

Submission
No 95

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

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Submission to the Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody

To the Select Committee,

I make this submission as a professional who has some experience in oversight in this space. I am not currently employed in this area. The views expressed in this submission are my own, based on my own observations. Any policies I have attached to this submission are publicly available.

I would first like to pay my respects to Elders past and present and emerging. I would also like to acknowledge the huge burden being shouldered by the families of those who have lost their lives in custody, and the traumatising and endless work that these families have put in to advocating for justice for their loved ones.

I do not purport to have the same understanding of these questions as Aboriginal people and I hope the committee gives far more weight to those voices. I lack the answers regarding the over-representation of Aboriginal people within the criminal justice system, but I will share my thoughts about some of the suggested reforms that have been made by advocacy groups and Aboriginal organisations. I also note that there no Aboriginal voices on this select committee, reflective of the lack of representation in parliament and in politics generally.

Reforms and oversight of the custodial and criminal justice system

The recommendations from the Royal Commission into Aboriginal Deaths in Custody were never fully implemented. There have been reviews, such as one undertaken by Deloitte published in 2018, that looked at the total number of recommendations and what has been implemented. This review found that *“the most action has been taken to respond to recommendations that relate to the justice system, prison safety, and reconciliation, land needs and international obligations. The least action has been taken to respond to recommendations that relate to non-custodial approaches and self-determination.”*¹

In my view, the important work that is left to be done is to increase services in the community outside of the punitive justice framework, and to empower Aboriginal people and organisations to achieve self-determination. Victoria has made progress in this space with the First People’s Assembly and working towards a treaty in that state.

I do not wish to minimise the reforms that have taken place in relation to prison safety, criminal justice reform, land rights. The reform work in this space is significant, but there is a strong argument that reform of the existing criminal justice system and increasing safety in custody should not be the main aim. Given the increasing over-representation, it appears that some of this energy needs to be redirected. There are again calls for major structural changes, particularly with renewed Black Lives Matter movement internationally, to defund the police, putting increased resources into non-punitive/justice approaches and thinking more creatively than we have done in the past. We also put a huge amount of resources into “crime and punishment,” and this remains a major political issue, despite falling crime rates

¹ <https://www.niaa.gov.au/sites/default/files/publications/rciadic-review-report.pdf>

in NSW. Some of this resourcing could be channelled into crime prevention, community, and mental health services, which would help to prevent offending by addressing causation.

Police oversight should be more independent, and some changes have occurred in this area with the introduction of the LECC as an independent body. However, the underfunding of LECC and ICAC² demonstrates that governments are reluctant to properly prioritise and fund independent oversight bodies, affectively handicapping them. This means that the primary work of investigating police complaints remains with NSW police.³ It is impossible for policing culture and systemic racism to be addressed without adequate independent oversight.

Other oversight bodies and stakeholders in the custodial space are the Official Visitors, the Inspector of Custodial Services, NSW Ombudsman, CSNSW and Legal Aid (prisoners legal service). These organisations are impacted by inadequate funding and significant workloads. I would also argue that there should be more designated positions within these organisations, and staff undertaking visits and inspections are often from non-Aboriginal backgrounds.

Further changes may occur in this space with the implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),⁴ however I am unsure of how implementation is progressing, and whether it will involve the establishment of a new independent inspection body in NSW, as some organisations are calling for.

Reforms focused on inmate health

There have been calls for a system where Aboriginal people entering custody receive an urgent medical assessment. In my view this should be a requirement, and the system is not currently set up in a way that would make this possible without significant resourcing and procedural changes.

In NSW, when an adult enters custody on remand there can be significant delay in seeing a doctor for a medical assessment or to receive medication. Often, a person may not be in a mental or physical state to clearly articulate with staff what they need. Usually a newly arrived inmate is seen by a nurse who fills out paperwork regarding any health issues or medication, based on an interview with the inmate.⁵ The inmate will go on a waiting list to see the doctor and this can take several weeks. A fresh custody inmate may be detoxing or experiencing acute psychiatric issues. This is a critical and dangerous time. Inmates struggle to adjust to the reality of custody. The liaison with external medical staff is often delayed, and there are limited resources in the remand centres because they are under resourced, busy, chaotic environments and people come and go constantly.

Another issue in the custodial environment is access to Opioid Substitution Treatment⁶. Some inmates who come into custody addicted to drugs may only be able to access OST in the weeks prior to their release. Drugs are often accessible in custody in NSW, and inmates

² <https://www.smh.com.au/politics/nsw/icac-funding-unlawful-and-puts-independence-at-risk-legal-advice-20200513-p54sk7.html>

³ <https://www.abc.net.au/news/2019-11-03/nsw-police-complaints-watchdog-funding-row/11667350>

⁴ Implementing OPCAT in Australia: <https://apo.org.au/sites/default/files/resource-files//apo-nid306516.pdf>

⁵ Corrective Services NSW Inmate handbook, published 2019:

https://www.correctiveservices.justice.nsw.gov.au/Documents/Related%20Links/library/male_handbook.pdf

⁶ Corrective Services NSW policy on Opioid Substitution treatment:

<https://www.correctiveservices.justice.nsw.gov.au/Documents/copp/opioid-substitution-treatment.pdf>

use unsafe practices to use, such as sharing needles. Being caught with drugs in custody, or a positive urinalysis result, is dealt with punitively and as a security issue (which it is), rather than as a health issue requiring treatment. One of the punishments available to correctional staff is to cut off an inmate's access to phone calls with their family and loved ones.

The recent NSW ice inquiry called for the need for Corrections NSW to introduce an overall drug strategy and a needle exchange program. However, there is strong opposition to this. In my view, treating drug addiction in custody, and supporting people with addiction when they are released into the community, would go some way towards decreasing the likelihood of recidivism where a person's offending is directly linked to their drug use.

It has been acknowledged that we, as a nation, need to do better in mental health both in the community and for those in the criminal justice system. One positive aspect of the Covid-19 crisis is the new found political will to increase funding for mental health (having previously woefully underfunded services). In the custodial environment, there is of course a high percentage of inmates with serious mental health issues, and high demand for service and clinical appointments. Inmates in NSW have access to a free mental health line on the phone system. Like the public mental health system in the community, these services are under constant strain, and the initial assessment when a person comes into custody could be improved, as well as access to services in the community upon release.

Youth Justice and child protection

One of the main issues that needs to be addressed is the institutionalisation of Aboriginal young people. We do not appear to be asking ourselves why Aboriginal young people end up in out of home care, in custody, which can be a pipeline into the adult criminal justice system. The calls for self-determination⁷ by Aboriginal organisations are being ignored, and I believe Absec has just had their funding drastically cut. There is a strong link between child protection and incarceration. According to Absec, 40% of children in out of home care in NSW identify as Aboriginal, but are about 5% of the children in NSW. Around 50% of children in youth justice are Aboriginal.

The Family is Culture review⁸ examined this link and what it calls "care criminalisation" which is where a child is arrested for behaviour in an out of home care placement that would, if they lived in a family setting, be dealt with through discipline by parents and not criminalisation. The review concluded with 125 recommendations for reform.

Children can enter the criminal justice system on remand, often only for short periods, not because of the seriousness of their alleged offenses, but because it is deemed that they do not have access to stable, safe accommodation in the community, and therefore cannot be granted bail. For example, if a young person is arrested for an act of violence or property damage in their out of home care placement, against their family members, or disability placement, new care arrangements may have to be made, and then the only alternative for a Magistrate is to remand them to custody. Surely there is a better alternative than housing children (and often Aboriginal children) in a youth justice centre, as if this is the safest place for them.

There is also a link between children being suspended or expelled from school and later entering the youth justice system. In Victoria, the Ombudsman has investigated the rate of

⁷ Absec policy on self-determination:

<https://www.absec.org.au/images/downloads/AbSec-Policy-Brief-Self-Determination.pdf>

⁸ https://www.familyisculture.nsw.gov.au/_data/assets/pdf_file/0011/726329/Family-Is-Culture-Review-Report.pdf

suspension and expulsion of children from public schools.⁹ The Ombudsman found that 60% of children in the youth justice system had been suspended or expelled from school previously. There has been a push for a better integration of culture and language into our rigid education system, and the documentary *In My Blood It Runs* beautifully articulated the need for this.

The ages 10-14 are such a critical time in a child's development. I would anecdotally say it is uncommon for children at this age to be arrested for offences at the top end of the seriousness scale. In my experience there is a high percentage of young people in custody who self-harm and who have experienced violence in the community. Youth justice centres are not therapeutic environments and a lot is asked of the staff. It is an incredibly hard job to try to manage the mental health, trauma, and self-harm behaviours of children, while also maintaining the good order and security of the centre. It is about containment and safety. The difficulties of this work was reflected in the Shearer report published in 2019,¹⁰ following the riots that occurred at Frank Baxter YJC.

Not addressing the therapeutic and behavioural needs of these young people, and arguably further traumatising young people who are already exhibiting challenging behaviours, is going to increase the likelihood of reoffending, and the likelihood that these children will never "break the cycle." In custody, children can have force used on them by staff, or witness other young people restrained or subjected to force, and children are often housed with older children in the same centre. Of note in this area is the Inspector of Custodial Services report¹¹ regarding use of force, separation, segregation, and confinement on children in custody in NSW. This demonstrates that these management tools are routinely used in youth justice centres in NSW. It has been shown that use of force, restraint and "isolation" are traumatising, especially to children.

Raising the age of criminal responsibility to 14 will have a positive impact. I have seen children as young as 10 in custody, and I truly believe, regardless of the type of crime or difficult behaviours they are presenting, that placing them in the custodial environment is the worst possible way that we, as a civilised society, can respond. The ACT government has become the first jurisdiction to endorse raising the age of criminal responsibility, as of 21 August 2020. The ACT government has also announced \$1.35 funding for Aboriginal led organisations to address incarceration rates in that state.

NSW should consider raising the age, and increasing funding in community led solutions, diversionary programs, youth accommodation services, youth mental health programs, and Aboriginal programs.

The coroner

I have less experience in this area so I will just make a few points about the current state of play. The primary responsibility for reviewing deaths in custody is the coroner. Other oversight bodies generally will not examine a matter once it has been referred to the coroner, as this is viewed as wasteful. The NSW Attorney General is currently undertaking a statutory review of the *Coroners Act 2009*, and there have been calls for reform of the

⁹ <https://www.abc.net.au/news/2017-08-14/victorian-children-as-young-as-five-being-expelled-from-school/8804376>

¹⁰ <http://www.juvenile.justice.nsw.gov.au/Documents/ministerial-review-into-frank-baxter.pdf>

¹¹ <http://www.custodialinspector.justice.nsw.gov.au/Documents/use-of-force-seperation-segregation-confinement-nsw-juvenile-justice-centre.pdf>

structure of the coroner's court in NSW for some time.¹² In 2017-2018, NSW expenditure for the coronial system was significantly less than Victoria and Queensland.¹³ State Coroner Teresa O'Sullivan, appointed in 2019, has said deaths in custody is a priority.

The coronial process is traumatising for families, particularly given the length of the process, for example the David Dungay inquest was procedurally delayed. In terms of reviews of deaths in custody, the coroner has medical and investigative expertise. The coroner can make recommendations to NSW police, Justice Health, NSW Health or CSNSW regarding policy and procedure. I do have concerns about the lengthiness of the process for families, and that perhaps the process is not adapting to the needs of those from different cultural backgrounds or those who have experienced intergenerational trauma. There is also some logic in the idea of another review mechanism, because the coronial recommendations normally come at the end of a lengthy investigation (which can take several years), this is a long time for the police or corrections to wait to then be told to change practices and policies.

Conclusion

The federal government has not responded to the Pathways to Justice Report, and has announced targets to reduce incarceration rates by 15% by 2031. These targets have been widely criticised. In July 2020, the NSW government responded to the Family is Culture report, and has announced a Deputy Children's Guardian for Aboriginal Children and Young People, an Aboriginal Knowledge Circle, and an Aboriginal Outcomes Taskforce, among other changes.

I am hopeful about the push for the age of criminal responsibility to be raised, and that the dialogue has shifted in recent years towards empowerment and self-determination. I hope Australia can accept that structural racism exists, and that we have a long way to go in the journey towards a society in which justice treats all people equally. I also hope that Aboriginal people will one day achieve constitutional recognition, and a voice to Parliament.

23 August 2020

¹² <https://www.smh.com.au/national/nsw/anachronistic-experts-call-for-a-shake-up-of-the-nsw-coroners-court-20190305-p511zf.html>

¹³ Table 7.1 of <https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/justice/courts/rogs-2019-partc-chapter7.pdf>