of the elements of successful specialist sentencing courts,[23] and submissions received by stakeholders in the justice system, including Just Reinvest NSW, Legal Aid NSW, Aboriginal Legal Service (NSW/ACT), the NSW Bar Association and other NSW organisations.[24] The ALRC's proposal has presented the NSW Government with an opportunity

[18] Steve Young and Elizabeth Moore, Circle Sentencing, incarceration and recidivism (Crime and Justice Bulletin No 226, NSW Bureau of Crime Statistics and Research, April 2020).
[19] Zoë Dawkins, Martyn Brookes, Katrina Middlin and Paul Crossley (2011) *County Koori Court: Final Evaluation Report* (County Court of Victoria and the Victorian Department of Justice 3.
[20] Ibid.
[21] Don Weatherburn et al, *The NSW Drug Court: A Re-Evaluation of Its Effectiveness* (Contemporary Issues in Crime and Justice No 121, NSW Bureau of Crime Statistics and Research, September 2008) 9.
[22] ALRC, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, December 2017) [10.47]–[10.48].
[23] ALRC, Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (Discussion Paper 84, July 2017) [11.42]–[11.50].
[24] See, for example, Just Reinvest NSW, Submission No 82 to ALRC, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (12 September 2017) 10–11; Women's Legal Service NSW, Submission No 83 to ALRC, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (14 September 2017) [101]–[102]; Community Legal Centres NSW, Submission No 85 to ALRC, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (14 September 2017) 13; NSW Bar Association, Submission No 88 to ALRC, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (15 September 2017) [147]–[149]; Legal Aid NSW, Submission No 101 to ALRC, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (September 2017) 54–55; Aboriginal Legal Service (NSW/ACT), Submission No 112 to ALRC, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (10 October 2017) 3.

for an effective, evidence-based policy reform that has the support of the people and organisations who are most familiar with the issues it will address.

In January 2020, the Special Commission of Inquiry into the Drug 'Ice' recommended that 'the NSW Government implement the Walama Court proposal, including through adequate funding and resourcing, to improve access to culturally appropriate diversion programs for Aboriginal people.'[25] The Inquiry recognised that the proposed Walama Court model addresses the underlying factors that contribute to a person's offending.[26]

Economically, the Walama Court is good policy. The publicly reported costing from the NSW Department of Justice (Dec 2018) estimated a cost of $19.3 million for a five-year pilot, with potential savings of $21.8 million over six to eight years, plus potential productivity gains.[27]

The urgent need for a Walama Court

In light of the significant evidence in support of the Walama Court, Ngalaya demands urgent action to address the over-incarceration of First Nations people in NSW by way of an Indigenous-specific sentencing court. We stand with the chorus of voices calling for the establishment of the Walama Court, including the ALRC, the NSW Bar Association and NSW Law Society.

It is imperative that the NSW Government address systemic racism within the justice system. By establishing the Walama Court, the NSW Government would be creating a more culturally appropriate response to criminal justice. In funding a five year pilot of the Walama Court, the NSW Government would be enacting practical and meaningful reform to meet the nation's proposed Closing the Gap refresh target to reduce the rate of incarceration of First Nations adults by at least 5 per cent by 2028.

Evidence demonstrates that the Walama Court will produce economic savings for the NSW Government, and reduce the incarceration and recidivism rates for First Nations people. It is a sensible, systemic and culturally appropriate reform. It recognises the role and importance of First Nations Elders, and community support networks. It is a proposal with the support of First Nations people, the legal profession, the District Court, and the Police Association of NSW.

There is demonstrable good will in the NSW community towards addressing the criminalisation and over-incarceration of First Nations people. The Walama Court is an opportunity for NSW to take a step in the right direction while delivering a net economic benefit to the state in the long term.

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[25] Dan Howard SC, *Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants* (Report, 28 January 2020) xlii.
[26] Ibid xliii; 713-5.
[27] Michaela Whitbourn, 'Indigenous Walama Court would deliver millions in savings, costings show' *The Sydney Morning Herald* (online, 24 June 2020) https://www.smh.com.au/national/indigenous-walama-court-would-deliver-millions-in-savings-costings-show-20200622-p554yy.html.

Role of First Nations people in accountability for the criminal justice system

The continued over-incarceration of First Nations people in NSW and regular deaths in custody preceding significant commissions and inquiries such as the RCIADIC and Pathways to Justice report demonstrate that the criminal justice system continually fails to self-correct. Increasing First Nations' involvement and oversight of police and correctional services would have a significant impact on the transparency and accountability of both agencies for their policies and organisational culture.

There is capacity within NSW amongst First Nations legal practitioners, academics, medical practitioners, psychologists and police and correctional officers to support and develop a First Nations-led, statutory body responsible for independent oversight of NSW Police and Correctional Services. Such a body could oversee transparent data collection around police action, and support the independent investigation of police powers and deaths in custody. It could also be given the power to refer individuals for prosecution under criminal and civil law mechanisms where appropriate. Such an approach would not give First Nations people a privileged status or race-based rights within the criminal justice system, rather it would empower First Nations people to ensure that their communities are policed with respect, accountability and in accordance with the law.

Accountability for discriminatory policing practices

A key contributor to the over-incarceration of First Nations people is the over-policing of First Nations communities, leading to increased interactions with police, and incarceration for minor offenses. Increased transparency of police action is necessary to make individual officers and Local Area Commands accountable for their practices. Increased transparency and accountability will encourage a culture of community-centred policing. We argue that this can be achieved through more thorough and publicly available data, and a stronger, independent, police complaints body.

Gaps in data collection

High quality and publicly accessible data is necessary to accurately assess, track and evaluate First Nations people's interactions with the justice system. Anecdotes of perceived racial profiling of First Nations people are abundant, and cannot not be adequately addressed without robust data. In its submission to the Pathways to Justice inquiry, Redfern Legal Centre remarked on the pattern of discriminatory policing practices against its First Nations clients.[28] Many of Redfern Legal Centre's First Nations clients have experienced a pattern of routine stop and search by police without a lawful basis, causing them to believe they are being racially profiled or otherwise targeted by police. There is a substantial body of international research that identifies racial profiling to be indicated in the absence of a lawful grounds for suspicion.

[28] Redfern Legal Centre, Submission No 79 to ALRC, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (12 September 2017) [5.2].

There are many stages and touch-points in the criminal justice system that impact First Nations people and result in disproportionate incarceration rates. Data collected at each of these stages is necessary to effectively improve and reform the criminal justice system. A 2017 report of academic experts (the Police Stop Data Working Group) sets out detailed recommendations for how Victoria Police can monitor and prevent racial profiling by collecting and making publicly available demographic and ethnicity data on the use of police powers. These include benchmarking data against 'available populations' and identifying disproportionality in stop and search rates against resident populations, and an analysis of the outcomes or 'hit rate' of stops and searches in conjunction with an analysis of the presence of 'reasonable grounds' before a person is stopped and/or searched. The Police Stop Data Working Group argue that "a robust racial profiling monitoring scheme must be capable of capturing information relevant to demographics, outcomes and reasons for police intervention in all police-initiated street and vehicle interactions."[29] Such a scheme would require effective regulation.[30]

It is essential that data collected through the criminal justice system is made public. Public access to data on policies and strategies that impact First Nations people and communities is an issue of sovereignty and accountability. The concept of Indigenous data sovereignty recognises the rights of First Nations peoples to the collection, ownership and application of data about them and their communities. Public access to data is also about accountability, allowing First Nations to monitor community interactions with police and the effectiveness of strategies to reduce over-incarceration.

The police complaints process

New South Wales lacks an effective, independent system to investigate police complaints. In NSW, the relevant Local Area Command internally investigates 'minor' police complaints. Such investigations lack independent oversight and transparency. For someone to access information about their complaint, they need to make an application under the *Government Information (Public Access) Act 2009* (NSW). The process is time consuming and difficult to navigate without legal support. It is also predicated on an assumption of trust in the system. For individuals seeking accountability of the police force by way of making a complaint, it is easy to understand why that person may feel discouraged from jumping through further administrative hoops to access information, even though that information is directly about them.

The Law Enforcement and Conduct Commission (**LECC**) is the independent investigatory body responsible for investigating complaints that are categorised as 'serious misconduct' or 'serious maladministration'. The LECC is prevented from investigating a criminal offence that is not a "serious indictable offence" or "unlawful conduct that is not an offence or corrupt conduct". However, the LECC's purview is limited when investigating complaints of 'critical incidents', which includes any police contact deaths. The LECC is required to refer the complaint back to

[29] Police Stop Data Working Group, 'Monitoring Racial Profiling Introducing a scheme to prevent unlawful stops and searches by Victoria Police' (Flemington and Kensington Community Legal Centre, August 2017) 6.
[30] Ibid 7.

police investigators where there are allegations of police misconduct or excessive force that have led to serious injury or death. Further, the LECC's capacity to effectively oversee such investigations is restricted as it is only permitted to observe interviews with the consent of the interviewee and the critical incident investigator.

As it stands, the complaints system is ineffective at holding police accountable and preventing future misconduct. Former Commissioner for Oversight, Patrick Saidi (removed January 2020) has publicly stated that officers subject to legal complaints were "given no feedback as to the illegality of any action on their part" and that unit commanders were often not informed about findings made against police.[31] This demonstrates the absence of personal accountability in the process. Victims of illegal conduct complain to the LECC not only in response to their personal experience, but also to prevent the same wrong from occurring to others. Saidi also argued that the practice of police providing the LECC with misinformation was "so pervasive that one truly questions how one could expect any voluntary cooperation from the NSWPF in the future, or otherwise can accept information provided by the NSWPF in the future as being accurate".[32] It is clear that the LECC has insufficient power and influence to hold individual officers accountable for wrongdoing, or to create systemic change in the police force. We cannot rely on the current police complaints process to protect First Nations peoples from police misconduct.

Accountability for deaths in custody

First Nations families have publicly expressed their disappointment with the coronial inquest process in NSW, and perceived lack of accountability for individuals involved in deaths in custody. Increased personal accountability at all levels, from the Minister and Police Commissioner down to individual officers working for NSW Police and Correctional Services is necessary to combat deaths in custody. Where death is a result of negligence, there must be personal accountability for that negligence and systemic change to ensure it cannot be repeated.

In its submission to the Pathways to Justice inquiry, the Human Rights Law Centre noted that there is no system for completely independent investigations of deaths in police custody. They argued for the establishment of bodies "hierarchically, institutionally and practically independent of the police" with the ability to conduct investigations that "are comprehensive, prompt, subject to public scrutiny and...involve the family of the deceased."[33]

The LECC, as it stands, is ill-equipped to conduct thorough independent investigations and hold police accountable. The coronial inquest process similarly sets a high bar for the referral of officers involved in a death in custody for potential prosecution and/or further investigation. There is significant room for improvement in NSW. At the minimum, First Nations lawyers and

[31] Office of the Inspector of the Law Enforcement Conduct Commission, 'A report dealing with a complaint by the Commissioner for Oversight of the Law Enforcement Conduct Commission against the Chief Commissioner' (NSW Government, Special Report 20/01 – 3 December 2019) 117.
[32] Ibid 119.
[33] Human Rights Law Centre, Submission No 68 to ALRC, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (6 September 2017) [113]; [115].

experts should be included and involved as independent advocates and/or investigators to increase accountability and transparency around deaths in custody.

Conclusion

The Honourable Tom Bathurst, Chief Justice of the Supreme Court of New South Wales, reflected that, 250 years after James Cook's arrival in Australia, "the Black Lives Matter movement has exposed that our criminal justice system remains a tool of injustice for Indigenous Australians, who are one of the most incarcerated people in the world."[34] His Honour also argued that "[o]ur profession is only so strong as it is diverse."[35] This is the sentiment and principle underpinning Ngalaya's advocacy for greater representation of First Nations people at every level of the legal profession and across the criminal justice system.

At the heart of self-determination is the understanding that First Nations people have the knowledge and skills to address First Nations issues. There is significant room to involve First Nations in reducing over-incarceration. This can be achieved by shifting the culture of the criminal justice system and developing evidence-based and community-specific solutions to community problems.

Improved data collection at all stages of the criminal justice process is required to ensure accountable policing and effective service delivery. Data is a crucial element of any policy or strategy, including in evaluating outcomes and identifying areas for improvement. The current gaps in data on policing (particularly in relation to racial profiling) prevent systemic evidence-based reform.

First Nations involvement at all stages of the criminal justice system, coupled with public access to improved data, will provide the transparency and accountability necessary in the criminal justice system to effectively reduce First Nations over-incarceration and deaths in custody.

[34] Chief Justice Tom Bathurst 2020, *Admission of Lawyers* (Supreme Court of New South Wales, August 2020) [21].
[35] Ibid [14].