

Submission
No 112

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

Organisation: Redfern Legal Centre

Date Received: 7 September 2020

Redfern Legal Centre



7 September 2020

Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody
Legislative Council, NSW Parliament

By email: First.Nations@parliament.nsw.gov.au

Dear Committee,

Please find attached our submission in response to the Inquiry into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody.

Yours faithfully,
REDFERN LEGAL CENTRE

Joanna Shulman
CEO

Redfern Legal Centre



SUBMISSION: **Select Committee inquiry into the high level of First Nations People in custody and oversight and review of deaths in custody**

AUTHORS: Sophie Parker

DATE: 7 September 2020

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1. Introduction: Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a particular focus on human rights and social justice. Our specialist areas of work are tenancy, domestic violence, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. RLC's work with First Nations peoples

RLC has a long history of acting for First Nations peoples, particularly in relation to complaints of police misconduct.

The systemic abuse of police powers towards First Nation peoples was one of the major catalysts for the creation of RLC in 1977. In 2011, RLC created a state-wide police accountability practice specialising in formal complaints. Since its inception, the practice has advised in more than 1200 police misconduct matters. Of those matters, more than 16% identified as First Nations peoples.

Redfern Legal Centre continues to operate its specialised police accountability practice with a key focus on improving the formal complaints system.

3. Submissions

3.1. Police accountability and the complaints system

a. Police accountability

Police misconduct contributes to the rate of incarceration of First Nations peoples and the inherent weaknesses in the mechanism for complaints means that much misconduct goes undeterred. A core component of accountable policing is an effective complaints system.¹

In 2017, Redfern Legal Centre made a submission to the ALRC enquiry on the over-representation of First Nations Peoples in custody. We have attached that submission for your reference, as it remains relevant to this enquiry. In particular, we refer to our submissions at section 5.4, as they relate to the role of police accountability in the rate of incarceration of First Nations Peoples.

b. Law Enforcement Conduct Commission

RLC's position and recommendations in relation to the police oversight system were detailed in our submission to the Review of Police Oversight in NSW (**Tink Review**)² which we have attached for reference. Many of the issues raised in our submission to the Tink Review continue to abide.

We would like to highlight the following key issues in relation to the current oversight system:

¹ Graham Smith, 'Every complaint matters: Human Rights Commissioner's opinion concerning independent and effective determination of complaints against the police', *International Journal of Law, Crime and Justice*, 38 (2010) 59-74 at 59.

² Redfern Legal Centre, Submission to the NSW Department of Justice Review into Police Oversight in NSW

1. inability of the LECC to bind the NSWPF to make findings of misconduct;
2. judicial findings regarding unlawful police conduct do not necessarily result in equivalent misconduct findings;
3. complaints can be declined for investigation due to past criminal proceedings or prospective civil proceedings, despite the judiciary lacking any power to make formal misconduct findings;
4. complaints are often declined if there are active criminal proceedings, despite in some cases, there being allegations that might impact the veracity of police evidence;
5. the LECC's investigative powers are limited to "serious misconduct" meaning routine and pervasive misconduct impacting First Nations communities lacks effective oversight;
6. in our experience, the LECC is hesitant to make findings of misconduct in circumstances where there is a conflict between the complainant's evidence and the subject officer's evidence (and there is no independent evidence, such as body-worn video);
7. in our recent experience, the LECC has been hesitant to exercise its oversight powers where:
 - a. the LECC considers that the NSW Police will not be receptive to the recommendations. In our view, it is important that the LECC be continually communicating its position in respect of misconduct, whether the NSW Police choose to implement the recommendations or not;
 - b. the LECC considers that the NSW Police will not alter the disciplinary outcome, even if it were to make additional findings of misconduct. In our view, individual findings of misconduct can play an important role in effecting cultural change whether or not there are disciplinary outcomes.
8. The LECC is severely underfunded and its budget has been decreased since its inception. In order to provide effective oversight, an independent police accountability body must have recurrent substantial funding.

Recommendations

We make the following recommendations:

- a. The LECC be given the power to make its own binding findings of misconduct;
- b. The NSW Government report annually on:
 - i. the number of police complaints made by or in relation to the treatment of First Nations Peoples;
 - ii. the nature of complaints made by First Nations Peoples; and
 - iii. the outcome of complaints made by First Nations Peoples.
- c. Funding to the LECC be increased significantly so that complaints are not declined for investigation due to funding constraints.
- d. In deciding whether to exercise its investigative powers in respect of a complaint, the LECC consider whether the complainant identifies as a First Nations person.
- e. The LECC exercise its oversight powers in respect of all complaints made by First Nations peoples.

- f. Body-worn video should be mandated in all interactions with First Nations peoples.

3.2. Oversight Body into Deaths in Custody

Redfern Legal Centre supports the submission made by Jumbunna in respect of Oversight of Deaths in Custody. In particular, we support the call for the establishment of a First-Nations led independent body tasked with investigating deaths in custody.

4. Conclusion

There is an important connection between the exercise of police powers and the rate of incarceration of First Nations people. It is therefore critical that the Legislative Council consider measures that may limit the improper exercise of police powers and improve police accountability.