

Submission
No 107

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

Organisation: Change the Record

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Change the Record submission to the Select Committee on the high level of First Nations People in Custody and Oversight and Review of Deaths in Custody

About us

Change the Record is Australia's only national Aboriginal led justice coalition of legal, health and family violence prevention experts. Our mission is to end the incarceration of, and family violence against, Aboriginal and Torres Strait Islander people.

We are comprised of the following member organisations: *ANTaR, Amnesty International, ACOSS, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, Federation of Community Legal Centres (VIC), First Peoples Disability Network (Australia), Human Rights Law Centre, Law Council of Australia, National Aboriginal Community Controlled Health Organisations, National Aboriginal and Torres Strait Islander Legal Services, National Aboriginal and Torres Strait Islander Women's Alliance, National Association of Community Legal Centres, National Congress of Australia's First Peoples, National Family Violence Prevention Legal Services Forum, Oxfam Australia, Reconciliation Australia, SNAICC - National Voice for Our Children and Victorian Commissioner for Aboriginal Children and Young People.*

Our submission

Change the Record endorses the submissions made by the Aboriginal Legal Service (NSW/ACT) Limited ('ALS') to the 'Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody.' As a national body, we defer to the expertise of the front line Aboriginal legal service providers who are interacting with First Nations people in custody and detention within NSW.

However, we take this opportunity to respond to the below item in the Inquiry's Terms of Reference, with specific reference to OPCAT and the designation and resourcing of a culturally appropriate and independent NPM:

(d) how those functions should be undertaken and what structures are appropriate

Mass incarceration and deaths in custody

The mass incarceration of Aboriginal and Torres Strait Islander peoples, and the ongoing preventable tragedy of black deaths in custody, have been the subject of Royal Commissions, inquiries, reports and hundreds of recommendations. We will not reproduce the substantive evidence that discriminatory policing, policies and legislation contributes to the over-representation of Aboriginal and Torres Strait Islander peoples in prison, nor the recommendations to address this crisis.

We note that the crisis in the NSW correctional system is worsening, not improving, despite sustained calls for reform. Consistent with the national trend of increasingly frequent use of imprisonment; the average daily number of prisoners in NSW increased for the March quarter 2020 by 2% with almost one third of Aboriginal and Torres Strait Islander peoples incarcerated nationally imprisoned in NSW.¹

There will not be a reduction in deaths in custody until there is an end to the mass imprisonment of Aboriginal and Torres Strait Islander peoples. To this end, we echo the law reform recommendations made by the ALS and call on the NSW Government to:

- **Raise the Age:** raise the minimum age of criminal responsibility to at least 14 years for all offences.
- **End Proactive Policing / Targeted Policing of Aboriginal communities:** for example, immediately discontinue applying the Suspect Target Management Plan to all children under the age of 18 years old and remove targets/quotas for proactive policing strategies which disproportionately impact Aboriginal peoples and other culturally diverse groups.
- **Repeal the offence of offensive language:** specifically repeal section 4(A) of the Summary Offences Act 1998 (NSW)
- **Decriminalise low-level drug offences**
- **Implement legislative provisions re: consideration of Aboriginality in bail and sentencing:** this provision should be modelled on s3A of Bail Act 1977 (Vic) and developed in collaboration with peak legal bodies, including the requisite funding support. Further, work with relevant Aboriginal and Torres Strait Islander organisations to develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports'
- **Legislate for arrest to be a measure of last resort**

¹ Australian Bureau of Statistics, 4512.0 - Corrective Services, Australia, March Quarter 2020
<https://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>

Oversight and OPCAT

Currently, only three bodies have been designated as NPMs in Australia:

1. Commonwealth Ombudsman (NPN coordinator and responsible for inspecting places of detention under the control of the Commonwealth)
2. Western Australian Office of the Inspector of Custodial Services (the OICS) and
3. Western Australian Ombudsman (responsible for inspecting mental health and other secure facilities).

It is our view that OPCAT and the designation of independent, adequately resourced and culturally competent NPMs are a crucial tool in addressing the mass incarceration of Aboriginal and Torres Strait Islander peoples, and their deaths in custody. “Cultural competence” goes beyond the basic requirements of ensuring access to interpreters, for example. It requires the consideration of Aboriginal and Torres Strait Islander peoples’ needs, strengths, knowledge and worldview in all aspects of detention. For example, the North Australian Aboriginal Justice Agency highlights the need for culturally competent provision of mental health services which requires “expertise in terms of ATSI people perspectives. For example, many psychological tools including assessing risk used for ATSI people are not ‘normed.”² This is why it is so important that Aboriginal and Torres Strait Islander expertise is incorporated in all aspects of the NPM.

Key elements of an effective NPM

It is our position that for NPM bodies to be effective, and provide effective oversight and accountability, as well as serve a preventative and protective function, they must:

1. Be established with full and transparent consultations with civil society and others as recommended by the Subcommittee on Prevention of Torture (SPT)
2. Include Aboriginal and Torres Strait Islander representation in all oversight bodies and expert advisory panels to ensure NPMs are established in a culturally safe way, and with the trust of community
3. Have a statutory basis and be independent of government and the institutions they oversee
4. Be adequately and jointly resourced by Federal, State and Territory Governments
5. Make findings and recommendations publicly available and require a response from governments and detaining authorities which should also make public their responses
6. Be empowered to undertake regular and preventative visits
7. Have free and unfettered access (to all places of detention, whether announced or unannounced; to all relevant documents and information; and to all persons including public employees and privately engaged contractors, including the right to conduct private interviews);

² North Australian Aboriginal Justice Agency, Submission No 45 to Australian Human Rights Commission, OPCAT in Australia Consultation, July 2017, 3

8. Have the power to submit proposals and observations to Parliament or the public concerning existing or proposed legislation; and
9. Be afforded appropriate privileges and immunities (no sanctions or reprisals for communicating with the NPM; confidential information should be privileged).³

Overcoming existing limitations

The limitations of existing oversight bodies should be avoided when future NPMs are established. For example, the Western Australian OICS cannot compel the Western Australian Government respond to recommendations made in OICS Reports. This is a substantial limitation to the authority and accountability that the OICS can provide.

NATSILS, in their submission to the Australian Human Rights Commission consultation on the implementation of the Optional Protocol to the Convention Against Torture and Cruel, Inhuman or Degrading Treatment in Australia (OPCAT) in July 2017 highlight the impact of these limitations with the case study of Mr Ward - the horrifying and preventable death of an Aboriginal man in the back of a WA paddy wagon. We quote:

“Prior to the death of Mr Ward in 2008, an Aboriginal elder who died from heatstroke while being transported from Laverton to Kalgoorlie by Department of Corrective Services’ contractors, **OICS had warned that the use of the vehicle used to transport Mr Ward would be inhumane for anything other than a short trip.** Mr Ward died on 27 January 2008 after suffering heat stroke in the rear pod of an unventilated prisoner transport vehicle during a 4.5 hour journey from Laverton to Kalgoorlie in remote Western Australia, in circumstances where the air conditioning failed. The outside temperatures that day were over 40 degrees Celsius. On arrival at the Kalgoorlie hospital, Mr Ward had a large burn on his abdomen from contact with the pod’s metal surface and a core temperature of over 41 degrees Celsius.”⁴

It is crucial that for NPMs to play their *preventative role* in stopping the occurrence of torture and human rights abuses within sites of detention, that governments are required to consider and respond to their recommendations and findings publicly.

³ These principles have drawn heavily on the work of NATSILS in their submission to the Australian Human Rights Commission consultation on the implementation of the Optional Protocol to the Convention Against Torture and Cruel, Inhuman or Degrading Treatment in Australia (OPCAT) in July 2017 accessed http://www.natsils.org.au/portals/natsils/NATSILS%20OPCAT%20Submission_AHRC_Submitted%20at%209.39AM%2020082017.pdf?ver=2017-08-23-164926-817 ; and Joint Submission OPCAT, places of detention and Covid-19 (2020) accessed <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5ece02a4bcf8b9772c55de7b/1590559415794/COVID-19+-+OPCAT+places+of+detention+and+COVID-19+-+Pre-Committee+Version.pdf>

⁴ NATSILS (July 2017), above n7

In the same submission, NATSILS raised concern that “many jurisdictions do not have an office with a statutory mandate, guaranteed independence in access to resources, powers of access to information and places of detention, protection from removal and the ability to have urgent recommendations addressed by the relevant decision-makers, including ministers, departments, agencies and NGO providers.”⁵

It is crucial that in establishing an NPM to play the important preventative and oversight role of detention facilities in NSW, the NSW Government does not replicate these shortfalls in existing oversight bodies.

Conclusion

Establishing an NPM is not a panacea to end the tragic and preventable occurrence of deaths in custody. To end Aboriginal and Torres Strait Islander deaths in custody, the NSW Government must commit to addressing the discriminatory laws which disproportionately affect Aboriginal and Torres Strait Islander peoples, discriminatory policing and the underlying systemic disadvantaged faced by too many Aboriginal and Torres Strait Islander peoples.

However, OPCAT provides the NSW Government with an important framework to increase transparency and accountability of its detention facilities and to prevent some of the human rights abuses and acts of torture which occur within them.

We thank the Committee for undertaking this work at this time, and urge that increased focus be placed on establishing an NPM and ensuring adequate oversight of detention facilities in light of the unprecedented pressures being placed on police and prison systems during Covid-19.

For further information please contact:

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⁵ NATSILS (July 2017), above n7