

Submission
No 105

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

Organisation: The Royal Australian and New Zealand College of Psychiatrists
Date Received: 7 September 2020



The Royal
Australian &
New Zealand
College of
Psychiatrists

New South Wales Branch

7 September 2020

The Hon. Adam Searle
MLC Member of the Legislative Council
Chair, Select Committee on the High Level of First Nations People in Custody and Oversight
and Review of Deaths in Custody
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Searle,

First.Nations@parliament.nsw.gov.au

Re: inquiry into high level of First Nations people in custody and oversight and review of deaths in custody

On behalf of the Royal Australian and New Zealand College of Psychiatrists (RANZCP), we welcome the opportunity to make a submission to the above inquiry.

RANZCP has long been concerned about the disproportionately high rates of incarceration among First Nations people and the untold harm this causes on them, their families, and the communities in which they live.

The over-representation of Aboriginal men, women and young people in our prisons tells us that the current justice system is failing to address the underlying causes of offending and re-offending.

Governments can do more to reduce First Nations people's contact with the justice system and prevent re-offending by investing in early intervention, prevention, and diversion strategies to address the root causes of reoffending and cut imprisonment rates. Our submission calls for these services and programs to be devolved to First Nations people to ensure they are delivered in a culturally safe and responsive manner.

If you would like to discuss our submission, please contact please contact Ben Folino, Policy and Advocacy Advisor,

Yours sincerely,

Dr Angelo Virgona
Chair, RANZCP NSW Branch Committee

Dr Calum Smith
Chair, Faculty of Forensic Psychiatry
Subcommittee



The Royal
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Psychiatrists

Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody – September 2020

Improving the mental health of the community

NSW Branch Submission

Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody – September 2020

Introduction

This submission to the *Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody* is prepared by the NSW Branch ('Branch') of the Royal Australian and New Zealand College of Psychiatrists ('RANZCP'), and the NSW Faculty of Forensic Psychiatry Subcommittee ('Subcommittee'). We welcome the opportunity to make this submission to the Select Committee overseeing this inquiry.

In relation to language, we use the term 'First Nations people' and 'Aboriginal people' interchangeably. We use the term 'we' to mean the NSW Branch of RANZCP, the NSW Faculty Forensic Psychiatry Subcommittee, psychiatrists and Aboriginal community members who provided input into this submission.

RANZCP is a membership organisation that trains doctors to be medical specialists in the field of psychiatry, supports and enhances clinical practice, advocates for people affected by mental illness and advises governments on mental health care. It has almost 6000 members bi-nationally, including more than 4000 qualified psychiatrists and around 1400 members who are training to be psychiatrists. RANZCP NSW Branch (NSW Branch) represents more than 1200 Fellows and 400 trainees. The NSW Faculty of Forensic Psychiatry Subcommittee provides the above role specific to forensic psychiatry. With respect to this submission, the Subcommittee is involved in the training of psychiatrists who work in the custodial system and advocates on issues regarding mental health in the forensic system.

As mental health specialists, psychiatrists are well positioned to provide constructive input into improving outcomes for people with mental health conditions.

About our submission

Our submission represents the collaborative views of psychiatrists who have a deep understanding of mental health issues affecting First Nations people in custody. It discusses conceptual issues, describes facts and figures outlining the egregious situation. Our submission also offers a number of suggestions to address the complex problems associated with First Nations people's high rates of imprisonment.

Thinking around the situation

There are a number of themes we would like to raise that we feel would help the Select Committee understand the current situation and provide a framework in which to suggest specific solutions.

Another inquiry

We acknowledge that there have been numerous governmental inquiries in the past about this particular issue (e.g. Royal Commission into Aboriginal Deaths in Custody, Australia Law Reform Commission's discussion paper *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, etc.). In our experience and discussion with Aboriginal representatives, we note that many of the findings and recommendations remain relevant today. We encourage the Select Committee to refer to these reports as part of their deliberations on the matter at hand.

The continuing high incarceration rates suggest that the efforts so far lack an element or several elements that would promote improved outcomes.

Trauma and incarceration

Our submission relates mostly to First Nations people already in custody or their experience immediately prior to custody. We believe it requires saying at every single opportunity that many of the factors that set people on the path to incarceration occur before that.

NSW Branch Submission

Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody – September 2020

Intergenerational trauma, family and sexual violence, child removal, mental illness and disability, and poverty are adverse events spliced into First Nations people's experience. Incarceration itself is part of this sequence, and to be sure, is perpetuated by it. Whilst it is beyond the remit of this paper to outline the mechanism of this, it is crucial that it be acknowledged. The trauma and problems of the experience of First Nations people in this country have been ingrained over generations and it will take a long time for these to be untangled.

Structure and culture

The solutions to reducing the effects of incarceration on First Nations people will not be easy; they will require a concerted effort and significant structural and cultural change from multiple organisations, both government and non-government.

We acknowledge that RANZCP is no exception to this. We have received feedback from both Fellows and Aboriginal people representatives that the training provided does not adequately prepare them for dealing with Aboriginal people issues in general, let alone the complexity of those caught up in the legal system. While it is beyond the scope of this submission to detail our plans to work on this in our own organisation, it is equally important that RANZCP acknowledges that it struggles to provide a truly representative and culturally informed practice.

Resources – mechanisms and collaboration

Given the above note regarding the multiple previous inquiries that have been undertaken and the recommendations that have been made, we recognise that one reason for a lack of progress on the issue of incarceration of First Nations people, may be delays in or a reluctance to seriously address and implement these recommendations. We think that mutual learning, additional collaboration and enhanced mutual support amongst the many groups already working on this problem may achieve better results.

Resources – money

While many of those recommendations rely on making better use of existing resources and implementing significant cultural change across all parts of the health and justice systems, others do not. There will need to be significant ongoing investment by government in general to address the social determinants of mental illness and incarceration, as well as additional specific funding for additional resources such as training and recruiting First Nation Health professionals.

First Nations people, mental health and the criminal justice system

As psychiatrists, we acknowledge the many excellent studies and published reports highlighting the significant correlations between imprisonment and severe mental illness and distress. The problems with providing mental health services to those in custody are significant. An academic paper taking a worldwide view of some of these issues can be found in article published recently in *The Lancet Psychiatry* [1]. A [brief overview](#) of these issues in NSW prepared for a general audience can also be found on the RANZCP website [2].

Of particular significance to First Nations people is that they take a different view of mental health. There are already significant shortfalls in the traditional psychiatric approach to mental illness in custody and these difficulties are far greater for a cohort of people for whom the model does not adequately understand or speak to their experience. This has severe adverse

¹ Favril L, Yu R, Hawton K, and Fazel S. Risk factors for self-harm in prison: a systematic review and meta-analysis. August 2020 *The Lancet Psychiatry* [Cited 28 August 2020] Available at DOI:[https://doi.org/10.1016/S2215-0366\(20\)30190-5](https://doi.org/10.1016/S2215-0366(20)30190-5)

² <https://www.ranzcp.org/news-policy/news/the-plight-of-people-with-mental-illness-in-custod>

impacts on First Nation individuals, families and communities. The damage done to individuals multiplies as its consequences move through families and on into First Nations communities.

High rates of First Nations people in custody

Factors predisposing to incarceration

We have set out below some general statements about the unacceptably high rates of First Nations people's incarceration. We make these statements as the basis of our recommendations and potential guiding principles or framework for the development of policy solutions to this problem and also to the problem of deaths in custody. With this in mind, we submit the following:

- The imprisonment of First Nations people represents a consistently worsening national crisis. When the Royal Commission into Aboriginal Deaths in Custody (the Royal Commission) was released some 30 years ago, First Nations people were being imprisoned at seven times the rate of the broader population [3]. Today it's 13 times [4]. According to NSW prison population data, the rate of imprisonment of First Nations people in NSW has increased by 31 per cent since the year 2011[5], with Aboriginal women (with dependent children) comprising the fastest growing cohort of this population [6].
- As at 30 June 2020, there are 3,450 First Nations people in custody representing 26% of the entire NSW prison population. There is concern a 'tipping point' has been reached where incarceration of First Nations people is becoming *normalised*. When we hear from College Fellows that Aboriginal people now expect to go to prison, that it is a rite of passage for them, then something is seriously wrong with our social systems and their responses to this problem.
- Highly restrictive institutional environments must recognise the risk of re-traumatisation inherent in these systems that parallel experiences of early trauma as well as intergenerational trauma. In particular seclusion and isolation practices actively reinforce the powerlessness endemic to experiences of intergenerational trauma and are re-traumatising and remove opportunities for connection and self-determination.
- Knowing this, the continued reliance on criminal justice responses is largely ineffective in reducing the overwhelming number of First Nations people in our justice system. We need to move towards health-based approaches that address contributing factors such as mental illness and underlying psychosocial issues such as poverty, trauma, and addiction. We consider that other social measures such as those underpinning justice reinvestment approaches need to be taken to assist First Nations families to raise their children before they become enmeshed in the justice system. Furthermore, the underlying causes of poverty and transgenerational trauma need to be the focus of such efforts.
- First Nations people are perhaps one of the most vulnerable and disadvantaged groups in our society. They experience poor outcomes across a range of social and economic

³ Change the Record Coalition. A generation of government failure – time for change. April 2016. [Cited 14 August 2020] available from <https://nacchocommunique.com/2016/04/15/naccho-news-royal-commission-into-deaths-in-custody-25th-anniversary-today-whats-changed/>

⁴ Australian Bureau of Statistics, Prisoners in Australia. December 2016. [Cited 14 August 2020], available at <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Imprisonment%20rates~12>

⁵ Bureau of Crime Statistics and Research Custody Statistics. June 2020. [Cited 14 August 2020] available at https://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx

⁶ Law Council of Australia, Addressing Indigenous Imprisonment National Symposium Discussion Paper. October 2017, no. 84. [Cited 14 August 2020] available at [https://www.lawcouncil.asn.au/docs/0f08ee12-23ae-e711-93fb-005056be13b5/3349%20-%20Incarceration%20Rates%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples%20\(Discussion%20Paper%2084\).pdf](https://www.lawcouncil.asn.au/docs/0f08ee12-23ae-e711-93fb-005056be13b5/3349%20-%20Incarceration%20Rates%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples%20(Discussion%20Paper%2084).pdf)

NSW Branch Submission

Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody – September 2020

indicators like health, education and employment. Numerous inquiries and studies have shown direct links between entrenched social, economic and cultural disadvantage and interaction with the criminal justice system. Some specific causes include family and/or sexual violence, childhood abuse, mental illness, alcohol and drug addiction, previous imprisonment, lack of education, unemployment, homelessness or unstable housing. These realities drive the over-representation of First Nations people in the criminal justice system and stem from the oppression, violence, trauma and discrimination associated with colonisation, and transmitted through generations.

- Formal criminal proceedings and detention should be considered a measure of last resort. Where it is safe and appropriate to do so, First Nations people who come into contact with the justice system should be given the opportunity for diversion. Intervening early to provide First Nations people with the opportunity to address the underlying issues contributing to criminal behaviour is essential to diverting them from progressing further into the justice system. We are concerned that there is evidence that First Nations people are less likely to be successfully diverted at court [7].
- Prevention of incarceration should be conceptualised as a continuum, from preventing the problem before it occurs (e.g. when a young person is showing signs of offending behaviour at school), to intervening early when it has occurred (e.g. when an offence involves contact with the Police) and responding to reduce the long-term impact (when court proceedings or sentencing occurs). For this to be realised, all parts of the community services sector which includes education, community services, and justice (e.g. Police, the courts, health, legal services etc), need to work together in a coordinated flexible manner to intervene at all 'touch points' to prevent adverse contact with the justice system. These services also need to be sustainably funded, flexible, culturally safe and relevant and tailored to individual needs, circumstances of the person within the context of their culture, family, community and peers.
- It is essential to recognise the differential impact of social determinants on Aboriginal people patients and to recognise the interplay of personal, situational and socio-cultural factors, such as deprivation, exploitation, victimisation and poverty and their significant impact on mental health. The de-contextualisation of this experience minimises the social and institutional contexts and formulates social problems as individual pathology. Taking a life-course perspective recognises that the influences that operate at each stage of life can change the vulnerability and exposure to harmful processes, or stressors.
- Bail and parole play a substantial role in imprisonment rates of imprisonment for First Nations people. Bail conditions such as the availability of suitable or adequate accommodation tend to disproportionately affect First Nations people, particularly in remote locations.
- This provides further evidence of the need to take urgent action to improve the conditions of daily life from before birth across the lifespan. Evidence has shown that giving children the best possible start in life generates the greatest societal and mental health benefits.
- Individuals in contact with the criminal justice system are known to suffer an enormous burden of mental illness, associated with poor long-term outcomes including with regard to economic and other participation in society. People in custody are 10 to 15 times more

⁷ Soon Y-L, Rae N, Korobanova D, Smith C, Gaskin C, Dixon C et al. Mentally ill offenders eligible for diversion at local court in New South Wales (NSW), Australia: factors associated with initially successful diversion. July 2018 (29) 5 available at <https://doi.org/10.1080/14789949.2018.1508487>

likely to have a psychotic disorder [8]. In NSW, there remains an overrepresentation of First Nations people in correctional facilities and a higher proportion of First Nations inmates (41.7%) in completed suicides when compared to non-Aboriginal inmates between 1998 and 2013 [9]. It has been suggested that First Nations persons may be less likely to express suicidal ideation and that generic approaches to suicide risk assessment may not identify First Nations inmates at risk [10].

- A survey report produced by the Justice Health and Mental Health Network involving found that 49.2% of 1,132 participants surveyed had received some form of psychiatric care prior to their current period of incarceration. 62.9% of participants had received at least one mental health diagnosis (most common diagnoses were depression and anxiety) [11]. A conclusion we can draw from this survey result is that people with mental health conditions are highly vulnerable to falling through the cracks of our psychiatric care system and ending up in custody.
- People with mental health conditions in custody need far better care and treatment than they are currently receiving. As it is, they receive nowhere near what they would be receiving if living in the community¹². It is not uncommon for offenders with mental health problems (sometimes up to 15 at a time) to have to wait weeks, even months, to be transferred to a prison hospital or declared facility to get the treatment they need. And if they are at risk of harm, it is also not uncommon for them to be put in seclusion for long periods of time. The simple truth of the matter is our prisons are not suitably equipped to treat mental illness and the imbalance that exists between services in the community and services in correctional facilities needs urgent redressing.
- People exiting custody often receive support that is inadequate or inappropriate, which can increase the likelihood of reoffending. According to data published by BOCSAR, 66% of young people released from detention re-offend within 12 months of their release [13]. The percentage for First Nations adults is 70% [14]. These statistics are a telling indictment on the scale, scope and ineffectiveness of programs in place to support offenders released from custody.

Recommendations

We have set out below a number of recommendations we believe would go some way to addressing the unacceptable high rates of imprisonment of First Nations people.

Recommendation regarding mental health services

Our experience is that too many First Nations people end up in the prison system because primary support systems in health, mental health, and housing have failed them. Mental health and justice involvement are closely linked with prisons functioning as de-facto mental health

⁸ Ogloff J. Good mental health care in prisons must begin and end in the community. [Cited 17 August 2020]. Available at: <https://theconversation.com/good-mental-health-care-in-prisons-must-begin-and-end-in-the-community-40011>. Fazel S, Seewald K. Severe mental illness in 33 588 prisoners worldwide: systematic review and meta-regression analysis. *The British Journal of Psychiatry* 2012 (200): 364-373

⁹ Willis M, Baker A, Cussen T and Patterson E. Self-inflicted deaths in Australia prisons. *Trends & Issues in Crime and Criminal Justice*. AIC. No. 51

¹⁰ Larney S, Topp L, Indig D. A cross-sectional survey of prevalence and correlates of suicidal ideation and suicide attempts among prisoners in New South Wales, Australia. January 2012 *BMC Public Health* 12(14). [Cited 17 August 2020] available <https://doi.org/10.1186/1471-2458-12-14>

¹¹ Justice Health and Forensic Mental Health Network. Network Patient Health Survey 2015. May 2015. [Cited 17 August 2020] available from https://www.justicehealth.nsw.gov.au/publications/2015_NHPS_FINALREPORT.pdf

¹² Inspector of Custodial Services. Women on Remand. February 2020. [Cited 28 August 2020]. P 101-04.

¹³ http://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx

¹⁴ Ibid

NSW Branch Submission

Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody – September 2020

facilities. Prison must always be used as a last resort. This means adequately resourcing mental health services and interventions in the community to prevent people with mental illness coming into contact with the justice system in the first place.

In the light of this, we call on the Select Committee to recommend government invest in expanding bed capacity across the public mental health system.

Recommendation regarding criminal age of responsibility

- The minimum age of criminal responsibility should be raised from 10 to 14 years of age. Implementing such a change reduces the risk of children becoming permanently entangled in the justice system by re-orienting the way we look at offending by young people. This is particularly important for young Aboriginal people who are disproportionately impacted.

Recommendations regarding police and courts prior to incarceration

- We note the limited mainly city-centric mental health/cognitive impairment court diversion services have been shown to significantly reduced re-offending and improve mental health outcomes. We therefore endorse a rapid expansion of uniform court liaison services throughout all NSW, in particular in remote and regional local courts to increase diversion options for mentally ill clients coming before the courts. We believe that improving diversion court liaison services for mentally ill would, in turn, improve incarceration rates of First Nations people [15].
- Court processes are insufficiently culturally adapted for First Nations people and this is likely to be significantly contributing to their high rates of incarceration. We recommend a culturally specific court, and note the existence of the Walama court, as a model for this.
- There are already schemes where police work with First Nations people prior to or at the point of arrest. These need to be enhanced. There are existing schemes to have mental health nurses travel with the police and a similar model could be used for First Nations people.
- In NSW local courts also, a culturally specific court process is needed, with First Nations court liaison officers to work with those arrested at the point of arrest or arraignment.
- Emergency hospital departments are an access point where police take people who they believe may be suffering from a mental illness. In these contexts, assessments and physical layout need to be more culturally aware [16].

Recommendation regarding legal processes and written court work

- There is a need for review of legal processes that drive the disproportionate rate of First Nations imprisonment. This includes imprisonment arising from low level offences such as fine defaults, minor traffic offences, peaceful civil unrest and mandatory sentencing laws that disproportionately impact First Nations people.
- More culturally sensitive approaches could ameliorate the disproportionate level of First Nations people being refused bail or parole and preventing the imposition of inappropriate conditions. However, it is also important that practical solutions and alternatives to refusal, such as bail hostels and safe houses for parolees, are developed.

¹⁵ Albalawi O, Chowdhury N Z, Wand H, Allnutt S, Greenberg D, Adily A et al. Court diversion for those with psychosis and its impact on re-offending rates: results from a longitudinal data-linkage study. January 2019. *British Journal of Psychiatry* 5(1). [Cited 28 August 2020] available at doi: 10.1192/bjo.2018.71.

¹⁶ Culturally responsive practice acknowledges the importance of supporting the social, cultural and emotional wellbeing of Aboriginal patients in their recovery and in particular supporting connection to country, culture and community.

NSW Branch Submission

Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody – September 2020

- In relation to sentencing options, we note that short sentences are costly and do little to rehabilitate offenders because once in prison there is little if any opportunity for them to access rehabilitation programs. Imprisonment data show that 40% of persons sentenced to prison for less than 6 months are First Nation and that some 60% who received such sentences were likely to re-offend within two years [11]. Thus, there is a need for review of short custodial sentences greater reliance on alternative community-based sentencing orders. These include Intensive Corrections Orders that focus on addressing the underlying causes of offending behaviour.

Recommendation about psychiatric practice

- We recommend that work related to a person's legal situation undertaken by a member of RANZCP should include a statement regarding Aboriginal and/or Torres Strait Islander or Torres Strait Islander status and, where possible, should include a brief summary of their history as it relates to trauma and history of incarceration.

Recommendations during the incarceration experience

- We recommend more resources are invested to allow for trauma informed, culturally specific care and practices to support First Nations people in custody who are at risk of suicide. This needs to be done under a care coordination model. We note the NSW government has committed funding 'Towards Zero' suicide initiative across Local Health Districts and custody. However, dedicated money for First Nation populations is necessary. This needs to include funding for the recruitment of First Nations peer workers or mental health professionals.

Recommendations for post release care and follow up

- Continuity of care is an area that needs ongoing improvement for all patients suffering mental illness. Early and regular release planning is crucial. With regards to First Nations patients, we believe that specifically allocated funding to the Aboriginal Medical Service in the community would aid continuity of care and post release planning.
- Development of partnerships will improve safe transitions and better follow up in the community.
- There are significant gaps in access to the NDIS post release. First Nations people with psychosocial disability arising from mental health problems are eligible for NDIS support, but the NDIS is not available for individuals in prison. Individuals must navigate a complex system, and strong self-advocacy is needed to secure an appropriate package. Limited planning occurs prior to release from prison to link individuals returning to the community with the NDIS, resulting in significant wait times for access to services upon release. NDIS support packages should be prioritised for people leaving prison and provided in a timely and streamlined way.

Recommendations regarding workforce

Building cultural competence across health, education, community and justice systems not only strengthens capability and knowledge of workers in these sectors, it provides another layer of protection against First Nations people (with or without mental illness) falling through the gaps in care services and potentially ending up in the justice system. Our service organisations and systems and the people who work in these, need to better understand the impact of history and significance of culture when engaging with and delivering services to First Nations people. This is important for understanding how First Nations people talk about mental illness, identifying any underlying trauma affecting an individual's mental wellbeing and formulating effective interventions. The establishment of trusted relationships with qualified

NSW Branch Submission

Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody – September 2020

staff is a foundational step towards the kind of rehabilitation and healing that will give First Nations people the best chance of avoiding further involvement with the justice system. There is a need therefore to ensure existing Aboriginal people (mental) health workers are more effectively used when supporting First Nations clients attract and recruit qualified and committed staff across all parts of the system. With this in mind we recommend:

- The government invest in the development of workforce strategies that increase cultural competence of relevant personnel (i.e. health, justice, education and community services) to ensure delivery of trauma informed and culturally appropriate services to First Nations people
- The development of policies by health organisations that ensure Aboriginal people (mental) health workers are utilised more effectively by clinicians when providing treatment and support to First Nations people with a mental illness
- The government employ more Aboriginal people in our health and justice systems to ensure First Nations people receive culturally appropriate support.

Recommendation regarding coroners

- We recommend that any death in custody that has mental health involvement should include external expert witness review. This would strengthen the confidence both the profession and affected communities can have in the process.

Other recommendations

- Government, non-government agencies, and communities working together to strengthen First Nations communities is an essential element in achieving success with vulnerable First Nations people. Aboriginal communities and Aboriginal led organisations need to be at the forefront in developing and implementing these strategies.
- The College has a longstanding stance against enforced mental health care in custody which is enunciated in our position statement '[Involuntary mental health treatment in custody](#)' no.93.

Concluding remarks

We thank the Select Committee for the opportunity to make this submission to this very important inquiry.

RANZCP has long been concerned about the disproportionately high rates of incarceration among First Nations people and the untold harm this causes on First Nations people themselves, their families, and the communities in which they live.

The over-representation of First Nations people in our prisons tells us that the current system is failing to address the underlying causes of offending and re-offending. It is patently clear that strategies other than imprisonment are needed and need to be identified and implemented quickly if we are serious about 'closing the gap' between Aboriginal and non-Aboriginal people.

We believe imprisonment should be a last resort and that addressing intersectional disadvantage is key to reducing the over-representation of First Nations people in custody.

This requires broader investment in families and communities as well as more specific programs focussed on diversion and alternatives to incarceration when contact with the justice system occurs. Where a person is incarcerated the focus should remain on rehabilitation and intensive post-release support to enable community reintegration, prevent exits into homelessness and reduce recidivism.

NSW Branch Submission

Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody – September 2020

Many effective models of support are outlined in our submission and could be replicated to across NSW in areas of high need.

It is also crucial to ensure First Nations people are at the centre of policy and program decisions and are given as much control as possible in developing and implementing these.