Submission No 123

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

Organisation: Western NSW Community Legal Centre Inc. (WNSWCLC) and Western Women's Legal Support (WWLS)

Date Received: 25 September 2020

Western NSW Community Legal Centre Inc

25 September 2020

The Honourable Mr Adam Searle MP
Chair, Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody
Parliament House
6 Macquarie Street
SYDNEY NSW 2000

Dear Mr Searle

SUBMISSION TO INQUIRY INTO FIRST NATIONS PEOPLE IN CUSTODY IN NSW

Western NSW Community Legal Centre Inc. (**WNSWCLC**) and Western Women's Legal Support (**WWLS**) welcome the opportunity to make 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 **Committee**).

In 1991, when the final report of the Royal Commission into Aboriginal Deaths in Custody was handed down, making 330 recommendations, spanning issues from justice reform and prison safety, to self-determination, health and education, there was cautious optimism that Australian governments were finally going to take responsibility for the historic displacement, suffering, loss, violence and disadvantage suffered by Australia's First Nations populations. Since then, however, there has been little to no practical change. We are now almost three decades on and yet:

- the rate of incarceration of Aboriginal and Torres Strait Islander peoples has almost doubled (now representing 27% of the total Australian prison population);[1]
- Aboriginal and Torres Strait Islander children remain eight times more likely than their non-Aboriginal and Torres Strait Islander peers to enter out of home care by the age of five;[2]

[1] Department of the Prime Minister and Cabinet, *Closing the Gap Prime Minister's Report 2018* (2018) 120.
[2] Professor Megan Davis, *Family is Culture Final Report Independent Review into Aboriginal Out-of-Home Care in NSW* (October 2019) 43.

- Aboriginal and Torres Strait Islander children are 16 times more likely than non-Aboriginal and Torres Strait Islander children to have contact with both the child protection and criminal justice systems;[3] and
- Aboriginal and Torres Strait Islander women are 21.2 times more likely to be incarcerated than non-Aboriginal and Torres Strait Islander women.[4]

Across the last three decades, the Terms of Reference of the Committee have been addressed in a multitude of government reports, and decades of advocacy work has focused on the systemic discrimination and disadvantage experienced by Aboriginal and Torres Strait Islander peoples. However, despite having identified the problem, and being told how to fix it, Australian governments have failed to effect meaningful change. Successive Australian governments have failed Aboriginal and Torres Strait Islander communities and it is nothing short of a national tragedy.

1. BACKGROUND

1.1 Who we are

WNSWCLC is a community-based, not-for-profit organisation located in Dubbo that provides free legal services to people in Western NSW who experience social, economic and/or geographic disadvantage. WNSWCLC provides legal advice, ongoing casework, referrals and representation, and offers outreach services to rural and remote towns, servicing an area of approximately 200,000 square kilometres, bordered by Mudgee in the east, the Queensland border to the north, and Bourke and Cobar in the west. WNSWCLC also engages in community legal education, law reform and offers media comment on issues of importance.

WWLS is WNSWCLC's specialist domestic violence unit. WWLS was established in 2015 after the Commonwealth Government identified Western NSW as having some of the highest rates of family and domestic violence in the country. WWLS is one of two specialist family and domestic violence legal services in NSW, specifically funded under the Commonwealth Government's Women's Safety Package to provide holistic support to female victim-survivors. WWLS currently employs three lawyers, one domestic violence caseworker and an Aboriginal support worker and services the same geographic area as WNSWCLC.

The offices of WNSWCLC and WWLS are located on the land of the Tubba-Gah people of the Wiradjuri Nation, who we recognise as its traditional owners and we acknowledge that

[3] Department of the Prime Minister and Cabinet, above n 1, 120.
[4] Australian Law Reform Commission, *Pathways to Justice – inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples* (2018) 3.25.

sovereignty was never ceded. In addition to Wiradjuri Nation, the area of Western NSW which we service spans across the traditional land of the Kamilaroi, Wongaibon, Wailwan, Ngemba, Barkindji and Murrawarri peoples. Western NSW represents approximately 2% of the total population of NSW but is home to over 10.5% of NSW's Aboriginal and Torres Strait Islander peoples. In the 2018/2019 financial year, 37% of our clients identified as Aboriginal or Torres Strait Islander, reflecting the disproportionate disadvantage that Aboriginal and Torres Strait Islander peoples continue to face.

1.2 Scope and overview of submission

This submission does not provide a comprehensive overview of all issues relevant to the topic of incarceration of First Nations peoples in custody in New South Wales. As previous inquiries have shown, incarceration of Aboriginal and Torres Strait Islander peoples is rooted in historic dispossession and unresolved intergenerational trauma. It is closely linked with a raft of interconnected socio-economic issues which disproportionately affect Aboriginal and Torres Strait Islander peoples, including poverty, discrimination, low educational outcomes, homelessness, family and domestic abuse, impact of the stolen generations and the continued removal of children, poor health outcomes, loss of cultural identity, and substance misuse. To comprehensively address all of the issues at play, a longer inquiry is needed.

Instead, this submission seeks to identify some of the key issues relevant to the high rates of First Nations peoples in custody, namely:

1. suspect targeting of Aboriginal and Torres Strait Islander youth and over-policing of Aboriginal and Torres Strait Islander communities;
2. how bail laws remain culturally inappropriate and indirectly discriminate and disadvantage Aboriginal and Torres Strait Islander peoples;
3. the lack of cultural support for Aboriginal and Torres Strait Islander peoples engaged in the criminal justice system;
4. the closure of culturally appropriate prisons; and
5. the lack of appropriate oversight bodies for Aboriginal deaths in custody;

In preparing this submission we have worked with the following representatives of the

and We thank these people for sharing their time, personal stories and insights. Unfortunately, due to the COVID-19 pandemic, our outreach services have been temporarily suspended since March 2020. This, together with the shortness of time in which to lodge the submission has restricted our ability to conduct wider consultations in our outreach communities.

2. SUSPECT TARGETING AND OVER POLICING

WNSWCLC and WWLS note that the unacceptably high and increasing rates of Aboriginal and Torres Strait Islander peoples in custody is, in large part, the result of the continuation of discriminatory police and justice policies.

One such example is the use of Suspect Target Management Plans (**STMPs**) under which local area police commands specifically target known offenders through increased surveillance and policing activities with the objective of minimising repeat offending. Whilst well-intentioned, STMPs have become an authorised means for discriminatory targeting of Aboriginal and Torres Strait Islander peoples, particularly children and young people.

Although only three percent of NSW's population identity as Aboriginal or Torres Strait Islander, 72% of the 429 children selected by the NSW Police Force for STMP targeting between 1 August 2016 and 1 August 2018 were identified as "possibly Aboriginal or Torres Strait Islander".[5] More than half of the identified targets lived in rural and remote areas.[6] This data highlights a number of problems with the development and use of STMPs, including:

- the unrestricted discretion of police officers to nominate children and youth as targets for STMPs;
- the lack of transparency around criteria to nominate a target;
- the lack of uniformity in use and application of STMPs;
- the disregard for the presumption of innocence, specifically in respect of children; and
- generally speaking, the lack of police accountability.

Aboriginal and Torres Strait Islander youth in the Western NSW region frequently report being followed, watched and harassed by police; in many cases after only being charged with minor offences (or in some cases, never having been charged at all). It seems that police do not inform children that they are being monitored under an STMP, or why they are being monitored, and children only become aware of the fact they are a target through increased and repeated contact with police. This exacerbates negative relationships between Aboriginal and Torres Strait Islander peoples and police and often results in charges for additional low-level offending being laid, such as in relation to incidents of swearing at police.

In January this year, in its interim report into the use of STMPs on children and young people, the NSW Law Enforcement Conduct Commission (**LECC**) acknowledged that STMP

[5] Law Enforcement Conduct Commission, *An investigation into the formulation and use of the NSW Police Force Suspect Targeting Management Plan on children and young people* (January 2020) 11.
[6] Ibid 17.

amounts to "unreasonable, unjust and oppressive" interactions and targeting of children. LECC expressed concern that:

> ... the local target identification process does not demonstrate sufficient rigour to prevent the unfair targeting of certain types of young offenders and ameliorate officer bias in who gets selected. For obvious reasons, even the appearance of discrimination in the application of a policy such as the STMP can have negative implications for its effectiveness.

While the report made a number of recommendations to improve accountability and transparency around the use of STMPs, WNSWCLC and WWLS urges the NSW Government to:

Recommendation 1

Ban the use of STMPs on children.

The targeting of Aboriginal and Torres Strait Islander peoples through STMPs is just one example of the over-policing which continues to occur in Aboriginal and Torres Strait Islander communities, entrapping vulnerable children and young people in the criminal justice system. Despite improvements, Aboriginal and Torres Strait Islander peoples are significantly more likely to be targeted, charged, arrested and face gaol time for low-level offences than their non-Aboriginal and Torres Strait Islander peers. In NSW:

- 31% of all people imprisoned for driving while suspended or disqualified are Aboriginal or Torres Strait Islander;[7]
- 17% of people issued with criminal infringement notices for offensive language are Aboriginal or Torres Strait Islander;[8]
- 12% of all persons subjected to police strip searches are Aboriginal or Torres Strait Islander;[9] and
- over 80% of all Aboriginal and Torres Strait Islander peoples found with a non-indictable quantity of cannabis are taken to Court, compared to just over 50% of non-Aboriginal and Torres Strait Islander people.[10]

Aboriginal and Torres Strait Islander peoples in Western NSW, including our clients, are too often becoming involved with the criminal justice system from a young age as a result

[7] Australian Law Reform Commission, above n 4, 12.137.
[8] Ibid 12.171.
[9] Michael McGowan, 'NSW police disproportionately target Indigenous people in strip searches' *The Guardian* (online) (16 June 2020) < https://www.theguardian.com/australia-news/2020/jun/16/nsw-police-disproportionately-target-indigenous-people-in-strip-searches>.
[10] Michael McGowan and Christopher Knaus, "Essentially a cover-up': why it's so hard to measure the over-policing of Indigenous Australians' *The Guardian* (online) (13 June 2020) <https://www.theguardian.com/australia-news/2020/jun/13/essentially-a-cover-up-why-its-so-hard-to-measure-the-over-policing-of-indigenous-australians>.

of being targeted by police. The classic example is an Aboriginal child or young person who justifiably feels victimised by police (because of discriminatory policies including STMPs), becomes defensive of their actions because they have done nothing wrong and asserts their legal rights. The situation escalates, the young person is charged with offensive language and/or resisting arrest, fails to attend Court (which may be for a variety of reasons, including a lack of transport), and a warrant is issued.

Instead of rigorously policing low-level offending of Aboriginal and Torres Strait Islander peoples, WNSWCLC and WWLS calls on the NSW Government to:

Recommendation 2

Shift its focus to intervention, diversion and rehabilitation focused programs and prioritise keeping Aboriginal and Torres Strait Islander peoples, particularly young peoples, out of the criminal justice system.

Recommendation 3

Provide long-term funding for Youth Koori Courts to be established in regional areas with high Aboriginal and Torres Strait Islander populations, specifically in Western NSW.

Recommendation 4

Fund the development and long-term operation of a drug treatment facility in Dubbo that includes residential and non-residential detox for all drug types and is open to those exiting the criminal justice system or with co-occurring mental health concerns.

WNSWCLC and WWLS recognise that the NSW Government has taken some steps in recent years to implement the principle of prison as a last resort, with the Youth Koori Court in Parramatta a prime example. However, there remains a distinct lack of intervention and rehabilitative programs and infrastructure in regional and remote areas. The lack of locally-based alternatives to prison means that vulnerable Aboriginal and Torres Strait Islander peoples in remote areas are at higher risk of early engagement with the criminal justice system.

3. DISCRIMINATORY EFFECT OF CULTURALLY INAPPROPRIATE BAIL LAWS

While principled changes have been made to NSW bail laws since the 1991 Royal Commission, the practical application of these laws is continuing to have an adverse and discriminatory effect on Aboriginal and Torres Strait Islander peoples. In particular,

standard bail conditions and processes requiring a single, fixed address indirectly discriminate against Aboriginal and Torres Strait Islander peoples resulting in higher rates of bail refusal and arrests for breach of bail within Aboriginal and Torres Strait Islander populations.[11]

First, the requirement for a single bail address fails to take into account the devastating socio-economic disadvantage experienced by Aboriginal and Torres Strait communities.

- An Aboriginal or Torres Strait Islander person is over nine times more likely to be homeless, and six times more likely to live in social housing, than a non-Aboriginal or Torres Strait Islander person.[12]
- An Aboriginal or Torres Strait Islander woman is 32 times more likely to be hospitalised as a result of family or domestic abuse than a non-Aboriginal or Torres Strait Islander woman.[13]
- Aboriginal and Torres Strait Islander children are 10 times more likely to be placed in out-of-home care than their non-Aboriginal and Torres Strait Islander peers.
- And an Aboriginal and Torres Strait Islander person is 2.7 times more likely to be unemployed than a non-Aboriginal and Torres Strait Islander person.[14]

These socio-economic risk factors often have a significant, although rarely acknowledged, impact on an Aboriginal or Torres Strait Islander person's ability to get and retain bail. For example, a person who is homeless, has been forced to give up their social housing tenancy during incarceration, or has no home to go to because they have been in and out of foster care, often has no address to provide for bail purposes. Instead, an Aboriginal or Torres Strait Islander person will provide the address of a family or kin member. But in that home they may be exposed to family or domestic violence and the devastating predicament that if they leave the home to escape violence they may be charged with breaching bail conditions.

Second, there are a myriad of social and cultural reasons as to why it is often unsuitable for an Aboriginal or Torres Strait Islander person to be required to provide a single bail address. As has been well-documented, government displacement, resettlement and child removal policies forced the separation of Aboriginal and Torres Strait Islander family and kinship groups. This has resulted in many Aboriginal and Torres Strait Islander family groups being splintered across vast geographic areas, forcing Aboriginal and Torres Strait Islander peoples to travel significant distances to retain family, kin and cultural ties and

[11] Lorana Bartels, 'Indigenous over-representation in the criminal justice system' *Indigenous Justice Clearinghouse* Research Brief 24 (May 2019) 3.
[12] Australian Institute of Health and Welfare, *Homelessness among Indigenous Australians* (2014) 2.
[13] Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story* (2019) 101.
[14] Department of the Prime Minister and Cabinet, above n 1, 78.

attend to matters of cultural importance. Strict bail requirements discriminate against the need for legitimate movement between family for personal and cultural reasons.

To mitigate the discriminatory impact of NSW bail laws on Aboriginal and Torres Strait Islander peoples, WNSWCLC and WWLS call on the NSW government to:

Recommendation 5

Amend bail laws to allow Aboriginal and Torres Strait Islander peoples to list three to four safe places of residence as bail addresses.

4. LACK OF CULTURALLY APPROPRIATE SUPPORT WITHIN THE CRIMINAL JUSTICE SYSTEM

There is currently inadequate cultural support for Aboriginal and Torres Strait Islander peoples engaged in the NSW criminal justice system.

WNSWCLC and WWLS acknowledge the importance of the Aboriginal Community Liaison Officer (**ACLO**) role in local police command areas with high Aboriginal and Torres Strait Islander populations, including Bourke, Brewarrina, Dubbo, Gilgandra, Walgett and Wellington. ACLOs play an invaluable role in supporting Aboriginal and Torres Strait Islander peoples in their interactions with police and in developing positive relationships between Aboriginal and Torres Strait Islander communities and police.

However, limitations to the availability and appropriateness of ACLO support means that many Aboriginal and Torres Strait Islander peoples are not able to obtain the assistance of an ACLO. ACLOs working in the Western NSW region are currently only available from 9am to 5pm, Monday to Friday and many remote communities do not have a permanent ACLO stationed in town. This means that Aboriginal and Torres Strait Islander people who are involved in incidents outside business hours, or in very remote towns, are not provided with access to cultural support. In the Dubbo region there are currently two ACLOs, both of whom are male, supporting approximately 10,000 Aboriginal and Torres Strait peoples. In many situations, particularly in circumstances of family and domestic abuse, support from a male ACLO is not appropriate. WNSWCLC and WWLS urge the

NSW Government to:

Recommendation 6

Fund and appropriately resource 24-hour male and female ACLO support in each NSW Police Force local area command

Recommendation 7

Ensure that recruitment processes for ACLOs involve mandatory consultation with local Aboriginal communities to ensure that persons appointed to ACLO positions are trusted by the communities in which they are working.

5. CLOSURE OF CULTURALLY APPROPRIATE PRISONS

The NSW Government's recent decision to close culturally appropriate and rehabilitative prisons highlights its disregard for the cultural safety of Aboriginal and Torres Strait Islander peoples within the criminal justice system.

In 2000, a minimum-security prison for young Aboriginal men was opened 700 kilometres north-west of Sydney, near Brewarrina. The Yetta Dhinnakkal (meaning "right pathway" in the Nyemba language) Correctional Centre (**Yetta Correctional Centre**) was the first Australian prison specifically designed to meet the needs of Aboriginal inmates and was heralded as a much needed and ground-breaking response to the high rates of Aboriginal and Torres Islander incarceration.

Yetta Correctional Centre was located on a 10,500 hectare cattle station, maintained by Aboriginal elders, and was designed to maintain and foster deep cultural and community connections and rehabilitate low-risk Aboriginal prisoners. The young men at the facility were able to maintain contact with families and their communities, many local boys were able to stay on country and inmates were able to learn new vocational skills during their period of incarceration. Within ten years of operation, the reoffending rate of inmates had halved.[15] WNSWCLC has conducted a legal outreach service to Yetta Dhinnakkal since 2008 and our clients, even those originally from other communities (including Sydney), frequently reported feeling physically and culturally much safer than in mainstream prisons.

[15] New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2019, 19 (David Shoebridge).

However, in July 2020, Yetta Correctional Centre was closed down for being "too remote [and] too costly".[16] We understand the young inmates, aged 18 to 25, who were incarcerated for first-time, low-level offending (with sentences of less than two years), are now being moved hundreds of kilometres away to other prisons (which may well be maximum security) away from families, communities and culture. The closure of a prison specifically designed as a culturally-safe and rehabilitative centre highlights the NSW Government's lack of commitment to providing cultural support for Aboriginal and Torres Strait Islander peoples within the criminal justice system. WNSWCLC and WWLS calls on the NSW Government to:

Recommendation 8

Reopen Yetta Correctional Centre and open additional prisons based on a rehabilitative and culturally-appropriate model.

Recommendation 9

Invest in culturally appropriate programs to aide rehabilitation and reduce recidivism of Aboriginal and Torres Strait Islander offenders and, ultimately, reduce rates of incarceration.

6. INAPPROPRIATENESS OF OVERSIGHT BODIES TASKED WITH INVESTIGATING DEATHS IN CUSTODY

Aboriginal and Torres Strait Islander peoples should not be dying in custody. The NSW Government must urgently implement the recommendations raised in this submission and recommendations of the multitude of previous government reports to keep Aboriginal and Torres Strait Islander peoples out of prison and address underlying trauma, disadvantage and poverty within Australia's First Nations communities.

Mechanisms must also be introduced so that if an Aboriginal or Torres Strait Islander person does die in custody their family is informed, the death is independently investigated, the process is open and transparent and any persons responsible are held to account. Under current processes, families and representatives of Aboriginal and Torres Strait Islander peoples who have died or suffered injury in custody have reported:

- not being informed of the death or injury for several days;
- not being allowed to see the body and/or having a body returned with body parts missing;

[16] Jessie Davies, 'Brewarrina jail is closing and the community warns it will have a devastating effect' *ABC News* (online) (20 October 2019) <https://www.abc.net.au/news/2019-10-20/brewarrina-jail-closure-community-devastated/11618676>.

- not being interviewed as part of the investigation process or otherwise given the opportunity to provide information to investigators about conditions in custody reported to them prior to the death or incident; and
- not being communicated with or kept up-to-date of the investigation.

WNSWCLC and WWLS calls on the NSW Government to:

Recommendation 10

Require the Aboriginal Legal Service to be informed of any deaths of Aboriginal and Torres Strait Islander peoples in custody within 12 hours of the person discovered.

Recommendation 11

Establish an independent, Aboriginal and Torres Strait Islander oversight body to investigate and report on Aboriginal and Torres Strait Islander deaths in custody in NSW. In the interests of truth and justice, the body should be given broad investigative powers, including the power to enter correctional facilities and police stations and the power to require a range of witnesses (including inmates and police and correctional officers) to give evidence.

Recommendation 12

Implement a mandatory process whereby an Aboriginal Support Worker is with an arrested Aboriginal or Torres Strait Islander person from the time they are delivered to the custody manager at a police station until such time after that person is secured in a cell as agreed between the worker and the detained individual.

Recommendation 13

Require that a person from the Aboriginal and Torres Strait Islander oversight body be present at an autopsy conducted as a result of a death in custody. That person must consult the family prior to attending the autopsy. They may choose not to attend the autopsy if the family has given written consent for them not to attend.

Recommendation 14

A person from the Aboriginal and Torres Strait Islander oversight body must be notified within one hour of an Aboriginal or Torres Strait Islander death in custody and must notify the family of that death within a reasonable time (that time shall not exceed 3 hours from the time the death was discovered).

7. CONCLUSION

For any questions or to discuss this submission further please contact Hannah Robinson, WNSWCLC Solicitor, on or at

Yours faithfully
Western NSW Community Legal Centre Inc
Per:

Hannah Robinson
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On behalf of

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