

**Submission  
No 109**

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

**Organisation:** Australian National University Law Reform and Social Justice  
Research Hub

**Date Received:** 7 September 2020

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Select Committee on the High Level of  
First Nations People in Custody and  
Oversight and Review of Deaths in Custody  
Legislative Council  
Parliament House  
6 Macquarie Street  
Sydney NSW 2000

7 September 2020

Dear Officer,

**RE: Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody**

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, responding to terms of reference (a), (b), (c) and (e) of the inquiry.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

**Summary of Recommendations:**

Term of reference (a):

1. Structural racism is pervasive in all stages of Australia's criminal justice system and should be taken into account when reviewing Indigenous deaths in custody and the unreasonably high rate of First Nations people incarcerated in NSW.
2. Indigenous voices should be considered at every stage of legal review to ensure culturally appropriate solutions, which give effect to the object of reviewing the current criminal justice system.
3. Parliament should adopt the recommendations of the Australian Law Reform Commission set out in the Pathways to Justice Report. Specifically, we believe that immediate action with respect to recommendations 5, 6, 7, 9, 10, and 14 is required.

Term of reference (e):

4. There should be a renewed focus on decarceration strategies, led by Indigenous communities in consultation with the NSW Government.

Terms of reference (b) and (c):

5. The Inspector of Custodial Services should report to Parliament specifically on Indigenous deaths in custody in its annual reports and make relevant recommendations based on its findings.

6. Deaths in custody should be included in the list of 'reviewable deaths' that the NSW Ombudsman has jurisdiction to review and monitor.
7. The powers of the corrective services unit of the NSW Ombudsman should be expanded to include the capacity to independently investigate deaths in custody.
8. NSW Ombudsman communication procedures should be mandated with respect to complaints so that families are kept informed and community confidence is increased in the complaint process.
9. The Independent Commission Against Corruption (ICAC) should evaluate and address systemic racism in the police force.
10. The NSW Coroner should be legally required under the *Coroners Act 2009 No 41* (NSW) to hold inquests into Indigenous deaths in custody and that the Coroners' offices should be legally required and resourced to monitor and report on the implementation of recommendations arising from inquests into deaths in custody.

If further information is required, please contact us at

On behalf of the ANU LRSJ Research Hub,

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Under the supervision of: Associate Professor Anthony Hopkins (ANU College of Law).

## 1. Response to Term of Reference (a)

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Overrepresentation of First Nations people in custody must be understood as a consequence of the historical and present-day experience of Indigenous peoples with colonisation, colonialism and state policies and actions. These policies and actions include dispossession of land, economic and social marginalisation, the removal of children, assimilation and the denial of citizenship.<sup>1</sup> The injustices of the past bear heavily on the lives of those now disproportionately represented at all stages of the criminal justice system. They are compounded by a continuing failure to take account of Indigenous experience and voice at all stages of the criminal justice system.

According to Thalia Anthony and Harry Blagg, ‘contemporary manifestations of penal incarceration for Indigenous people are a continuation of colonial strategies rather than a distinct phase’.<sup>2</sup>

First Nations overrepresentation in the criminal justice system is a feature of settler-colonial societies. Imprisonment rates of Indigenous people are similarly disproportionate to the general population in Canada and New Zealand.<sup>3</sup> In Canada, one third of prisoners are Indigenous, while this figure rises to 52% for Maori in New Zealand, who make up just 16% of the population.<sup>4</sup> As such, it is imperative that any attempt to reduce Indigenous representation in custody is done with the knowledge and understanding of the underlying violence inherent within the settler-colonial framework which has created the conditions for such overrepresentation. Piecemeal reform is not enough to solve such endemic issues embedded in the fabric of Australia’s colonial legacy.

Indigenous Australians are overrepresented in every stage of the criminal justice system. Whilst Indigenous Australians constitute around 2% of the total Australian population,<sup>5</sup> they represent 29% of the total prison population.<sup>6</sup> In the March Quarter 2020, the imprisonment rate of Indigenous Australians was 2585 people per 100,000 of the adult Indigenous population.<sup>7</sup> The incarceration rates of First Nations people in NSW are particularly damning. Imprisonment in

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<sup>1</sup> Aboriginal Legal Service of Western Australia (Inc.), Submission to the Community Development and Justice Standing Committee, Legislative Assembly Parliament of Western Australia, ‘*Making our prisons work*’ Inquiry into the efficiency and effectiveness of prisoner education training and employment strategies (April 2010) 4.

<sup>2</sup> Thalia Anthony and Harry Blagg, *Hyperincarceration and Indigeneity* (2020) *Oxford Research Encyclopedia Criminology and Criminal Justice* 1.

<sup>3</sup> Ley and Cecco, “National Tragedy: report shows one third of Canada’s prisoners are Indigenous”, *The Guardian* (online, 23 January 2020) <<https://www.theguardian.com/world/2020/jan/22/one-third-canada-prisoners-indigenous-report>>.

<sup>4</sup> *Ibid.* See also Jendy Harper, “Why does NZ imprison so many Māori”, *newsroom* (online, 29 August 2020) <<https://www.newsroom.co.nz/why-does-nz-imprison-so-many-maori>>.

<sup>5</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC 133 Executive Summary Report, March 2018).

<sup>6</sup> Australian Bureau of Statistics, *Corrective Services Australia December Quarter 2019* (Cataologue No 4512.0, 12 March 2020).

<sup>7</sup> Australian Bureau of Statistics, *Corrective Services Australia March Quarter 2020* (Cataologue No 4512.0, 4 June 2020).

NSW, QLD and the NT comprises nearly three-quarters of national Indigenous incarcerations.<sup>8</sup> Furthermore, NSW accounts for 48% of federally sentenced Indigenous prisoners.<sup>9</sup>

To continue using the current approach to law enforcement and the review of legal processes is to ignore the structural challenges faced by Indigenous peoples. Deaths in custody are the culmination of structural racism, cultural dispossession and an ignorance of the particular circumstances faced by Indigenous peoples on every level. We echo the sentiments of former Chief Justice Martin in his submission to the Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system:

‘The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people. Aboriginal people are also significantly over-represented amongst those who are detained indefinitely under the Dangerous Sexual Offenders legislation. So at every single step in the criminal justice process, Aboriginal people fare worse than non-Aboriginal people.’<sup>10</sup>

This cycle begins with the over-policing of Indigenous people. Statutory enactments such as the *Amendment Act (NT)* sanction the unwarranted detainment (often arbitrarily) of individuals arrested for ‘infringement notice offences for up to four hours’.<sup>11</sup> An internal memo from the WA Police Department revealed internal recognition of an ‘uncomfortable distinction between automated camera and police-initiated traffic enforcement’ with regard to Indigenous people.<sup>12</sup> While camera-based enforcement recorded offences that were balanced between ethnicities, enforcement conducted by police officers such as on-the-spot fines and police-initiated infringements are issued to Indigenous drivers at three times the rate of other ethnicities.<sup>13</sup>

These implicit biases are present in every state in Australia. Yet, NSW criminal justice enforcement is even more explicit in its racial targeting of Indigenous peoples. The surveillance of children with no prior offences or criminal history through a ‘blacklist disproportionately made up of Indigenous children’ goes beyond the unspoken racial biases noted above, and extends to

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<sup>8</sup> *Ib d.*

<sup>9</sup> *Ib d.*

<sup>10</sup> Martin CJ, Submission No 47 to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system* (14 December 2009).

<sup>11</sup> David Yaoming Yang, ‘Policing Indigenous Australians in the Northern Territory: Implications of the “Paperless Arrest” (2015) 8(18) *Indigenous Law Bulletin*, 21.

<sup>12</sup> Western Australian Police, *Let’s Get Traffic Penalties Compared* (Briefing Note released under Police Freedom of Information, The Guardian, 2019), 1.

<sup>13</sup> *Ib d.*, 2-3.

the use of ‘unreasonable, unjust and oppressive tactics’ to target these children.<sup>14</sup> As noted by Camilla Pandolfini, senior solicitor at the Public Interest Advocacy Centre, these policies have ‘no lawful basis’. Continued racial profiling of Indigenous youth, coupled with intimidating tactics such as ‘stop, search and detain’ risks the NSW criminal justice system descending to the likes of the United States’ culture of sanctioned racism.

The disadvantages faced by Indigenous people both internal and external to the justice system are directly correlated with high incarceration rates; by ignoring these factors that disproportionately affect Indigenous people, the courts perpetuate a cycle of inequality. In *Bugmy v The Queen*, the High Court dismissed the submission that the fact that First Nations people are ‘subject to social and economic disadvantage measured across a range of indices’<sup>15</sup> held relevance to the circumstances of a single offender for first time offences. While an individual’s particular circumstances remain relevant to sentencing of a repeat offender, the Court declined to recognise the relevance of these factors for sentencing of Indigenous Australians.<sup>16</sup> Echoing the Pathways report, the central problem with the findings in *Bugmy* is the structural barriers that hinder getting evidence of the particular ‘social and economic disadvantages’ of any individual before the court.<sup>17</sup>

Failure to recognise the unique circumstances of Indigenous Australians not only contributes to higher incarceration rates, but also results in the imposition of harsher penalties for Indigenous peoples as a deterrent for Indigenous customary law practice.<sup>18</sup>

Once imprisoned, Indigenous people face larger hurdles with unrealistic and overly harsh bail conditions. Imposing a bail condition, which the accused cannot reasonably perform, is to set them up to fail. For example, it is impossible for an individual to comply with a non-association order when other members of their immediate community are the very people with whom they have been ordered not to associate. These onerous conditions are reflected in the breach rates of Indigenous people released on bail, where the breach rate is more than twice that of non-Indigenous offenders.<sup>19</sup>

These figures emanate from a number of circumstances that are unique to Indigenous Australians. They may be accounted for by culturally inappropriate bail conditions, higher scrutiny of Indigenous accused, and internal discrimination with respect to being ‘tough on crime’ against Indigenous offenders.<sup>20</sup>

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<sup>14</sup> Michael McGowan, NSW police put children as young as nine, many of them Indigenous under surveillance, *The Guardian* (online, 14 Feb 2020) < <https://www.theguardian.com/australia-news/2020/feb/14/nsw-police-put-children-as-young-as-nine-many-of-them-indigenous-under-surveillance>>.

<sup>15</sup> *Bugmy v The Queen* [2013] HCA 37, 15 [41].

<sup>16</sup> *Ibid.*

<sup>17</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, March 2018), 13-18.

<sup>18</sup> Thalia Anthony, *Indigenous People Crime and Punishment* (Melton Park: Routledge, 2013), 192.

<sup>19</sup> Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper 84, July 2017) [2.64].

<sup>20</sup> *Ibid.*

**Recommendation 1: Structural racism is pervasive in all stages of Australia’s criminal justice system and should be taken into account when reviewing Indigenous deaths in custody and the unreasonably high rate of First Nations people incarcerated in NSW.**

**Recommendation 2: Indigenous voices should be considered at every stage of legal review to ensure culturally appropriate solutions, which give effect to the object of reviewing the current criminal justice system.**

**Recommendation 3: Parliament should adopt the recommendations of the Australian Law Reform Commission set out in the Pathways to Justice Report. Specifically, we believe that immediate action with respect to recommendations 5, 6, 7, 9, 10, and 14 is required.<sup>21</sup>**

## **2. Response to Term of Reference (e)**

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The focus of reducing overrepresentation in custody should be on reducing reliance on prisons as a ‘catchall solution to social problems’.<sup>22</sup> Incarceration is a driver of individual, familial and community disintegration. Australian anti-prison advocacy group Sisters Inside acknowledges that ‘prisons are a failed institution and an irrational response to social problems’.<sup>23</sup> There needs to be a concerted effort to acknowledge and address the myriad ways in which prison contributes to the continued cycles of disadvantage and harm which damage First Nations individuals and communities. Prisons, rather than rehabilitating, further alienate socially marginalised groups and perpetuate the problems they obscure.

Thus, policies to address overrepresentation in custody should recognise the problem with prisons and identify decarceration strategies to reduce reliance on imprisonment. According to Sisters Inside,

‘Decarceration’ refers to those strategies that build community resources, power and resilience, rather than relying on surveillance, supervision and coercion by Governments to address social problems.<sup>24</sup>

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<sup>21</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, March 2018), 13-18.

<sup>22</sup> Ruth Wilson Gilmore, *Golden Gulag PRISONS SURPLUS CRISIS AND OPPOSITION IN GLOBALIZING CALIFORNIA*, 2007, University of California Press.

<sup>23</sup> Sisters Inside, Submission to Discussion Paper and the Inquiry into the Incarceration rates of Aboriginal and Torres Strait Islander Peoples to the Australian Law Reform Commission (8 November 2017) 1.

<sup>24</sup> *Ibid.*

A justice reinvestment approach involves diverting funds for imprisonment towards communities where there are high levels of offenders.<sup>25</sup> This funding can be spent on programs and services in these communities aimed at addressing the underlying causes of criminal behaviour, thereby shifting the focus away from imprisonment. However, this approach needs to be introduced outside of the 'criminal justice' system and must emphasise self-determination and Indigenous-led approaches.

**Recommendation 4: There should be a renewed focus on decarceration strategies, led by Indigenous communities in consultation with the NSW Government.**

### 3. Response to Terms of Reference (b) and (c)

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#### 3.1 Inspector of Custodial Services

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We recommend that the Inspector of Custodial Services report to Parliament specifically on Indigenous deaths in custody in its annual reports and make relevant recommendations based on its findings.

The Inspector of Custodial Services ('ICS'), Fiona Rafter, is appointed to inspect adult correctional facilities and youth justice centres, and report to Parliament on the findings of these inspections. They are to provide independent scrutiny of the conditions, treatment and outcomes for adults and young people in custody.

The *Inspector of Custodial Services Act* (2012) requires all adult custodial centres to be inspected at least once every five years.

To date, the ICS has published reports on a wide range of topics including women in custody, managing radicalised inmates, the clothing and bedding of inmates, managing aged offenders, and more. Despite this, the ICS has never published a report on Indigenous deaths in custody, or even a report which focuses specifically on Indigenous Australians in custody. The ICS also produces annual reports for each financial year. These reports do not substantially mention Indigenous deaths in custody.

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<sup>25</sup> Aboriginal Legal Service of Western Australia (Inc.), Submission to the Community Development and Justice Standing Committee, Legislative Assembly Parliament of Western Australia, 'Making our prisons work' Inquiry into the efficiency and effectiveness of prisoner education training and employment strategies (April 2010) 4.



**Recommendation 5: The Inspector of Custodial Services should report to Parliament specifically on Indigenous deaths in custody in its annual reports and make relevant recommendations based on its findings.**

## 3.2 NSW Ombudsman

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We recommend that the NSW Ombudsman corrective services unit powers should be expanded to include the ability to conduct independent investigations with mandated communication procedures into Indigenous deaths in custody. We also recommend that Indigenous deaths in custody be included in the list of 'reviewable deaths' under the jurisdiction of the NSW Ombudsman.

The Ombudsman has a special corrective services unit that is staffed by those with thorough knowledge of the correctional systems.<sup>26</sup> Those in custody can make complaints about problems with Corrective Services NSW, as well as privately run correctional services to the NSW Ombudsman.<sup>27</sup> However, this unit is only responsible for handling complaints from inmates, resolving issues and observing conditions and routines.<sup>28</sup> There appears to be no capacity to investigate deaths in custody, or matters related to deaths in custody. The staff make visits to correctional centres but these visits are primarily about hearing complaints directly from inmates and detainees. These complaints can be about unfair or improper treatment, unreasonable decisions that were made or delays in receiving information or services.<sup>29</sup> However, none of these complaint procedures are available to families of those who are in custody or have died in custody.

The Ombudsman is responsible for the review and monitoring of some deaths. These 'reviewable deaths' are those of children who die as a result of abuse or neglect, children who die while in 'out-of-home care,' children who die in detention and persons with a disability, who at the time of their death were living in group accommodation or assisted boarding houses.<sup>30</sup> Notably absent from the list of 'reviewable deaths' are any deaths that occurred while in custody.

An independent body to conduct independent investigations of Indigenous deaths in custody has been called for by the families of those who passed, and this has been supported by the

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<sup>26</sup> Custodial Services, *Ombudsman New South Wales* (Web Page) <<https://www.ombo.nsw.gov.au/what-we-do/our-work/custodial-services>>.

<sup>27</sup> *Ib d.*

<sup>28</sup> *Ib d.*

<sup>29</sup> Corrective Services, *Ombudsman New South Wales* (Web Page) <<https://www.ombo.nsw.gov.au/what-we-do/our-work/custodial-services/corrective-services>>.

<sup>30</sup> Reviewable Deaths, *Ombudsman New South Wales* (Web Page) <<https://www.ombo.nsw.gov.au/what-we-do/our-work/community-services/reviewable-deaths>>.

Law Council of Australia.<sup>31</sup> Currently, none of the bodies tasked with investigating conduct in NSW prisons have the capacity to send independent investigators in to prisons to obtain evidence.<sup>32</sup> Having the capacity to conduct independent investigations into Indigenous deaths in custody is crucial to the realisation of justice for the families involved and build confidence in the oversight bodies.

Currently, there is little confidence in the complaints process regarding Indigenous deaths in custody.<sup>33</sup> There is a low substantiation rate of complaints, poor communication with complainees and concerns about the lack of independence of investigating bodies, as police are investigating police.<sup>34</sup> The lack of confidence in the system, in turn, leads to a lower level of complaints which perpetuates the cycle.<sup>35</sup> As a result, many police are not held accountable for their actions.

The NSW Ombudsman could be a suitable body to review Indigenous deaths in custody given its status as an independent agency. There is already a dedicated correctional services team and a procedure whereby the NSW Ombudsman reviews and monitors 'reviewable deaths'. These two functions should be expanded to allow the correctional services team to review and investigate deaths in custody, but in particular Indigenous deaths in custody. Deaths of Indigenous Australians in custody should be added to the list of 'reviewable deaths' that the NSW Ombudsman has jurisdiction over. The existing complaints procedure should include mandated procedures with regards to communication with the families who have made complaints. This should start to build more confidence in the system and a good working relationship between the NSW Ombudsman and the Aboriginal and Torres Strait Islander community. Increased confidence leads to more people feeling comfortable to make complaints, and thus the police can be held accountable for their actions.

**Recommendation 6: Deaths in custody should be included in the list of 'reviewable deaths' that the NSW Ombudsman has jurisdiction to review and monitor.**

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<sup>31</sup> Lorena A am, NSW deaths n custody rev ew ha ed as chance to end po ce nvest gat ng po ce , *The Guardian* (News Article, 18 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/18/nsw-deaths-n-custody-rev-ew-ha-ed-as-chance-to-end-po-ce-nvest-gat-ng-po-ce>>.

<sup>32</sup> David Shoebridge, Deaths n Custody Parliamentary Inquiry established with support from across the NSW Parliament , *David Shoebridge MP* (Web Page, 18 June 2020) <<https://davdshoebridge.org.au/2020/06/18/deaths-n-custody-parliamentary-inquiry-established-with-support-from-across-the-nsw-parliament/>>.

<sup>33</sup> Complaints against police , *Australian Law Reform Commission* (Web Page, 11 January 2018) <<https://www.alrc.gov.au/publications/pathways-to-justice-into-the-nrcarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-a-report-133/14-police-accountability/complaints-against-police/>>.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

**Recommendation 7: The powers of the corrective services unit of the NSW Ombudsman should be expanded to include the capacity to independently investigate deaths in custody.**

**Recommendation 8: NSW Ombudsman communication procedures should be mandated with respect to complaints so that families are kept informed and community confidence is increased in the complaint process.**

### 3.3 Independent Commission Against Corruption (ICAC)

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We recommend that the Independent Commission Against Corruption (ICAC) should evaluate and address systemic racism in the police force.

The Law Enforcement Conduct Commission (LECC)'s current oversight capacities are flawed. The LECC was designed to streamline the police complaints system. However, its investigative power is restricted to 'serious' misconduct or maladministration.<sup>36</sup> Per the *Law Enforcement Conduct Commission Act 2016*, it can only observe critical incident interviews with 'the consent of the person being interviewed and the senior critical incident investigator'.<sup>37</sup> This significantly limits LECC's ability to investigate critical incidents, such as deaths in custody, and provide adequate oversight of police corruption.

Further, LECC in its current form lacks the resources available to execute a comprehensive oversight of police corruption. The LECC has been overwhelmed by direct complaints. Due to budget constraints, the LECC received 2547 complaints against police in 2018, but only fully investigated 2 percent of them.<sup>38</sup> LECC's focus on reviewing individual acts of police behaviour significantly detracts from the ability to provide corruption oversight. ICAC already has pre-established corruption oversight mechanisms. Given this, ICAC should be tasked with evaluating and addressing systemic racism in the police force.

Systemic racism is a form of corruption. *The Inspector of the Independent Commission Against Corruption Act 1998* defines corruption to include conduct of a person that is 'dishonest', 'breach[es] public trust' and 'adversely affects...the impartial exercise of official functions'.<sup>39</sup> Racism affects an individual's ability to act objectively and involves using power to privilege one

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<sup>36</sup> *Law Enforcement Conduct Commission Act 2016* (NSW) s 3(b).

<sup>37</sup> *Ibid* s 114(3)(c).

<sup>38</sup> Nigel Gastone and Lucy Cormack, 'F rehose' of comp a nts about NSW Po ce not nvest gated as watchdog faces cuts , *The Sydney Morn ng Hera d* (on ne at 3 November 2019) <<https://www.smh.com.au/nat ona /nsw/f rehose-of-comp a nts-about-nsw-po ce-not- nvest gated-as-watchdog-faces-cuts-20191101-p536jo.htm #:~:text=Th s%20year's%20state%20budget%20 ncreased,ts%20%2422.3%20m on%20annua %20bud get>>.

<sup>39</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 8(1).

race over the other. The disproportionate incarceration of Indigenous Australians and the ongoing issue of Indigenous deaths in custody demonstrates that the problem is systemic - not merely a case of a few 'bad apples'.

Noting this, ICAC should investigate police corruption in Indigenous deaths in custody on a holistic, systems level. This should involve identifying opportunities for systemic racism to infect police responsibilities, the role of discretion in internal police investigations, and whether senior leadership has been complicit to reports or findings of racism.

**Recommendation 9: The Independent Commission Against Corruption (ICAC) should evaluate and address systemic racism in the police force.**

### 3.4 NSW Coroner

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We recommend that the NSW Coroner should be legally required under the *Coroners Act 2009 No 41* (NSW) to hold inquests into Indigenous deaths in custody and that the Coroners' offices should be legally required and resourced to monitor and report on the implementation of recommendations arising from inquests into deaths in custody.

Given that the NSW Coroner is not required to hold inquests into deaths occurring in or attempting to escape from police custody, the body could be more suitable to inquire into Indigenous deaths in custody.

Where cases of Indigenous deaths in custody are sent to the NSW Coroner, usually no substantial recommendations are made, and no criminal convictions. This lack of oversight has led to Indigenous activists demanding for investigations and inquiries to be made on their own terms and by 'our [the First Nations people's] independent body that overlooks all the forensics'.<sup>40</sup> The ineffectiveness of inquests into Indigenous deaths in custody has also led to a demand for a 'reopening of all the black deaths in custody cases in Australia'.<sup>41</sup>

Where substantial recommendations by the NSW Coroner are made, their lack of implementation also demonstrates an indifference of the authorities to prevent Indigenous deaths in custody. This inaction and the lack of a legal requirement for implementation of recommendations significantly limits the effectiveness of the NSW Coroner as an oversight body. The recommendations, aimed at minimising the risk of future and similar deaths occurring, are largely ignored.

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<sup>40</sup> Pau Gregoire, *Now Is the Time for First Nations Justice and Systemic Change*, Sydney Criminal Lawyers (online at 22 June 2020) <<https://www.sydneycriminalawyers.com.au/blog/now-is-the-time-for-first-nations-justice-and-systemic-change/>>.

<sup>41</sup> *Ibid.*

Furthermore, recommendations by coroners which are unachievable are also barriers to providing effective oversight into inquiries. For example, in all five of the cases where coroners recommended that instructions to police officers in police cells should be revised, police officers were not aware of their instructions. This demonstrates a recommendation made by a coroner that could not be adequately implemented without an increase in the length and quality of police training.<sup>42</sup>

### **Case Study: David Dungay Jr**

David Dungay Jr was a 26-year-old Indigenous man who died in Sydney's Long Bay Prison Hospital on 29 December 2015. After refusing to stop eating a packet of biscuits, six guards held him down and administered a sedative, while he called out twelve times that he couldn't breathe. After losing consciousness, the guards waited several minutes before administering basic life-saving support consisting of two compressions. David Dungay Jr died from cardiac arrest.<sup>43</sup>

The NSW Coroner's recommendations following the inquest into David's death were made under s 82 of the *Coroners Act 2009 No 41*. These recommendations are yet to be implemented.

**Recommendation 10: The NSW Coroner should be legally required under the *Coroners Act 2009 No 41 (NSW)* to hold inquests into Indigenous deaths in custody and that the Coroners' offices should be legally required and resourced to monitor and report on the implementation of recommendations arising from inquests into deaths in custody.**

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<sup>42</sup> Indigenous Deaths in Custody: Chapter 8 Custodial Conditions, *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/our-work/indigenous-deaths-custody-chapter-8-custodial-conditions>>.

<sup>43</sup> Death of David Dungay Jr., *Justice Action* (Web Page) <<https://www.justiceaction.org.au/prisoners/prison-issues/221-deaths-in-custody>>.