

**Submission  
No 126**

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

**Organisation:** Deadly Connections Community and Justice Services Limited  
**Date Received:** 30 September 2020

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**DEADLY CONNECTIONS**  
COMMUNITY AND JUSTICE SERVICES

**Select Committee on the High Level of First Nations  
People in Custody and Oversight and Review of Deaths in  
Custody**

**30 September 2020**

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## **About Deadly Connections**

### **Who we are**

Deadly Connections Community & Justice Services ('Deadly Connections') was established in September 2018 as a specialist Aboriginal community led notfor-profit organisation. This was in response to direct community concerns around the lack of culturally responsive, community driven, grass roots, innovative solutions to address the over-representation of First Nations people, families and communities in both the child protection and justice systems.

### **Our Truth**

First Nations people of Australia are grossly over-represented in the child protection and justice systems. This involvement perpetuates a cycle of intergenerational grief, loss, trauma and disadvantage. True lived experience, culture, healing, self-determination and a deep community connection must be the heart and soul of all work with First Nations people and communities.

### **Our Purpose**

Deadly Connections positively disrupts intergenerational disadvantage, grief, loss, trauma by providing holistic, culturally responsive interventions and services to First Nations people and communities, particularly those who have been impacted by the child protection and/or justice systems.

### **Our Vision**

To break cycles of disadvantage, trauma, child protection and justice involvement so First Nations people of Australia can thrive not just survive.

### **Our Work**

- We place culture, healing, true lived experience, deep community connections and self-determination at the centre of all we do;
- We embody and embed holistic, community-based, decolonising approaches to connecting First Nations people to their cultural, inner and community strength; and
- We advocate and collaborate to improve justice and child protection systems.

### **Our Approach**

- Life Course – we recognise the connections across all stages and domains in life, intervention and change can occur at any stage of a person's life span.
- Decolonising – we challenge the dominance, values and methods of imposed colonial systems, practices and beliefs.
- Self-Determination – Aboriginal people, families and communities are experts of their own lives, with solutions to the challenges we face and their own agents for change.
- Healing Centred Engagement – a holistic healing model that adopts culture, spirituality, community action and collective healing.

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# DEADLY CONNECTIONS

## COMMUNITY AND JUSTICE SERVICES

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## Recommendations Summary

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This submissions calls for:

1. The NSW Government to urgently address the over-representation of First Nations people in police and prison custody in order to reduce deaths in custody and mitigate the harm and trauma that flows from incarceration for First Nations people inside prison, their families, and communities.. Efforts to decrease incarceration should include the following measures:
  - a. Decriminalising and de-incarcerating Aboriginal people policed for minor offences, especially public order, non-violent offences, breach of justice orders, traffic and minor property offences.
  - b. Raise the age of criminal responsibility.
  - c. Providing a right to bail for all Aboriginal people appearing before the court, except where there is a flight risk, including by recognising Aboriginal strengths and circumstances in the bail legislation.
  - d. Promoting non-custodial sentences for Aboriginal offenders, including repeat offenders. This is especially important for Aboriginal young people, parents and care givers
  - e. Culturally responsive and accessible diversionary options and sentencing alternatives
  - f. Increased, long term and well resourced, early intervention, prevention and diversionary programs, especially Aboriginal owned and operated programs
  - g. Promoting self-determination of Aboriginal people, families and communities including community-led organisations and families in justice and child protection spaces.
2. Safeguards in prison to be implemented that will prevent First Nations deaths in custody, including culturally safe programs run by Aboriginal controlled organisations such as Deadly Connections that support Aboriginal people in custody and their families
3. The establishment of specific bail and sentencing courts and procedures for First Nations people.
4. The establishment and resourcing of a community, cultural, healing and social justice hub for justice involved First Nations people, families and communities.
  4. Implementation of the 339 recommendations from the Royal Commission into Aboriginal Deaths in Custody.
  5. Address underlying factors that contribute to justice involvement for First Nations people, families and communities including out-of-home-care interventions, disadvantage and trauma
  6. The establishment of an independent body, appointed by and inclusive of the Aboriginal Community (including those with lived experience and those who have lost loved ones in

custody). This independent body should have Aboriginal oversight of Aboriginal deaths in custody investigations, coronial inquiries and implementation of coronial recommendations. This oversight body should also have its own authority to provide advice to the DPP on relevant charges and instigate its own prosecutions against people and institutions responsible for First Nations deaths in custody.

## Introduction

Deadly Connections welcomes the opportunity to contribute to the NSW Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody. As Aboriginal people who have experienced imprisonment and also professionally supporting justice involved Aboriginal peoples and families, we intimately understand the adverse impacts of imprisonment on our men, women, children, families and communities. Addressing the mass imprisonment of our people and deaths in custody is a critically urgent issue. It perpetuates intergenerational trauma, disrupts and diminishes the wellbeing of our communities and families and undermines our cultures.

First Nations people in Australia are recognised as the oldest living culture on earth yet we continue to be subject to state and institutional oppression and systemic racism. The over representation of First Nations people in custody is clear evidence of these injustices and contributes to deaths in custody, the ongoing disconnection from culture, family, community. fracturing of families and our ongoing suffering.

## 1. High Rates of Incarceration of Aboriginal Peoples in NSW: The Urgent Need for Change

### 1.1 Behind the Data

The high rates of incarceration of Aboriginal peoples in NSW has been extensively documented and reported over a significant period, including for 29 years following the Royal Commission into Aboriginal Deaths in Custody. The overrepresentation of Aboriginal peoples within the ‘justice’ system from police interactions to imprisonment is so enduring that it can be taken as self-evident for this inquiry.

Whilst this is not a new phenomenon, we set out below some key statistics to underline the urgency, ongoing crisis and failure of measures to address the disparity and the broad reaching impacts on our communities. These statistics are more than ‘numbers’. These are loved family members, parents, children, uncles, aunties, grandparents, siblings and community members who are or have been imprisoned in NSW. Their lives, stories and experiences cannot be reduced to a dataset.

### 1.2 Imprisonment Rates are Higher and Growing Faster for Aboriginal People

Aboriginal people comprise 3.5% of the NSW population,<sup>1</sup> but **28%** of the adult prison population.<sup>2</sup> Between 2001 and 2015, the number of First Nations peoples in NSW prisons more than doubled.<sup>3</sup> The upward trajectory has continued since then.

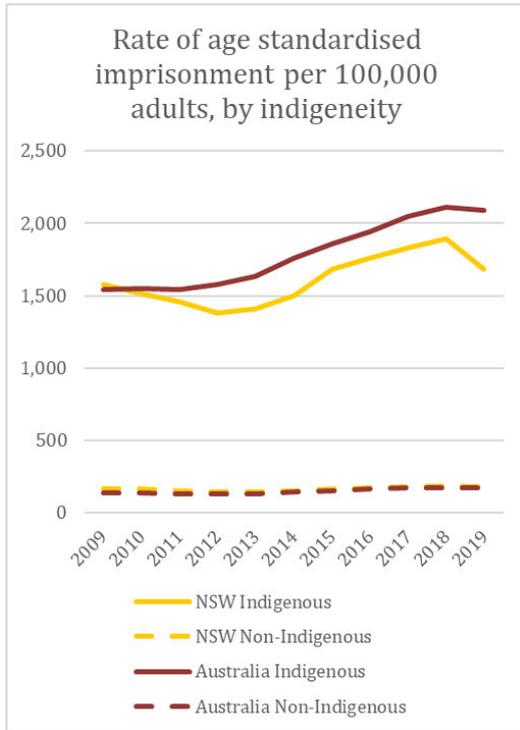
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<sup>1</sup> Australian Bureau of Statistics, [Aboriginal and Torres Strait Islander Prisoner Characteristics](#) (Catalogue No 4517.0, 30 June 2018).

<sup>2</sup> Australian Bureau of Statistics, [Aboriginal and Torres Strait Islander Prisoner Characteristics](#) (Catalogue No 4517.0, 30 June 2019).

<sup>3</sup> NSW Bureau of Crime Statistics and Research, ‘Indigenous Crime and Punishment’ (Media Release, 28 September 2016) < [https://www.bocsar.nsw.gov.au/Pages/bocsar\\_media\\_releases/2016/mr-Indigenous-crime-and-imprisonment.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2016/mr-Indigenous-crime-and-imprisonment.aspx)>.

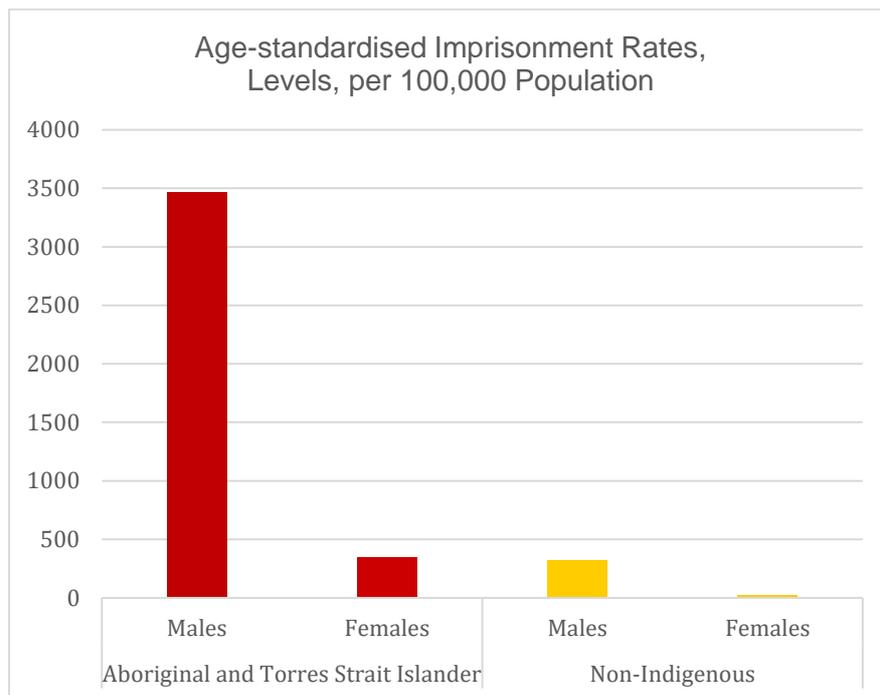
**Rate and Growth of Age Standardised Imprisonment per 100,000 Adults, by Indigeneity.**



Note: Age-standardised rates are adjusted for differences in the age distribution of the Indigenous and non-Indigenous populations. Source: ABS 2019 Prisoners in Australia, December 2019.

The disparity between Aboriginal and non-Aboriginal peoples in age-standardised and gendered imprisonment rates continues to be marked, demonstrating an enduring crisis within.

**Age-standardised Imprisonment Rates, Levels, per 100,000 Population (NSW)**



Source: ABS - Prisoners in Australia, 2019<sup>4</sup>

### Rates of Imprisonment of Aboriginal Peoples in NSW

Aboriginal men are imprisoned at 10.8 times the rate of the general male population



Aboriginal women are imprisoned at 16 times the rate of the general female population



Aboriginal young people are imprisoned at 16 times the rate of non-Indigenous young people



Source: ABS 2019 Prisoners in Australia, December 2019;; AIHW, Youth Justice in Australia 2018–19 <<https://www.aihw.gov.au/reports/juv/132/youth-justice-in-australia-2018-19/contents/state-and-territory-factsheets/new-south-wales>>.

Recidivism is higher among First Nations prisoners. 74% of Aboriginal prisoners have previously been imprisoned, compared to 47% of non-Aboriginal prisoners.<sup>5</sup>

The trends in increasing incarceration rates are not, however, matched by the rate of offences. Between 2001 and 2015 in NSW the rate of arrest of First Nations peoples for violent offences declined by nearly 37 per cent (36.81%), the rate of arrest for property crime has also declined by almost 33% (32.95%).<sup>6</sup> This trend indicates that growing rates of incarceration is not a response to growing crime rates but a result of systemic bias in law enforcement against First Nations people.

### 1.3 Inadequacies of the Criminal Justice System for First Nations People

The concept of over-policing has been used to describe how First Nations people in particular, and First Nations communities more generally, are policed in a way that is different from, and more intensive than the policing of non-Aboriginal communities<sup>7</sup>. The practice of over-policing stems from and perpetuates direct and systemic racism.

<sup>4</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2019* (Catalogue No. 4517.0, 5 December 2019) <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Main+Features12019?OpenDocument>>.

<sup>5</sup>Ibid.

<sup>6</sup> NSW Bureau of Crime Statistics and Research, 'Indigenous Crime and Punishment' (Media Release, 28 September 2016) <[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_media\\_releases/2016/mr-Indigenous-crime-and-imprisonment.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2016/mr-Indigenous-crime-and-imprisonment.aspx)>.

<sup>7</sup> Anna Crehan, "Appropriate" Police Discretion and Indigenous Over-Representation in the Criminal Justice System' (2010) 11(1-2) *Australian Journal of Professional and Applied Ethics* 1, 1-13 <

## 1.4 Overrepresentation Starts Young

On average, First Nations peoples in custody were younger when they first interacted with police and when they were first convicted, compared to non-Indigenous people in custody.<sup>8</sup> On an average day in 2018–19, in New South Wales First Nations over-representation was higher in detention (16 times the non-Aboriginal rate).<sup>9</sup>

First Nations young people are experiencing higher rates of contact at all levels of the criminal justice system compared with non-Aboriginal young people. The disproportionate rates of supervision and detention of First Nations children indicate a clear need for immediate change.

## 1.5 COVID Measures and the Impact on The Prison Populaton: Indications of Rapid Reduction on Incarceration Rates

The impact of COVID has seen a substantial decrease in the NSW prison population. Between January 2019 and May 2020, there was an 11.3% decrease of First Nations people in NSW prisons. The decrease for First Nations people in prison is slightly higher than the overall decrease in imprisonment (10.7%). The decline is especially due to courts increasingly granting bail and releasing people on bail where health and related matters are preeminent in bail considerations. The main factors contributing to the decline are law enforcement and judicial decisions to remand fewer people to custody and courts discharging more people on bail, with a drop in the remand population of 21.2%.<sup>10</sup> The average weekly number of discharges to bail between 15 March and 31 May was 95.0% higher than the average weekly number of discharges between 12 January and March 2020.<sup>11</sup>

The rapid decrease in incarceration demonstrates that where health and wellbeing considerations are prioritised in bail, sentencing and parole decisions, First Nations imprisonment can decline rapidly. It also shows the risk that prisons present to First Nations people in terms of disease and mental wellbeing, which have been key considerations in granting bail.<sup>12</sup> At the same time, the decrease in the remand population has not been matched with an increase in crime levels, rather many crime categories have experienced a downward trend.<sup>13</sup>

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[http://researchoutput.csu.edu.au/R/-?func=dbin-jump-full&object\\_id=13963&local\\_base=GEN01-CSU01](http://researchoutput.csu.edu.au/R/-?func=dbin-jump-full&object_id=13963&local_base=GEN01-CSU01)>.

<sup>8</sup> Australian Institute of Health and Welfare, Parliament of Australia, *Youth Justice in Australia 2018-19* (Report, 2020) 9 <<https://www.aihw.gov.au/getmedia/a5a364b9-fe69-4d02-9c93-1965a69a3d93/aihw-juv-132.pdf.aspx?inline=true>>.

<sup>9</sup> *Ibid* Table 3.1.

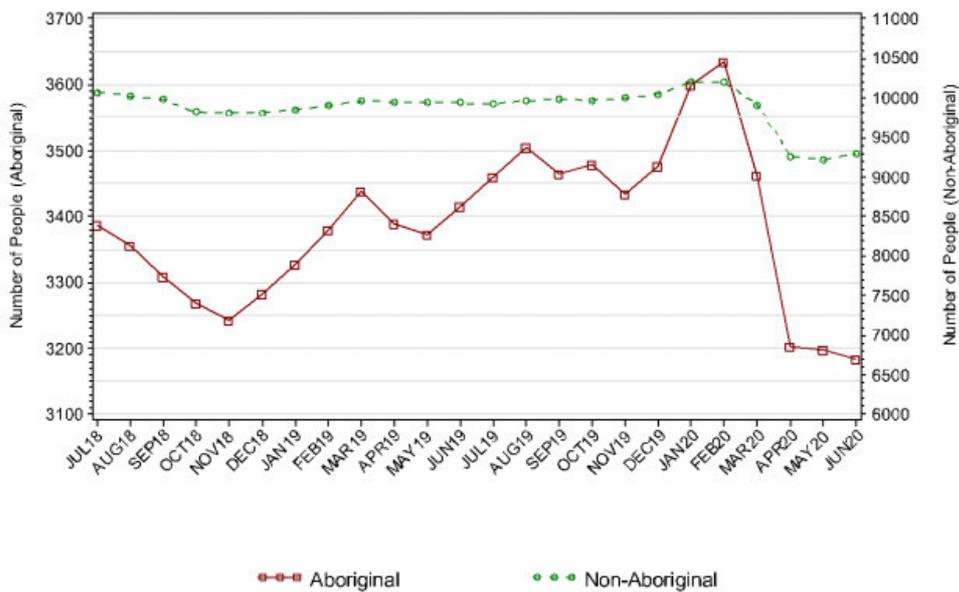
<sup>10</sup> NSW Bureau of Crime Statistics and Research, *The Impact of COVID-19 Measures on the Size of the NSW Adult Prison Population* (Bureau Brief 149, 2020) 4 <<https://www.bocsar.nsw.gov.au/Publications/BB/BB149-The-impact-of-COVID-19-measures-on-the-NSW-adult-prison-population.pdf>>.

<sup>11</sup> *Ibid* 1.

<sup>12</sup> *Rakielbakhour v DPP [2020] NSWSC 323*.

<sup>13</sup> NSW Bureau of Crime Statistics and Research (n 10) 3.

### 2.1.4 ADULT CUSTODY POPULATION BY ABORIGINALITY



Source: NSW Bureau of Crime Statistics and Research, *Custody Statistics, Quarterly Update June 2020*.<sup>14</sup>

## 1.6 Costs of Overrepresentation: Direct Expenditure on Imprisonment is High and Ineffective

The Australian Productivity Commission estimates that in 2015–16, total direct expenditure on public order and safety in NSW was \$7 billion, of which an estimated \$883 million (13%) was spent on First Nations peoples.<sup>15</sup> In 2018-19, the **Justice** cluster spent \$10.2 billion (\$8.8 billion recurrent **expenses** and \$1.4 billion capital **expenditure**).

On a per person basis, NSW public order and safety expenditure for First Nations people is more than 4 times the expenditure for non-Aboriginal people (\$3,844 per Aboriginal person compared to \$818 per non-Aboriginal person). This is part of a broader trend over the last decade.<sup>16</sup>

Governments spend a significant amount on prisons and services associated with incarceration. There is a significant opportunity to direct these savings to community-led intervention, prevention, diversion and healing to further reduce involvement in the justice system and ongoing detrimental, disruption to First Nations people, families and communities.

<sup>14</sup> NSW Bureau of Crime Statistics and Research, *New South Wales Custody Statistics, June 2020* (Report, August 2020) 18 <[https://www.bocsar.nsw.gov.au/Publications/custody/NSW\\_Custody\\_Statistics\\_Jun2020.pdf](https://www.bocsar.nsw.gov.au/Publications/custody/NSW_Custody_Statistics_Jun2020.pdf)>.

<sup>15</sup> Public order and safety expenditure includes spending on police services, fire protection services, criminal courts services, other courts and legal services, access to justice services, juvenile corrective institutions, other prisons and corrective services, and other public order and safety services. It therefore includes expenditure on services that are not directly related to criminal justice matters: Productivity Commission for the Steering Committee for the Review of Government Service Provision, Parliament of Australia, *2017 Indigenous Expenditure Report* (Final Report, October 2017) 7 <<https://www.pc.gov.au/research/ongoing/indigenous-expenditure-report/2017/ier-2017-indigenous-expenditure-report.pdf>>.

<sup>16</sup> [Ibid.](#)

## 2. Systemic Change: Implementing RCIADIC & ALRC Recommendations

### 2.1 Royal Commission into Aboriginal Deaths in Custody: Nearly 30 Years On

2021 will mark the 30 year anniversary of the tabling of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') report into federal parliament. Nearly three decades have passed and yet we face a deepening crisis in the impacts of the justice system on First Nations peoples across NSW and Australia.

RCIADIC's final report recognised the discriminatory impacts of the criminal system on Aboriginal people and made 339 recommendations across a wide range of policy areas. The largest number of recommendations relate to policing, criminal justice, incarceration and deaths in custody, although there was also substantial body of recommendations dedicated to enhancing Aboriginal self-determination.<sup>17</sup>

The RCIADIC concluded that "Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody...what is overwhelmingly different is the rate at which Aboriginal people come into custody, compared with the rate of the general community".<sup>18</sup> Yet, investment in Aboriginal organisations has declined in recent years, especially at a Federal level.

Despite this key finding, in the 29 years since the RCIADIC the proportion of First Nations people in prisons has doubled from 14 to 28%.<sup>19</sup> There is an urgent need for the NSW government to need to divest funding from prisons and criminalising First Nations people and instead invest in holistic, culturally informed intervention, prevention, diversion strategies and alternatives to full-time imprisonment.

### 2.2 Implementing and Tracking Progress on RCIADIC Recommendations

Despite nearly 30 years having passed, a significant number of recommendations made by the RCIADIC remain outstanding. The joint response to the Deloitte Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, concluded that '*very few of the RCIADIC recommendations have been implemented, and some policy positions directly contravene the recommendations*'.<sup>20</sup> In particular the joint statement notes that many outcomes central to the concern of RCIADIC have continued to worsen.<sup>21</sup> In particular, the commitments of RCIADIC to reduce the number of Aboriginal people in custody (recommendation 148); maintain a watching brief on deaths in custody through transparent reporting and annual monitoring (recommendations 15, 40); and extensively consult with Aboriginal people throughout the process of implementation, have not been realised in a substantive sense'.<sup>22</sup>

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<sup>17</sup> Commonwealth of Australia, *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1991) vol. 5.

<sup>18</sup> Ibid vol. 1[1.3.1]–[1.3.3].

<sup>19</sup> Thalia Anthony, 'Costs, Consequences and Alternatives to Imprisoning First Nations People', Committee for Economic Development Australia (Blog, 13 July 2020) <<https://www.ceda.com.au/Digital-hub/Blogs/CEDA-Blog/July-2020/Costs,-consequences-and-alternatives-to-imprisoning-First-Nations-people>>.

<sup>20</sup> K. Jordan et al, *Joint response to the Deloitte Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (CAEPR Topical Issue No. 4, 20 December 2018) 1.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

## 2.3 Failure to Implement Recommendations is a Matter of Life and Death for First Nations People

The failure to fully implement all RCIADIC recommendations, and numerous recommendations from the plethora of subsequent inquiries and key reports on the incarceration of First Nations peoples, continues to be a matter of life and death for First Nations peoples. There must be a genuine commitment from governments at all levels to review implementation and immediately address the numerous inadequacies in the current response to the incarceration of First Nations people.

In the last 10 years, there have been 21 First Nations deaths classified as a death in custody in NSW.<sup>23</sup> These include deaths where Aboriginal people were denied adequate healthcare, young people were held on remand, and prison facilities were inadequate to cater for the needs of prisoners.<sup>24</sup> These are circumstances which could have been prevented had key RCIADIC recommendations been implemented by the State and Commonwealth governments.

The table below provides a snapshot of a number deaths in NSW and other jurisdictions, and the recommendations which, had they been implemented, could have prevented harm coming to that person, or have otherwise contributed to the trauma of the family and community following the death.

NSW	
Death in Custody	Key Recommendations
Rebecca Maher was a 36-year-old Aboriginal woman detained in police custody for public drunkenness in 2016. After taken into custody, the police did not attempt to contact a responsible person or contact the Aboriginal Legal Services Custody Notification Service. The police were overtly racist in their conduct towards Ms Maher. She died in her cell that night and police did not check on her until the next morning.	Although NSW has decriminalised public drunkenness, NSW has not implemented recommendation 81, which requires legislation that decriminalises public drunkenness to also place a statutory duty upon police to utilise alternatives to police cells to detain an intoxicated person. S 206 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> (NSW) still allows police to detain intoxicated persons.  Had Rebecca Maher been taken to an alternative safe place with a responsible person, she may not have passed away.
David Dungay Jnr, a 26-year-old Dunghutti man, died in Long Bay prison hospital in 2015. He was killed when prison officers held him face down, pushed a knee into his back and a nurse administered a sedative while screaming "I can't breathe" 12 times.	The Coroner recommended de-escalation techniques instead of the use of force (recommendation 17.40). This has not been implemented. Yet, RCIADIC made a similar recommendation almost thirty years ago (Recommendation 163).
TJ Hickey was a 17-year-old Aboriginal boy who died in the course of a police pursuit in 2004. The inquest found that there was no evidence of police wrongdoing, although relied on a highly partial	NSW Coroners are required by legislation to investigate not only the cause and circumstances of death but also the quality of the care, treatment and supervision of the deceased prior to the death (Recommendation 12). This has not been

<sup>23</sup> *The Guardian*, Deaths Inside: Indigenous Australian Deaths in Custody 2020 (online database) < <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>>.

<sup>24</sup> See Nathan Reynolds, Tane Chatfield, and RB: *Ibid*.

<p>police investigation.<sup>25</sup> Police testimony was also limited and not publicised. Despite calls for a second inquest by TJ's family, no inquest has been launched.<sup>26</sup></p>	<p>implemented. Recommendation 11 has also not been implemented, which requires that coronial inquests and evidence should be conducted in public.</p>
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In addition to the failure to implement is the absence of effective implementation and adherence to requirements when recommendations are purportedly implemented. The effectiveness of implemented recommendations remains a separate issue; for example, the death of JH in 2018.<sup>27</sup> JH committed suicide in a cell with a hanging point but NSW has supposedly implemented recommendation 165, which recommended police screen all cells for safety and make sure there are no hanging points. Current practice requires each cell to be searched before and after use for anything that may be used to inflict harm or to cause damage.

The direct connection between deaths in custody and the failure to fully implement RCIADIC and other key inquiry recommendations underscores the urgency to committing and following through on nothing less than full and genuine implementation. We urge the NSW Government to fully implement the RCIADIC recommendations, which remain as relevant today as in 1991. There needs to be urgent action taken on measures to reduce Aboriginal people in custody and support Aboriginal self-determination.

Finally, we urge the Federal Government to provide a response to the Australian Law Reform Commission's Inquiry on Indigenous Incarceration Rates (2017), which emerged from the legal profession's outrage with unprecedented rates of Indigenous incarceration in Australia. The ALRC made key recommendations in relation to repealing minor offences (e.g. offensive language) that result in the disproportionate punishment of Indigenous people, reforming bail and sentencing laws/practices and promoting self-determination in community-based options, diversion, justice reinvestment and Aboriginal wellbeing strategies. The NSW Government should heed these recommendations in making reform to decrease incarceration.

*Recommendation:*

1. *The NSW Government should urgently tackle the over-representation of First Nations people in police and prison custody in order to reduce deaths in custody and mitigate the harm and trauma that flows from incarceration for First Nations people inside and their families, communities and cultures. Efforts to decrease incarceration should include the following measures:*
  - a. *Decriminalising and de-incarcerating Aboriginal people policed for minor offences, especially public order, breach of justice orders, traffic and minor property offences.*
  - b. *Raise the age of criminal responsibility.*

<sup>25</sup> Thalia Anthony, 'Policing in Redfern: Histories and Continuities' (2018) *Court of Conscience* 12,46-55.

<sup>26</sup> Rebecca Barrett, 'Thomas 'TJ' Hickey's Family Seeks Apology on 10<sup>th</sup> Anniversary of Teenager's Death in Redfern Riot', *ABC News* (online, 14 February 2014) < <https://www.abc.net.au/news/2014-02-14/tj-hickey-death-tenth-anniversary-march/5258958>>.

<sup>27</sup> Steven Trask, "'My son should not have died': Prison Death of Indigenous Man is Much More Than An "Isolated Tragedy", *SBS News* (online, 15 May 2020) < <https://www.sbs.com.au/news/my-son-should-not-have-died-prison-death-of-indigenous-man-is-much-more-than-an-isolated-tragedy>>.

- c. *Providing a right to bail for all offenders except where there is a flight risk, including by recognising Aboriginal strengths and circumstances in the bail legislation.*
- d. *Promoting non-custodial sentences for Aboriginal offenders, including repeat offenders. This is especially important for Aboriginal young people, parents and care givers.*
- e. *Promoting self-determination of Aboriginal organisations and families in justice and family care and wellbeing spaces.*

### 3. Community-Led Solutions and Self-Determination

#### 3.1 Self-Determination at the Centre of Addressing the High Level of Incarceration

The foundations of Deadly Connections are built on: True lived experience, culture, healing, self-determination and a deep community connection. These fundamentals must be the heart and soul of all work with Aboriginal communities to find ways to break the cycles of inter-generational trauma, disadvantage and poverty and reduce the numbers in child protection and the justice system.

One of the key underlying principles considered by the RCIADIC was the principle of self-determination and of empowering Aboriginal people to make many of the decisions affecting our lives.<sup>28</sup> In the 29 years since the RCIADIC report, numerous reports have also emphasised the importance of equitable partnerships with First Nations peoples, and of involving First Nations peoples in the development and implementation of policies and programs that impact upon us.<sup>29</sup>

Despite the deepening national crisis within the justice system since RCIADIC, as a community Aboriginal peoples are activated and optimistic, and like Deadly Connections, leading change on a local and national level without adequate resourcing. There is an opportunity with the focus of this inquiry to embrace meaningful, sustainable change through genuine commitment to the role of the Aboriginal community controlled sector as change leaders, including the transfer of capacity to the sector to respond to the needs of our communities. First Nations peoples have the capacity, strengths and the right to lead change for our community. Change is achievable when First Nations peoples are empowered to drive solutions. Self-determination must be the founding principle of reforms and recommendations.

#### Importance of the Right to Self-Determination

The disproportionate numbers of First Nations people in Australia's justice system is both directly and indirectly linked to inter-generational experiences of entrenched trauma, poverty and disadvantage for Aboriginal families and communities. Equally, the state's law enforcement model has continually subjugated, segregated and harmed First Nations people since the early period of colonisation. Collectively, these experiences and state interventions have meant that First Nations

<sup>28</sup> [Royal Commission into Aboriginal Deaths in Custody](#) (National Report, 1991) vol 2 and 4, chs 20 and 27 ('Deaths in Custody Report').

<sup>29</sup> Aboriginal and Torres Strait Islander Peak Organisations, [The Redfern Statement](#) (2016) 5; see, eg, Commonwealth, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, ['Bringing Them Home Report'](#) (Final Report, April 1997) ('Bringing them Home Report'); PwC, [Indigenous Incarceration: Unlock the Facts](#) (Report, 2017) 9 (recommendation 1) ('PwC Report'); Australian Law Reform Commission, [Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples](#) (Report, 2017) 61 [2.25].

peoples have principally been dominated by, and had decisions made for them by, non-Aboriginal decision-makers and society.<sup>30</sup>

Where policies, programs and services are developed by non-Aboriginal decision-makers, they may be inaccessible to First Nations peoples and, even if they are accessible, they are unlikely to achieve their objectives.<sup>31</sup> Both national and international research demonstrates that genuine and meaningful Aboriginal involvement and participation in policy-making, program design and service delivery leads to improved outcomes across various sectors such as health, child protection and criminal justice.<sup>32</sup>

First Nations self-determination improves the efficiency and effectiveness of policies, programs and service delivery for a number of reasons. Some of these reasons include:

- First Nations peoples are better placed to know and understand relevant issues of concern, and the priorities of these issues, at both a national level and in our local areas;<sup>33</sup>
- the involvement of First Nations peoples improves the cultural responsiveness and safety of policies, programs and services and of their delivery;<sup>34</sup> and
- the involvement of First Nations peoples is likely to increase community acceptance and engagement.<sup>35</sup>

### **Aboriginal Community Led and Controlled Organisations**

It is well-recognised that in order for self-determination to be effective, First Nations peoples must have a high degree of participation, and must genuinely share in decision-making powers.<sup>36</sup> In relation to the criminal justice system, First Nations peoples must be empowered to design, develop and control our own solutions in order to enhance the effect of these solutions.<sup>37</sup>

Aboriginal community led and controlled organisations ('ACCOs') such as Deadly Connections, provide an appropriate, trusted and effective means by which First Nations peoples can have our opinions articulated and can engage with governments and government services.<sup>38</sup> ACCOs are

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<sup>30</sup> [Royal Commission into Aboriginal Deaths in Custody](#) (n 28) vol 1, [1.7].

<sup>31</sup> Bringing the Home Report (n 29).

<sup>32</sup> See, eg, Margaret Kelaher et al., '[Does More Equitable Governance Lead to More Equitable Health Care? A Case Study Based on the Implementation of Health Reform in Aboriginal Health Australia](#)' (2014) 123 *Social Science and Medicine* 278; Kelly Richards et al., '[Promising Interventions For Reducing Juvenile Offending](#)' (Research Brief 10, March 2011); Steering Committee for the Review of Government Service Provision, '[Overcoming Indigenous Disadvantage: Key Indicators 2014](#)' (2014) 23 [5.2]; Secretariat of National Aboriginal and Islander Child Care, '[Whose Voice Counts? Aboriginal and Torres Strait Islander Participation In Child Protection Decision-Making](#)' (2013); Josee Lavoie et al., '[Have Investments in On-Reserve Health Services and Initiatives Promoting Community Control Improved First Nations' Health In Manitoba?](#)' (2010) 71(4) *Social Science and Medicine* 171.

<sup>33</sup> Deaths in Custody Report (n 28) vol 4 [27.9.2].

<sup>34</sup> Kelly Richards et al., '[Promising Interventions for Reducing Juvenile Offending](#)' (Research Brief, March 2011) 5; Secretariat of National Aboriginal and Islander Child Care, '[Whose Voice Counts? Aboriginal and Torres Strait Islander Participation in Child Protection Decision-Making](#)' (2013) 13; Aboriginal and Torres Strait Islander Peak Organisations, '[The Redfern Statement](#)' (2016) 12.

<sup>35</sup> Larissa Behrendt et al., '[Self-Determination: Background Concepts](#)' (2017) 13 – 14; Nathan Yaffe, '[Indigenous Consent: A Self-Determination Perspective](#)', (2018) 19 *Melbourne Journal of International Law* 704, 729.

<sup>36</sup> Australian Institute of Health and Welfare, Parliament of Australia, '[Engaging with Indigenous Australia: Exploring the Conditions for Effective Relationships with Aboriginal and Torres Strait Islander Communities](#)' (Issues Paper, October 2013) 33; Bringing the Home Report (n 29).

<sup>37</sup> PwC, '[Indigenous Incarceration: Unlock the Facts](#)' (Report, May 2017) 35; Bringing the Home Report (n 29).

<sup>38</sup> Bringing the Home Report (n 29) vol 4 [27.1.3]; Secretariat of National Aboriginal and Islander Child Care, '[Whose Voice Counts? Aboriginal and Torres Strait Islander Participation in Child Protection Decision-Making](#)' (2013) 3; Aboriginal and Torres Strait Islander Peak Organisations, '[The Redfern Statement](#)' (2016) 12; See also, Yuriko

accountable to the communities which they serve, and provide the best likelihood of achieving genuine, effective self-determination and positive outcomes for First Nations peoples.<sup>39</sup>

In the 29 years since the RCIADIC, there has been an increased recognition of the importance of ACCOs in upholding the right to self-determination for First Nations peoples. Broadly, the literature has called for:

- ACCOs to be involved in the preparation of guidelines for ensuring that the self-determination principle is applied in the design, modification or implementation of any policy or program which particularly affects First Nations peoples;<sup>40</sup>
- the governments to work with relevant ACCOs to:<sup>41</sup>
  - identify areas for improvement;
  - develop policies, programs and services; and
  - implement strategies;
- preference to be given to ACCOs as the bodies responsible for delivering services pursuant to any policy or program which particularly affects First Nations peoples;<sup>42</sup> and
- the governments to provide improved recognition, funding and resourcing of ACCOs.<sup>43</sup>

### 3.2 Deadly Connections: Community-Led Change

Based on our experience as Aboriginal people and professionals, more resources need to be directed to Aboriginal community controlled, grass roots organisations such as Deadly Connections to provide place based, culturally responsive and culturally safe interventions, services and programs.

Deadly Connections is the only specialist Aboriginal organisation that deals with both child protection and justice system involvement of Aboriginal people, families and communities. Deadly Connections is also very unique in our approach to offering programs across the life span. Our programs are by the community for the community, in collaboration with Elders, people with lived experience and professional support services. We develop and deliver innovative, culturally responsive ways to support First Nation people. We also support justice involved community, families, children and individuals at every life stage for stronger, safer communities and greater opportunities.

Deadly Connections receives ongoing requests for support for justice involved people through self referrals, professionals, family and community however is not currently resourced to provide the extent and type of support that is required .

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Yamanouchi, ['Kinship, Organisations and 'Wannabes': Aboriginal Identity Negotiation in South-Western Sydney'](#) (2010) 80(2) *Oceania* 216.

<sup>39</sup> Deaths in Custody Report (n 28)vol 4 [27.1.3] and [27.4.11].

<sup>40</sup> Deaths in Custody Report (n 28) vol 4 ('recommendation 188').

<sup>41</sup> See, eg, Deaths in Custody Report (n 28)vol 4ch 27 (recommendation 194); Australian Law Reform Commission, [Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples](#) (Final Report, December 2017) 25; Council for Aboriginal Reconciliation, [Reconciliation: Australia's challenge](#) (Final Report, 2000) chapter 10 (recommendation 1); Aboriginal and Torres Strait Islander Peak Organisations, [The Redfern Statement](#) (2016) 12.

<sup>42</sup> See, eg, Deaths in Custody Report (n 28) vol 4 (recommendation 192); PwC, [Indigenous incarceration: Unlock the Facts](#) (Report, 2017) 9 ('recommendation 1').

<sup>43</sup> See, eg, Deaths in Custody Report (n 28)vol 4 ('recommendations 190 and 194'); Aboriginal and Torres Strait Islander Peak Organisations, [The Redfern Statement](#) (2016) 5 and 11.

The values and principles underpinning our approach are central to meaningful engagement with justice involved peoples and their families and critical for effective, intergenerational, sustainable change.

**Culture** is the fundamental underpinning of our organisation and is built on the critical importance of respect, connection to culture, country, language, belonging and identity.

We recognise that culture serves as a protective factor and we operate within a healing framework. Deadly Connections develops community-led, culturally responsive approaches and solutions to matters that affect us. We identify that our communities and Elders are a source of information, knowledge and expertise. We adopt a community-led “bottom-up” approach to owning, managing and dealing with community matters, as opposed to the “top-down” approach imposed by government and other non-government organisations.

Aboriginal epistemology informs our organisation, services and programs in which we authentically embed Aboriginal ways of being, knowing and doing. Our strength also extends to our experience in enabling the development of community capacity and leadership to effect change.

**Lived experience** is not just an essential design feature of our programs, it is everything. Every family, child, and individual have different challenges and require a different response. The heartfelt, intuitive wisdom of someone who has been through a similar experience is vital to giving First Nations people the personalised and culturally responsive care they need and deserve.

*“Indigenous people are more than consumers of social services; we have the skills and capabilities to drive the services of our community. Our model of service delivery requires us to employ local Indigenous people and build the capacity of the workforce within our community and this is what makes the Indigenous community-controlled sector so critical to achieving change.”*

Dr Christine Bond, Oodgeroo Unit QUT and board member of Inala Wangarra

**Deep community connections** means that Deadly Connections is family to the people we serve. For traumatised people who are accustomed to systems that problematise, stigmatise and dehumanise, this is extremely important to establishing trust and building relationships that promote healing, growth and empowerment.

**Holistic** means individual health and wellbeing encompasses the whole community throughout the entire life-course. It includes collective issues like social justice, equity, and rights, as well as traditional knowledge, traditional healing, and connection to culture. The Aboriginal concept of health includes mental, social, physical, cultural and spiritual health.

**System change** means advocating, campaigning and lobbying for systemic change on processes and policies that disproportionately affect First Nations communities and for elevating the voices of First Nations people to inform program/service development/delivery and advise on matters that affect us.

### **A Model Based on Intervention and Lived Experience**

Our initiatives are designed to strengthen communities and improve outcomes for system-involved people and their families. Our management, staff and volunteers are

*“credible messengers,” people with backgrounds and characteristics like the populations they serve, who develop robust relationships with program participants built upon authentic shared*

experiences

and

understanding<sup>44</sup>.

There is a plethora of research and many examples of how lived experience programs can achieve significant outcomes for those being supported to make positive change. Deadly Connections programs are based on lived experience and professional service and training to ensure our staff provide effective support to our people, communities, and families.

**Six goals underpin our overarching aim to create stronger, safer and healthier communities that provide opportunities for improved outcomes and positive futures for Aboriginal People, families and communities**



Address the over representation of Aboriginal children, people, families, communities in the child protection/justice systems.



Reduced levels of violence, crime, drug use, trauma, anti-social behaviour, child protection/ justice involvement



Strengthen connection to culture and community



Culturally Competent Governance & Self-Determination

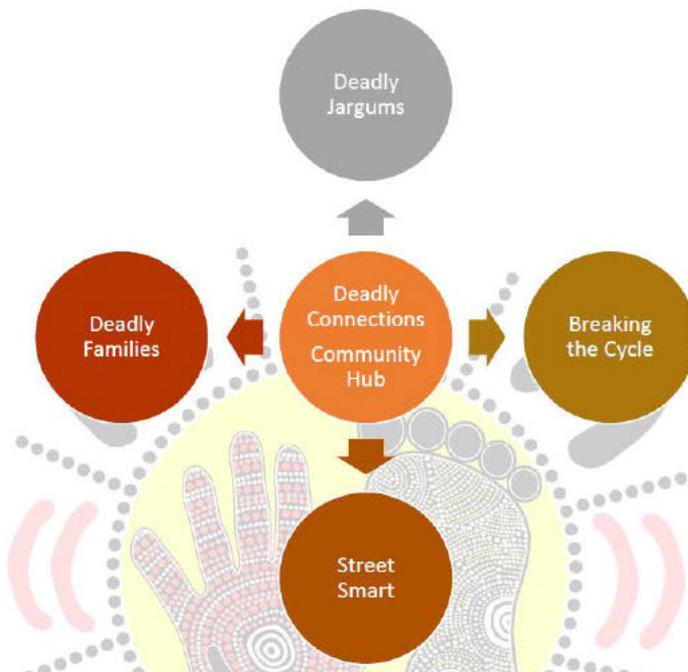


Develop the capacity of the sector



Systemic, legislative and practice change in the social justice space

**The Deadly Connections Model**



<sup>44</sup> Mathew Lynch Suno Esthappan et al, Arches Transformative Mentoring Program, An Implementation and Impact Evaluation in New York City (Research Report, February 2018) viii('executive summary').

### **Deadly Families (0-5 years old)**

Deadly Families is a culturally responsive, early intervention and prevention program (for Aboriginal mum's and/or dad's) designed to target risk factors associated with child protection notifications and interventions. The program develops the capacity of parents, improves parenting and life skills, promotes positive outcomes for families and encourages healthy, connected, strong, safe relationships with their children through individualised, holistic, cultural and social support.

### **Deadly Jargums (7-12 years old)**

An early intervention, prevention and diversion program to develop the social and emotional skills of 'at risk' (Aboriginal) primary school aged children (7-12 years) through the provision of mentoring, workshops and free after school/holiday activities. All activities are purpose driven, culturally safe and responsive to individual needs of the children.

### **Street Smart (10-24 years old)**

The Street Smart project adopts a form of outreach and street based youth work, during times of high risk. Street Smart operates without the use of a centre and occurs where YP "are at" both geographically and developmentally'. Street Smart Project is an early intervention, prevention and diversion that seeks to divert young Aboriginal people from the justice system and risky or anti-social behaviours (and the harmful consequences of this behaviour) in Redfern/Waterloo/Glebe areas aged between 10 - 24 years old.

### **Breaking the Cycle (all ages)**

'Breaking the Cycle' is an early intervention, prevention and diversion program that has been designed to divert Aboriginal people from the justice system through reducing recidivism, promoting healing/rehabilitation and improving community safety by strengthening the cultural identity of participants & targeting risk factors associated with child protection interventions and justice involvement.

### **Recommendations– Community led solutions & self-determination**

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- Provide long term funding to Aboriginal community-controlled services commensurate with need across all sectors, and their representative bodies, to ensure quality, culturally strong services for Aboriginal peoples
- Support the development of place-based, Aboriginal communitycontrolled services based on identification of need
- Increase the coverage and capacity of Aboriginal community-controlled services to lead integrated and holistic supports for families based on their knowledge of local needs.

## **4. Correlation Between Child Protection & Justice Involvement**

### **4.1 Well-Established Correlation**

There is a well-established correlation between a history of care and protection intervention and future justice involvement.<sup>45</sup> This nexus is further compounded for First Nations people due to the

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<sup>45</sup> Davis, M. Family is Culture: The Independent Review of Aboriginal Children and Young People in OOH in NSW (2019) 235; Judge Peter Johnstone, 'Cross-Over Kids—The Drift of Children From the Child Protection System Into the Criminal Justice System' (Speech, Noah's on the Beach, 5 August 2016) 22; Elizabeth Fernandez et al,

disproportionate numbers of our young people in out of home care (OOHC), representing 40% of the total OOHC population in NSW as at 30 June 2019.<sup>46</sup> There is an urgent need to address the disproportionate rate of involvement of First Nations young people in both the OOHC and criminal justice system to confront the ongoing and compounding trauma impacts of removal and justice involvement.

The correlation between care and justice involvement is not a recent phenomenon. RCIADIC noted that close to 50% of those First Nations peoples whose deaths were reviewed had experienced removal from their families.<sup>47</sup> The 1997 Bringing them Home Report further highlighted the relationship between out-of-home care and the increased likelihood of coming into contact with the criminal justice system.<sup>48</sup> This nexus and the disproportionate impact on First Nations young people has continued in the decades since. In a 2015 study, children in OOHC in NSW were found to be heavily overrepresented in criminal proceedings, with close to 50% having a history of OOHC and over 50% of those young people being First Nations.<sup>49</sup> At a national level, recent AIHW data from 2014-2018 indicates that First Nations young people were around 17 times as likely as non-Indigenous young people to have been both in the child protection system and under youth justice supervision.<sup>50</sup> It is imperative that this disparity and nexus is addressed urgently and appropriately given the long term impacts on our young people, their families and our communities.

#### 4.1 Criminalisation of Kids In Care

The concept of 'care criminalisation' refers to young people in out of home care being unnecessarily exposed to the criminal justice system.<sup>51</sup> This includes stigmatising young people, labelling their behaviours as criminal, and adopting a criminal response to actions that would not be treated as criminal in a family home.<sup>52</sup>

The reasons for care criminalisation of First Nations young people are complex and interwoven with continuing and intergenerational trauma experiences of colonisation. In the 2019 Family is Culture report, Professor Megan Davis noted the existence of theories for why children in OOHC are over-represented in the criminal justice system, including pre-care experiences such as abuse and neglect giving rise to risk factors, exacerbated at key transition points and additional pre-care difficulties arising from the legacy of racist policies.<sup>53</sup> Professor Davis notes that there

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A study of the Children's Court of New South Wales (Report, 2014) 25; Kath McFarlane, 'Care-criminalisation: The involvement of children in out-of-home care in the New South Wales criminal justice system' (2018) 51(3) Australian and New Zealand Journal of Criminology 412, 418

<sup>46</sup> Davis, M. Family is Culture, the Independent Review of Aboriginal Children and Young People in OOHC in NSW (2019) 235;

<sup>47</sup> Royal Commission into Aboriginal Deaths in Custody (Final Report, 1991) vol 1, 2.2.9;

<sup>48</sup> Human Rights and Equal Opportunity Commission, Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997) 164.

<sup>49</sup> Elizabeth Fernandez et al, A study of the Children's Court of New South Wales (Report, 2014) 25, cited in Davis, M. Family is Culture, the Independent Review of Aboriginal Children and Young People in OOHC in NSW (2019)

<sup>50</sup> Australian Institute of Health and Welfare 2019. Young people in child protection and under youth justice supervision: 1 July 2014 to 30 June 2018. Data linkage series no. 25. Cat. no. CSI 27. Canberra: AIHW. Note the data excludes New South Wales data, not submitted.

<sup>51</sup> Cameron N, McPherson L, Gatwiri K & Parmenter N (2019) Care Criminalisation: Issues and Current Research 19

<sup>52</sup> Queensland Family and Child Commission (2019) Annual Report 2018-2019 accessed at <https://www.qfcc.qld.gov.au/about/annual-report> on 7 September 2020

<sup>53</sup> Davis, M. Family is Culture, the Independent Review of Aboriginal Children and Young People in OOHC in NSW (2019) 236

is now 'strong evidence' for the negative effects of the placement of children and young people with a history of maltreatment in OOHC, particularly in residential care,<sup>54</sup> concluding that:

it has now been demonstrated that placement in OOHC exacerbates the existing risk that maltreated children will become involved in criminal offending. This occurs by way of a 'care-criminalisation' process, by which children and young people in OOHC are arrested for behaviour that would usually result in a disciplinary response from parents and not a criminal justice related response from police officers. For example, children may be arrested for offences that occur in their placements, such as damage to property or assaults against staff or kinship carers.<sup>55</sup>

Other factors going to the process of 'care criminalisation' or exacerbating the risk of offending identified in the Family is Culture report, include<sup>56</sup>:

- Where young people in OOHC are arrested for breach of bail due to over-scrutiny and policing of residential care homes;
- Difficulties getting bail due to insecure accommodation or lack of support network;
- Placement instability (resulting in multiple OOHC placements) has a detrimental impact on later criminal behaviour;
- Loss of connection to family and culture;
- Lack of access to services to address trauma, mental health issues or learning difficulties;
- Risk of trauma in care;
- Limited support for OOHC leavers;
- Poor education attendance, with education noted as being the biggest protective factor against engagement in criminal behaviour<sup>57</sup>.

The Centre for Excellence in Child and Family Welfare<sup>58</sup>, in distilling the Victorian Sentencing Advisory Council's *Crossover Kids report*, concludes that there is clear evidence of the 'ongoing failure to properly respond to the needs of vulnerable children for stability, healing and compassion'. The Centre identified key takeaways from the report, including:

- missing opportunities for earlier and swifter intervention to support families who are experiencing multiple forms of disadvantage;
- address placement instability
- provide therapeutic and rehabilitative support to children in care before they have serious contact with the justice system
- the need to implement clear legislative targets to keep governments accountable for reducing the over-representation of Aboriginal children in youth justice and child protection.
- the need to implement an agreement to reduce the criminalisation of young people in residential care in Victoria

## **SOLUTIONS** – what works, what do we need?

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<sup>54</sup> Citing Catia G Malvaso, Paul H Delfabbro and Andrew Day, 'Risk factors that influence the maltreatment-offending association: A systematic review of prospective and longitudinal studies' (2016) 31 *Aggression and Violent Behavior* 1, 6.

<sup>55</sup> Davis, M. *Family is Culture*, the Independent Review of Aboriginal Children and Young People in OOHC in NSW (2019) 236

<sup>56</sup> Davis, M. *Family is Culture*, the Independent Review of Aboriginal Children and Young People in OOHC in NSW (2019) 237-8

<sup>57</sup> Children's Court of New South Wales, Submission No 18 to *Family is Culture: Independent Review of Aboriginal Children and Young People in OOHC in NSW*, November 2017.

<sup>58</sup> Centre for Excellence in Child and Family Welfare <https://www.cfecfw.asn.au/its-on-us-we-must-prevent-the-criminalisation-of-children-in-care/> accessed 7 September 2020

The alarming rates of over-representation of First Nations young people in the OOHC and criminal justice systems need to be seen in the context of colonisation and the enduring legacy of intergenerational trauma.<sup>59</sup> Culturally informed early intervention, prevention and diversion options need to be developed and implemented. These solutions must be place based and community driven. Examples of such projects can be found in the work of Deadly Connections.

The Family is Culture Report (2019) recommended:

Recommendation 22: The NSW Government should ensure that financial investment in early intervention support is commensurate with the proportion of Aboriginal children in out-of-home care, with a preference for delivery of early intervention and prevention services by Aboriginal Community Controlled Organisations.<sup>60</sup>

## **Recommendations – Correlation Between Child Protection And Justice Involvement**

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- Implement recommendations from the Family is Culture report
- Develop a framework similar to Victoria to reduce the care criminalisation nexus
- Improve data collection and public reporting on young people involved in both the OOHC and justice systems

## **5. Addressing discrimination and disadvantage at sentencing**

### **5.1 Establishment of Specific Sentencing Courts and Processes for First Nations People**

For Aboriginal people, mainstream courts can be inaccessible or alienating. This experience can affect access to justice, and can also result in some of the key principles underpinning criminal justice—including deterrence, punishment and rehabilitation—having a lesser impact on Aboriginal defendants<sup>61</sup>.

Indigenous sentencing courts provide many benefits including;

- better sentencing outcome
- empowering First Nations people and communities,
- reducing recidivism
- achieve restorative justice outcomes between offenders and victims<sup>62</sup>.

These courts also provide an opportunity for First Nations people to be involved in the sentencing process at a relatively formal level. The courts further provide the space to amplify the voices of the community in relation to matters such as<sup>63</sup>;

- whether the offender should return to the community
- the strengths of the person appearing before the court
- the seriousness of the offence
- the offender's character

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<sup>59</sup> Cameron N, McPherson L, Gatwiri K & Parmenter N (2019) Care Criminalisation: Issues and Current Research 19

<sup>60</sup> <https://www.familyisculture.nsw.gov.au/?a=726329> at XLII.

<sup>61</sup> <https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/11-access-to-justice-issues/specialist-courts-and-diversion-programs/>

<sup>62</sup> Cunneen, Chris, Sentencing, Punishment and Indigenous People in Australia, *Journal of Global Indigeneity*, 3(1), 2018. Pg 15

<sup>63</sup> Cunneen, Chris, Sentencing, Punishment and Indigenous People in Australia, *Journal of Global Indigeneity*, 3(1), 2018. Pg 15

- the offenders prospects of rehabilitation from a community perspective
- the nature of an appropriate penalty<sup>64</sup>.

In this context, Aboriginal culture is seen as a protective factor to the rehabilitation of Aboriginal offenders.

The key elements that are considered critical to the operation and success of these models, include<sup>65</sup>:

- Active participation of the defendant and community
- Case management of the defendant
- Cultural competence<sup>66</sup>.

Evaluations confirmed that Aboriginal specialist courts provide; *a sense of ownership to participants over court processes and outcomes; increase court appearance rates for Aboriginal and Torres Strait Islander offenders; and improve compliance with court orders*<sup>67</sup>.

## 5.2 Risk Assessment Tools for First Nations people – Sentencing

Sentencing processes involve a risk assessment of the individual, a process which calculates prison terms, assists in targeting the delivery of treatment and rehabilitation programs, and calculates the risk of recidivism.<sup>68</sup> Current risk assessment tools utilised by Corrective Services NSW, (LSI-R) aim to classify an offender’s risk of reoffending and identify their needs with reference to criminogenic factors.<sup>69</sup> An accurate risk assessment is therefore essential to ensure individualised justice.<sup>70</sup> An over-predicted risk may result in a prolonged period in preventative detention or an incorrect determination of treatment/rehabilitation programs.<sup>71</sup> This is a significant concern for First Nations people, who are already overrepresented in custody.

Current risk assessment tools are ineffective and discriminatory against First Nations people because they fail to consider the unique criminogenic and non-criminogenic risk factors experienced by First Nations people which contribute to offending.<sup>72</sup> These are factors associated with the historical and intergenerational trauma and compounding experiences of loss, anger, and stress experiences amongst First Nations offenders,<sup>73</sup> and include a history of displacement, child removal, alcohol and drug abuse, mental illness, suicide, and continuous over-representation in

<sup>64</sup> Cunneen, Chris, Sentencing, Punishment and Indigenous People in Australia, *Journal of Global Indigeneity*, 3(1), 2018. Pg 15

<sup>65</sup> <https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/11-access-to-justice-issues/specialist-courts-and-diversion-programs/>

<sup>66</sup> <https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/11-access-to-justice-issues/specialist-courts-and-diversion-programs/>

<sup>67</sup> <https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/11-access-to-justice-issues/specialist-courts-and-diversion-programs/>

<sup>68</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Requirement to consider Aboriginality in Australian sentencing courts* (Report, 2017) 6.77; Anna Macklin and Robyn Gilbert, ‘Working with Indigenous offenders to end violence’ (Research Brief, June 2011) 3.

<sup>69</sup> Ian Wakins, ‘The Utility Level of Service Inventory – Revised (LSI-R) Assessments within NSW Correctional Environments’ [2011] 29 *Corrective Services NSW Research Bulletin*.

<sup>70</sup> Anna Macklin and Robyn Gilbert, ‘Working with Indigenous Offenders to End Violence’ (2011) *Research Brief 3*; Thalia Anthony, ‘[Indigenising Sentencing? Bugmy v The Queen](#)’ [2013] 35 *Sydney Law Review* 451, 454.

<sup>71</sup> Alfred Allan and Deborah Dawson, ‘Assessment of the Risk of Reoffending by Indigenous Male Violent and Sexual Offenders’ [2004] 280 *Trends & Issues paper 2*.

<sup>72</sup> Anna Macklin and Robyn Gilbert, ‘Working with Indigenous Offenders to End Violence’ (2011) *Research Brief 3*.

<sup>73</sup> *Ibid.* 2.

the criminal system.<sup>74</sup> These traumas are only increased by encounters with the criminal justice system, which is exacerbated by inaccurate risk assessment outcomes.<sup>75</sup>

A 2013 overseas study found that the current use of LSI-R assessment tools should not be supported because Aboriginal offenders are not being classified into appropriate risk categories, a result of the incongruity between current risk assessment factors and the factors which actually relate to crime and offending for First Nations people.<sup>76</sup> Inappropriate categorisation of risk negatively impacts outcomes for First Nations people, such as decreasing availability of treatment opportunities and rehabilitative support.<sup>77</sup>

Canadian courts have ruled the use of psychological risk assessment tools on First Nations offenders to be illegal, as they were not accurate with respect to the different circumstances surrounding offending by First Nations people.<sup>78</sup> The court found that using such tools were ineffective and applying them would constitute a breach of statutory duty.

We urge the NSW government to engage in a similar process of inquiry and take steps to reform the discriminatory risk assessment tools currently used for First Nations people. The failure of current risk assessment tools to adequately address risk for Aboriginal offenders is a clear example of systemic bias and discrimination against First Nations people. The purpose of risk assessment is to increase community protection, increase deterrence, and reduce recidivism, and these aims will be furthered if Aboriginal offenders are sentenced with regard to their specific cultural needs.<sup>79</sup> Standard risk assessment tools must undergo a culturally-informed revision process in order to recognise the social disadvantages experienced by First Nations people. For example, risk assessment tools should expand to consider factors such as intergenerational trauma, childhood dispossession, and Aboriginal disadvantage.<sup>80</sup>

A culturally-informed approach to risk assessment for First Nations offenders should be developed and facilitated by First Nations communities and community controlled organisations. A genuine collaboration with First Nations people on sentencing processes and considerations is the only way to provide courts with an accurate understanding of the risk factors specific and unique to First Nations people.<sup>81</sup>

### 5.3 Bugmy Justice Reports

There is a clear need for improved community-based and background information to support risk assessment for First Nations people. In *Bugmy v The Queen*,<sup>82</sup> the High Court stated that if background information was to be relevant to the offender and sentencing, it was necessary to have “material tending to establish that background”.<sup>83</sup>

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<sup>74</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Requirement to Consider Aboriginality in Australian Sentencing Courts* (Report No 133, 2018) [6.93].

<sup>75</sup> *Bugmy v The Queen* (2013) 37 HCA.

<sup>76</sup> Holly A. Wilson and Leticia Gutierrez, ‘[A Meta-Analysis Examining the Predictive Ability of the Level of Service Inventory \(LSI\) With Aboriginal Offenders](#)’ (2014) 41(2) *Criminal Justice and Behaviour* 196.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ewert v Canada* (2018) 30 SCC.

<sup>79</sup> Thalia Anthony, ‘[Indigenising Sentencing? Bugmy v The Queen](#)’ (2013) 35 *Sydney Law Review* 451, 451.

<sup>80</sup> Stephane Shepherd, ‘[Violence risk assessment and Indigenous Australians: A primer](#)’ (2018) 43(1) *Alternative Law Journal* 45.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Bugmy v The Queen* (2013) 37 HCA.

<sup>83</sup> *Ibid* [41].

Deadly Connections is paving the way for making space for courts to adduce personal information and experiences of Aboriginal offenders. This is done by way of a report. These reports, which give extra attention to the unique systemic factors of an Aboriginal offender, have been referred to as 'Bugmy Justice Reports'.

'Bugmy Justice Reports' are a comprehensive document that identifies the unique cultural and historical factors specific to First Nations offenders, which may otherwise contribute to a high-risk assessment. They include background information about the offender's specific circumstances, with respect to sociocultural factors such as trauma and mental health, and their personal experiences as an individual within the wider First Nations community.<sup>84</sup> They are intended to inform courts in the risk assessment process to ensure appropriate sentencing of Aboriginal offenders, draw attention to the impact of offending on First Nations communities, and where appropriate, recommend alternatives to incarceration. Bugmy Justice Reports provide a contextualised understanding of the impact of racial histories on offending, sentencing, and treatment options,<sup>85</sup> and are an essential step towards reducing the severe overrepresentation of First Nations people in custody.

The specific objectives of Bugmy Justice Reports include:

- Improved sentencing practices wherein the courts consider relevant background material connected to an offender's experience as a First Nation's person, including the unique history of trauma associated with colonisation and its continuing effects;
- Better sentencing options which reflect the lived reality of an offender's life and her/his current needs, and providing better opportunities to avoid offending behavior and address underlying causes of offending;
- Greater input, visibility and sense of cultural recognition within the criminal justice system for Aboriginal offenders, families and communities as a result of the courts recognising the systemic factors at play related to Aboriginal offending and incarceration;
- A stronger evidence base for the reports, based on the research in Queensland and Victoria, that provides a usable framework across Australia and may inform ongoing resourcing and recommendations for law reform.

In 2017, the Australian Law Reform Commission recommended in recommendations 6-1 to 6-3 that sentencing legislation should be reformed to require specific consideration of the unique systemic and background factors affecting First Nations peoples, during the sentencing process.<sup>86</sup> Recommendation 6-3 recommends that state and territory governments work with First Nations organisations to develop models for presenting culturally-contextualised information to the court.<sup>87</sup>

As an Aboriginal organisation, Deadly Connections is ideally suited to write Bugmy Justice Reports as our writers will have a better understanding of the unique circumstances faced by Aboriginal people and, more often than not, share common experiences and challenges.

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<sup>84</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Requirement to Consider Aboriginality in Australian Sentencing Courts* (Report No 133, 2018) [6.137].

<sup>85</sup> Anna Macklin and Robyn Gilbert, 'Working with Indigenous Offenders to End Violence' (2011) *Research brief 3*.

<sup>86</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, (Recommendations 6-1–6-3).

<sup>87</sup> *Ibid.*, 6-3.

One of the more obvious benefits of having a *Bugmy Justice* report completed is that it provides an opportunity for an Aboriginal person to provide insight and address issues that may have contributed to them being in the criminal justice system. One of the underlying benefits not seen by the criminal justice system is the therapeutic process of having a *Bugmy Justice* report completed. Many justice-involved Aboriginal people have not been provided an opportunity to explain who they are or, in most instances, never had an opportunity to self-reflect on the individual they have become or why. From this perspective, a *Bugmy Justice* report is not just a sentencing report. It serves as a holistic approach that often begins the first step in an Aboriginal person's healing journey.

An analogous process should be undertaken in NSW in partnership with Aboriginal community controlled organisations and resourced appropriately to ensure it can be implemented in practice. Aboriginal-led organisations, such as Deadly Connections, are best placed to prepare and submit these reports, with additional case management, healing activities and cultural support services for First Nations clients.

Ultimately, it is essential that sentencing courts take a more proactive approach to ensure that factors relating to Aboriginality and any associated disadvantages are considered by the court at sentencing. The Australian Law Reform Commission recommends a two-stage approach when sentencing an Aboriginal offender; the first step would require the courts to take judicial notice of the experiences of First Nations people as a group and their unique disadvantages, and the second step is to consider each individual offender against the wider group experience.<sup>88</sup> This approach links individual circumstances with broader cultural experiences to ensure the delivery of culturally-informed justice.<sup>89</sup>

Culturally-informed sentencing is a critical reform to ensure that First Nations people do not continue to experience disadvantage in the criminal justice system. Reforming the use of assessment tools and requiring the consideration of Bugmy reports at sentencing are essential first steps.

## Recommendations—Sentencing for First Nations people

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- Work with First Nations communities and organisations to reform current risk assessment tools to:
  - Expand risk assessment tools to consider cultural factors experienced by First Nations people.
  - Involve First Nations people and organisations in the sentencing process to provide cultural context.
- Implement recommendations 6-1 to 6-3 of the ALRC *Pathways to Justice* inquiry findings;
- In accordance with *Bugmy v The Queen* [2013] HCA 37 promote and resource the preparation and submission of individual (Bugmy) reports during court/sentencing processes that adequately capture the complexities, historical and current factors that entrench Aboriginal people, families and communities in the justice system (Deadly Connections is currently implementing this as part of their current programs);

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<sup>88</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Requirement to consider Aboriginality in Australian sentencing courts* (Report, 2017) 6.88.

<sup>89</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Requirement to consider Aboriginality in Australian sentencing courts* (Report No 133, 2018) [6.88].

## 6. Addressing Support For Aboriginal Peoples in Custody

### 6.1 Meeting the Needs of Aboriginal Peoples in Custody

First Nations peoples' experiences in custody demonstrate distinct needs to support wellbeing and positive outcomes post-release. The lack of culturally responsive support services for First Nations people in custody continues to have negative effects on identity and wellbeing and contributes to the cycle of recidivism that disproportionately impacts on Aboriginal peoples. Recidivism is higher among Aboriginal people in custody. 74 per cent of Aboriginal people in custody have previously been imprisoned, compared to 47 per cent of non-Indigenous people in custody.<sup>90</sup>

There is an urgent need for community-led and controlled organisations, such as Deadly Connections, to lead effective, transformational change for those already in the prison system to end the cycle of recidivism and intergenerational trauma from the experience of incarceration for individuals, families and communities.

### 6.2 Impact of a Lack of Cultural Support for First Nations People in Custody

Our wellbeing as First Nations peoples is closely tied to our cultural identity and connection. Custody severely disrupts our ability to maintain cultural identity and connection, contributing to higher rates of mental illness, self-harm, health and wellbeing issues, trauma and substance abuse.<sup>91</sup> Upon release, First Nations people who received inadequate support in custody may experience social and cultural exclusion, stigmatisation, and poorer access to support networks to support their transition back into society.<sup>92</sup> It is therefore essential that First Nations peoples in custody have access to programs and services aimed at supporting their connection to culture, identity, family, community and land.<sup>93</sup>

#### Meeting the Needs of Aboriginal Women

First Nations women in NSW prisons comprise 32% of the female prison population, yet only make up 1.29% of the general adult female population.<sup>94</sup> NSW imprisons more First Nations women (306) than anywhere else in the country.<sup>95</sup> First Nations women are the fastest growing prison demographic, with:

rates doubling between 2009 and 2019. Since 2013, First Nations women sentenced to prison increased by 49%, compared with a 6% increase among non-First Nations women. The vast majority of these women are imprisoned because they are denied bail and are awaiting a trial or have been sentenced for minor matters and for short terms.<sup>96</sup>

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<sup>90</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2019* (Catalogue No 4517.0, 5 December 2019).

<sup>91</sup> National Indigenous Drug and Alcohol Committee, *Bridges and barriers – Addressing Indigenous Incarceration and Health* (Report 2009) 1.

<sup>92</sup> National Indigenous Drug and Alcohol Committee, *Bridges and barriers – Addressing Indigenous Incarceration and Health* (Report 2009) 1.

<sup>93</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Prison Programs and Parole* (Report, 2017) 9.6, PwC, [Indigenous incarceration: Unlock the facts](#) (Report, 2017) 33.

<sup>94</sup> ABS, *Prisoners in Australia*, Cat. 4517.0 (2019) Table 21.

<sup>95</sup> NSW Custody Statistics, *Quarterly Update December 2019*, BOCSAR, Table 2.1.17.

<sup>96</sup> Thalia Anthony and Gemma Sentance, "The System Doesn't Care About Our Aboriginal Children": First Nations Mothers in Prison. (2020) *Precedent*. Issue 159, July/August, pp.22-27.a

The experience of imprisonment for First Nations women is particularly damaging because there is a lack of appropriate cultural support for First Nations women in custody.<sup>97</sup> First Nations women are a particularly vulnerable group in prison populations, due to their disproportionate experiences of trauma, abuse, and family violence.<sup>98</sup> Many current support services and programs assume that the needs of First Nations women can be met through services designed for First Nations men, an approach which ‘marginalises women and entrenches inequalities’.<sup>99</sup> There is also a lack of support for women who have been separated from their children, which is damaging to both family relationships and cultural and individual identity.<sup>100</sup> Greater trauma-informed, culturally responsive support specifically for First Nations women, delivered by Aboriginal community controlled organisations, is therefore an essential consideration.<sup>101</sup>

### 6.3 Impact of Greater Cultural Support for First Nations People in Custody and Upon Release from Custody

Culture is the fundamental underpinning of our organisation and community. We believe in the critical importance of respect, connection to culture, country, language, belonging and identity. Providing cultural support is an essential service to our people within both the criminal justice system and wider society.

Greater access to support that is trauma-informed, culturally responsive, and accessible for First Nations people in custody would support connection to family and culture while they are away from community.<sup>102</sup> A strong sense of cultural connection is associated with a range of social benefits, such as better self-assessed health, higher educational attainment, higher employment rates, and lower rates of alcohol abuse.<sup>103</sup>

The elements of what constitutes a culturally responsive program for Aboriginal people in custody includes<sup>104</sup>:

- designed, developed and delivered by Aboriginal organisations where possible;
- trauma-informed, especially where being delivered to female Aboriginal women; and
- focused on practical application, particularly for prisoners on remand or short sentence who need the skills on release to reintegrate<sup>105</sup>.

The lack of appropriate programs for Aboriginal people in custody and upon release may partially explain higher recidivism rates due to fewer opportunities for rehabilitation<sup>106</sup>. The Australian Law Reform Commission found that rehabilitation programs were not appropriately tailored to the

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<sup>97</sup> Council of Australian Governments, [Prison to Work](#) (Report, 2016) 6.

<sup>98</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, [Prison Programs and Parole](#) (Report, 2017) 9.54.

<sup>99</sup> Australian Human Rights Commission, [Social Justice Report: Walking with the Women – Addressing the needs of Indigenous women exiting prison](#) (Report, 2004).

<sup>100</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, [Prison Programs and Parole](#) (Report, 2017) 9.55.

<sup>101</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, [Prison Programs and Parole](#) (Report, 2017) 9.55.

<sup>102</sup> The Commission for Children and Young People, [Aboriginal Cultural Rights in Youth Justice Centres](#) (Report, July 2018) 9.

<sup>103</sup> PwC, [Indigenous Incarceration: Unlock the Facts](#) (Report, May 2017) 36.

<sup>104</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, [Prison Programs and Parole](#) (Report, 2017) 9.55.

<sup>105</sup> Ibid.

<sup>106</sup> Chris Cunneen, ‘Sentencing, Punishment and Indigenous People in Australia’ (2018) 3(1) *Journal of Global Indigeneity* 11.

needs of Indigenous offenders: “effective rehabilitation programs for [Indigenous] offenders should be adequately resourced, incorporate principles of Aboriginal healing, and provide ongoing assistance to participants to avoid... further offending”<sup>107</sup>.

### **Types of Support That Are Needed**

Sustainable employment pathways

Stable, safe and appropriate accommodation upon release

These support mechanisms increase First Nations people’s connection to family and culture.<sup>108</sup> These recommendations should be implemented for all First Nations people in custody, not just children.

The Council of Australian Governments (COAG) emphasised in the *Prison to Work* report that all support programs should be holistic, trauma-informed, culturally competent and remain accessible post-release.<sup>109</sup> Ongoing support is particularly important in supporting First Nations people during their transition back into community, while addressing social factors which may contribute to reoffending.<sup>110</sup>

Support services and programs should be led and delivered by First Nations-led and -controlled organisations in order to be culturally appropriate and effective.<sup>111</sup> At Deadly Connections, we combine our lived and professional experience to create holistic, practical, and culturally-responsive programs to break the cycle of disadvantage, trauma, and system involvement to improve outcomes for First Nations people, families, and communities. We urge the NSW Government to recognise the need for greater cultural support for Aboriginal people in custody and to collaborate with and learn from us in implementing them.

At present, Deadly Connections is not currently authorised or permitted to enter any prisons in NSW. This is despite being the only ACCO that specialises in supporting justice involved people. An application to CSNSW was formally withdrawn by Deadly Connections in Sept 2020, due to the onerous effort undertaken (over 12 months) in attempting to gain access and provide culturally responsive services and programs to First Nations people in custody. The arduous processes, unattainable assessment criteria<sup>112</sup> CSNSW have embedded and poor effort in reciprocating contact with such services is a significant barrier in the provision of vital, culturally responsive support to vulnerable mob who are separated from family and often their community.

Additionally, CSNSW have advised that there are currently nil agreements in place to facilitate Audio Visual Access (AVL) with non-government organisations and people in custody.

### **Recommendations – Addressing Support for Aboriginal People in Custody in NSW**

- Deadly Connections to be funded on a statewide basis for a toll free hotline for First Nations people in custody and their families to access non-legal, culturally responsive and trauma informed support

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<sup>107</sup> Ibid.

<sup>108</sup> The Commission for Children and Young People, [Aboriginal Cultural Rights in Youth Justice Centres](#) (Report, July 2018) 10.

<sup>109</sup> Council of Australian Governments, [Prison to Work](#) (Report, 2016) 7.

<sup>110</sup> Australian Law Reform Commission, [Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples](#), [Prison Programs and Parole](#) (Report, 2017) 9.65.

<sup>111</sup> Ibid., 9.48.

<sup>112</sup> Offender Management and Programs Corrective Services NSW, [Policy for Assessing Applications from External Agencies](#) (Report, January 2020).

- CSNSW to review their assessment processes, procedures to ensure increased access for ACCO's into prisons
- Develop formal agreements and increase remote AVL access to people in prison (across the State) with ACCO's/NGO's

## 7. Support for Families of Imprisoned Parents

### 7.1 Support of Children and Families of Imprisoned Parents

#### Immediate Needs of Children and Families

As Aboriginal people who have experienced imprisonment and also support Aboriginal parents professionally, we inherently understand the adverse impacts of imprisonment on our children, families and communities. Any measures seeking to address the high rates of Aboriginal peoples in custody must also urgently respond to the impacts of imprisonment on the children and families of those in custody. Given the significant overrepresentation of Aboriginal people and parents in prison, a disproportionate number of Aboriginal children are affected by parental imprisonment. Furthermore, the large kinship structures and extended networks in Aboriginal families and communities means that the parent of a child does not have to be imprisoned for a child to be affected. The effects of imprisonment on Aboriginal children extend beyond parental incarceration. The imprisonment of a Grandmother, Grandfather, Uncle or Auntie has a profound impact on our children.

There are an estimated 60,000 children under 16 years of age in the state of New South Wales (NSW) who have experienced parental incarceration; at least one in five are Aboriginal children.<sup>113</sup> Aboriginal inmates are three times as likely to have had a parent incarcerated during their childhood than non-Aboriginal inmates.<sup>114</sup> Aboriginal children are more likely than non-Aboriginal children to experience 'not only the imprisonment of a parent, but also to experience repeat parental imprisonment'.<sup>115</sup>

The high rate of imprisonment of First Nations people has generational and indirect social impacts on family and community networks, often described as a 'ripple' effect.<sup>116</sup> The lack of support for incarcerated parents and their families contribute to the high rates of trauma, disrupted education, unstable housing, and poor mental and physical health outcomes experienced Aboriginal families.<sup>117</sup> This increases the likelihood of children and family members coming into contact with child protection systems and the juvenile justice system, thus perpetuating the cycle of First Nations disadvantage in Australia.<sup>118</sup>

<sup>113</sup> Angela Dawson, Debra Jackson and Adeline Nyamathi, 'Children of Incarcerated Parents: Insights to Addressing a Growing Public Health Concern in Australia' (2012) 34(12) *Children and Youth Services Review* 2433.

<sup>114</sup> Australian Institute of Health and Welfare, [The Health of Australia's Prisoners 2018](#) (Report, 30 May 2019) 14.

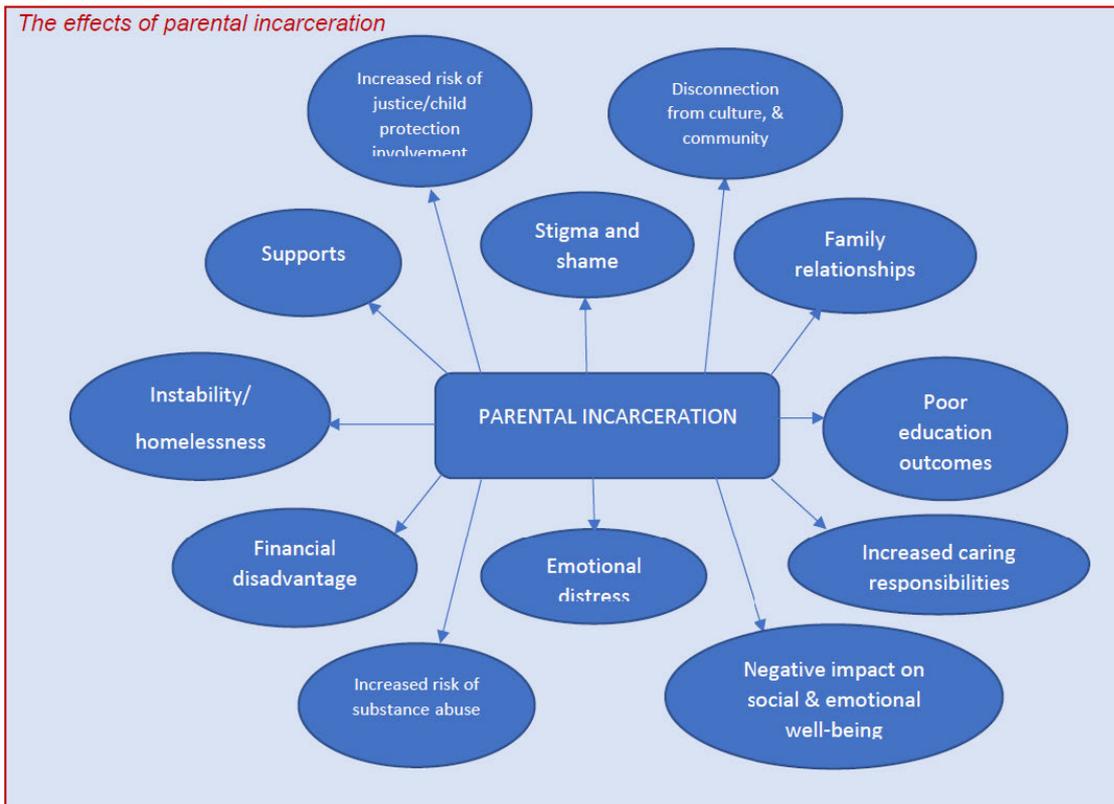
<sup>115</sup> The Bar Book Project, [Incarceration of a Parent or Caregiver](#) (November 2019) 2.

<sup>116</sup> Ibid.

<sup>117</sup> Aboriginal Legal Service Submission to Parliament of NSW, [Inquiry into the support of children of imprisoned parents in NSW](#) (February, 2020) 4.

<sup>118</sup> Ibid.

*The effects of parental incarceration*



Our direct concerns for Aboriginal children with imprisoned parents encompass parental contact, keeping children connected to family, community and culture during periods of care for the children, lack of support and rehabilitative options for Aboriginal parents, restoration to parents, the increased cost of child protection interventions, long terms orders, research and support to develop the capacity of Aboriginal parents.

### Aboriginal Women

The majority of Aboriginal women in prison (more than 80%) are mothers and Aboriginal women often have primary care responsibilities for other children<sup>119</sup>.



The crisis of Aboriginal women’s overimprisonment is causing immeasurable harm to women, their children, families and communities. The overwhelming majority of Aboriginal women in custody are survivors of violence, experience housing insecurity, poverty, mental illness, disability and profound effects of trauma.<sup>120</sup> This compounds the impacts of discriminatory laws and practices within the justice system that further entrench trauma and disadvantage, rather than healing. The solution must include working with Aboriginal community controlled organisations like Deadly

<sup>119</sup> Elizabeth A. Sullivan et al, '[Aboriginal mothers in prison in Australia: a study of social, emotional and physical wellbeing](#)' (2019) 43(3) *Australian and New Zealand Journal of Public Health* 241.

<sup>120</sup> Human Rights Law Centre and Change The Record, '[Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women’s growing over-imprisonment](#)' (Report, May 2017) 5.

Connections to develop and implement solutions that centre on Aboriginal women's unique and gendered experiences and are responsive to the critical role that women play in our communities and families.

This approach must necessarily recognise the over-representation of Aboriginal women and children among victims/survivors of family violence, and prioritise culturally safe and targeted approaches which address Aboriginal women and children's unique needs, perspectives and barriers to getting assistance. Any response must also include increased, long-term investment in early intervention, prevention and community education approaches, specialist and culturally safe frontline legal services for Aboriginal women, and strategies to improve responses by police, courts, child protection and corrections.

## Case Studies

### *Renee (35) (pseudonym)*

Renee is a 35-year-old Nyampa woman, born and raised on Wiradjuri land in Griffith.

Renee was arrested in June 2019 on suspicion of Aggravated Break and Enter. Renee has 5 children (aged 17, 14, 9, 8, 6), 4 of which have special needs. Her 8 year old daughter was diagnosed with Leukemia while Renee was in custody and was not informed of her daughter's diagnosis or treatment until she was released. Renee spent 6 mths on remand across 3 different Correctional Centres. Renee's charges were dismissed due to lack of evidence.

Whilst in custody, the Father of her children (a DV perpetrator and active heroin user) removed the children from the home of her elderly mother (76) who had been caring for the children since her incarceration. It took Renee 9 weeks to locate her children after her release. After initiating Family Court proceedings to recover the children, Renee was informed of her children's whereabouts and was able to recover them without pursuing the matter through Family Court.

Renee advised that she had approached a number of non-government agencies and requested their support without success. While in custody Housing N.S.W also ended her tenancy which meant Renee and her children had nowhere to live after her release.

Renee felt that no correctional officers/welfare workers in the jail were compassionate when she shared her concern for her children being separated from her especially after the lengthy amount of time that they were apart and given they already had special needs. During her time in custody, Renee was so desperate for assistance that she placed an ad in the Koori Mail seeking support and assistance .

The children had experienced significant disruption and trauma as Renee had experienced domestic violence for a number of years during her relationship with the children's father.

Dealing with parole has been extremely stressful, from not being allowed have her appointments at her temporary accommodation (currently in Ronald McDonald house) so that she may be with her daughter in hospital, to being given a hard time for attending appointments an hour earlier than scheduled so she can be back to her daughter before her chemotherapy appointments. She also expressed her concern that there was no option for her to attend any type of rehabilitation program unless it was court ordered.

Renee was asked to leave Ronald McDonald house after they discovered Renee was on a community-based order (Parole). Renee and her child was engaged in active chemotherapy treatment were homeless until Deadly Connections were able to advocate for temporary housing and then more stable, safe accommodation within 2 kilometres of the hospital.

Another obstacle was trying to organise jail visits while her children were with family in Griffith NSW, and Renee was in a Sydney jail. Renee felt there was no financial support (other than the job she had in jail) or Aboriginal specific welfare workers. She also felt that FACs did not offer her any support but instead supported her children's father – a known DV perpetrator.

Renee felt that the NSW Government needs more compassion towards both parents, especially in regards to children with disabilities/illnesses (given bail or accommodating alternate visits) she also expressed her disappointment in not being informed of her daughters illness as well as not being informed of family members passing away. She also stated that she feels she would have benefitted from staff receiving more cultural training, instead of dealing with Indigenous peoples with all force, even if they are a victim.

Deadly Connections would have been an appropriate support service response for Renee and her children to assist with;

- Cultural support for Renee whilst she was in custody
- Support to locate her children
- Culturally safe space for Renee to access support
- Support with DV processes
- Support to advocate to both community corrections and child protections agencies
- Supporting Renee with her transition to community including compliance with Community Corrections and visiting her children
- Advocacy for Renee to be relocated to a Correctional Centre so that children and family could visit more frequently
- Support with housing upon release
- Support with compassion and empathy in a culturally safe way
- Facilitating contact with Renee and her children
- Parenting Education Course for Renee to develop her capacity as parent
- Culturally responsive support and activities for her children
- Support for her children and family while Renee was in custody
- Support through the Family Law Court processes
- Counselling and Trauma healing support

**Andrew (29) (pseudonym)**

Andrew was in a relationship with his partner Carolyn before his incarceration. Carolyn fell pregnant prior to Andrew's incarceration and gave birth to a little girl (Amanda) on the 19th of May, 2018. Andrew was in custody from December 2017- September 2019.

Carolyn had a history of drug use and due to child protection concerns Amanda was removed and placed with the Maternal Aunt who was not Aboriginal. Permanent Orders were made while Andrew was in custody which granted Parental Responsibility to the Minister until she was 18. Given the fact that Andrew was in custody, he had no way of challenging this decision or actively participating in the Court processes.

Andrew was referred to our Deadly Families Project by the Care and Protection field officer from the Aboriginal Legal Service to assist him in developing his capacity as a parent, providing intensive family support and applying for a Section 90 so that he can regain custody of his now 2 year old daughter.

Deadly Connections recognises the importance of developing support for families. The implementation of place-based, culturally responsive and safe services is a key strategical focus to achieve our goal of supporting community, families, and children to disrupt intergenerational loss and trauma.

### *Children*

The criminal justice system should aim to divert parents, especially mothers, away from incarceration, particularly where sentences are short or the crimes are minor.<sup>121</sup> If diversion is not possible, First Nations people in custody should be supported to meet their familial obligations, in order to promote stronger connection to culture, protect family relationships, and minimise the detrimental 'ripple' effect on family.<sup>122</sup>

Support services and programs for family overlaps significantly with support for people in custody as mentioned above, for example, the implementation of short term leave programs for parents, greater use of technology to facilitate communication, and more culturally-appropriate practices in prisons.<sup>123</sup>

Support services and programs should be led and delivered by First Nations organisations in order to be culturally appropriate and effective.<sup>124</sup> We urge the NSW Government to recognise the need for greater cultural support for Aboriginal people in custody and collaborate with us and other Aboriginal-led organisations to implement the recommendations below, and drive systemic change.

## **Recommendations – Frameworks to Support Families of Incarcerated Parents**

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- We strongly support and endorse the 97 recommendations made in the 1997 Report into Children of Imprisoned Parents by the Standing Committee on Social Issues;

<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2005/Compiled%20report.pdf>

To increase effective support for family members with family in custody, Deadly Connections recommends the following:

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<sup>121</sup> Aboriginal Legal Service Submission (NSW/ACT) Limited, *Submission to the Inquiry into Support of Children of Imprisoned Parents in New South Wales* (Report, February 2020) 4.

<sup>122</sup> The Bar Book Project, *Incarceration of a Parent or Caregiver* (2019) 2.

<sup>123</sup> The Commission for Children and Young People, *Aboriginal cultural rights in youth justice centres* (Report, July 2018) 10.

<sup>124</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, *Prison Programs and Parole* (Report, 2017) 9.48.

- As per RCIADIC recommendations, imprisonment should be used as a last resort, particularly for parents;
- Establishment of community hubs for justice-involved people to have their needs met at one access point (Deadly Connections is currently working towards establishing one in the Inner West of Sydney);
- There is a distinct lack of holistic and culturally responsive programs, Deadly Connections provides holistic and culturally responsive services and programs but is under-resourced to do so;
- Comprehensive, culturally responsive assessments of the needs of parents should be undertaken at the earliest possible time to allow for adequate support and release planning;
- Improving access to technology for imprisoned parents to increase contact and connections to children;
- Acknowledgement of prisoners as parents and the vital role they play in their children's lives;
- Alternatives to imprisonment should be well known and used where appropriate;
- Well-resourced programs that target Aboriginal parents with child protection history or involvement (such as the Deadly Families Project)<sup>125</sup>
- Increased culturally safe, educational and skills-based programs to develop the capacity of parents (Deadly Families is currently delivering this as part of our Deadly Families Project);<sup>126</sup>
- Culturally responsive programs to work with justice-involved Aboriginal people (e.g. Breaking the Cycle);
- Culturally responsive programs that target factors that contribute to disadvantage, grief, loss and trauma;
- Implement legislative and policy/practice change to support the action of recommendations by Deadly Connections and other community agencies (otherwise we run the risk of repeating the same process of RCIADIC);
- Acknowledgement of Aboriginal kinship structures in both correctional and community settings (understanding that Uncles may act as Fathers and Aunties may act as Mothers);
- Elevate and implement the voices of justice involved parents to inform service delivery and programs;
- Improved sustainable employment pathways and support for justice involved parents;
- Increased in-reach services to custodial settings that connect Elders and other community representatives to those in prison;
- Culturally responsive, place based residential parenting facilities for Aboriginal Mums and Dads;
- Increased interventions and support for men/women who harm or use domestic violence
- Priority (safe and stable) accommodation for parents exiting prison with caring responsibilities;

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<sup>125</sup> Appendix B.

<sup>126</sup> Appendix C.

- Extension from 6 to 12 months of reduced rent for imprisoned parents in community/public housing properties;
- Prison visiting; supported visits and fathering units; and educational fathering programs;
- Increased access to community-based orders for parents (including ICO's);
- Flexible reporting mechanisms for parents subjected to community-based orders when they have children with special needs (including children with chronic or terminal illnesses);
- Allow people in prison to access support for rehabilitation at any point in their sentence (this now has to be Court ordered prior to sentencing);
- Culturally responsive programs in custody including yarning circles for parents;
- Increased training for stakeholders in the justice system to understand the complex reasons behind the entrenchment of Aboriginal people and families in the justice system;
- Equipping justice stakeholders to understand the difference between urban, rural and remote Aboriginal people/communities and their complexities;
- Visiting areas in Correctional Centre's should be child friendly with play equipment, healthy food options and opportunities for parents to engage in activities with their children;
- Visits should be staggered to avoid lengthy waiting periods for families especially those with children who have special needs;
- Increased resources and access for Aboriginal Community Controlled Organisations to access and provide support to Aboriginal Mums/Dad's or carers;
- Increased provision of culturally safe programs, services and activities that develop the capacity of imprisoned parents particularly for those whose parenting skills have been disrupted through their own experiences of care and/or justice involvement;
- Vary eligibility criteria for Aboriginal people to access community-based programs (e.g. violence as an exclusion criterion disproportionately affects Aboriginal people given the high levels of violence in Aboriginal communities and Aboriginal people are over represented as both victims and perpetrators of violence);
- Increased accountability to keep parents and children connected to each other, Culture, Country and Community particularly by non-Aboriginal carers;
- Aboriginal women who are considered perpetrators of violence should be considered in the context of Aboriginal Family Violence;
- Aboriginal parents are most responsive with a place based, Aboriginal service such as Deadly Connections;
- Any service provided needs to be provided in prison and through the transition out of prison;
- Department of Communities and Justice (which incorporates both child protection and corrective services) still operate as separate agencies, there should be increased collaboration in supporting those with child protection and justice involvement including specialists within correctional centres to assist those in custody with understanding orders, rights and responsibilities in Care and Protection matters;
- Focusing on supporting both the incarcerated parent and their family in the development of pre- release planning and support where appropriate would thus benefit. Currently, families are not a central component of this process;
- Increased collation of data on imprisoned parents and the affects on children as;

- The majority of prisoners are men, yet there has been very little formal attention concerning the parenting status of these men;<sup>127</sup>
- In Australia, the exact number of incarcerated parents, and children of incarcerated parents (COIP), is unknown, as this data is not collected.<sup>128</sup>

## 8. Death in Custody Investigations

### Lack of Independence

The lack of independent investigations into deaths in custody undermines outcomes and accountability and confidence in the process. It weakens the independence of coronial and criminal investigations. The internal nature of investigations into deaths in custody in NSW contrasts overseas jurisdictions, such as in Europe and the United Kingdom, where independent bodies or the courts are empowered to carry out independent investigations. They also have capacity to draw independent conclusions in relation to charges, apart from the prosecution. In NSW, the prosecution work hand in hand with the police in preparing potential criminal cases. This creates distinct problems when police or prison guards are suspects in death in custody matters. Aboriginal families and organisations have claimed that the current process amounts to a conflict of interest because it involves “police investigating police”.<sup>129</sup> It lends itself to processes and outcomes that are biased against First Nations victims.

The Law Enforcement Conduct Commission (LECC) has monitoring powers to review critical incident investigations,<sup>130</sup> but not to independently investigate deaths at the hands of police. It relies on the internal police investigation rather than gathering its own evidence. Consequently, there is a lacuna in rigorous, independent review processes for death in custody investigations.

### Models for Oversight

Independent reviews should have teeth. They should conduct direct inquiries and attend the site at the outset of the fatality to collect evidence and prevent police collusion and corroboration of their accounts. For example, in Northern Ireland the Police Ombudsman<sup>131</sup> or Prisoner Ombudsman<sup>132</sup> immediately sends investigative staff to the scene of the fatality to collect evidence and interview police and civilian witnesses. They use independent scientists and medical experts to analyse evidence and attend post mortems that are conducted by the state pathologist. They produce the investigation file and are in charge of collecting the evidence for the coroner.

### Aboriginal Oversight and Prosecution Powers

In Australia, there needs to be independent Aboriginal involvement in oversight bodies, including with powers to prosecute police and prison staff who are responsible for deaths in custody. Similar prosecution powers exist in other domains concerning Aboriginal justice such as violation of sacred

<sup>127</sup> Tess S. Bartlett, ‘Supporting Incarcerated Fathers: An Exploration of Research and Practice in Victoria, Australia’ (2019) 66(2) *Sage Journals Publications* 201, 218.

<sup>128</sup> *Ibid.*

<sup>129</sup> Roxanne Moore, ‘We need justice to #ChangeTheNation’, *IndigenousX* (Web Page, 24 January 2020) <<https://indigenousx.com.au/we-need-justice-to-changethenation/>>.

<sup>130</sup> *Law Enforcement Conduct Commission Act 2016* (NSW) s 115(3).

<sup>131</sup> See Police Ombudsman For Northern Ireland <<http://www.policeombudsman.org/>>. See also on the advantages of this impartial model: Police Accountability Project, *Independent Investigation of Complaints Against the Police* (Policy Briefing Paper, 2015) <[https://www.policeaccountability.org.au/wp-content/uploads/2015/11/CLCpaper\\_final.pdf](https://www.policeaccountability.org.au/wp-content/uploads/2015/11/CLCpaper_final.pdf)>.

<sup>132</sup> See The Prisoner Ombudsman for Northern Ireland, *Death in Custody Investigations* <<https://niprisonerombudsman.gov.uk/what-we-do/death-in-custody-investigations>>.

sites in the Northern Territory. The statutory authority – the Aboriginal Areas Protection Authority NT – has powers to prosecute under the *Aboriginal Sacred Sites Act 1989* (NT) s 39.<sup>133</sup>

The establishment of an **independent Aboriginal critical incidents authority** would be tasked with working with Aboriginal families to follow up leads, collect evidence and assist to prepare the coroner’s brief. In the absence of the unwillingness of the DPP to pursue prosecutions, with or without a coronial recommendation which occurs frequently with First Nations deaths in custody and other First Nations victims, the Aboriginal statutory body can step in to instigate prosecutions. Where the state prosecution is preparing the case, the independent Aboriginal authority should be able to provide evidence to the prosecution.

## 8.1 Support for Families and Communities Following a Death in Custody

In addition to a lack of support for people with family in custody, there is a significant lack in support services aimed at supporting family who have experienced the death of a family member in custody. Imprisonment correlates with a higher risk of death, as identified by the Royal Commission into Aboriginal Deaths in Custody.<sup>134</sup> Experiencing the death of a family member in custody is a traumatic experience that is insufficiently addressed through current support services. At Deadly Connections, we recognise the effectiveness of culturally-informed, holistic services to assist traumatised people through support, healing, growth and empowerment.

Deadly Connections is currently supporting the family of an Aboriginal man who lost his life in custody. We are assisting the family to further develop their vision of a healing centre on Country for justice involved people, families and communities.

## 8.2 Conclusion

We strongly urge this Inquiry to place Aboriginal self determination at the centre of its recommendations and recognise that systemic racism underlies the over-representation of First Nations people in the justice system which culminates in disproportionate Aboriginal deaths in custody.

There is also a significant need for greater support for family following deaths of a family member in custody. This should include a central access point for meeting, sharing and healing. Deadly Connections is committed to establishing this cultural, community, healing and social justice hub. We need support and resources to achieve this.

This submission was prepared by Carly Stanley (CEO & Founder), Keenan Mundine (Co-Founder & Ambassador) and is endorsed by our Board of Management.

**Carly Stanley**

**Keenan Mundine**

**Thalia Anthony (on behalf of the Board)**

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Dated 30 September 2020.

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<sup>133</sup> Thalia Anthony and Robert Chapman, ‘Unresolved Tensions: Warlpiri Law, Police Powers and Land Rights’ (2008) 7(5) *Indigenous Law Bulletin* 9.

<sup>134</sup> Aboriginal Legal Service Submission (NSW/ACT) Limited, *Submission to the Inquiry into Support of Children of Imprisoned Parents in New South Wales* (Report, February 2020) 7.