Submission No 86

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

Organisation: Australian Lawyers Alliance

Date Received: 24 August 2020

Inquiry into First Nations people in custody in New South Wales

Submission to NSW Legislative Council Select Committee on First Nations People in Custody in New South Wales

24 August 2020

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | **ABN** 96 086 880 499
T +61 2 (02) 9258 7700 | **F** +61 2 9258 7777 | **E** enquiries@lawyersalliance.com.au | **W** www.lawyersalliance.com.au
Protecting and promoting justice, freedom and the rights of the individual.

Contents

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the inquiry being conducted by the Select Committee on First Nations People in Custody in New South Wales ('the Committee').

2. This submission will first consider the over-representation of Aboriginal and Torres Strait Islander people in custody NSW and the over-representation of Aboriginal and Torres Strait Islander young people in custody in NSW. The submission will also consider Aboriginal and Torres Strait Islander deaths in custody in NSW. The submission will then canvass proposals for reducing the over-representation of Aboriginal and Torres Strait Islander people and young people in custody, including:

    - The development of culturally appropriate justice reinvestment programs across NSW;
    - Addressing inappropriate policing practices in relation to the exercise of police discretion, policing of bail conditions and charging practices; and
    - Raising the age of criminal responsibility in NSW from 10 to 14.

The high numbers of First Nations people in custody in NSW

3. In NSW the number of people in custody as at 31 March 2020 was 13,991. Of these, 3,683 were Aboriginal or Torres Strait Islander people. Aboriginal or Torres Strait Islander people made up 26.3% of the total people in custody or prison in NSW, despite only being 3.4% of the NSW population.[2]

4. The total number of Aboriginal or Torres Strait Islander people in custody or prison in NSW was 28.5% of the total number of Aboriginal or Torres Strait Islander people in custody or prison nationwide.[3]

5. In 2018–2019 the average daily number of young people in custody in NSW was 265. Of these, the average daily number of Aboriginal and Torres Strait Islander young people in

[2] Australian Bureau of Statistics (ABS) 2020, *4512.0 Corrective Services Australia*, March quarter 2020.

[3] Ibid.

custody was 127 (48%).[4] In NSW the rate of imprisonment for Aboriginal and Torres Strait Islander young people is approximately 12 times the rate for non-Aboriginal and Torres Strait Islander young people.[5]

6. The ALA considers that the over-representation of people of Aboriginal and Torres Strait Islander descent in custody or prison and youth detention is unacceptable. The ALA submits that the NSW Government must set ambitious targets to reduce the level of incarceration of Aboriginal and Torres Strait Islander people in NSW.

Deaths of First Nations people in custody in NSW

7. Of the 164 nationwide Aboriginal or Torres Strait Islander deaths in custody from 2008–2020, 21 were in NSW (12.8%). In 11 of these cases, the Aboriginal or Torres Strait Islander person suffered from some form of mental or cognitive impairment.[6]

8. In 11 of these cases, the death followed the provision of inadequate care or assistance.[7]

9. The 21 deaths in custody included the following:

> On 29 Dec 2015 David Dungay Jr, a 26-year-old Dungatti man, died in Sydney's Long Bay Prison Hospital. In an attempted cell transfer, David had refused to stop eating a packet of biscuits. As a result, six guards held him down in a prone position, administering a sedative while nursing staff and four other guards looked on. He called out twelve times that he couldn't breathe before losing consciousness. By the time the guards realised the seriousness of the situation, several minutes had gone past before basic life-saving

[4] Australian Institute of Health and Welfare (AIHW) (2020), *Youth detention population in Australia 2019*, Bulletin 148, February 2020.

[5] AIHW, Youth Justice in Australia as quoted in *The Guardian*, 16 July 2020, 'Indigenous children 17 times more likely to go to jail than non-Indigenous youth.'

[6] 'Deaths inside – Indigenous Australian deaths in custody 2020', *The Guardian*, 5 June 2020, available online at <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>.

[7] Ibid.

support was attempted. Only two compressions were undertaken. David had gone into irreversible cardiac arrest.

In November 2019 the NSW deputy coroner found 'it was neither necessary nor appropriate for David to be moved and that he did not pose a security risk', and 'From a medical point of view there was no evidence of any acute condition which would have warranted a cell transfer.'

On 4 July 2017 Eric Whitakker, a Gamilaraay man, died in hospital after suffering a brain haemorrhage in prison. He had been shackled to a bed in the last days of his life despite being unconscious and unresponsive. The NSW coroner found that prison officers had failed to recognise signs of emergency and failed to provide adequate care to the 35-year-old, who called for help more than 20 times in the hours before he was transported, unconscious, to hospital.

On 1 Sept 2018, Nathan Reynolds, a 36-year-old Aboriginal man from Rooty Hill, western Sydney, died in custody in the Outer Metropolitan Multi-Purpose Correctional Centre in South Windsor. Inmates at the centre say that Nathan died following a severe asthma attack. They claim Nathan himself, and then fellow inmates, desperately called for help on the prison intercom system during his asthma attack, but it took 20–40 minutes for prison guards to respond. By the time an ambulance arrived, he was dead.

10. The ALA submits that all Aboriginal and Torres Strait Islander deaths in custody in NSW since 2008 should be reviewed to consider whether it is appropriate to implement systemic changes to ensure these tragedies are not constantly repeated. In particular, the ALA strongly urges a review of the death of David Dungay Jr to consider whether criminal charges should be brought against the prison guards involved in restraining him.

Reducing over-representation – justice reinvestment

11. The ALA submits that adopting a commitment to implementing a justice reinvestment strategy will be instrumental in reducing the rate of incarceration for Aboriginal and Torres Strait Islander people.

12. A justice reinvestment approach to criminal justice reform involves a redirection of money from prisons to fund and rebuild human resources and physical infrastructure

in areas most affected by high levels of incarceration.[8] It has been estimated that incarceration of Aboriginal and Torres Strait Islander people is costing $7.9 billion per year and rising.[9]

13. The principle underlying justice reinvestment is that prisons represent a poor investment of public resources, as they cause significant harm to communities and to the individuals incarcerated, who are often not rehabilitated by their imprisonment, and whose mental health and substance abuse are often exacerbated by the experience of imprisonment. According to the principles of justice reinvestment, public money is better spent by reinvesting in place-based, community-led initiatives that address the causes of offending, particularly in places with a high concentration of offenders.

14. According to the Australian law Reform Commission (ALRC), justice reinvestment holds particular promise in addressing Aboriginal and Torres Strait Islander incarceration as it involves a commitment to invest in 'front-end' strategies to prevent criminalisation. Justice reinvestment emphasises working in partnership with communities to develop and implement reforms, and this is consistent with evidence that effective policy change to address Aboriginal and Torres Strait Islander disadvantage requires partnership with Aboriginal and Torres Strait Islander people.[10]

15. The Maranguka Justice Reinvestment Project in Bourke is a successful example of a place-based justice reinvestment project. In 2015 Bourke had the highest rate of juvenile conviction in NSW. The town also scored high on indicators of disadvantage, including long-term unemployment, low levels of education and high rates of non-violent crime. In 2016, the project commenced under local Aboriginal leadership.

16. According to a 2018 KPMG Impact Assessment, the Maranguka Justice Reinvestment Project:

> '… delivered a number of various interlinked activities designed to create an impact at different levels of community and the justice system. This included Aboriginal leadership driving a grassroots movement for change among local community members, facilitating collaboration and alignment across the service system, delivering new community-based

[8] Australian Law Reform Commission (ALRC) (2017), *Pathways to Justice – Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, December 2017, paragraph 4.7.

[9] Ibid, paragraph 4.10.

[10] Ibid, paragraph 4.7.

programs and service hubs, and working with justice agencies to evolve their procedures and behaviours towards a proactive and reinvestment model of justice.'[11]

17. The Impact Assessment found a 23% reduction in police recorded incidence of domestic violence and comparable reduction in rates of re-offending. In addition, it found a 31% increase in year 12 student retention rates and a 38% reduction in charges across the top five juvenile offence categories. There was also a 14% reduction in bail breaches and a 42% reduction in days spent in custody.

18. KPMG reported that the project had an estimated economic benefit of $3.1 million to the region in 2017, with an estimated additional benefit of $7 million for 2018 if the project continued to achieve even 50% of the results it had achieved in 2017.

19. The ALA strongly encourages the NSW Government to consider adopting the model that has been successfully implemented in Bourke with the Maranguka Justice Reinvestment Project in other locations in NSW, with appropriate adaptions for local nuances, and ensuring local Aboriginal leadership drives the projects in each location.

Reducing over-representation – approach to policing

20. The ALA agrees with the ALRC that poor policing practices with respect to First Nations people has negatively impacted relations between police and Aboriginal and Torres Strait Islander people. This often results in disproportionate arrests, detention in police custody and higher incarceration rates among Aboriginal and Torres Strait Islander people. The ALA submits that police practices and procedures, particularly the exercise of police discretion, and the mechanisms for handling police complaints should be reviewed to ensure that discriminatory practices are removed from policing practices in NSW.[12]

21. In its inquiry *Pathways to Justice – Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* the ALRC received reports of inappropriate policing practices in relation to the exercise of police discretion, policing of bail conditions and charging practices. In relation to police discretion, the ALRC received reports that police were less likely to issue cautions

[11] KPMG (2018), Maranguka Justice Reinvestment Project Impact Assessment, 27 November 2018, available online at <http://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>.

[12] See ALRC, above note 8, paragraphs 14.3, 14.5.

against Aboriginal and Torres Strait Islander young people, and more likely to arrest them, than in relation to non-Aboriginal and Torres Strait Islander young people.[13] Case study examples from NSW reported to the ALRC included the following:

> Melissa had been celebrating a friend's birthday with a group of teenagers outside a McDonald's restaurant. Several of the young people were intoxicated. Melissa's friend was arrested for swearing at police. After Melissa tried to assist her friend by wrapping her arms around her, Melissa was arrested and charged with resisting and hindering police. The Constable who arrested Melissa tackled her to the ground, put her in a headlock and dragged her towards the back of a paddywagon, dropping her on the ground where Melissa hit her head and became unconscious. The Magistrate who dismissed the charges against Melissa found that police used 'an inordinate amount of force'.[14]
>
> Legal Aid NSW received an enquiry from a worker at a support service whose client, Donna, was an Aboriginal woman whose bail conditions required her to live at a particular address. Donna was experiencing domestic violence at this address and spoke to police about her intention to live elsewhere. The police officer she spoke to said she would be arrested if she breached her residence condition.[15]

22. In relation to policing of bail conditions the ALRC received reports of Aboriginal and Torres Strait Islander people being subjected to more proactive policing of technical breaches of bail conditions compared to non-Aboriginal and Torres Strait Islander people. Examples of technical breaches included being five minutes late for curfew or being with a different family member other than the person specified in the bail conditions. The ALA submits that such proactive policing is not commensurate with the severity of the offence, given that there has been no harm suffered by the defendant or the community. Moreover, such proactive policing of bail conditions gives rise to a significant risk of revocation of bail and an increase in the rate of Aboriginal and Torres Strait Islander people being detained on remand.[16]

---

[13] Ibid, paragraph 14.24.

[14] Case study from Redfern Legal Centre, ALRC, above note 8, paragraph 14.26.

[15] Case study from Legal Aid NSW, ALRC, above note 8, paragraph 14.27.

[16] ALRC, above note 8, paragraphs 14.34–14.36.

23. In relation to police charging practices the ALA is concerned about the practice of over-charging and the effect of this on an Aboriginal and Torres Strait Islander accused. The practice of over-charging involves a person being charged with multiple offences in relation to one incident or being charged too high for an offence, or both. As the charges are prepared for trial, prosecution and defence may undertake negotiations that result in charges being withdrawn or downgraded. A defendant may also seek to 'charge bargain' – to have charges withdrawn in exchange for a guilty plea to a lesser charge.

24. The practice of over-charging can be disadvantageous for an Aboriginal and Torres Strait Islander accused, as it may result in an inappropriate guilty plea, bail refusal, and ultimately the accused receiving a term of imprisonment. [17]

25. The ALA submits that police practices in relation to charging should be reviewed to ensure that charging decisions accurately reflect the evidence against the accused and the likelihood of obtaining a conviction for said charges.

26. In relation to the handling of complaints against police, the ALA agrees with the ALRC that NSW's mechanisms for handling police complaints should be reviewed, with a particular focus on how to improve the perception held by Aboriginal and Torres Strait Islander people regarding police accountability for misconduct. The review should address concerns that when Aboriginal and Torres Strait Islander people complain about police conduct those complaints are not properly addressed and investigated. The outcome of the review should be to develop a mechanism of handling complaints against police that provides Aboriginal and Torres Strait Islander people and communities with greater confidence in the integrity of police complaints handling processes.[18]

[17] Ibid, paragraphs 14.39, 14.42 and 14.46.

[18] Ibid, paragraphs 14.50.

Reducing over-representation – housing

27. The ALA submits that adopting a commitment to improving social housing conditions reduces risk of criminal behaviour. Research indicates that poor housing conditions increase risk of crime.[19]

28. In NSW, 96,907 Aboriginal and Torres Strait Islander households are in a social housing program.[20] These programs are state funded, meaning that NSW has the responsibility of ensuring these households are of a liveable standard.

29. Currently, First Nations people are five times more likely to live in overcrowded homes than non-Aboriginal and Torres Strait Islander Australians.[21] Research indicates that overcrowding increases risk of criminal behaviour.[22]

30. A principle of crime prevention through environmental design (CPTED) is territorial reinforcement. Theoretically, this principle attempts to create a sense of community ownership, increasing social cohesion and inviting residents to feel responsibility for the space.[23] Additionally, another principle of CPTED is space management. This theory outlines that neglecting community areas and housing invites crime.[24]

31. The ALA submits that the NSW Government should implement these theories in Aboriginal and Torres Strait Islander households to reduce crime. The following recommendations should be considered in state-owned Aboriginal and Torres Strait Islander households:

---

[19] Alison Vivian and Eloise Schnierer, *Factors affecting crime rates in Indigenous communities in NSW: A pilot study in Bourke and Lightning Ridge* (Community report, November 2010) <https://www.uts.edu.au/sites/default/files/FinalCommunityReportBLNov10.pdf>.

[20] 'Aboriginal and Torres Strait Islander people: A focus report on housing and homelessness' (Cat. no. HOU 301, Australian Institute of Health and Welfare, 2019) 37, <https://www.aihw.gov.au/getmedia/bd1def8e-90ee-44a0-9dd4-5615f1c48fd2/17596.pdf.aspx?inline=true>.

[21] 'Overcoming Indigenous Disadvantage Key Indicators' (Productivity Commission for the Steering Committee for the Review of Government Service Provision, 2016) 2529, <https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-overcoming-indigenous-disadvantage-key-indicators-2016-report.pdf>.

[22] Vivian and Schnierer, above note 19.

[23] Timothy D Crowe and Lawrence J Fennelly, 'CPTED Concepts and Strategies' in Lawrence K Fennelly (ed), *Handbook of Loss Prevention and Crime Prevention* (Elsevier, 2012).

[24] Ibid.

a. Reduce overcrowding in Aboriginal and Torres Strait Islander households to reflect international standards and implement principles of territorial reinforcement and space management. A reduction in over-crowding is proven to increase community ownership and social cohesion.[25] Additionally, it suggests that the Government is maintaining community areas, reducing neglect and crime rates.

b. Using principles of space management and second generation CPTED,[26] community areas need to be maintained to accommodate for cultural ceremonies and traditions, while observing spiritual connection to the land. The root of crime is complex but has been linked to the loss of culture that arose from Australian invasion.[27] The Government should form partnerships with Aboriginal and Torres Strait Islander elders to develop strategies to manage housing spaces that accommodate for Aboriginal and Torres Strait Islander traditions. This will enhance social cohesion while repairing the ramifications of colonisation. Subsequently, Aboriginal and Torres Strait Islander people will have greater ties to their communities, reducing crime.

32. The ALA submits that the NSW Government should review the current housing arrangement and how it effects First Nations people and adopt CPTED principles to reduce risk of crime.

Reducing over-representation – the age of criminal responsibility

33. The ALA considers that raising the age of criminal responsibility is a key measure in reducing the rate of incarceration of young people, particularly Aboriginal and Torres Strait Islander young people. Young people should be detained only as a last resort. Currently, the age of criminal responsibility, 10 years, is the same for all Australian states and territories.

34. The low age across all of Australia's states and territories is in breach of human rights standards and puts Australia out of step with much of the rest of the world; the worldwide median age of criminal responsibility is 14 years. The ALA submits that the age of criminal responsibility should be raised to 14 years of age, in accordance with the recommendations of the United Nations Committee on the Rights of the Child. This would also significantly

[25] Vivian and Schnierer, above note 19.

[26] G Saville and G Cleveland, 'Second-generation CPTED- Rise and Fall of opportunity Theory' in Randall Atlas (ed), *21st Century Security and CPTED* (CRC Press, 2013).

[27] Vivian and Schnierer, above note 19.

reduce the rate and the cost of detaining young Aboriginal and Torres Strait Islander people in NSW.

35. According to the Australian Institute of Health and Welfare (AIHW), in 2017–2018 on any given day, 7% of the total number of young people under youth justice supervision were aged between 10 and 13. This equates to approximately 385 children. Of these, the overwhelming majority (approximately 75%) were Aboriginal and Torres Strait Islander children.[28]

36. According to a recently released Productivity Commission report on Government Services, on average there were 4,790 young people under youth justice supervision in 2018. The average daily detention rate for Aboriginal and Torres Strait Islander children between the ages of 10 and 17 was more than 30 per 10,000, compared to 1.4 per 10,000 for non-Indigenous youths. This means that Aboriginal and Torres Strait Islander youth are being detained at a rate of 23 times that of non-Indigenous young people.[29] As noted above, in NSW the rate of imprisonment for Aboriginal and Torres Strait Islander young people is approximately 12 times the rate for non-Aboriginal and Torres Strait Islander young people.

37. According to the AIHW, it is often the most vulnerable and disadvantaged children who come to the attention of the justice system at a young age.[30] The ALA submits that it is not appropriate for children aged between 10 and 14 to be under the supervision of the youth criminal justice system.

The capacity of children to comprehend the nature of their conduct

38. The ALA notes that a significant quantity of contemporary research indicates that many children aged between 10 and 14 are not at a cognitive stage of development where they can appropriately appreciate the nature and significance of criminal conduct and the lifelong consequences of undertaking such conduct. This creates significant doubt on the capacity for

[28] AIHW, *Youth Justice in Australia 2017–18,* May 2019, 8–9.

[29] Australian Government Productivity Commission, Report on Government Services 2020, Youth Justice Services, 23 January 2020, available online at <https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/youth-justice>.

[30] AIHW, *Youth Justice Supervision in Australia 2015–16,* Bulletin 138, supplementary data table S78b, March 2017.

children of this age to appropriately reflect before embarking on a course of action involving criminal behaviour.[31]

39. According to the UN Committee on the Rights of the Child:

> '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.'[32]

40. The ALA is also concerned that by criminalising the behaviour of children who may not be aware of the consequences and nature of their conduct, a dangerous cycle of disadvantage is initiated, causing children to become entrenched in the criminal justice system. Several studies confirm that when children are drawn into the criminal justice system at a young age, there is a significantly higher likelihood of subsequent reoffending, and a lower likelihood of that child completing her/his education or securing employment.[33]

41. The ALA also notes that in December 2019 the Australian Medical Association stated that raising the age of criminal responsibility was an important measure to prevent the unnecessary criminalisation of vulnerable children.[34]

The case of a 'severe crime'

42. The main deterrence to raising the age is the public and media attention that severe crimes have received. Recently, a five-year-old boy was gang raped on a remote Australian beach by

---

[31] Kelly Richards, 'What makes juvenile offenders different from adult offenders?', *Trends & Issues in crime and criminal justice*, No. 409, February 2011, 4; Laurence Steinberg, 'Risk taking in adolescence: new perspectives from brain and behavioural science' (2007) 16 *Current Directions in Psychological Science* 55, 56.

[32] UN Committee on the Rights of the Child, *General comment No. 24: Children's rights in the child justice system*, CRC/C/GC/24, 18 September 2019, paragraph 22.

[33] AIHW, *Young people returning to sentenced youth justice supervision,* 2014–15, Juvenile justice series no. 20, June 2017; AIHW Welfare, *Young People Aged 10–14 in the Youth Justice System, 2011–2012*, July 2013.

[34] Paul Karp, 'Peak legal and medical groups push to limit minimum age of criminal responsibility to 14', *The Guardian*, 17 December 2019.

children all under 13.[35] A common policy question is how would the criminal law deal with children under 14 who have committed crimes of high severity.

43. The High Court dealt with the issue of legal personhood in cases of rape in 2016.[36] RP was aged 11½ years old and had raped his younger brother while his father was at work.[37] During these occasions, his brother made it clear that he did not consent.[38] The High Court took the approach of attempting to determine whether or not the accused was aware that his actions were morally wrong or just 'naughty'.[39] This distinction determines whether or not the child will be criminally liable. The judgement refers to current policy, where the closer defendants are to the age of 14, the more likely it is that they were aware their actions were morally wrong.[40] Thus, less evidence is required to rebut *doli incapax*.[41] The court inferred difficulty in condoning this policy as 'it suggests that children mature at a uniform rate'.[42] The judgement noted that:

> 'It is common enough for children to engage in forms of sexual play and to endeavour to keep it a secret, since very young children may appreciate that it is naughty to engage in such play. The appellant's conduct went well beyond ordinary childish sexual experimentation, but this does not carry with it a conclusion that he understood his conduct was seriously wrong in a moral sense, as distinct from it being rude or naughty.'[43]

44. The judgement further concluded that:

---

[35] Warren Barnsley and Summer Wooley, 'Police respond after boy, 5, "gang-raped" on remote Queensland beach', *7news* (online, 17 July 2020) <https://7news.com.au/news/qld/police-respond-after-boy-5-gang-raped-on-remote-queensland-beach-c-1172444>.

[36] *RP v R* [2016] 259 CLR 642.

[37] Ibid, [13].

[38] Ibid, [28].

[39] Ibid, [9].

[40] Ibid, [12].

[41] Ibid.

[42] Ibid.

[43] Ibid, [33].

'The fact that a child of 11 years and 6 months knew about anal intercourse, and to use a condom when engaging in it, was strongly suggestive of his exposure to inappropriate sexually explicit material or having been himself subject of sexual interference.'[44]

45. The High Court allowed the appeal, noting that it was unlikely that a child aged 11½ would be aware that his conduct was seriously wrong in a moral sense.[45]

46. The above judgement illustrates that even in cases of severe crime it is unlikely that children are morally culpable and thus they should not be held criminally responsible. The arbitrary nature of current policy has led to an assumption that childhood development is uniform and not unique to each child and their differing experiences.

International human rights law and the age of criminal responsibility

47. Under article 40(3) of the UN *Convention on the Rights of the Child* (signed and ratified by Australia in 1990), state parties are required to establish a minimum age of criminal responsibility. However, the article does not specify the age. Over 50 state parties have raised the minimum age following ratification of the Convention and the most common minimum age of criminal responsibility internationally is 14.

48. The UN Committee on the Rights of the Child has consistently said that countries should be working towards a minimum age of 14 years or older.[46]

49. In 2017, both the UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination (CERD) recommended that Australia take active steps to raise the age of criminal responsibility.[47] The CERD specifically expressed concern regarding the over-

[44] Ibid, [34].

[45] Ibid, [36]–[37].

[46] Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44th session, UN Doc CRC/C/ GC/10 (25 April 2007), paragraphs 32–33; see also above note 32, paragraph 22.

[47] Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6, 1 December 2017, para 44; Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, CERD/C/AUS/CO/18-20, 26 December 2017, paragraph 26.

representation of young Aboriginal and Torres Strait Islander children who come into contact with the criminal justice system:

> 'The Committee is deeply concerned about the high proportion of indigenous children in contact with the criminal justice system, some of them at a very young age. It is also concerned about the ill-treatment suffered by juveniles, especially indigenous children, and the conditions in which they are held.'[48]

50. The ALA submits that the NSW Government should increase the age of criminal responsibility to 14, creating fair and consistent laws for all children.

Specialist courts

51. The ALA supports the establishment of specialist courts for Aboriginal and Torres Strait Islander people as a mechanism to reduce recidivism and the over-representation of First Nations people in custody. In this regard the ALA notes the benefits of circle sentencing in NSW as identified by the NSW Bureau of Crime Research and Statistics (BOCSAR), which reported that Aboriginal offenders participating in circle sentencing:

    - Are 9.3% less likely to receive a prison sentence;
    - Are 3.9% less likely to reoffend within 12 months; and
    - Take 55 days longer to reoffend if and when they do. [49]

52. The ALA also notes the success of the NSW Youth Koori Court which has been operating in Parramatta since 2015. As a result of the success of the Youth Koori Court in addressing underlying social factors that contribute to young Aboriginal people entering the criminal

[48] Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, CERD/C/AUS/CO/18-20, 26 December 2017, paragraph 25.

[49] See <https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2020/mr-circle-sentencing-cjb226.aspx>.

justice system such as lack of access to housing, education, substance abuse and unemployment, the program has been further expanded with the opening of a Youth Koori Court in Surry Hills in 2019.

53. The ALA supports the call from Ngalaya Indigenous Corporation for the immediate establishment of the Walama Court, an Indigenous sentencing court within the District Court of NSW. The Walama Court model recognises the cultural authority of First Nations Elders and the importance of community-centred, holistic support for First Nations people. The ALA submits that a Walama Court within the District Court of NSW will assist in reducing the number of Aboriginal and Torres Strait Islander people in the criminal justice system by reducing recidivism and increasing compliance with court orders.

The suitability of oversight bodies

The NSW coroner

54. The ALA submits that currently the NSW coroner has limited power. The main duty of the NSW coroner is to investigate evidence of criminal misconduct, and recommend whether a criminal trial should proceed.[50] Traditionally, 'only illegal acts contributing to a death or negligent failures to do what is required to keep a detainee safe has been investigated'.[51] Since 1989, no sufficient prima facie evidence of criminal negligence has been found.[52] Due to the gravity of the allegations, 'evidence must be solid before a coroner will recommend that criminal charges are laid'.[53] Thus, it is unlikely that evidence can instigate criminal charges if investigations are of poor quality.[54]

55. Although criminal charges may not be laid it may be found that a death in custody was negligent, creating the possibility of a claim for damages. Thus, statutory guidelines should

[50] Australian Human Rights Commission (AHRC), *Indigenous Deaths In Custody 1989-1996,* Part D – Implementing the recommendation, October 1996, <https://humanrights.gov.au/our-work/indigenous-deaths-custody-part-d-implementing-recommendations#f131>.

[51] Ibid.

[52] Ibid.

[53] Ibid.

[54] Ibid.

widen the scope of coroners to investigate not only the cause and circumstances of death but also the quality of care, treatment and supervision of the deceased prior to death.[55]

56. The final report of the Royal Commission into Aboriginal Deaths in Custody recommended that a state coroner should have equal independence and discretion to a District Court judge.[56] The Australian Human Rights Commission notes that these recommendations have never been implemented[57] and since 1996, they still have not. We accept the Australian Human Rights Commission's recommendation that coroners must be tenured to ensure independence and allow them to fearlessly criticise the laws, policies and practices of the government appointing them, if such criticism is warranted.[58]

The NSW Ombudsman

57. The NSW Ombudsman investigates whether recommendations arising from the Royal Commission into Deaths in Custody have been implemented, including the recommendation regarding policing and custodial health and safety procedures.[59] The Ombudsman has the power to investigate a state agency where allocated funds towards a recommendation have been ineffectively employed.[60]

58. Currently, police complaints are confidential and are not accessible by the NSW Ombudsman.[61] This reduces transparency and minimises the ability of the Ombudsman to monitor Royal Commission recommendations. This particularly goes against Recommendation 226 – that the Ombudsman investigate police misconduct.[62] Aboriginal and Torres Strait Islander people feel alienated from complaint mechanisms. Reform is required to ensure this complaint mechanism is independent from the police and highly accessible for

[55] Ibid.

[56] Royal Commission into Aboriginal Deaths in Custody (1991), Volume 1, para 4.5.9, 132.

[57] AHRC, above note 50.

[58] Ibid, recommendation 72.

[59] Ibid.

[60] Ibid.

[61] 'We cannot handle complaints about', *Ombudsman New South Wales* (webpage) <https://www.ombo.nsw.gov.au/complaints/making-a-complaint/what-you-cannot-complain-about-to-us>.

[62] AHRC, above note 50.

Aboriginal and Torres Strait Islander people. The Australian Human Rights Commission pushed for the implementation of this recommendation in 1996 and it is yet to be implemented.[63]

Conclusion

59. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide this submission to the inquiry being conducted by the Select Committee on First Nations People in Custody in New South Wales ('the Committee'). The ALA is willing to further assist the Committee in its deliberation regarding this most important issue.

Joshua Dale

NSW President

Australian Lawyers Alliance

[63] Ibid.