

**Submission  
No 98**

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

**Organisation:** NSW Aboriginal Land Council

**Date Received:** 26 August 2020

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**New South Wales  
Aboriginal Land Council**

***Submission to the NSW Parliament Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody  
August 2020***

**RECOMMENDATIONS:**

**Recommendation 1:** That the Select Committee considers previous key reports on First Nations incarceration, and their recommendations, including the Australian Law Reform Commission, Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report No 133 (2017).

**Recommendation 2:** In line with the NSW Government's Closing the Gap commitments, the NSW Government should partner with NSW CAPO to develop comprehensive, strengths-based reforms to reduce incarceration, accompanied by ambitious justice targets for NSW.

**Recommendation 3:** That the NSW Government, in partnership with peak Aboriginal legal services, design and implement reforms to the *Bail Act*.

**Recommendation 4:** That community-based courts are supported, including the proposal to establish the Walama Court.

**Recommendation 5:** That the NSW Government review police practices and procedures, including the exercise of police discretion and the Police Suspects Target Management Plan so that the law is applied equally and without discrimination with respect to Aboriginal peoples.

**Recommendation 6:** That the NSW Government, in partnership with NSW CAPO, ensure mechanisms for independent assessment and review of police and justice agencies are aligned to Closing the Gap commitments, and promote accountability, transparency and fairness.

**Recommendation 7:** That the NSW Government design and implement reforms to Coroners Court procedures to increase government accountability and better support families of victims.

## **INTRODUCTION**

Thank you for the opportunity to provide a submission to the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody.

The New South Wales Aboriginal Land Council (**NSWALC**) provides these comments in our capacity as the peak body representing Aboriginal peoples in NSW and as the largest Aboriginal member based organisation in Australia, with a network of 120 autonomous Local Aboriginal Land Councils (**LALCs**) across the state and over 23,000 members. NSWALC is a self-funded statutory corporation under the Aboriginal Land Rights Act 1983 (NSW) (**ALRA**), with legislated objectives to improve, protect and foster the best interests of all Aboriginal peoples in NSW.

NSWALC is a member of the NSW Coalition of Aboriginal Peak Organisations (**CAPO**). CAPO is comprised of peak Aboriginal community controlled organisations, including the NSW Child, Family and Community Peak Aboriginal Corporation, Link-Up NSW, Aboriginal Education Consultative Group NSW, Aboriginal Legal Service NSW/ACT, Aboriginal Health and Medical Research Council and the First Peoples Disability Network. CAPO is a member of the National Coalition of Aboriginal and Torres Strait Islander Peak organisations, working to design and deliver the new Closing the Gap Framework.

## **HIGH RATES OF INCARCERATION**

Reasons for the high incarceration rates of Aboriginal peoples in Australia have been canvassed in numerous reports since the Deaths in Custody Royal Commission in the early 1990s. There have been reports by the Commonwealth Senate, the Australian Institute of Criminology, the Australian National Council on Drugs, the Law Council of Australia, the Australian Law Reform Commission and a variety of academic and non-government organisations. However, most of the recommendations in these reports have not been implemented, or only partially implemented without adequate resourcing to provide any lasting change.

Consequently, we suggest that the Select Committee consider previous key reports, and their recommendations, including the Australian Law Reform Commission, Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report No 133 (2017).

This submission focuses on structural factors contributing to high rates of incarceration, and the practical reforms needed to implement immediate change. This includes:

- Partnering with NSW CAPO and peak Aboriginal community controlled organisations to design and deliver whole-of-government reforms,
- Reforming the Bail Act to reduce the number of people held on remand (a significant factor in high jail rates),
- Supporting community-based courts, such as the Walama Court proposal,
- Raising the age of criminal responsibility
- Increasing the rigour and oversight of the Police Suspect Target Management Plan, in partnership with Aboriginal peak organisations.

NSWALC would also like to draw the Select Committee's attention to the submission by Aboriginal Legal Service (ALS) which goes into more detail on the issues raised in our submission.

## **Partnerships and shared decision making**

The new National Agreement on Closing the Gap includes four priority reforms which aim to fundamentally change the way in which governments work with Aboriginal people:

- Shared decision making
- Building the Aboriginal community-controlled sector
- Transforming mainstream institutions

- Data sharing

The role of governments must shift from delivering systems predicated on disadvantage, to facilitating the aspirations, priorities and self-determination of Aboriginal peoples. Governments must be prepared to move into an enabling and innovative space to support Aboriginal self-determination, and long-term partnerships.

A recent report by the Australian Law Reform Commission notes the importance of governments working with Aboriginal community-controlled organisations and communities to implement strategies to reduce rates of Aboriginal incarceration.<sup>1</sup> The new National Agreement on Closing the Gap includes targets to:

- reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15 per cent by 2031
- reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at least 30 per cent

The NSW Government should work with NSW CAPO to design and deliver comprehensive, whole of government, strengths-based approaches to reduce incarceration. This should include broad reforms and initiatives such as access to housing, education, health and mental health services, early intervention programs, justice reinvestment, youth engagement, disability supports and social inclusion.<sup>2</sup>

### **Bail reform**

Reforming the *Bail Act* could have a significant impact on reducing incarceration rates. Currently, nearly a third of adult inmates in NSW prisons are held on remand awaiting trial or sentence.<sup>3</sup> Many do not receive a custodial sentence upon conviction or are sentenced to time served while on remand. This suggests prisoners are being held on remand for low-level offending.

The proportion of juvenile offenders on remand is even higher, with around 50% of juveniles and young people in custody held on remand.<sup>4</sup> Many young Aboriginal people on remand have been refused bail because they are homeless.<sup>5</sup> When sentenced, over 80% do not receive a custodial sentence, which again suggests low-level offending.

In a recent review of the *Bail Act 2013* (NSW), the ALS recommended the insertion of a standalone provision in the Act to give consideration for the ongoing impacts of past and current discriminatory policies and practices towards Aboriginal peoples.<sup>6</sup> ALS suggest that the standalone provision should be modelled on s3A of *Bail Act 1977* (Vic) and developed in collaboration with Aboriginal peak legal bodies. Funding for support services and training for bail authorities, lawyers and the judiciary in the appropriate and consistent interpretation of the standalone provision should also be provided.<sup>7</sup>

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<sup>1</sup> Australian Law Reform Commission, Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report No 133 (2017).

<sup>2</sup> <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf> Pages 23-24

<sup>3</sup> Australian Law Reform Commission, Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report No 133 (2017).

<sup>4</sup> <https://www.parliament.nsw.gov.au/lcdocs/other/6711/Highlighted%20transcript%20-%20Uncorrected%20proof%20-%20Attorney%20General%20-%20Justice.PDF>

<sup>5</sup> As above

<sup>6</sup> [https://www.alsnswact.org.au/submission\\_to\\_the\\_administrative\\_review\\_of\\_the\\_bail\\_act\\_2013\\_nsw](https://www.alsnswact.org.au/submission_to_the_administrative_review_of_the_bail_act_2013_nsw)

<sup>7</sup> As above

## **The Walama Court Proposal**

We note that a business case for the Walama Court was prepared by the NSW Justice Department in December 2018, before the March 2019 state election.<sup>8</sup> The proposal sought to expand on the successful Youth Koori Court to establish a community court for adult offenders. The court would involve Aboriginal and Torres Strait Islander elders in sentencing discussions with the judge. A recent Special Commission of Inquiry into the Drug ‘Ice’ recommended that there needed to be a ‘paradigm shift’ away from a criminal justice lens to a health-based response for people charged with drug offences. NSWALC reiterates ALS’s recommendation for the NSW Government to act without delay in establishing community based initiatives including the Walama Court.<sup>9</sup>

We also note the 2018 NSW Parliamentary *Inquiry into the provision of drug rehabilitation services in regional, rural and remote NSW* recommended increasing rehabilitation services.<sup>10</sup>

## **Over policing of Aboriginal people**

Many Aboriginal people come into contact with the criminal justice system because of targeted policing and there is evidence that the law is not applied equally. For example, the Australian Law Commission found Aboriginal young people are less likely to be cautioned and more likely to be charged than non-Indigenous young people.<sup>11</sup> Under the Police Suspects Target Management Plan Aboriginal young people can be targeted because their parents were in prison. Police practices can contribute to the disproportionate arrest, police custody and incarceration rates of Aboriginal people.<sup>12</sup> It also influences Aboriginal peoples’ relationship with police and how they respond to interactions with police.

The Australian Law Reform Commission recommends police practices and procedures, particularly the exercise of police discretion—are reviewed by governments so that the law is applied equally and without discrimination with respect to Aboriginal peoples.<sup>13</sup> We also note the lack of cultural awareness and community engagement training for police has also been found to impact relationships and interactions with police.<sup>14</sup>

The NSW Government should review police practices and procedures, including the exercise of police discretion and the Police Suspects Target Management Plan so that the law is applied equally and without discrimination with respect to Aboriginal peoples.

## **SUITABILITY OF OVERSIGHT BODIES**

We note with concern that the last Law Enforcement Commission Annual report states that only 2% of complaints against police were investigated.<sup>15</sup> The Australian Law Reform Commission recommends that mechanisms for independent assessment or review of complaints should be considered, so that

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<sup>8</sup> <https://www.smh.com.au/national/indigenous-walama-court-would-deliver-millions-in-savings-costings-show-20200622-p554yy.html#:~:text=A%20proposed%20new%20court%20inside,and%20deliver%20millions%20in%20savings.>

<sup>9</sup> [https://www.alsnswact.org.au/als\\_welcomes\\_renewed\\_calls\\_for\\_walama\\_court\\_and\\_greater\\_support\\_for\\_communities](https://www.alsnswact.org.au/als_welcomes_renewed_calls_for_walama_court_and_greater_support_for_communities)

<sup>10</sup> <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2466/Final%20report%20-%20Drug%20rehabilitation%20services%20-%206%20August%202018.pdf>

<sup>11</sup> Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133 (2017).

<sup>12</sup> <https://www.lecc.nsw.gov.au/news-and-publications/news/publications/operation-tepito-interim-report-january-2020.pdf> - pages 17-18

<sup>13</sup> As above

<sup>14</sup> [https://www.alrc.gov.au/sites/default/files/pdfs/publications/summary\\_report\\_133\\_amended.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/summary_report_133_amended.pdf)  
*Recommendations 14.1, 14.2, 14.3, 14.4*

<sup>15</sup> <https://www.lecc.nsw.gov.au/news-and-publications/annual-reports/lecc-annual-report-2018-19.pdf/view>

investigation of complaints about police misconduct are, and are seen to be, thorough, transparent and fair.<sup>16</sup>

The NSW Government, in partnership with NSW CAPO, must ensure mechanisms for independent oversight and review of police and justice are aligned to Closing the Gap commitments, and promote accountability, transparency and fairness.

We also note concerns about the limited enforceability for Coroner's Court recommendations, and limited mechanisms to make sure that the government acts on those recommendation.<sup>17</sup> In Victoria the government has to make a written response to a coroner's report within three months, which provides a degree of public accountability. Coroners should also be empowered to provide commentary on the extent to which the government has implemented their recommendations. More support is also needed to assist families of victims subject to a coronial inquest. Inquests can often be long drawn out processes and there be should be social and financial support for families during the process.

Thank you for the opportunity to provide this submission. We would be happy to provide further contributions. Please contact NSWALC on _____ or _____
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<sup>16</sup> Australian Law Reform Commission, Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report No 133 (2017).

<sup>17</sup> Aboriginal Legal Service submission to the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody August (2020)