Submission No 38

INQUIRY INTO CORONIAL JURISDICTION IN NEW SOUTH WALES

Organisation: Deadly Connections Community & Justice Services Inc

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DEADLY CONNECTIONS
COMMUNITY AND JUSTICE SERVICES

Inquiry into the coronial jurisdiction in New South Wales

30 July 2021

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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 Not For 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.

Contact

Carly Stanley – CEO and Founder
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DEADLY CONNECTIONS
COMMUNITY AND JUSTICE SERVICES

Table of Contents

Background **1**

2. Use of Bugmy Justice-style Reports in the NSW Coroner's Court **2**

2.1 What are Bugmy Justice Reports? ..... **Error! Bookmark not defined.**

2.2 How could a Bugmy Justice Report-style document be utilised in the Coroner's Court? ..... **Error! Bookmark not defined.**

3. Implementing the Royal Commission into Aboriginal Deaths in Custody Recommendations **3**

4. The limitations of the NSW Coroner's Court in addressing broader systemic failures as part of the coronial process **4**

5. Responding to the need for accountability and implementation **6**

6. Addressing unconscious bias in the NSW Coroner's Court **6**

7. Community-led protocols and procedures for the inquest into the death of a First Nations person **7**

Background

Deadly Connections welcomes the opportunity to contribute to the Legislative Council's inquiry into the coronial jurisdiction in New South Wales ('**Inquiry'**), in particular to address the needs of First Nations peoples and communities.

Thirty years ago, the 1991 Royal Commission into Aboriginal Deaths in Custody ('**RCIADIC**') identified failings in the structure and process within the coronial system. RCIADIC noted the important capability of the Coroner's Court that *'[i]n the final analysis adequate post death investigations have the potential to save lives.*'[1] It is well-established that Aboriginal deaths in custody occur at a disproportionate rate. Despite over 40 years of inquests examining Aboriginal deaths in custody, deaths continue to occur in the same or similar circumstances, including for the same families.

It has been our observation and experience that the coronial system in NSW is not only ineffective in delivering justice for First Nations families, but that it re-traumatises bereaved families and communities.

This submission will focus on (a)(v) of the Inquiry's Terms of Reference, being the ability of the Court to respond to the needs of First Nations families and communities. Deadly Connections has addressed 6 areas of concern:

(a) The participation of the bereaved family and community in the coronial investigation and inquest is restricted, which inhibits a fulsome understanding of the deceased and their circumstances;

(b) RCIADIC recommendations provide a structure and sound basis for reform of the coronial process but implementation remains incomplete;

(c) The NSW Coroner's Court should consistently accept submissions on the role of systemic racism contributing to First Nations deaths in custody;

(d) Unconscious bias in the Coroner's Court against First Nations peoples impacts on the outcomes in the Coroner's Court and should be addressed through appropriate training and procedures;

(e) There is a need for community-led protocols and procedures for the inquest into the death of a First Nations person to better reflect First Nations cultures and practices around death;

(f) Continuing improvements to the representation of First Nations peoples within all levels of the coronial process is required to achieve more cultural sensitive processes and outcomes.

[1] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, National Report (1991) vol 1, 170 [4.7.4].

2. Use of Bugmy Justice-style Reports in the NSW Coroner's Court

The ability of the Coroner's Court to better address the needs of First Nations families and communities could be improved through a more holistic understanding of the relevant personal circumstances of the deceased, their family, community and cultural connections. Such circumstances could include systemic racism that the deceased experience in the criminal justice system, including in custody. The voices and perspectives of the deceased's family and community, received in a culturally safe and supported manner, would provide an avenue for the greater participation of bereaved First Nations families and communities in the coronial process.

Deadly Connections proposes that this involvement and perspective of the family could occur through the inclusion of Bugmy Justice-style reports to the Coroner's Court. Such reports would be additional to the family statement and written in conjunction with the family. There is precedent for this type of approach, noting that the RCIADC had individual death reports prepared.[2]

> *Slowly a picture would emerge from all the sources. Sometimes there would be a level at which truth emerged in the official records; more often not. What did emerge was that to understand the last hours of life of each individual and to truly understand the circumstances of their deaths Commissioners had to know the whole life of the individuals and, equally important, had to understand the experience of the whole Aboriginal community through their two hundred years of contact with non-Aboriginal society.*
>
> *RCIADIC, 1.2.15*

In addition to the preparation of family statements, Bugmy Justice-style reports could be prepared by an Aboriginal organisation in collaboratioin with the family. Their purpose is to document the experiences of the deceased throughout his/her life, especially resulting from institutional interventions, as well as systemic impacts of bias in the criminal justice system on the deceased's community.

The use of Bugmy-style coronial reports, identifying the the unique cultural and historical factors specific to a First Nations deceased person, will:

- provide a more holistic perspective of the individual, their human value and their lived experience;
- better recognise any gaps in the institutional processes and systems which led to the death (encompassing not only the criminal legal system but also those others encountered by the individual throughout their life, such as healthcare, social services, housing and education); and

[2] http://www.austlii.edu.au/au/other/IndigLRes/rciadic/individual/

- in this way, modernise the coronial system to better act as a tool for the improvement of public health and safety, to provide restorative truth and to advance of the rights of First Nations people.

Deadly Connections has experience preparing Bugmy Reports in criminal sentencing and is of the view that they could be equally important for enhancing justice in the coronial process. Coronial inquests often focus on the incarcerated experience of the deceased rather than providing a fulsome view of their lived experiences and the institutional failures contributing to their death. Where an inquest does discuss systemic issues affecting First Nations people, solutions are rarely borne out in recommendations. This limits the capability to recognise and address the ongoing and significant impacts of colonisation, and can result in the re-traumatisation of bereaved families and communities through the coronial process.

Recommendation

That the NSW Government amend the Coroners Act 2009 (NSW) to allow the Coroner to consider Bugmy Justice Reports when inquiring into the death of a First Nations person. These reports are funded by the Coroner's Court on the request of the family and prepared by an Aboriginal organisation in partnership with the deceased's family.

3. Implementing the Royal Commission into Aboriginal Deaths in Custody recommendations in relation to coronial processes

A key finding of the RCIADIC was that the coronial structure in place at the time failed to provide adequate, objective and independent investigations into the deaths that occurred.[3] The RCIADIC made 35 recommendations as to post-death investigations (recommendations 6 to 40). These recommendations pertained to the Coroner's role and responsibilities, the involvement of the family of the deceased person, the police investigation process and the protocol around investigation. These recommendations provide an important framework through which reform of the coronial process should be developed.

The recommendations proposed reforms requiring custodial authorities to investigate the quality of care, treatment and supervision of the deceased and work with the family in the culturally sensitive way, to conduct an independent and appropriate investigation into the death. The recommendations held the family's rights and interests as a primary consideration for the Coroner.[4] Recommendation 38 urged governments to work in collaboration with First Nations-led organisations to develop a protocol for the conduct of post-mortem investigations, in a way that upholds and respects traditional and cultural rites.

Implementation of the RCIADIC recommendations in NSW remains partial. From a legislative standpoint, notable gaps include that:

[3] RCIADIC, paras 1.2.5 and 1.10.3.
[4] RCIADIC, recommendat ons 19-25.

- there is no legislation mandating the public conduct of inquests or that full records of inquest hearings be retained (recommendation 11);
- there is no legislation requiring the investigation of the quality of the care, treatment and supervision of the deceased prior to death (recommendation 12);
- there is no legislation requiring responses from a governmental agency to a Coroner's findings and recommendations (recommendation 15); and
- there is no legislation requiring immediate notification of family in a culturally appropriate manner (recommendation 19).

Importantly, effective implementation of the RCIADIC recommendations looks beyond legislative change to whether legislative reform has realised its practical objectives. There is still significant progress to be made in the implementation of these recommendations. Deadly Connections urges the NSW Government to implement these recommendations as an essential first step in remedying the failures of the coronial system in responding to the needs of First Nations people.

Recommendation

That the NSW Government legislate to implement RCIADIC recommendations 11, 12, 15 and 19.

4. The limitations of the NSW Coroner's Court in addressing broader systemic failures as part of the coronial process

The coronial process must address the very limited focus that is currently given to systemic failures as fundamental contributors to the deaths in custody of First Nations people. The RCIADIC reported that 'the lack of inquiry into systems issues such as custodial practices and procedures, hospital and emergency procedures, resulted in a lack of findings or recommendations designed to rectify failures in these systems'.[5] Further, in order to prevent future deaths, racism and colonisation and their contemporary effects and consequences should be included in the exploration of 'systemic problems' that have contributed to a First Nations death in custody.[6]

Under the current frameworks, the findings of, and recommendations made by, the Coroner often focus on the events directly before a person's death, rather than systemic issues that have impacted the life of the deceased. This represents a limited reading of the Coroner's power under section 82 of the *Coroners Act 2009* (NSW) to make any recommendations that are "necessary or desirable".

[5] Ib d, 4.5.8.

[6] Subm ss on 108 to The h gh eve of F rst Nat ons peop e n custody and overs ght and rev ew of deaths n custody rev ew, Dr F ona A son and Professor Chr s Cunneen from the Ind genous Law and Just ce Hub, Jumbunna Inst tute for Ind genous Educat on and Research, and Ms Me an e Schwartz, Deputy Head of Schoo , Law, Un vers ty of Techno ogy Sydney

Deadly Connections refers to the Legislative Council Select Committee Report on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody ('**Legislative Council Report**') on this issue. We support the recommendations that the Coroner is required to examine whether there were systemic issues relevant to the death of a First Nations person in custody, and the ability of the Coroner to make recommendations for systemic improvements to decrease the risk of First Nations deaths in custody: [7]

Recommendation 33

That the NSW Government amend the Coroners Act 2009 to stipulate that the Coroner is required to examine whether there are systemic issues in relation to a death in custody, in particular for First Nations people, with the Coroner provided with the power to make recommendations for system wide improvements.

Deadly Connections also supports the recommendation put forward by the Jumbunna Institute of Indigenous Education and Research (and endorsed in the Legislative Council Report) that the Coroners Act 2009 should be amended to mandate Coroners to make findings on whether implementation of any, some or all of the Royal Commission into Aboriginal Deaths in Custody report recommendations could have reduced the risk of death in all cases where a First Nations person has died in custody:

Recommendation 34

That the NSW Government amend the Coroners Act 2009 to mandate Coroners to make findings on whether the implementation of any, some or all of the recommendations from the Royal Commission into Aboriginal Deaths in Custody report could have reduced the risk of death in all cases where a First Nations person has died in custody.

Coronial inquests have the potential not only to contribute to First Nations public health and safety and prevent avoidable deaths, but further 'allay suspicion, safeguard public scrutiny of contentious deaths and ensure justice is seen to be done'.[8] Reform to mandate the consideration of systemic issues as contributing factors and accompanying recommendations to address this is critical from a practical outcomes perspective for First Nations peoples, and as a recognition of the ongoing trauma and impacts of systems and instutitions.

Recommendation

That the NSW Government amend the Coroners Act 2009 (NSW) to:

a) oblige the Coroner to consider submissions on systemic racism that relate to the death of the deceased, including beyond the immediate timeframe of the passing; and

b) provide the Coroner with powers to make recommendations in relation to the impact of systemic racism on First Nations deceaseds and how it contributed to their deaths.

[7] Leg s at ve Counc , Se ect Comm ttee on the H gh Leve of F rst Nat ons Peop e n Custody and Overs ght and Rev ew of Deaths n Custody (Apr 2021) at (x x), recommendat on 31–35.
[8] R Scott Bray, 'Paradox ca Just ce: The Case of Ian Tom nson' (2013) 21 *Journal of Law and Medicine* 449.

5. Responding to the need for accountability and implementation

Accountability and effective implementation of recommendations is an integral component of a coronial system that is equipped to address and prevent deaths in custody of First Nations peoples. It is critical to ensuring that the coronial process responds to the needs of families to have tangible outcomes. Currently the NSW system lacks concrete mechanisms to hold the relevant government departments and correctional centres to account in implementing recommendations that are made by the Coroner in relation to deaths in custody. Deadly Connections supports recommendation 32 made by the Select Committee on Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody.

Recommendation

[Recommendation 32] That the NSW Government amend the Coroners Act 2009 to ensure that the relevant government department and correctional centre respond in writing within six months of receiving a Coroner's report, the action being taken to implement the recommendations, or if no action is taken the reasons why, with this response tabled in the NSW Parliament.

6. Addressing unconscious bias in the NSW Coroner's Court

Unconscious bias on the part of the Coroner can manifest when the Coroner unreasonably accepts the evidence of police and corrections officers over the evidence of First Nations families and witnesses. This was referred to in the RCIADIC, which stated that 'in many instances the inquest merely reflected the inadequacies of perfunctory police investigations and did little more than formalise the conclusions of police investigators. Reliance was placed on misleading or inaccurate evidence provided by the police without critical examination, relevant witnesses were not called or, if called, were not asked pertinent questions'.[9]

For example, in the 2004 inquest of TJ Hickey, who died while being pursued by police, the police consistently failed to answer questions and the Senior Constable against whom the main allegations were directed refused to give evidence at the inquest. Despite this, the Coroner accepted the police version of events over the evidence of witnesses and the actions of police following the incident which the Coroner recognised as breaches of police procedures. The Coroner ultimately found that TJ died during 'police operations' without apportioning blame.[10]

[9] RCIADIC, para 4.5.5.

[10] J Abernathy, *Inquest into the death of Thomas James Hickey* (Coroners Court of New South Wa es, Report No 287, 17 August 2004) 89, c ted n T Anthony, Po c ng n Redfern: H stor es and Cont nu t es (2018) 12 *Court of Conscience* 46, 50.

Similarly, the Coroner declined to refer the officers involved in the death of David Dungay in 2015 to disciplinary proceedings, contrary to the submissions of the Dungay family. This decision was made on the basis that the officers' conduct was limited by systemic deficiencies in training provided to them and that the available evidence did not rise so high as to suggest that the officers' actions 'were motivated by malicious intent, but rather a product of their misunderstanding of information'.[11] The Coronor found that David died whilst being restrained in the prone position by officers, with his medical condition (partly caused by the prone restraint) and the extreme stress as a result of the use of force and restraint being contributory factors to his death.

In the 2020 inquest of Nathan Reynolds, the Coroner found that Nathan's death by bronchial asthma was contributed to by deficiencies in the management of his severe asthma by the Justice Health network and deficiencies in the immediate response by Corrective Services NSW. The Coroner found that the primary medical officer had a limited understanding of the relevant processes and that his treatment was 'deficient'. Nevertheless, the Coroner declined to refer the officer to the NSW Medical Council for a review of his professional conduct, accepting his evidence that he had become familiar with the appropriate procedures since Nathan's death.[12]

Addressing unconscious bias in the NSW Coroner's Court is a necessary component to improve the delivery of just outcomes for First Nations people and communities. Deadly Connections refers to its submissions to the Australian Law Reform Commission's Review of Judicial Impartiality in particular recommendations 18, 19, 21 and 25 (extracted in Appendix A) and suggests that a similar approach to cultural competency and unconscious bias training would be appropriate for the NSW Coroner's Court. It underscores the importance on any programs to address unconscious bias in the Coroner's Court be overseen by a First Nations Advisory Committee within the cour.

Recommendation

That the Coroner's Court have a program of training to address unconscious bias in the court. The program should be overseen by a First Nations Advisory Committee within the court.

7. Community-led protocols and procedures for the inquest into the death of a First Nations person

Protocols should also be developed to keep families informed and involved in the inquiry and investigation immediately following the death.[13] There should be accountability measures in place

[11] D Lee, *Inquest into the death of David Dungay* (Coroners Court of New South Wa es, F e No. 2015/381722, 22 November 2019) at para 18.12.
[12] E Ryan, *Inquest into the death of Nathan Reynolds* (F e number 2018/269824, 11 March 2021) at para 241.
[13] Inqu ry nto h gh eve of F rst Nat ons peop e n custody and overs ght and rev ew of deaths n custody, *Submission 124 Reynolds Family* (30 September 2020).

if protocols are not followed. This includes in relation to the family and community beliefs and cultural protocols around death and the body of the deceased person.

For example: In Western Australia, the Supreme Court was required to determine if a post-mortem examination could be refused on cultural and religious grounds or whether it was in the public interest for it to be undertaken.[14] The case was brought by the senior next of kin, a mother, seeking an order to prevent a full post-mortem to be undertaken on her 14 year-old daughter. The mother, an Aboriginal woman from South Australia, understood that should an autopsy be undertaken, 'the deceased's soul will be forever tormented and will never have peace; but if her body is buried whole, her spirit will be at peace'.[15] The Coroner's Office took a position that the full post-mortem examination was required in order to fully investigate the manner of death, and insisted that, while the spiritual and cultural beliefs should not be disregarded, they would not be determinative when balancing against public interest.[16]

Recommendation

Processes should be established within deaths investigations teams for immediate notification of the family of the death in custody and access to evidence. The family's access to evidence should include immediate access to the scene of the death, the loved one's body and witnesses. Expeditious access to evidence should prevail throughout the coronial process.

Prepared by:

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Dated: 30 July 2021

[14] *Paterson v Coroner King* [2019] WASC 25.
[15] Ib d at [17].
[16] Ib d at [21].

Appendix A: Deadly Connections Submission to the Australian Law Reform Commission's Review of Judicial Impartiality (2021)

Recommendations

In response to the consultation proposals and consultation questions:

CONSULTATION PROPOSAL 18

Each Commonwealth court (excluding the High Court) should circulate annually a list of core judicial education courses or other training that judges are encouraged to attend at specified stages of their judicial career, and ensure sufficient time is set aside for judges to attend them. Core courses in the early stages of every judicial career should comprehensively cover (i) the psychology of decision-making, (ii) diversity, intersectionality, and comprehensive cultural competency, and, specifically (iii) cultural competency in relation to Aboriginal and Torres Strait Islander peoples.

We support this proposal. To strengthen its intention, we suggest that the High Court should be included in its scope given that it adjudicates on significant issues concerning and affecting First Nations communities and rights. We further propose there should be ***ongoing*** *training and it should encompass 'the psychology and* ***implicit bias in decision making'****. In relation to the latter, this training should give special attention to unconscious biases arising from the social/cultural standpoint of the judicial officer.*

CONSULTATION QUESTION 19

What more should be done to map, coordinate, monitor, and develop ongoing judicial education programs in relation to cultural competency relevant to the federal judiciary, and to ensure that the specific needs of each Commonwealth court are met? Which bodies should be involved in this process?

A First Nations Advisory Committee within the Federal Court should be established to oversee this work (for similar examples within NSW see the Ngara Yura Program of the NSW Judicial Commission). The mapping and evaluation should be conducted in collaboration with First Nations organisations who specialise in professional cultural competence training in the justice sector, such as Deadly Connections and We Al-li. This Advisory Committee should also work to broadly incorporate cultural competency programs within the federal judiciary.

CONSULTATION QUESTION 21 What further steps, if any, should be taken by the Commonwealth courts or others to ensure that any implicit social biases and a lack of cultural competency do not impact negatively on judicial impartiality, and to build the trust of communities with lower levels of confidence in judicial impartiality? Who should be responsible for implementing these?

To build trust, a First Nations Advisory Committee should be set up within the Federal Court (see response to Qn 19) to propose a program of engagement with First Nations communities and organisations and cultural competency training. The advisory committee should include key First Nations justice organisations, such as Deadly Connections, the National Aboriginal and Torres Strait Islander Legal Services, First Peoples Disability Network, SNAICC, National Family Violence Prevention Legal Service and the National Native Title Council.

CONSULTATION QUESTION 25 What other data relevant to judicial impartiality and bias (if any) should the Commonwealth courts, or other bodies, collect, and for what purposes?

Commonwealth courts should work with First Nations organisations and researchers to collect data on perceptions of bias by First Nations court users and their lawyers and understake an implicit bias analysis of judicial remarks. This information should be used to inform cultural competence programs and bias training.

Introduction

Deadly Connections welcomes the opportunity to contribute to the Australian Law Reform Commission's Review of Judicial Impartiality. As an Aboriginal community controlled and led organisation who professionally supports justice-involved Aboriginal peoples and families, we intimately understand the adverse impacts of systemic bias on our communities.

The Australian Law Reform Commission's Consultation Paper and Background Papers acknowledges the systemic and ongoing issues impacting impartiality and perceptions of judicial bias. The impacts of these issues are most pronounced for First Nations peoples. Deadly Connections sets out solution-focussed recommendations, specifically addressing the issues raised by Consultation Questions 18, 19, 21 and 25, regarding the steps to be taken to ensure that implicit social biases and a lack of cultural competency do not negatively impact on judicial impartiality.

Judicial impartiality and neutrality are intended to be foundational principles of the legal system. For First Nations peoples, however, the law and the broader legal system has been used to enact significant injustices on First Nations peoples, and justify unequal treatment. Against this background, there is clear evidence of continuing racial bias in judicial decision-making, whether it take the form of explicit or implicit bias. The prevalence of racial bias throughout the justice system raises the need for explicit considerations of race for the system to produce substantive equality.

There are a number of points at which key decisions are made concerning First Nations people coming into contact with the justice system. At each of these stages, racial bias may surface for the various decisionmakers in criminal (e.g. police), family (e.g. child protection case workers) and civil (e.g. social security bureaucrats) matters. The collective and interrelated impact of racial bias, integegrated over time for each person and across all First Nations peoples is significant. Even small biases at each stage may aggregate into a substantial effect.[17] This effect results in direct harm to the individual and the broader First Nations community perceptions of the legal system and judiciary. Broader systems change at each level of interaction between First Nations people and the legal system remains necessary, however the significant power of the judiciary to address and correct injustices occurring at those earlier stages of interactions, and serve as a catalyst for change in the prevalence of racial bias, make the opportunities for judicial reform significant and necessary.

CONSULTATION PROPOSAL 18 Each Commonwealth court (excluding the High Court) should circulate annually a list of core judicial education courses or other training that judges are encouraged to attend at specified stages of their judicial career, and ensure sufficient time is set aside for judges to attend them. Core courses in the early stages of every judicial career should comprehensively cover (i) the psychology of decision-making, (ii) diversity, intersectionality, and comprehensive cultural competency, and, specifically (iii) cultural competency in relation to Aboriginal and Torres Strait Islander peoples.

We support this proposal. To strengthen its intention, we suggest that the High Court should be included in its scope given that it adjudicates on significant issues concerning and affecting First Nations communities and rights. We further propose there should be ***ongoing*** *training and it should encompass 'the psychology and* ***implicit bias in decision making'****. In relation to the latter, this training should give special attention to unconscious biases arising from the social/cultural standpoint of the judicial officer.*

CONSULTATION QUESTION 19 What more should be done to map, coordinate, monitor, and develop ongoing judicial education programs in relation to cultural competency relevant to the federal judiciary, and to ensure that the specific needs of each Commonwealth court are met? Which bodies should be involved in this process?

A First Nations Advisory Committee within the Federal Court should be established to oversee this work (for similar examples within NSW see the Ngara Yura Program of the NSW Judicial Commission). The mapping

[17] Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1210 (2009) at 1202.

and evaluation should be conducted in collaboration with First Nations organisations who specialise in professional cultural competence training in the justice sector, such as Deadly Connections and We Al-li. This Advisory Committee should also work to broadly incorporate cultural competency programs within the federal judiciary.

A number of principles should guide the development of training:

- Training on Aboriginal and Torres Strait Islander cultural competency should be trauma-aware and led by qualified and experienced Aboriginal and Torres Strait Islander controlled organisations or individuals. Participation in intensive training on these topics should be considered a priority (or otherwise demonstrated) before a judicial officer sits on a specialised list dealing with a high proportion of Aboriginal and Torres Strait Islander people, such as the Native Title list in the Federal Court or Indigenous lists in the Family Court. More broadly, the Judicial College of Victoria identified the need for cultural competence education in its submission to the ALRC Inquiry into Indigenous Incarceration Rates (2017).[18]
- It should be incumbant on judicial officers to do a range of activities, including on-country cultural immersion [19], and probono work with Aboriginal organisations to instil judicial officers with a sense of the grounded work of frontline organisations and the needs and circumstances of their clients.
- Training should also encompass implicit bias training so judicial officers can identify their own bias that arises from their social/cultural standpoint.[20]

8. Building and delivering effective cultural competency education and training programs to address judicial bias

Appropriately designed and delivered cultural competency and safety training and education is essential in limiting the impacts of judicial bias and promoting access to justice for First Nations peoples. This forms a basis for the consideration of an individual's personal circumstances in sentencing and bail applications. A judiciary that is culturally competent, including having an understanding of First Nations families, child-rearing practices and kinship, and the centrality of culture, is important for the determination of the best interests of First Nations children in the family law jurisdiction and the interpretation and application of specific provisions of the Family Law Act relating to the cultural needs of First Nations children.

Current cultural competency procedures are insufficient,[21] and the length, participation and content of current programs vary across jurisdictions. The short time frame of many education courses renders the training ineffective in allowing participants to develop a genuine understanding of the historical and contextual issues for First Nations peoples, and therefore does not effectively influence behavioural or attitudinal change. Robert Bean criticises short workshops as 'largely ineffective in developing practical skills and professional competence'.[22] Longer cultural immersion visits or ongoing work with Aboriginal organisations may provide a more sustained understanding of the experiences of First Nations people to counterbalance any assumed biases in the judging process.[23] Notably, a review of the benchbooks and practice notes available for the federal courts did not reveal any practical guidance available to judges or lawyers around identifying relevant cultural information for First Nations parties.

[18] See https://www.a rc.gov.au/wp-content/up oads/2019/08/102. the ud c a co ege of v ctor a.pdf.
[19] Vanessa Cavanagh and E en Marchett , Jud c a Ind genous cross-cu tura tra n ng: what s ava ab e, how good s t and can t be mproved? (2016) 19(2) *Faculty of Social Sciences – Papers 52.*
[20] See https://on ne brary.w ey.com/do /epdf/10.1111/1742-6723.13691.
[21] Vanessa Cavanagh and E en Marchett , Jud c a Ind genous cross-cu tura tra n ng: what s ava ab e, how good s t and can t be mproved? (2016) 19(2) *Faculty of Social Sciences – Papers* 45, 53.
[22] Ib d.
[23] Ib d 53.

Currently, only Victoria and South Australia have compulsory cultural awareness training for judges,[24] however there still remain significant deficits in this competency training as there is no examination or evaluation process to outcomes of judicial understanding or behavioural change.[25] There is also no national standard against which cultural awareness training can be assessed.[26]

8.1 Cultural Competency education and training should be trauma-aware and led by Aboriginal and Torres Strait Islander controlled organisations

To operate effectively, all cultural competency education must be First Nations-led, designed and delivered. This education must be grounded in the lived experiences of First Nations peoples, in particular, those who have been most impacted by the legal system. The centering of trauma-aware practice and an understanding of the deep impacts of trauma inflicted and perpetuated by the Australian legal system is foundational to effecting change in judicial decision-making that can flow on to reduced perceptions of impartiality.

Cultural competency education must include the ongoing impacts of invasion and colonisation, intergenerational trauma, experiences within all levels of the legal system and the contemporary experiences of urban, regional and remote communities, such as racism and discrimination. We also submit that this education must also include the strengths of First Nations peoples and communities, particularly around self-determination and the significant contributions made by our Aboriginal community controlled sector.

This educational background is essential to a foundation of understanding of the systemic and background factors affecting First Nations people.

In addition to the knowledge requirements, any education must include the acquiring of practical competence in working with First Nations parties in the courtroom and cultural safety practices.

8.2 Cultural Competency Education should be mandatory, ongoing and assessed

We agree with the proposal in Consultation Question 18, however, further say that participation in ongoing education courses must be mandatory rather than 'encouraged'. Participation in intensive training on these topics should be considered mandatory and a priority (or otherwise demonstrated) before a judge sits on a specialised list dealing with a high proportion of Aboriginal and Torres Strait Islander people, such as the Native Title list in the Federal Court or Indigenous lists in the Family Court. Judges should be expected to have a functional understanding of the cultural context in which these issues are taking place and how to work effectively with First Nations parties in their courtroom.

Assessment of the development of greater insight and understanding must be incorporated to ensure the efficacy of any education. Mandatory, ongoing and assessed training ensures that judges are meeting a minimum level of general cultural competency.

8.3 Cultural Competency education and training should address implicit biases

Implicit biases occur outside of conscious awareness but can still influence behaviour.[27] Overcoming the impact of these biases first requires understanding the ways in which they manifest. Studies in a healthcare context have shown a relationship between implicit bias and clinical decision-making, which may lead to worse outcomes for patient care.[28] This impact was particularly prevalent in time-pressured situations, where

[24] Ib d 54.
[25] Ib d 53.
[26] Ib d 57
[27] Imp c t b as towards Abor g na andTorres Stra t Is ander pat ents w th n Austra anemergency departments, Qu g ey, Hutton et a , Emergency Med c ne Austra as a 2021 33, 9-18, 9.
[28] Ib d 10.

assumptions and patterned thinking allowed practitioners to take 'cognitive shortcuts'.[29] Training and education programs should be built around self-reflective practice and observation, facilitating the identification and addressing of implicity biases.

Recommendations

Implement the following measures:

- *Mandatory cultural competency training for all judges and courtroom staff, designed and led by First Nations people;*
- *Mandatory assessment processes to ensure a minimum standard of completion; and*
- *Mandatory community-involvement aspects of the training, with a specific focus on involvement between the judiciary and First Nations communities.*

CONSULTATION QUESTION 21
What further steps, if any, should be taken by the Commonwealth courts or others to ensure that any implicit social biases and a lack of cultural competency do not impact negatively on judicial impartiality, and to build the trust of communities with lower levels of confidence in judicial impartiality? Who should be responsible for implementing these?

9. Establish a First Nations Advisory Committee

A First Nations Advisory Committee should be set up within the Federal Court (see response to Qn 19) to propose a program of engagement with First Nations communities and organisations and cultural competency training. This First Nations-guided program would facilitate trust building between the federal court and First Nations communities. The advisory committee should include key First Nations justice organisations, such as Deadly Connections, the National Aboriginal and Torres Strait Islander Legal Services, First Peoples Disability Network, SNAICC, National Family Violence Prevention Legal Service and the National Native Title Council.

Specific initiatives listed below should be developed by this First Nations Advisory Committee:

- Specialised First Nations courts (e.g. care circles such as in NSW – see below) designed by First Nations peoples.
- Specialised court lists, that provide for more time, input and perspectives from First Nations people in family matters and civil matters (e.g. racial discrimination, or appeals from the Administrative Appeals Tribunal).
- Increasing the number of First Nations peoples in the judiciary and legal profession, including by creating pathways other than from the bar.
- Bugmy justice reports in order to shed light on the particular experiences of First Nations individuals, their families and community background so as to preclude decisions being made with reference to unconscious bias about First Nations cultures or simply a lack of knowledge that contributes to inappropriate decisioin making and outcomes. These reports should be available for family and criminal court matters as well as relevant civil matters.
- Mandatory consideration of Aboriginality in criminal matters and incorporated in the Commonwealth Criminal Code – similar to provision s 718.2(e) of the Canada Criminal Code (discussed in 2017 ALRC report).
- There should be specific training on Aboriginal families structures and relationships that is strengths-based. This should be complemented by Bugmy reports. This overcomes the widespread deficit discourse by lawyers in their submissions, which in turn contributions to this approach in judicial decision making.

[29] Ib d 14.

9.1 Representation of First Nations peoples in the judiciary

The Consultation Paper recognises that current judicial appointment processes and arrangements for new judges do not equip individual judges, and the judiciary as a whole, with the ability to appropriately manage the challenges that arise from bias and a lack of cross-cultural knowledge.[30] This is the result of courts, particularly criminal courts, being 'substantially the domain of white decision makers'.[31] Diversity and representation within the judiciary is therefore essential to ensure that the judiciary as a whole is equipped to handle these issues. First Nations representation on the judiciary results in fairer and more appropriate outcomes for First Nations people, as First Nations judges bring Indigenous perspectives, strengths-based approaches and a healing and restorative lens to processes and outcomes.[32]

The NSW Parliament Legislative Council Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody (**Legislative Council Report**) released its report in April 2021 and included a series of recommendations for the NSW Government. The Legislative Council Report recommended that the NSW Government implement a program to actively employ a greater number of First Nations staff across all areas of the criminal justice system, and that the Attorney General consider appointing significantly more suitably experienced and qualified First Nations people to the judiciary. We urge the Commonwealth Attorney General to do the same.[33] It is an essential step in reconciliation and rebuilding First Nations trust within the legal system.Judicial targets must be applied to ensure that a greater number of First Nations judges are employed across all areas of the Commonwealth courts system.[34]

To support the above, the Commonwealth Government should create pathways to support First Nations legal practitioners in entering the judiciary. In Canada, this has involved launching special streams for Indigenous students in law schools and championing diversity as a factor for consideration in the appointment process.[35] In 2012, the United Kingdom's Select Committee on the Consitutition recommended in their 'Report on Judicial Appointments' that appointment panels themselves should be diverse and required to undertake diversity training.[36] The Committee also stated that the Government has a critical responsibility in encouraging applications from all lawyers, not just barristers.

It is also essential for courts to retain First Nations judges, once appointed, by creating a culture of inclusion within the judiciary.

The increase in representation of First Nations peoples in all levels of the Commonwealth courts system, in conjunction with other recommendations outlined, is likely to assist in building the trust and confidence of First Nations peoples through increased cultural safety and competency.

Recommendations

That the Commonwealth Government implement a program to actively employ a greater number of First Nations staff across all areas of the Commonwealth courts system.

That the Commonwealth Attorney General consider appointing significantly more suitably experienced and qualified First Nations people to the judiciary.

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[30] Constu at on Paper p 12.

[31] Tha a Anthony, Address ng rac sm embedded w th n the cr m na just ce system , *Croakey Health Media* (on ne, 16 June 2020) <https://www.croakey.org/address ng-rac sm-embedded-w th n-the-cr m na - ust ce-system/>.

[32] Ib d.

[33] Leg s at ve Counc , Se ect Comm ttee on the H gh Leve of F rst Nat ons Peop e n Custody and Overs ght and Rev ew of Deaths n Custody , Apr 2021, 179-180.

[34] Ib d.

[35] Kath een Harr s, The chang ng face of Canada s jud c ary: more women, more d vers ty *CBC News* (on ne, 5 May 2019) < https://www.cbc.ca/news/po t cs/jud c ary-d vers ty-appo ntments-1.5074102>.

[36] Ray Ste nwa , Address ng cu tura d vers ty n the Austra an jud c ary , *Diversity Council Australia* (on ne, 30 Apr 2014) < https://www.dca.org.au/b og/address ng-cu tura -d vers ty-austra an-jud c ary>.

10. Bugmy Justice Reports

The JI6 paper recognises the accumulation of institutional discrimination and bias that First Nations people experience in the court system. The paper recognises that this is a crucial cause of the overrepresentation of First Nations people in the national prison population.[37] Currently, sentence assessment reports provide a narrow snapshot and risk assessment of individuals. These reports can be impacted by racial assumptions and stereotypes at the writing stage, which can then go on to impact judicial perception at the risk assessment stage.[38] The use of similar psychological risk assessment reports in Canada has been ruled as inaccurate and invalid for First Nations populations.[39]

A key step to reducing judicial impartiality in sentencing is to require courts and judges to consider the unique circumstances of First Nations offenders and sentence them in a culturally-informed way.

'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. The reports are named after the case of *Bugmy v The Queen*,[40] where 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'.[41] They include background information about the offender's specific circustances, including sociocultural factors, such as trauma and mental health, and their personal experiences as an individual within the wider First Nations community.[42]

Bugmy Justice Reports have also been strongly recommended by other advocacy bodies in Australia. In 2017, the ALRC recommended in Recommendations 6-2 to 6-6 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.[43] The ALRC recommended that these take the form of 'Indigenous Experience Reports', which perform the same function as Bugmy Justice Reports. 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.[44] At minimum, these models should be based on a legislative requirement for judges to consider the unique social and cultural factors of First Nations peoples at sentencing. The compilation of these reports should be judge-ordered.

In Canada, Gladue Reports similarly seek to incorporate an understanding of relevant cultural factors into bail and sentencing decisions, as well as family law matters. The reports assist judges to fulfill their duties under s 718.29(e) of the Canadian Criminal Code, which requires that they consider all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstance of Aboriginal offenders.[45] The Court in *Ipelee* considered that, rather than being an 'affirmative action' policy or race-based discount in sentencing, the use of Gladue factors was essential to achieving a

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[37] Background Paper JI6, *Cognitive and Social Biases in Judicial Decision-Making*, 13.

[38] Tha a Anthony, Address ng rac sm embedded w th n the cr m na just ce system , *Croakey Health Media* (on ne, 16 June 2020) <https://www.croakey.org/address ng-rac sm-embedded-w th n-the-cr m na - ust ce-system/>.

[39] Human R ghts Law Centre, *Supreme Court of Canada rules use of psychological risk assessment tools on Indigenous offenders illegal* (Webpage, 13 June 2018) < https://www.hr c.org.au/human-r ghts-case-summar es/2018/12/17/supreme-court-of-canada-ru es-use-of-psycho og ca -r sk-assessment-too s-on-nd genous-offenders- ega >.

[40] (2013) 249 CLR 571.

[41] Ib d [41].

[42] Austra an Law Reform Comm ss on, *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) 6.137.

[43] Austra an Law Reform Comm ss on, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples Recommendations* 6-2–6-6.

[44] Austra an Law Reform Comm ss on, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples Recommendations* 6-3.

[45] Austra an Law Reform Comm ss on, *Pathways to Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples Part 3.*

fit and proper sentence by expanding the scope of relevant factors that ought to be taken into account.[46] The possible application of these reports to family law matters has also been identified.[47]

Deadly Connections have begun rolling out Bugmy Reports within the NSW criminal jurisdiction. These reports are produced by a dedicated writer who undertakes a detailed set of interviews with the defendant and their family while also examining the circumstances of the First Nations community in which the defendant grew up and currently resides. The reports have shed light on issues pertaining to culture, upbringing, family ties, experiences of racism and institutional interventions, strengths and capacities. The reports identify appropriate options for the sentencing courts that are relevant to the individualised experience of the First Nations defendant. The value of these reports has also been recognised in other jurisdictions. Bugmy report programs developing in Victoria (auspiced by Victorian Aboriginal Legal Service) and Queensland (Five Bridges Aboriginal and Torres Strait Islander Community Justice Group). The Deadly Connections Bugmy Reports are perceived by our clients as a holistic and meaningful account of their experiences.

10.1 Informing judges at sentencing and reducing bias

The JI6 paper states that if judges are aware of their own biases, they may 'take steps to remove their impact from decision-making'. According to Professor Thalia Anthony, 'redressing implicit bias in the courts requires the creation of new narratives and conditions that counter racial assumptions'.[48] At present, Aboriginality and culture is not one of the factors which the court is required to take into account in determining sentencing.[49] Therefore, common law would have to be relied upon so far as is possible consider First Nations people as such.[50] The legislation further requires that "the court must not take into account …any form of customary law or cultural practice as a reason for: (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or (b) aggravating the seriousness of the criminal behaviour to which the offence relates."

Bugmy Justice reports aim to bring structural discrimination to the forefront of judicial consideration at sentencing. Bugmy Justice reports are intended to inform courts in the risk assessment process to ensure appropriate, culturally-sensitive sentencing of First Nations offenders, draw attention to the unique racial and cultural factors systemic to First Nations offenders and highlight the impact of offending on First Nations communities. Where appropriate, the reports urge courts to consider alternatives to incarceration. Unlike current sentence assessment reports and risk assessment tools, Bugmy Justice Reports provide a contextualised understanding of the impact of systemic racism on offending, sentencing, and rehabilitation options.[51] They are an essential step towards reducing the severe overrepresentation of First Nations people in custody.

Culturally-informed sentencing is critical in ensuring that First Nations people do not continue to experience disadvantage as a result of institutional bias. The consideration of Bugmy reports at sentencing is an essential first step in reducing the impact of judicial bias on sentencing outcomes for First Nations people. Their implementation is a logical way to address Consultation Question 21, as Bugmy Justice Reports would require judges to actively consider the social bias and disadvantage First Nations people face in the criminal justice system and beyond.

Recommendation

[46] *R v Ipeelee* 2012] 1 SCR 433 75]
[47] Rom Lask n, Expand ng the Reach of G adue: Exp or ng the Use of G adue Reports n Ch d Protect on, 2021 26 *Appeal: Review of Current Law and Law Reform* 25, 25.
[48] Tha a Anthony, Address ng rac sm embedded w th n the cr m na just ce system , *Croakey Health Media* (on ne, 16 June 2020) <https://www.croakey.org/address ng-rac sm-embedded-w th n-the-cr m na - ust ce-system/>.
[49] *Crimes Act 1914* (Cth), s 16.
[50] *Bugmy v The Queen* (2013) 249 CLR 571 set out under sect on [10-470] Race and ethn c ty n Sentenc ng Bench Book (NSW).
[51] Anna Mack n and Robyn G bert, Work ng w th Ind genous offenders to end v o ence (Research Br ef, June 2011)

Deadly Connections recommends that the Australian Government amend s 16A Crimes Act 1914 (Cth), s16A; Judiciary Act 1903 (Cth), s68 to make Bugmy Justice Reports a mandatory consideration at sentencing, and require judges to consider the unique social and cultural factors of First Nations offenders.

11. Data

Recommendation

Commonwealth courts should work with First Nations organisations and researchers to collect data on perceptions of bias by First Nations court users and their lawyers and understake an implicit bias analysis of judicial remarks. This information should be used to inform cultural competence programs and bias training.