REPORT ON PROCEEDINGS BEFORE

SELECT COMMITTEE ON THE HIGH LEVEL OF FIRST NATIONS PEOPLE IN CUSTODY AND OVERSIGHT AND REVIEW OF DEATHS IN CUSTODY

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

CORRECTED

AtMacquarie Room, Parliament House, Sydney, on Monday 26 October 2020

The Committee met at 09:30.

PRESENT

The Hon. Adam Searle (Chair)

The Hon. Trevor Khan
The Hon. Rod Roberts
The Hon. Penny Sharpe
Mr David Shoebridge (Deputy Chair)

PRESENT VIA VIDEOCONFERENCE

The Hon. Natalie Ward

The CHAIR: Welcome to the first hearing of the Select Committee inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody. Before we commence, I would like to acknowledge the Gadigal people, who are the traditional custodians of this land. I would also like to pay respect to the Elders past, present and emerging of the Eora nation, and extend that respect to other First Nations people present and those who may be watching these proceedings. Today we will be hearing from a number of stakeholders, including various legal organisations and Aboriginal services and families of those directly affected by some of the matters that we are inquiring into.

While we have many witnesses with us in person some will be appearing via videoconference today. I thank everyone for taking the time to give evidence before this upper House inquiry. Before we commence I would like to make some brief comments about the procedures for today's hearing. Today's hearing is being broadcast live via the Parliament's website. A transcript of today's evidence will be placed on the Committee's website when it becomes available. In accordance with the broadcasting guidelines media representatives are reminded that they must take responsibility for what they publish about the Committee's proceedings. The guidelines for the broadcast of proceedings are available from the secretariat.

While parliamentary privilege applies to witnesses giving evidence today it does not apply to what witnesses say outside of their evidence at the hearing. I therefore urge witnesses to be careful about comments they may make to the media or to others after they complete their evidence. All witnesses have a right to procedural fairness according to the procedural fairness resolution adopted by the House in 2018. These rules have been provided to witnesses and are available from the secretariat. If the witnesses are unable to answer a question today and want more time to respond they can take a question on notice. Written answers to questions taken on notice are to be provided within 21 days.

If witnesses wish to hand up documents they should do so through the Committee staff. To aid the audibility of the hearing, may I remind both Committee members and witnesses to speak into the microphones. As we have a number of witnesses in person and also via videoconference it may be helpful to identify who questions are being directed to and who is speaking. For those with hearing difficulties present in the room today please note that the room is fitted with induction loops compatible with hearing aid systems that have telecoil receivers.

TONY McAVOY, Chair, NSW Bar Association's First Nations Committee, and Member, Joint Working Party on the Over-representation of Indigenous People in Custody in New South Wales, affirmed and examined

SIMON BRUCK, Vice-President, NSW Young Lawyers, affirmed and examined

SARAH CRELLIN, Principal Solicitor for the Criminal Practice of the Aboriginal Legal Service, and Member, Law Society's Indigenous Issues Committee, before the Committee via videoconference, affirmed and examined

LOUIS SCHETZER, Policy and Advocacy Manager, Australian Lawyers Alliance, before the Committee via videoconference, affirmed and examined

The CHAIR: Would any of you like to start by making an opening statement? I know you have all made submissions, but would you like to add to them briefly?

Mr McAVOY: First, I too acknowledge the Gadigal people, I acknowledge the Bidjigal people, I acknowledge the Geawegal people, the Dharawal people and the Darug people. I acknowledge all the traditional owners and First Nations people in New South Wales because they are all affected by the outcome of this particular Committee. The inquiry you are about to embark on is one which is keenly felt by the First Nations community, it goes without saying. The New South Wales Bar Association understands how keenly that is felt and the injustice of the present scenario where we have such a gross over representation of Aboriginal people and Torres Strait Islanders in the New South Wales custodial system. The New South Wales Bar Association has established a joint working party specifically to deal with this issue. That joint working party is comprised of members from the human rights committee, for obvious reasons, and the criminal law committee, for obvious reasons, and the First Nations committee.

That committee has, over the last two years, worked incredibly hard to try and ensure that as best as it can, through the Bar Association, there is robust advocacy in relation to these issues. It was with some surprise and gratitude that the Bar Association committee noted the establishment of this inquiry. You will see from the written submissions that the Bar Association points, firstly, to all the other reports and inquiries that have gone before this one. I am reminded of the words of Justice Peter Callaghan when he was co-senior counsel assisting the royal commission into protection and detention of children in the Northern Territory. In his opening address he listed the sum of 50 reports that had been prepared over the years touching on those subjects. He made the observation that there seemed to have developed a culture of reporting in lieu of doing. I raise that now to encourage this Committee, this Parliament, to be focused on the act of doing.

The submissions from the Bar Association and the submissions from the legal advocacy bodies all touch on very similar matters. They touch on the recommendations of the royal commission into Aboriginal and Torres Strait Islander deaths in custody from 1991 and they touch on the report of the Australian Law Reform Commission that is now three years old. Those two reports in themselves provide a guidebook for the States and the Commonwealth as to how they might reduce over incarceration. The submissions from the Bar Association tend to extract from the "Pathways to Justice" report from the Australian Law Reform Commission as to the things that can be done now, the things that this Committee should not wait for. The basis for those submissions is that the level of over representation in custody is gross and inhumane and it need not wait. There are things that need to be done immediately and could be done immediately. The written submissions point to the fact that during the present operation of the Government response to COVID-19 there has already been a marked reduction in prison numbers so it cannot be said that it cannot be done. I do not propose to repeat the whole of the submissions in my opening remarks but I will say that the NSW Bar Association supports the structure of the Coroners Court as an inquisitorial process and the main thrust of the submission is that it should be properly resourced to do its job.

The submission does also make the point that there would be a great utility in having Aboriginal liaison officers. There would be a potential utility in having a system where—like in the Land and Environment Court of New South Wales—Aboriginal commissioners sit alongside judges when determining Aboriginal land claims. I am happy to answer questions about that if you like, having served a term as a Commissioner in that court serving that purpose. But there is also a very pointed submission that I will draw your attention to before closing these opening remarks. It is the NSW Bar Association's submission that it is unnecessary to require the Coroner sitting on a matter to form the opinion that a matter has reasonable prospects of a conviction before referring it to Director of Public Prosecutions and has recommended the repeal of that particular provision. I am happy to answer any questions that the Committee might have and thank you for the opportunity to appear today.

Dr SCHETZER: I would like to firstly acknowledge that I am appearing today on the land of the Bidjigal people, traditional owners of eastern coast land Sydney, and pay my respects to Elders past, present and emerging. I would echo and endorse the comments from Mr McAvoy, who has brilliantly expanded that this is no longer a time for mere reporting but a time for action. One thing that the last six months has shown us is the capacity of governments to act in the face of a crisis, as we have seen from responses to the COVID-19 pandemic. It is reasonable and quite obvious to say that the over-representation of Aboriginal and Torres Strait Islander people in detention and in prison is a crisis that requires urgent attention.

We have seen that governments can respond in crisis. Our submission outlines proposals that provide the opportunity for governments to take immediate action and I will welcome questions on those. The three main areas I would draw your attention to is the importance of the development of a culturally appropriate justice reinvestment program across New South Wales, the urgent need to address inappropriate policing practices—particularly in relation to the exercise of police discretion, policing and bail conditions and charging practices—and thirdly, we would strongly encourage the New South Wales Government to follow the example set by the Australian Capital Territory Government in raising the age of criminal responsibility in New South Wales from 10 to 14. Thank you.

Mr BRUCK: I pay my respects and thanks to Elders past, present and future on whose lands we meet, the Gadigal people of the Eora nation and I pay my respects to the expertise and contributions that First Nations people bring to society. Thank you for inviting NSW Young Lawyers to appear at this inquiry. NSW Young Lawyers is a peak professional body representing new and young lawyers and law students in New South Wales. Our submission to this inquiry was developed with First Nations input from our members. Whilst NSW Young Lawyers is a peak professional body, we want to emphasise that First Nations communities and people should lead on—and be consulted on—the development of policies that affect them.

Our submission emphasises practical changes that could be made, which may improve the social and health outcomes for First Nations people and reduce the excessively disproportionate rate of incarceration. In summary, we recommend the expansion of justice reinvestment to be led and owned by First Nations communities in order to provide safer and healthier communities. We recommend the expansion of diversion programs for youth and adults, which can be used when people interact with the police or when they appear before the courts. We recommend the minimum age of criminal responsibility—which currently sits at 10 years or age—should be increased to 14 years of age based on the neuroscience of brain development and because children with such behavioural problems at such a young age need urgent support not incarceration.

We express our concern at reports of search warrant quotas in Far West New South Wales which could act to systemically increase incarceration levels of First Nations people in the area. We express our concern about the disproportionately high number of strip searches on First Nations people, in particular on children. Likewise, the NSW Police Suspect Target Management Plan [STMP] appears to be disproportionately targeting First Nations young people, who then experience a greatly increased number of police encounters, which risk not being properly and lawfully justified and we are concerned about that plan not being accountable or transparent.

We recommend specific and regular detailed cultural awareness training run by First Nations people should be conducted across the whole criminal justice system. Lastly, we echo what Cheryl Axelby, CEO of the National Aboriginal and Torres Strait Islander Legal Services, said about the renewed national agreement on Closing the Gap, and I quote:

> Over-incarceration needs to be dealt with urgently but this target would not see parity in prison rates for adults until 2093. New South Wales should adopt more ambitious adult and young people incarceration targets in consultation with First Nations communities.

Thank you.

Mr DAVID SHOEBRIDGE: I would just start by thanking all of the witnesses for attending today. Mr McAvoy, your statement that this Committee needs to be focused on doing not reporting and getting the institution that we are a part of—Parliament—to be doing not reporting, I think, has been taken on board by the Committee. What we do not want is another report that becomes number 53. We actually want to develop some change and in that regard could I ask where does lifting the age of criminal responsibility fit in that priority list? I will start with Mr McAvoy but if anybody else wants to touch on it.

Mr McAVOY: It is a difficult question to answer. Clearly we understand that the incarceration of young people, particularly those of tender age under 14, touches on medical and human rights issues. We are incarcerating children basically because they are impoverished rather than understanding that their brain function has not sufficiently developed to properly understand the risk involved in their actions. It seems to me that it is an

easy objective for this Parliament to adopt. The medical evidence is all in support of that step being taken. It would put New South Wales in a position of parity with most European countries.

It would put this State in a position where it was adopting the relevant international norms of the international bodies. It is broader than just a justice issue. It has effects, as we know, on the rate of incarceration and the number of children that then go from the criminal justice system into the adult system is well recorded. Certainly it is something that is very high on the agenda. There is a risk, though, in prioritising any particular action.

There is a range of actions. The way I would put it to the Committee is that the justice system which operates in New South Wales is, in effect, a net and it catches those which it was designed to catch. The Parliament of New South Wales designed that net and if it does not want to catch and incarcerate and put through the criminal justice system certain individuals, well then it will not. In the case of Aboriginal young people it seems that they are designed to be caught and incarcerated. So, this is the place where that net can be redesigned and there are a number of things that might be done, including amendment of the bail laws, investment in community-based diversionary and prevention programs, Indigenous specialist courts. I would encourage the Committee not to think in terms of, necessarily, priorities but those things that might make a whole-of-system change.

Mr DAVID SHOEBRIDGE: Dismantling elements of that net and seeing it as a net.

Mr McAVOY: Understanding that this place is the designer, the creator, of the product that we see today and this place needs to redesign the system, if it wants a different result.

The CHAIR: Mr McAvoy, could I ask: What is the utility behind or what would you see as being the utility behind establishing something like the Walama Court and expanding the Youth Koori Court? How will those two initiatives assist in reducing the rate of incarceration?

Mr McAVOY: There is the Youth Koori Court. It has been the subject of some analysis, some preliminary analysis, and there has been analysis of the circle sentencing programs that exist within New South Wales to show that the rates of recidivism are reduced. That is the rate at which people reoffend and the length of time between being released or dealt with and a further offence occurs. So we know that that system works. We also know that in New South Wales the Drug Court has had a great effect and what the Drug Court does is allow for people to be managed in a way that recognises that their difficulties may very well be a health issue and not just a justice issue.

So the Walama Court is a court which is a hybrid between the Drug Court and the Koori County Court in Victoria. It is at the same level as our District Court in New South Wales and it provides for a system of oversight of individuals post sentence by the court with wraparound services designed to treat the issues that that particular offender has. It is done with the assistance of the community and community Elders will sit with the judge. The proposal is not one which is something new but it is a natural extension of that which already exists. What it will do is bring into the District Court of New South Wales a mechanism for reducing the rate of recidivism. We need to remember that in the District Court people are sentenced for long periods. The disruption to families and the effect on their families is greater. The effect on the communities is greater. And so the benefit, it seems to the Bar Association, is clearly there.

Mr DAVID SHOEBRIDGE: With your indulgence, Chair, does any other panel member want to respond to either the Walama Court and circle sentencing issue or the age of criminal responsibility? Maybe we could go first to someone on the videoconference?

Ms CRELLIN: We know that there is evidence to show that a therapeutic jurisprudence model works. Two examples of that that we have evidence of that it does work are circle sentencing and the Drug Court programs. The Youth Koori Court is still in its early days but I understand there has been some research to show that it does work and that is why it expanded to the Surry Hills Children's Court. It is the Law Society's position that those courts should be expanded to other parts of New South Wales—to more regional areas—for example, Dubbo, that has been calling out for some sort of rehabilitation program, some sort of court that allows the input of the community to give the community ownership over the system and change the system.

I would also say that the Walama Court proposal speaks for itself. A lot of people have put a lot of time and effort and work into the proposal to demonstrate that the proposal would give offenders an opportunity to participate in a therapeutic jurisprudence model but not only mirrors that, similar to our Drug Court, but also includes members of the Aboriginal community and Elders to try something different. I think we could all agree that the current system is not working saver for the Youth Koori Court, the circle sentencing program, the Drug

Court—systems which provide offenders with an opportunity for change and an opportunity for redirection away from the quicksand of the criminal justice system.

The Hon. PENNY SHARPE: I think, Ms Crellin, I will go to you first. I just want to unpack a little bit of what has happened with COVID and the fact that there has been, obviously, a massive reduction in the number of people being incarcerated. I am just wondering if you can comment about that in terms of what you have seen around the change and your views about how that can be sustained into the future. I am not aware that our crime rates have massively gone up as a result of this change. I am wondering if you can comment on that, please.

Ms CRELLIN: Yes. That is correct. During the COVID period we have seen the incarceration rate dropped dramatically and the crime rates have not gone up. I know that the Bureau of Crime Statistics and Research is looking into that as the reasons. But we can only assume that that is in relation to policing practices. Crime rates have not gone up yet there does not seem to be as many people in custody either on remand or sentenced to full-time imprisonment so it could be a combination of both the decisions of the police to bail refused people but also the decisions of the courts to either bail refuse or impose full-time imprisonment sentences and consider other options. It therefore dictates that the system does have the ability to choose other options apart from imprisonment and COVID has kind of given us the evidence to show that crime does not go up if you choose an option that sees a member of our community remain in the community rather than in custody.

The Hon. PENNY SHARPE: Does anyone else want to comment on that? Anyone else on the panel?

Mr McAVOY: The figures speak for themselves. I will just make the observation that the reduction in incarceration rates in New South Wales was I think something in the order of 11 per cent over the relevant period.

The CHAIR: It was 11.3.

Mr McAVOY: And I note that the national Closing the Gap target is set at 15 per cent by 2031. Part of the New South Wales Bar Association's submission is that the New South Wales Government need not be limited by the national target and it ought to set its own target—something much more realistic, such as parity by 2031.

The Hon. PENNY SHARPE: Sure. That is the national target that everyone signed up to under Closing the Gap. Are you aware whether any other States are going their own way in terms of trying to be more ambitious around this target?

Mr McAVOY: No. I can say that I do not think any have announced any other target yet and that as a result of the process. Each of the States has to prepare an implementation plan, and that is not due to have been prepared yet.

The Hon. PENNY SHARPE: But in terms of the timing of decision-making in New South Wales, there is an opportunity to be more ambitious through the development of the State-based plan.

Mr McAVOY: Yes, and I am aware that the Law Council of Australia has called on the States to consider that.

Mr DAVID SHOEBRIDGE: Do we agree that the policy settings that we have at the moment as a result of COVID-19, in terms of early release and limiting pathways into detention, should at a minimum be maintained going forward?

Mr McAVOY: It would appear so. They are complex matters, Mr Shoebridge. There are a range of discretions that are involved which are exercised by the police officers and by the court. Some of the figures, as I understand it, may have been as a result of the deferral of matters to allow for in person attendance in court. But taking those things into account, it is an indication of how the system ought to work in my submission. It is an indication of how the system might work if the discretions available to those parties were exercised in a way which was directed towards reducing the over-incarceration rate.

I would say this: We know that there are a range of discretions that exist. We know that there has been a recent report from the Australian National University by an academic named Siddharth Shirodkar—and I can point the Committee to the particular report—released in May this year that sampled 11,000 people and applied what is called an implicit association test. It came to the conclusion that three out of four Australian people have a negative unconscious or implicit bias against Aboriginal and Torres Strait Islander people. So it begs the question: Does that bias extend to the Police Force, for instance? Does that bias extend to the legal profession? Does that bias extend to the judiciary? It seems to me that there is no basis on which you could say that it does not.

You then think about all the discretions that exist, and how they might operate against Aboriginal and Torres Strait Islander people in this country. One example of that was the arrest of a pregnant mother in Western Australia. The Western Australia Attorney-General Mr Quigley made the comment that her treatment was not the treatment that you would expect a white mother in Cottesloe to receive, and that the only basis on which you can assume that she was treated in the way that she was is because she was an Aboriginal woman. She was not able to attend court because she was in hospital. The court was told that she was in hospital. The prosecutor asked for a warrant to be issued. The court issued the warrant. The police executed the warrant. They took her into custody and they then strip-searched and cavity searched her, and held her in custody. She was the complainant in a domestic violence complaint. You ask yourself how those discretions failed at every point. If you look at the report from Mr Shirodkar, you might have an understanding of how that happens.

The CHAIR: Mr McAvoy, I note that although there has been that significant reduction in incarceration levels for First Nations people, some of the submissions that we have got before us suggest that the rate of incarceration for First Nations women has not decreased in this time. In fact, their incarceration rate is much more pronounced than for First Nations people in general. There also seems to be a gender bias in the exercise of these various discretions. Do any of the witnesses wish to address that point?

Mr McAVOY: I believe that Ms Crellin will add to what I have to say, but I can say this: That trend has been in existence for a number of years now and there does not appear to me to have been any significant work to reduce that. The real tragedy of it is that I think that 80 per cent of those women are mothers. That means that their children end up in the protective system, their families are destroyed and we are creating another generation of dislocated children. I would hand over to Ms Crellin, if she has anything to add.

Ms CRELLIN: I echo what Mr McAvoy has said. There has not been significant work done into why that is the case, but certainly the number of Aboriginal women incarcerated is increasing, which is, to be honest, a little bit terrifying given that women are the mothers—they are the caregivers. If we are concerned about young people entering the criminal justice system, we know that there is a care-crime pathway where young people are removed from their family home and put into the care of the Minister, and they find themselves on the criminal justice pathway. It is very concerning, and more work needs to be done to ensure that the rate goes down rather than up.

Mr McAVOY: I should add that there has been an interesting development in the Northern Territory recently with the creation of an alternative to custody for women in Alice Springs, I think as a response to the Aboriginal Justice Agreement process. That seems to be a positive step. I understand that it is a partnership between the community and the Northern Territory Government. Certainly, those types of non-custodial options are sorely needed.

Mr BRUCK: The NSW Bureau of Crime Statistics and Research has looked at the adult prison population at the end of each month from June to May in their publication. While the total prison population decreased by 10 per cent over that time, I would caution that the Aboriginal adult population decreased by 11.3 per cent, so that is a very similar amount. I do not think that the benefits are taking away from the disproportionately high amount of First Nations people in custody.

The Hon. PENNY SHARPE: As a reduction overall, that is right. And there has been a minor improvement. I want to get to something else, but on the discretion issue—do any of you have any views around the discretion within corrections facilities as well? New South Wales corrections did a very good job in keeping COVID out of our prison systems, and it appears to me that there was closer collaboration than perhaps there normally is in the management of people on remand. Does anyone want to comment on that? You do not have to.

Mr McAVOY: I do not have the information to comment, but I would say that it is something that we are all thankful for: That COVID did not get into any of our prisons in any substantial manner.

The Hon. PENNY SHARPE: It was incredible.

Mr McAVOY: It was a grave fear that we all held, I think.

The Hon. PENNY SHARPE: I want to get to the issue of your recommendations around the role of the Coroner, and the way in which the Coroner can currently refer to the DPP. The Bar Association has got quite a long piece in your submission about the enhanced role that the Coroner could play in relation to supporting families who experience a death in custody, but also the support through the inquest process. Would you to speak to that, please?

Mr McAVOY: There is no doubt that the coronial process is a difficult one for any family involved. It is particularly onerous for Aboriginal and Torres Strait Islanders people because of the loss of a loved one in circumstances which are the apparatus of the State. I do not think that it would come as a shock to anybody for me to say that it is obvious that Aboriginal people express the view that they feel oppressed and put upon, and feel victims of State legislation designed to take their land and take their children. In those circumstances, the inquisitorial process undertaken in a Coroner's inquest has to deal with people who are traumatised and deal with the process of trying to reach some conclusion about the manner and cause of death in a trauma-informed way. The Bar Association is very conscious of the need for an inquisitorial as opposed to an adversarial process to take place but takes the view that that process may be assisted by a number of things, including having an Aboriginal liaison officer in the court who is able to speak with the family of the deceased. There is also an opportunity for the Coroners Court to mirror the provisions in the Land and Environment Court Act, which provide for an Aboriginal commissioner to sit with the judge in the Land and Environment Court or the Coroner in the Coroners Court.

I have had experiences, as I said, as a commissioner in the Land and Environment Court and I can say this much: I have no doubt that my presence on the bench alongside the judge gave confidence to the Aboriginal Land Council parties that their submissions were being heard, their evidence was being understood and that they were being given, I think, a fair hearing. Maybe I am overstating that but that is the impression that I had. One of the real issues of the coronial process is families being in a position where the decisions that are made may not be as transparent as they can be and the faith in the system is at a fairly low level, for all the obvious reasons.

Mr DAVID SHOEBRIDGE: Mr McAvoy, and to the balance the panel, a series of submissions—and many First Nations families that I have worked with would echo these concerns—say that whilst they support having the coronial system there, it is often two or three years after the death in custody occurs and all of the evidence is gathered by police and Corrective Services. They are desperately calling for an independent investigation—not having police and Corrective Services go in there and investigate their loved ones death, but a genuinely independent body gather the evidence, do those investigations and then, maybe, provide that material to the Coroner in due course. What do you say to those observations?

Mr McAVOY: Those particular observations have been the subject of very vocal calls from the Aboriginal community for many years. It is difficult for the family of the deceased in an Aboriginal community to have any faith in the investigation of a death in custody by the people who are answerable to the same Minister or commissioner as the people who may be the subject of adverse comment.

Mr DAVID SHOEBRIDGE: Does anybody else have an observation on the independence of the investigation of deaths in custody?

Ms CRELLIN: I can observe through my practice that it is important that there is an independent body investigating Aboriginal deaths in custody and, indeed, any deaths in custody. They are deaths in custody so they have occurred either as a result of a police operation in police custody or in Corrective Services custody. For the community to be satisfied that the outcomes, recommendations or findings of the Coroner are accurate, they need to know that the person investigating the death is providing the accurate information and that they are independent of the body that they are investigating. I echo what Mr McAvoy has said—that the Aboriginal community has been calling out for this for some years. It should come as no surprise to the Committee that there is a distrust of authority in the Aboriginal community, and it is my experience in my practice that many families grow increasingly suspicious of the process when they see police investigating police or Corrective Services investigating Corrective Services. I say that it would be very important for an independent body to be investigating coronials. That is my comment.

The CHAIR: Just on that point, the Coroner directs the inquiry, although often using police. One of the submissions—I think it is the Public Interest Advocacy Centre—says that maybe the Law Enforcement Conduct Commission [LECC] should take on this independent investigation role. Others suggest that it should be the Coroner, but with additional resources and maybe a dedicated investigative body. Where do the panel members see this independent investigative body sitting? Are we talking about some entirely new body or are we talking about in some ways consolidating and better focusing one or more of the existing oversight bodies?

Mr McAVOY: The Bar Association's preference, as stated in its submissions, is that the Coroner be resourced to do its job. That would mean resourcing the Coroners Court with the investigative powers to do the investigation independently. Clearly, though, if there is an independent investigation body established elsewhere, that is a vast improvement on the current situation.

Mr DAVID SHOEBRIDGE: That would be a fundamental change to the way the Coroners Court operates, if they also had a distinct investigative team and were sending people out as soon as an incident or death happened. That would be a substantial change to the way the Coroners Court operates, Mr McAvoy. Whereas, extending the role of the Law Enforcement Conduct Commission, which already has that role in oversight of police operations, an investigative team and those resources in place, would in some ways be a simpler institutional exercise.

Mr McAVOY: I accept that, Mr Shoebridge. The only difficulty might be in lines of command—who is directing the investigation and how the commission, for instance, would communicate with the Coroner. The Coroner would have to maintain the ultimate oversight. I do not say that the Law Enforcement Conduct Commission concept would not work—I think that it may—I am just unsure of how the lines of responsibility would work.

The CHAIR: Just as the Coroner can access and direct the assistance of the police and its investigations, would a similar arrangement with a bespoke part of the Law Enforcement Conduct Commission provide that function, leaving the overall control and direction with the Coroner but having an independent agency doing some of that investigative work?

Mr McAVOY: On face value, yes, that would be a suitable alternative.

Mr DAVID SHOEBRIDGE: Ms Crellin, would that address the concept of independence and the very real scepticism First Nations people have—of police investigating police, Corrective Services investigating Corrective Services—if you had that model with an investigative team of the LECC undertaking those investigations from day one?

Ms CRELLIN: Yes. I just note that I would say the majority of deaths in custody are deaths in Corrective Services custody, not in police custody so the LECC's powers would have to be expanded to Corrective Services. I can see how it would work on face value. I would urge the Committee, though, consideration of perhaps some sort of Indigenous commissioner or assistance on that panel to ensure input from the Aboriginal community.

Mr DAVID SHOEBRIDGE: Given the grossly disproportionate number of First Nations peoples who come in at all levels of the justice system, both in the policing realm and in the correctives realm, there seems to be a compelling reason to appoint a First Nations commissioner to the Law Enforcement Conduct Commission regardless, does there not? And it could work across both streams.

Mr McAVOY: Certainly.

Mr DAVID SHOEBRIDGE: Mr McAvoy, you say certainly. Ms Crellin?

Ms CRELLIN: I would say yes.

Mr DAVID SHOEBRIDGE: Do the other witnesses have any views about that concept?

Dr SCHETZER: There is one point to make, though, that I think Mr McAvoy made quite strongly in relation to the Coroners Court. It is that any independent oversight of this procedure requires adequate resourcing. It should go without saying but the capacity to provide that independent investigatory function does require sufficient resourcing for it to be effective.

The CHAIR: Yes, and I think the evidence around the resourcing of the Coroners Court is quite clear that it seems to be straining. It is sometimes three and four years between a death and a coronial outcome, and not just in relation to First Nations people. One of the other things that came out in the submissions is this disjunction between Coroners inquiry reports, sometime recommendations about action being taken and there being no action. I think at least one of the submissions touched on whether or not the Coroner should be given directive powers in relation to things and I think there was some discussion there. On the one hand it is a matter for the Government as to how it deploys public resources through the budget allocation but on the other hand I think Mr McAvoy called it the culture of reporting where there is Coroners report after Coroners report talking about systemic problems but action not being taken. Is there a systemic solution on how Coroners reports are actioned and oversighted that any of the panel members would wish to put on the table or discuss?

Mr McAVOY: There are a number of ramifications of that type of extension of power to a person. I would like to perhaps take that question on notice and undertake to respond later.

The CHAIR: Please.

Mr McAVOY: Clearly the extension of powers to Coroners to give directions to government agencies is a substantial shift from its existing and long-held role.

The CHAIR: Indeed.

Mr DAVID SHOEBRIDGE: There would be other options, would there not? There would be a presumption that the Government will implement the recommendations unless it responds within six months or so and indicates why it is unable to implement the recommendations. There is an array of different policy responses that would give more teeth to coronial findings and recommendations than simply the power to direct, Mr McAvoy.

Mr McAVOY: There are alternatives, yes. They are notoriously difficult to police. I am reminded of the royal commission into Aboriginal and Torres Strait Islander deaths in custody. There was a requirement for each of the governments to table in Parliament its actions in implementing those recommendations and that would happen, but yet we are here 30 years later and the implementation is at, it would seem, an all-time low.

The Hon. ROD ROBERTS: I will direct my questions to Mr McAvoy to start with and others can feel free to jump in. Let's go back to the age of criminal responsibility. You are talking about the potential or possibility of increasing it to 14 years of age. I draw your attention to Dr Schetzer's submission. On page 15 he quotes from *RP v The Queen* [2016] 259 CLR 642 where they are looking at the age of criminal responsibility. The court makes a statement in amongst everything else here but this is the key:

> The court inferred difficulty in condoning this policy as 'it suggests that children mature at a uniform rate'.

We all agree that that is not correct. There are children that are 10 years of age that do not know that they have committed something seriously wrong. They might think it is naughty, perhaps, but not to the degree of criminal responsibility. Conversely, though, what is your comment on the fact that there are children under 14 years of age who have matured and know that they are committing something seriously wrong and in fact a crime? Could you comment on that?

Mr McAVOY: Thank you for the question. I am not a medical expert and my understanding of this issue is based upon what the medical experts tell us. The medical experts tell us that even right through to the age of young adulthood people and particularly males have a decreased capacity to connect the actions that they take with the consequences. That is particularly so the younger people get. And so whilst of course there is variation from individual to individual my understanding is that the identification of the age of 14 as an appropriate minimum age of criminal responsibility takes into account the individual variations and is seen to be an appropriate level that reflects the medical evidence.

The CHAIR: Dr Schetzer, I think you wanted to answer the question.

Dr SCHETZER: Yes, given that it was the ALA's submission that referred to that. I think it is important to recognise that the common law has to a limited extent recognised that the age of 14 is the appropriate age at which criminal responsibility is inferred. Between the age of 10 and 14 there is the traditional common law doctrine of what is known as doli incapax in which the prosecution retains a strong burden to establish that very aspect that the member has inferred, that the child does have that sufficient maturity. But it is a significantly strong burden. And as Mr McAvoy has pointed out, the overwhelming medical evidence that shows in terms of the cognitive development progress of a child is that it is at the age of 14.

In some countries they recognise that it should be 16 I should point out at this point. So even the age of 14 is regarded at the lower end of when that cognitive ability is said to take place. So in that sense there is significant overwhelming developmental and medical research to indicate that the age of 14 is appropriate in that regard. That is not to say that there is never any exception to that. But when you are working on a basis of evidence-based policy, the overwhelming evidence is that it is the age of 14 that is the minimum age at which it can be inferred that there is full criminal responsibility acknowledgement. And in some countries, as I have said, they recognise that it is at the age of 16.

I would also point out there are a lot of different issues but when there is discussion about raising the age of criminal responsibility in Australia it seems to be this concern about, "What about the particularly serious offences? Are there exceptions for particularly serious offences?" If you look at it from the aspect of cognitive development that does not make the exception. It is still about that ability for the child to recognise whether or not their action and their conduct is of a criminal nature and that they can comprehend the ramifications of that conduct in terms of criminal responsibility. The question of "Do you make exceptions for serious offences?" is ultimately a political question. It is not based in cognitive development theory or medical research.

The Hon. ROD ROBERTS: Mr Bruck wanted to contribute on it.

Mr BRUCK: Yes, just very briefly. We would be in good company. Austria, Germany, Italy and Spain also have a minimum age of criminal responsibility of 14.

The Hon. ROD ROBERTS: There is no dispute that this is an issue. You talk about doli incapax. Well, we all know that is a rebuttable presumption to start with. What is to say that somebody at the age of 13 has not formed that criminal intent, is not mature enough to determine and understand that what they are doing is right and wrong? What I am suggesting and the idea I am floating out there is perhaps it is dealt with on a case-by-case basis and not a one size fits all. I think that is what you are saying at the moment. We just cannot say that, because you are between 10 and 14, you can form criminal intent. Surely every instance should be dealt with on its own merits and investigated as to whether that particular child has or does not have the mental capacity to form the intent. You cannot just put it into a box. Would you agree with that?

Mr McAVOY: No.

Dr SCHETZER: I guess I will turn the question back on to you. Can you give a case example of such a child of 13 in that case?

The Hon. ROD ROBERTS: I do not have the resources in front of me. It was a proposition that I was throwing out to see what your response would be.

Dr SCHETZER: My response is to again repeat what the medical and the cognitive development research indicates. The evidence is there that the age of 14 is the appropriate minimum age in that regard.

Mr McAVOY: I agree with Dr Schetzer. It is important to understand that, in setting the minimum age of criminal responsibility at 14, there will necessarily be systems to deal with children who come before that and who come to the attention of police to direct them out of the criminal justice system and elsewhere. Those systems need to be established. It is not just directing them into a vacuum. All of the jurisdictions Mr Bruck has just mentioned that have a minimum age of criminal responsibility have very well developed systems to deal with those children that fall within that category.

Ms CRELLIN: I guess I would be concerned about a system that creates more discretion for police in terms of charging. I would also be concerned about the resources required to establish evidence on every particular child about whether they did or did not understand something. I know that is already a heavy burden for the New South Wales police as it is. I agree with Mr McAvoy. I expect that, if the age was raised, there would be systems put in place to consider what should be done with a young person who does commit a serious offence that is not social or welfare related.

The Hon. ROD ROBERTS: I will go back to Mr McAvoy. You touched upon circle sentencing. I encourage anything that diverts people, whether they be Indigenous or anybody else for that matter, away from incarceration. But for the purpose of accuracy and clarity and for the record here today—you talk about the success of circle sentencing—I refer to Mr Bruck's submission where it says they are only 3.9 percentage points less likely to reoffend within 12 months. Circle sentencing on its own is not the panacea or silver bullet to this problem, is it?

Mr McAVOY: No.

The Hon. ROD ROBERTS: It is one step in the process.

Mr McAVOY: There is no simple solution. These are complex matters and require complex responses that are really quite nuanced. The reports that have been prepared over the years have delved into and documented that nuance and have understood complex material and made sophisticated recommendations. One of the recommendations is that the benefits from specialist Indigenous courts ought to be acknowledged and those courts expanded.

The Hon. NATALIE WARD: I just want to pick up on that age of criminal responsibility issue. I note that it is an absolutely critical age and we should do anything we can do to divert. I ask if you could comment on what your suggestion might be for any other forum to take that place were it to be the case that the criminal age is lifted but nonetheless something occurs with a young person aged 10 to 14. Is there something that, in your view, would be ideal to have in its place? We have heard briefly about circle sentencing. Is there another policy response or should it be youth justice? Who or what entity do you see stepping in at that critical juncture?

Mr McAVOY: The New South Wales Bar Association has not formed a position on what the appropriate alternatives ought to be, but certainly there needs to be an alternative system. I am aware that the Law Council of Australia is doing significant work on that topic. It has looked at the range of responses in the various jurisdictions internationally. Some deal with those circumstances as a child-welfare response. Some deal with it as an educational response. It appears that it is a type of response which is very much one that needs to be tailored to a particular jurisdiction and take into account the size, resources and population of the jurisdiction and the number of children that are being dealt with. For instance, in the Northern Territory the daily bed numbers in their incarceration was something like 50 youths. During the Don Dale royal commission, they were never talking about the huge numbers of people. That dictates the type of response and the resources that can be put towards it. Sorry for not being more direct.

Dr SCHETZER: I might pick up on that question and go back to Mr Shoebridge's first question about the priority to be afforded to raising the age of criminal responsibility. I would say that with a justice reinvestment approach your options and your flexibility within the system to afford the appropriate response to children aged lower than 14 is immediately enhanced by having greater capacity in educational job-training options available for young people at that age. Therefore, a coordinated response that emphasises community-directed justice reinvestment approaches similar to what exists in the Maranguka project in western New South Wales provide you with the options that are available to provide adequate referral to children at that age.

The Hon. NATALIE WARD: Ms Crellin, did you have anything to add?

Ms CRELLIN: No, I just echo the sentiments of the other panel members.

Mr BRUCK: I think that, instead of a criminal justice response, the response for children aged 10 to 14 if the age of criminal responsibility is raised should be in the health sector, the disability support sector and, say, therapeutic responses, counselling, dealing with cognitive impairments—that type of thing. So there are a number of different options in the health sector that could be used.

The Hon. NATALIE WARD: Could I just ask you, if each of you are able, to perhaps take that question on notice. If you could articulate any suggestions to fill that space, I would be grateful.

The Hon. PENNY SHARPE: I just wanted to go back to the Walama Court issue. Obviously this has a lot of strong support. We have a living example through the drug court around how this can work. There does not seem to be a lot of disagreement that it is a good idea. Are any of you able to give me an update on where you are at with the Government in relation to a commitment for funding for this?

Mr McAVOY: I suppose I am able to answer to some extent. There are a number of members of the Walama Court committee that are also members of the Bar Association Joint Working Party. I am familiar with the position through that committee. My understanding is that the decision on whether to proceed with the Walama Court has been deferred until November—next month.

The Hon. PENNY SHARPE: So for the budget. That is because the budget is next week.

Mr McAVOY: Yes. We are expecting to hear shortly but we also know that a decision on funding and expansion of the Just Reinvest program is also scheduled to be made at that time.

The Hon. PENNY SHARPE: So we watch that space. I have one more question on this, which is just a general question that I have. I am very aware of the burden and responsibility that Elders carry across New South Wales when being asked to participate in all of these various programs: through youth justice conferencing, justice reinvestment and all of those things. Within the budget for these programs, is there actually appropriate payment for the Elders that participate in them? Is there any payment? I am very concerned about a lot of labour for not a lot of money, when everyone else is being paid.

Ms CRELLIN: Absolutely. I know that within the Youth Koori Court budget, the Elders are paid for their services on that court. I am not sure about [inaudible] involved in that program but certainly within the Youth Koori Court the Elders are paid for their services, as are the Elders on the circle sentencing panels.

Mr McAVOY: And I am aware that the budget for the Walama Court includes payment for Elders' participation. I cannot say whether the budget for the Just Reinvest program, Maranguka, includes payment for community members who are involved in the various programs.

Mr DAVID SHOEBRIDGE: They are here tomorrow.

The Hon. PENNY SHARPE: Yes, I will ask them tomorrow. Thank you.

Mr DAVID SHOEBRIDGE: Mr McAvoy, you mentioned the exercise of discretion and how it is pervasive in the criminal justice system and works against First Nations peoples. When you look at the data and you see those points at which the discretion is exercised, at each point First Nations peoples are over-policed or over-incarcerated. I will just give you some of the points. When a crime is investigated, the choice by police to investigate is far more likely if there is a First Nations suspect. Again, charges are laid disproportionately against First Nations peoples. It is the same for determinations against bail, for determinations for a custodial rather than a non-custodial sentence, for determination to refuse parole and then right at the end of the system for a determination to revoke parole. At each point First Nations peoples are overwhelmingly, on the data, discriminated against. How can you describe that system other than one that is inherently racially biased against First Nations peoples? Is that a fair description of the criminal justice system in New South Wales?

Mr McAVOY: I think, on the basis of that data, that is the conclusion that one reaches. On its face, it appears to be colonial in nature. The interesting thing about the report from Mr Shirodkar that pointed to that implicit or unconscious negative bias among three out of four people against Aboriginal and Torres Strait Islander people is that most—I think all Aboriginal people that I have spoken to about that have said, "Well, yes, of course." Non-Aboriginal people who I have spoken to about that report have responded in such a way as to say, "Well, I wonder who the other three people are. I must be the one person who is not."

The CHAIR: That is the problem with unconscious bias, isn't it?

Mr McAVOY: It is, and so the difficulty is how you then deal with it. There are a number of ways in which you can try to approach it, but at some level there needs to be systemic change rather than trying to train unconscious actions out of people's behaviour.

The CHAIR: Just on the point of systemic change, noting what a considerable part of the criminal justice system First Nations people are—and a number of the submissions that we have had have spoken about the need to have greater Indigenous representation in the judiciary—obviously that is not going to happen overnight or by itself. What should Government do to try and improve that so that there is, if you like, a greater reflection of those going through the criminal justice system in terms of the bench—or indeed other parts of the system as well?

Mr McAVOY: Increasing the number and reach of Indigenous specialist courts is one matter. The inclusion of commissioners or other alternatives to appointment of judicial officers is another. There is some potential to my mind—and this is my personal view rather than that of the Bar Association—that the absence of judicial officers in New South Wales warrants some more radical action. We see that in Queensland there is something like seven magistrates and a District Court judge. In New South Wales we have one magistrate and one Federal Circuit Court judge and a population of 267,000 or something like that. So a radical solution might involve fast-tracking people into the magistracy, where most of the contact occurs.

Mr DAVID SHOEBRIDGE: But these discretions are at every level. Is it Parliament's job—acknowledging that those discretions are being exercised in a partial way against First Nations peoples—to put a statutory counterbalance in, to be compelling police and magistrates and parole officers to be acknowledging the bias and expressly seeking to de-incarcerate First Nations peoples? Is there a statutory obligation as well?

Mr McAVOY: It would seem in the absence of that type of change and the placement of responsibility at the top of the justice system that the changes will not occur. One might look at the statutory obligations of the Commissioner for Police.

Mr DAVID SHOEBRIDGE: Mr McAvoy, Hansard has not reflected it but I think you were the first Indigenous Senior Counsel appointed—at least in New South Wales is my understanding, but I could be wrong.

Mr McAVOY: In Australia.

Mr DAVID SHOEBRIDGE: In Australia. I think that Hansard, to do justice to your evidence, should reflect that.

The Hon. PENNY SHARPE: I think this is a question for Ms Crellin. I wanted to go to the Law Society's submission and to the issue that you have touched on previously around massive over-representation of First Nations kids in our out-of-home care system and the impact that has in terms of access to education. But I also just wanted to ask you to comment on your suggestion around a fairly short and easy-to-apply recommendation around having a First Nations-specific list within the Children's Court for care and protection matters. The pipeline of kids in out-of-home care to the juvenile justice system is very clear and very disturbing, so I am just interested in anything that you want to tell us about that.

Ms CRELLIN: Certainly. Unfortunately, my expertise is as a criminal lawyer but I did work in the Children's Court for a number of years and I saw the amount of young people who find themselves under the care of the Minister, and then before the criminal justice system. It is hard to know whether that is an issue of resourcing for Family and Community Services and their ability to provide proper care to young people. But, I think we can see from the Law Society's submission that a better approach and a more effective approach would be not to remove these young people from their families but to find them perhaps another family member in the greater kinship system who is able to care for them and have them remain in their communities. I expect that the submission from the Law Society in relation to the children's list is that by having an Indigenous specific list we hope that the issues particular to Aboriginal young people are considered by the courts including, and perhaps most importantly, safety but also cultural sensitivity and ensuring that they are able to remain attached to their people.

The Hon. PENNY SHARPE: Thank you. Does anyone else want to comment on that?

Mr McAVOY: Just briefly. The Committee will be aware that in 2019, I believe, a report prepared by Professor Megan Davis—

The Hon. PENNY SHARPE: *Family is Culture*, yes. Mr Shoebridge and I, yes, very aware.

Mr McAVOY: That report makes it clear that there are failings in that system at a number of levels, including the exercises of discretion. I do not need to say anything further about that report, I do not think. You are familiar with it.

Mr DAVID SHOEBRIDGE: Ms Crellin, could you take on notice whether or not the model that the Federal Circuit Court has developed with their Indigenous list on family law matters—which I think originated in the Sydney Registry, and entirely was created by the court, not by Parliament—elements of that could be adopted in the Children's Court in New South Wales?

Ms CRELLIN: I will certainly take that on notice, thank you.

The CHAIR: In terms of reforms that are relatively straightforward and may have a beneficial impact on reducing incarceration rates, a number of submissions, including those from the organisations represented here this morning, discuss changes to the Bail Act, for example having a provision more like 3A of the Victorian Bail Act, rather than 18 (1) (k) of the current Bail Act here in New South Wales, and also changes to the Summary Offences Act around offensive language. Regarding the offensive language provisions, is there any public policy consideration in favour of retaining the offensive language provisions, and to what extent do those provisions contribute towards First Nations levels of incarceration? If you can answer it here today, if you cannot I am happy for you to take questions on notice, of course.

Mr DAVID SHOEBRIDGE: I personally think they are shit.

The CHAIR: Well, yes.

Mr McAVOY: I will take the opportunity to answer it on notice. But I will say this, that the use of summary offences as a form of social control over Aboriginal and Torres Strait Islander communities is notorious. This Committee does not need to be told about the potential for abuse and misuse and the numerous complaints. In the early part of my career I was a solicitor and article clerk at the Aboriginal Legal Service in Brisbane and the list was filled every day with summary offences. The fact that those types of offences are still able to be brought against people in the way that they are is very problematic.

The Hon. ROD ROBERTS: Following on from that, Mr McAvoy, I agree somewhat with the sentiments of Mr Shoebridge, but I would like you to comment on this fact, because we do not want to create misrepresentation here. The Bureau of Crime Statistics and Research [BOCSAR] figures say that Indigenous incarceration for conduct offences at the moment, 0.7 per cent of the Indigenous population in prison at the moment are for, call them summary offences if you want to use that terminology. So it is not a key driver in the incarceration, is it?

Mr McAVOY: Not directly. But what happens is that people, convictions for those types of offences, they are often bound up with other offences and so we see people being stripsearched, they might be charged with a summary offence as a result of resisting a stripsearch, they are charged with assaulting police and then they are imprisoned for the assault police, but not for the summary offence. So there is a compounding effect. It also compounds later sentencing. People appear before magistrates with a list of summary offences and the magistrate is less inclined to exercise leniency in terms of a non-custodial sentence when they are charged with something

else. Whilst it might not be directly responsible for people being incarcerated, it certainly plays a role in the overall system of incarceration.

The CHAIR: Mr McAvoy, it used to be part of what was called the trifecta, was it not? You would have the summary offence of offensive language, then there would be resist arrest, and sometimes assault officer. Often what would be dealt with in the court most severely would be the assault officer, but it had its roots in the interaction around the summary offence. Is that still a phenomenon?

Mr McAVOY: I do not practice in the criminal courts very often these days. Others might answer that. I have recollections of it being referred to as "ham, cheese and tomato".

The CHAIR: Ms Crellin?

Ms CRELLIN: Yes, it is absolutely still a phenomena. Although offensive language is an offence punishable by fine, so you could not be sent to jail for it. The situation is that a person will be arrested for offensive language, and then, as you point out, the resist arrest and perhaps the assault police will flow from that. Once again, it raises that issue of discretion in that police can either turn away from someone swearing on the side of the road, or they can decide to arrest or fine them. That is where the incarceration rate is affected by offensive language being a criminal offence.

Mr DAVID SHOEBRIDGE: Some people support the retention of offensive language because they fear people will be threatened by somebody engaging in extreme examples of offensive language. Ms Crellin, in your observation if it gets to the point of somebody feeling threatened by the behaviour, are there alternatives under the criminal justice system that could address that, apart from offensive language?

Ms CRELLIN: Absolutely. It is a criminal offence to threaten someone, whether it is including a swear word or it is not, a common assault or a stalk, intimidate offence. There are lots of other offences that are provided for under the Crimes Act or other legislation that would encompass threatening words or behaviour.

Mr McAVOY: Including affray.

The CHAIR: Indeed.

The Hon. ROD ROBERTS: I have one last question and it is not on that. To Ms Crellin, I note that you are not the author of the submission, it is authorised by Richard Harvey.

Ms CRELLIN: Yes.

The Hon. ROD ROBERTS: As you are the representative, on page 1 of the submission, the last paragraph talks about recommendations from the Royal Commission into Aboriginal Deaths in Custody and to use imprisonment only as a last resort. Again for the purpose of clarity and drawing it to the attention of the rest of the Committee and for the record, could you comment please in relation to section 5 (1) of the Crimes (Sentencing Procedure) Act that states:

> A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.

Do you have any comment to make in relation to that?

Ms CRELLIN: Yes, certainly. That is in relation to sentencing procedures that imprisonment must be a matter of last resort. But we know that people can find themselves in custody on remand, bail refused, either by the police or by the courts. I guess this submission would be making reference to the fact that it is not just the courts that in sentencing proceedings are making those decisions, there are other avenues and reasons why people would find themselves incarcerated. But we certainly would agree that imprisonment should be a matter of last resort. I would assume that most of the community would agree with that because we want a community where people can feel safe but all members of the community can feel safe in that community.

Mr McAVOY: If I could just add on the question of bail. When I commenced in the law some long period ago bail was used as a mechanism to ensure people returned to court to have the matters dealt with. Over the decades since it has become a mechanism for social control. It allows the court to place conditions on individuals about how they live their life in the period between when they are bailed and when they return to court. My understanding is that a lot of the problems that occur in terms of being bail refused occur from breaches of those conditions by people. We are seeing the situation where the numbers of people bail refused is excessively increased in my view in order to try and achieve some other purpose apart from ensuring that the person returns to court.

The CHAIR: The time has now lapsed for this morning's hearing. Thank you to all the witnesses for attending. The Committee has resolved that answers to questions on notice be returned within 21 days. The secretariat will be in touch having reviewed *Hansard* in relation to any questions that a witness has taken on notice. I thank you all for your attendance.

(The witnesses withdrew.)

(Short adjournment)

VERITY SMITH, Solicitor, Public Interest Advocacy Centre, affirmed and examined

ALASTAIR LAWRIE, Senior Policy Officer, Public Interest Advocacy Centre, before the Committee via videoconference, affirmed and examined

CHRISTINA HEY-NGUYEN, NSW Co-Convener, Australian Lawyers for Human Rights, sworn and examined

KATE SINCLAIR, Chairperson, Ngalaya Indigenous Corporation, affirmed and examined

JASON O'NEIL, Executive Director, Ngalaya Indigenous Corporation, affirmed and examined

The CHAIR: Would any one of you, on behalf of the bodies you represent, wish to begin by making a brief opening statement?

Ms SMITH: Thank you for the invitation for Public Interest Advocacy Centre [PIAC] to appear at this inquiry today on the Gadigal land of the Eora nation. I pay my respects to Elders past, present and future. For those of the Committee not familiar with PIAC, it is a community legal centre that conducts test cases and strategic litigation and provides legal assistance, policy advice and training to create positive change to the lives of people who are disadvantaged and marginalised. There is, of course, a wealth of information already publicly available on the issues being considered in this inquiry from numerous previous inquiries and reports and from the expertise and experience of First Nations people. The topics we focus on in our submission are limited to the areas of PIACs current experience from working for young Aboriginal clients who come into contact with the criminal justice system. We urge the Committee's consideration of what is drawing young First Nations people into custody in the first place. Australian research demonstrates a strong link between encountering the criminal justice system at a young age and reoffending later in life.

Making practical changes to reduce the contact of the First Nations people with police when they are young will lead to a reduction of First Nations people in custody. Firstly, police must stop using policing tactics on First Nations young people that appear to be unreasonable, unjust and oppressive. This means stopping the use of the STMP on young people; stopping the targeting of Aboriginal children for increased interactions with police; and, stopping the frequent stops, searches and random checks at home, which we have seen to be invasive and destructive for the person being targeted, their family and their wider community. "Unreasonable, unjust and oppressive": These are not my choice of words, those are the words of the Law Enforcement Conduct Commission in its interim report on the use of the STMP on young people. In its analysis it identified that a staggering 72 per cent of the investigation cohort were possibly Aboriginal or Torres Strait Islander.

This is a strategy that is associated with an increased probability of imprisonment. If we are serious about addressing the high rate of incarceration of Aboriginal people, this type of policing strategy needs to stop. Secondly, we know that the current minimum age of criminal responsibility of 10 years of age disproportionately draws Aboriginal and Torres Strait Islander children into the criminal justice system at an early stage of life. Diverging children aged 10 to 13 away from the criminal justice system by raising the age of criminal responsibility to at least 14 is an important first step in preventing the offending trajectory and reducing chronic adult reoffending. We are disappointed that the Council of Attorneys-General has deferred any decision on a commitment to raising the minimum age of criminal responsibility nationwide until at least next year. In our view this does not have to be an impediment to taking local steps towards raising the age. We urge this Committee to closely consider the benefits that this change would have, particularly for First Nations people who are at the heart of this inquiry. For questions about raising the age, in particular, please address my colleague Alastair Lawrie, who is appearing via videoconference. Thank you.

Mr O'NEIL: I would like to begin by acknowledging the Gadigal people as the First People born to this country, and acknowledging the First People of New South Wales. I would also like to acknowledge the families of David Dungay Jnr, "TJ" Hickey, Rebecca Maher, Nathan Reynolds, Patrick Fisher, Eric Whittaker and Dwayne Johnstone, and all other First Nations families who have lost loved ones in custody across New South Wales. We acknowledge their tireless advocacy and commitment to making our systems more just. Ms Sinclair and I represent the Ngalaya Indigenous Corporation. We are the peak body for over 750 First Nations lawyers and law students across New South Wales and we are a volunteer First Nation-run organisation established to support First Nations lawyers and our pursuit of a more just legal system.

Our submission primarily focuses on self-determination within the criminal justice system. We believe that there is great room for improved involvement of First Nations people at every level of the criminal justice system. We echo the comments of our first Senior Counsel, Mr McAvoy, this morning. We are concerned that,

without the political will, this inquiry will join many other inquiries, submissions and reports on this and similar issues which have largely gone ignored by Parliament in that culture of reporting and not action. The issues facing First Nations people across New South Wales are the direct ongoing result of colonisation and therefore systematic cultural behaviour across the criminal justice system. To address them we need systemic change that brings about a cultural shift in the entire system.

There is a culture of over policing First Nations communities and inadequate systems and mechanisms to divert our people away from incarceration and towards a more holistic wraparound services that focus on the person and their needs. We support the submissions for a Walama Court in the District Court of New South Wales and funding for an expansion of justice reimbursement. We believe there is a lack of First Nations control and involvement throughout the system that contributes to the lack of accountability that we see around a lot of these discretions and how they are exercised. We believe that First Nations people should have a role at every level and stage as prosecutors, defence lawyers, coroners, counsel assisting, independent investigators and judicial officers.

We support submissions that consider an independent review body or even independent structures within existing structures with First Nations people involved with the mandate and powers necessary to conduct truly independent reviews of deaths in custody and police action and more power to make referrals for investigation and prosecution when necessary. We thank you for this opportunity to appear in person. We hope that the findings of this inquiry are met with that political will that is necessary to implement systemic change. Thank you.

Ms HEY-NGUYEN: Australian Lawyers for Human Rights thanks this select Committee for the opportunity to appear here today. Firstly, we would like to express our deepest condolences and we stand in solidarity with all the families seeking justice for First Nations people who have died in custody in New South Wales. We also acknowledge that we are speaking on the land of the Eora Nation. First off, Australian Lawyers for Human Rights is deeply concerned that 434 First Nations individuals have died since the 1991 royal commission and there has not been a single conviction for these deaths. Following on from my colleagues today we would like to focus our comments today on the current mechanisms for the oversight and review of deaths in custody, in particular subparagraphs (b), (c) and (d) of the terms of reference. Our comments are in addition to our written submission having had the benefit of reading the submissions of others, including the NSW Ombudsman and the Aboriginal Legal Service.

We note the inquiry is into both the oversight and review of deaths in custody and in our view this encompasses three elements: firstly, the review of the circumstances that led to the death in custody—for example, an investigation or inquiry; secondly, a review of all deaths in custody more broadly; and, thirdly, oversight of these review processes. At the moment we are deeply concerned that there is no independent body explicitly authorised to monitor internal investigations of deaths in custody. While there are several New South Wales bodies able to conduct oversight and review, there are several shortcomings including a lack of adequate resources to adequately carry out their functions including in a timely manner. We also would like to highlight that because Australia is a signatory to the seven core international human rights treaties, New South Wales is bound by those obligations regardless of the extent it has chosen to incorporate them into domestic law, practices or policy. Some of the particular human rights obligations we find relevant here are the right to life, the prohibition against cruel, inhumane, degrading treatment or punishment and the system of independent monitoring of places of detention under the optional protocol to the convention against torture.

Some of the shortcomings, whether carrying out an oversight or review function of current New South Wales bodies, we find impair their suitability to carry out the oversight functions under the terms of reference subparagraph (b). Some of the key five shortcomings that we have identified include a lack of independence—for example, we heard earlier today that the New South Wales Coroner can direct the police to investigate police conduct; a lack of investigatory powers, including the ability to collect evidence and manage the whole entire process of an investigation, not just monitor investigations conducted by others; insufficient funding and resources; investigations not being the primary mandate; and a lack of review—for example, follow-up of recommendations being binding and having a systematic review of all deaths in custody, which again raises concern over the accountability and transparency of these bodies.

We recommend that any suitable oversight body, as requested in the terms of reference, have the following features: Their function and purpose should be directly related to conducting inquiries, including legislative authority to do so; they should be well resourced and sufficiently funded; the body must be independent; must be able to make recommendations; the appropriate authority must respond to the findings, including action taken in accordance with those recommendations as well as an overall systematic review of all deaths in custody to identify and assess their root causes, as recommended by the NSW Ombudsman in their submission. Some of

the practical recommendations we put forward include establishing either an independent body that is able to conduct investigations or related to three existing New South Wales bodies as an alternative to enhance their current functions and complement their existing investigatory powers of the New South Wales Coroner. One thing we would like to also outline is that there needs to be discussion among these bodies to avoid any duplication and, first and foremost, ensure that First Nations people are consulted in any body developed.

In relation to monitoring internal investigations of death in custody, while we acknowledge that the law enforcement commission currently monitors the NSW Police Force investigations of critical incidences, they can advise the NSW Police Force or the Coroner of their findings but it is unclear whether there is any follow-up, for example. They do not conduct their own separate investigations and therefore is dependent on information provided by the police. We recognise that the NSW Ombudsman can make inquiries about certain issues when a complaint is received and has the power to formally investigate that alleged conduct. It is not explicitly authorised to monitor internal investigations. We agree with the NSW Ombudsman's recommendation for an independent agency to be explicitly authorised to monitor internal investigations of all deaths in custody, but we acknowledge that currently the LECC only monitors investigations by the NSW Police Force, and there may be circumstances where the death in custody has resulted due to other parties, such as Corrective Services, which we have heard today.

The oversight role should include the ability to conduct an independent inquiry or investigation, including the ability to collect evidence, they should be able to make recommendations, including disciplinary or criminal proceedings. In relation to an investigation into a death in custody, as we know the NSW State Coroner can conduct that and has the power to hold an inquest as a result of police operations. However, in practice, the Coroner does not have an ability to have explicit follow up of their recommendation or broader systemic review. We submit that those elements are required to ensure that there is an accountable and transparent review body. Thank you for the invitation to appear today and I will be happy to answer any questions.

The CHAIR: Thank you. Ms Hey-Nguyen, in relation to the submission from your organisation do I understand it correctly you are contending that the LECC's legislative framework should be extended so that it has the capacity to be the independent investigative body in relation to all deaths in custody?

Ms HEY-NGUYEN: Yes, that is right. While we recognise that the New South Wales State Coroner does have the ability to conduct independent investigations into all deaths in custody, there are shortcomings at the moment, ranging from lack of resources, the timeliness of investigations, as we have heard earlier, the ability for the NSW State Coroner to direct the police to conduct that. There are a range of elements in there, it is not that an independent function does not exist, it is the way it is being implemented in practice at the moment.

The CHAIR: Of course both the LECC and the Ombudsman have resourcing challenges, so whatever changes are made in this area, whether it involves the LECC or the Coroner or any other body, more resources will be needed. That is your understanding?

Ms HEY-NGUYEN: Yes, we think so.

The CHAIR: In relation to the PIAC, how does the STMP in relation to First Nations people lead to higher levels of incarceration? What is the practical impact of it in your view?

Ms SMITH: Practically, the first thing to note about the Suspect Target Management Plan is that it is targeting Aboriginal people at a disproportionate rate. I should also at the outset acknowledge that our expertise is in relation to young people and the Law Enforcement Conduct Commission's interim report, as we have outlined in our submission and in my opening statement, in its investigation found that as high as 72 per cent of young people being targeted from their investigation cohort for possibly Aboriginal or Torres Strait Islander. Interactions with police ultimately are the first point of interaction with the criminal justice system, and increased interactions with the police ultimately lead to more people being drawn into custody, more arrests and more people ending up being imprisoned.

The Suspect Target Management Plan on the whole as well is connected with an increase in the risk of imprisonment and our concern about young people being targeted, particularly young Aboriginal and Torres Strait Islander being targeted on the Suspect Target Management Plan, is that these early interactions with the criminal justice system are the first point of call that drag people into repeated, ongoing, long-term, chronic interactions with the criminal justice system. Even if these young people are not the bulk of the First Nations people in custody, the risk and the concern about this type of targeted policing, these types of invasive, increased interactions with the police, the concern is ultimately could lead to these young people later in life being the people who are becoming these highest statistics of First Nations people in custody.

The Hon. ROD ROBERTS: A question for Ms Smith: In relation to the Suspect Target Management Plan, the BOCSAR recently released a study in relation to that. The figures are approximate. Among the 11,000 people on the list there was a 16 per cent reduction in the likelihood of new violent or property crime for the first 12 months. More significantly, and this is an issue that concerns us all, a 43 per cent drop in domestic violence perpetrators reoffending in that time. It appears, by figures at least and evidence, that the Suspect Target Management Plan works to some degree. It has had a severe reduction in crime, and in particular domestic violence crime. Any comments in relation to that?

Ms SMITH: I am not able to be of much assistance in relation to the Domestic Violence Suspect Target Management Plan in particular. As I have said, our particular experience is working with young people on the STMP-II. In relation to the recent BOCSAR evaluation, I first of all note that the reduction—of course at the outset the report acknowledges that it is an association rather than it cannot say that it is the STMP that causes any particular reduction in offending and that they were not able to say that the—sorry, one moment— the reduction that they found in relation to property crime rather than in relation to violent crime. One particular point to note about, in light of the inquiry and the reason that we are here today about the concern about the high rates of Aboriginal people in custody, is that the BOCSAR evaluation did acknowledge that with the STMP comes an increased risk in imprisonment. So, when we are looking at this high, staggering amount of particularly First Nations people being targeted by this type of strategy, that is accepting that First Nations people on this plan, the strategy being applied, will lead to an increased risk of imprisonment.

The second thing that I would have to say from our experience is that the BOCSAR evaluation looked at 12 months before and 12 months after the placement on the Suspect Target Management Plan and the offending trajectory, for young people in particular, is different from that of adults. The evaluation itself acknowledged that with regard to juveniles, although I found that the STMP-II has no impact on their risk of a prison sentence, it is important to bear in mind that this is a short-term outcome. Early engagement with and surveillance by police while subject to STMP-II may also influence other outcomes relevant to a young person's development, for example, attitudes towards authority, educational achievement and mental health. Our concern about using this type of policing tool on young people, as I have said, is in relation to the long-term impacts on the target, the family and the communities of the person being targeted, because it is so disruptive, not only for the target but for their families and communities as well. And also, this has been in place for 20 years. This is the first evaluation of whether or not there is any association with a crime reduction and it is so far hard to draw conclusions about how effective it is, potentially in relation to young people, because what we need to look at is the long-term impacts on offending of young people and the net effect of the STMP on those young people.

Mr DAVID SHOEBRIDGE: Ms Smith, there have been concerns raised about the data used and a potential selection bias in the data which produces the outcome. Again, I am limiting my questions to STMP-II, not the domestic violence. Does that add to your concerns in addition to the fact that it only tracked young people for 12 months when we know the impacts of being in the criminal justice system can be lifelong, is that another concern?

Ms SMITH: With the caveat that I have read the BOCSAR evaluation and we have looked at the Law Enforcement Conduct Commission report and their concerns as well. I do not have the statistical expertise, from my experience as a lawyer working from young people on the STMP, but certainly the complexities of the STMP- II and what else is going on in the lives of these young people who are being placed on the STMP-II needs to be considered and interrogated in any analysis of the impact on offending and of the impact on young people.

Mr DAVID SHOEBRIDGE: If I recall the report it expressly said that whatever impact it can discern from its analysis the impact was less and had a lesser impact on reducing reoffending for Aboriginal people who are caught up in it than non-Aboriginal people. Notwithstanding the fact that Aboriginal people are wildly overrepresented in the scheme.

Ms SMITH: That is my understanding of BOCSAR's evaluation in relation to Aboriginal people, yes.

Mr DAVID SHOEBRIDGE: What did you make of the recommendation of the author that given it is not working particularly well for Aboriginal people, the way it can be remedied is co-opting Aboriginal Elders in to work with the police to identify young people to be put on the STMP program?

Ms SMITH: My comment in relation to that is that it is not clear to me from the report whether the author had any discussion with Aboriginal people or groups or other people being impacted by the STMP-II or the STMP. The other comment is that I do know that Aboriginal organisations and legal organisations working for Aboriginal people have time and time again made the call that it cannot be improved, it cannot be adapted to

First Nations people on the premise that First Nations people will continue to be targeted at the high rate and that instead the STMP-II cannot be improved, it cannot be adjusted to change the purposes, it is a system for disrupting and targeting these people and it needs to be abandoned.

The Hon. PENNY SHARPE: I was very interested in your submission and you go through in some detail the gaps in transparency and accountability. I am wondering if you could step us through that from your submission. You touch on accountability around practices within policing. There is quite a lot of detail there and I am quite keen to understand, particularly around the gaps in data collection. We are caught in a quite ridiculous situation where First Nations people say this is what we are experiencing, the data goes some way to try to unpack that, but to really get to the bottom of it can you speak to the Committee about that please.

Mr O'NEIL: Thank you for your question. Our view is that absolutely throughout the system there are so many touch points that always start with interactions with police where, as was reflected earlier, there is discretion of the police, a magistrate, or a correctional officer, or anyone in these positions of authority working for the State and there is a lack of transparency and data collection into how that discretion is exercised, which inhibits us as lawyers, policymakers, First Nations people, to get a clear picture of when and how much that discretion is exercised to the disadvantage of First Nations people. Based on the advocacy of First Nations families, individuals, lawyers over a long period of time I think it is fair to say that is happening and the evidence from this morning suggests that as well but we are prevented from understanding the extent of that. We believe that transparent data collection at every point from move on orders to obviously offensive language fines to decisions around refusal of bail and being kept on remand, we really need BOCSAR or another body to be sufficiently funded and there to be statutory requirements around data collection to create a culture of transparency and accountability.

The Hon. PENNY SHARPE: Some of that data is collected but it is not brought together, is that what you are talking about?

Mr O'NEIL: Yes, absolutely. There is a need to have it presented and collected in one body and presented in one form as well is for it to be perhaps more transparent and a greater emphasis on the identification of Aboriginal and First Nations people. That is the main data point that is not captured at every stage and capturing will empower us to create that more holistic picture of how a First Nations person moves through the criminal justice system. Going into the accountability further, we believe that there is a lack of accountability from the top down to address this issue. We believe that it is a systemic and cultural problem. We believe that there should be more onus on people like the police commissioner to shift the culture and to make it about wraparound services and holistic care and incarceration is the last option. We believe involving First Nations people more thoroughly throughout the system will help contribute to that.

The Hon. PENNY SHARPE: I wanted to take you to that because in your submission on page nine you talk about your belief that there is the capacity amongst people like yourselves, academics, police and correctional officers to support and develop a First Nations lead statutory body responsible for independent oversight. Do you want to talk to me a bit about how you see that working?

Mr O'NEIL: Absolutely. There has been great strides in New South Wales to increase the number of First Nations people in the legal profession. Similarly, in the medical profession. As the peak body for at least 400 to 500 practising solicitors in New South Wales and 350 students coming through right now there is capacity within the legal profession, within the medical profession, to have First Nations people employed as magistrates, as coroners or in an independent body that creates a culture of accountability, that independent review of police, of deaths in custody. We believe if the State was willing to come to the table and set up such a body that First Nations people, lawyers, academics, would be willing to come to the table and staff that body into that work.

Mr DAVID SHOEBRIDGE: Does that include putting in place a formal First Nations commissioner on bodies like the Law Enforcement Conduct Commission?

Mr O'NEIL: I think that would be completely appropriate, yes.

Mr DAVID SHOEBRIDGE: Does anybody else have a view on that?

Ms SMITH: We do not have a submission to contribute about the oversight bodies at this stage.

The Hon. PENNY SHARPE: We are trying to improve a system that has, as we have heard this morning, significant problems. I was interested in your submission where you talk about the barriers to actually holding police accountable where there have been complaints and the fact that there is not even a basic feedback loop. If there is a complaint made it is investigated, the family may not find out about what happened, but more

importantly the police officers may not get any feedback in relation to what has happened with that. How could you see that working better? It would seem to me that feedback seems to be the first thing but do you have any other comments around that? It is a novel idea, I know—people being told what they are being investigated for and what happened with it.

Ms SINCLAIR: I guess our first position on that kind of goes to our overarching submissions about the transparency and accountability. I would not suggest that we have the expertise to design a system to improve these measures. However, I guess you have identified the lack of feedback within the police commission itself and then you also have the lack of accountability to First Nations families. I see those as two distinct issues. I suggest that improvements made to the Law Enforcement Conduct Commission—potentially, the expansion of their powers but also just improvement about the data collection and reasons for every decision that is made by investigatory bodies and, in particular, LECC, and having those reasons distributed downwards is critical, I think. To the point of lacking a feedback loop, it goes to the issue of police conducting investigations about the police. It is inappropriate. It is not a suitable mechanism. By detaching the investigations about police from the Police Force, we can have those independent comments, those independent reasons, fed through an appropriate mechanism.

The close relationship between police officers investigating police officers is unsuitable. By empowering LECC to conduct further investigations as the independent body, without the administrative kind of hoops that prevent LECC from having the appropriate jurisdiction, is absolutely required to have the appropriate reasons for their decisions able to be funnelled back to the police officers at the heart of an investigation. I think it goes to the heart of the rule of law. It also is the only way that were going to see improvements and also a self-reflectiveness by police officers who are at the heart of each of these investigations. So, yes, we support the Australian Lawyers for Human Rights submissions as well as many of the other submissions to this inquiry about the expansion of LECC's powers and the necessary emphasis on the independence of any investigatory body.

As to the second issue about accountability to First Nations people and First Nations families, I think again in a number of the submissions made to this inquiry there are concrete suggestions about points of contact between the criminal justice system and the families involved in, for example, coronial inquests. Examples include the inclusion of Aboriginal liaison officers as well as ensuring that notification of families is done in an appropriate manner—particularly a culturally appropriate manner. I think currently there is not enough oversight over how those notifications are given to families as well as there is no continued culturally appropriate position for someone to support families throughout this heartbreaking process. So we really emphasise the need for not only a position but also it is systemic and it needs to be a culturally appropriate system brought in. I would defer to the other submissions made about the concrete solutions on how they could come to fruition.

The summary of it is that, yes, we do just need more of that information that has been collected being transferred down. I will say, finally, that one more example about the lack of information given to First Nations families is about decisions by the DPP about whether or not to prosecute. We see the Coroner: we know from the outset that the Coroner can make recommendations about whether or not to prosecute. Then DPP has discretion about whether or not to prosecute. As outlined in a number of the submissions to this inquiry, we do not know why the DPP has made decisions not to prosecute cases involving a death in custody where there is sufficient evidence to support a case. That leaves again First Nations people just in the dark. This process just over and over and over again excludes us from meaningfully participating. We can give you an example after example. We just need to be empowered ourselves.

The Hon. PENNY SHARPE: Just to go to that, I think the Bar Association's submission—I am just looking for it now—talked about part 2 of the Act. They are making a suggestion to this Committee that in relation to referring to the DPP that there is a barrier, which was a subject of discussion—

Mr DAVID SHOEBRIDGE: Evidentiary value.

The Hon. PENNY SHARPE: He is not a lawyer, but yes. It is about having to make some guess around whether they are likely to actually get a conviction, even if they think there is something that is wrong. If I can just be clear: What you are saying to the Committee, though, is that even in those cases the next point is the reasons around why the DPP chooses to proceed or not. Do you have a view around the evidentiary test before the referral from the Coroner to the DPP?

Mr DAVID SHOEBRIDGE: This is whether or not the Coroner should be satisfied there are reasonable prospects of success.

The Hon. PENNY SHARPE: Correct.

Mr O'NEIL: We would agree that that threshold should be lowered and that the Coroner should be greater empowered to make those referrals.

Mr DAVID SHOEBRIDGE: Ms Sinclair, you talk about the lack of a feedback loop between the Law Enforcement Conduct Commission and the Aboriginal community. You also talk about the lack of a feedback loop between the Law Enforcement Conduct Commission and the police. They are two quite distinct things, are they not?

Ms SINCLAIR: Yes.

Mr DAVID SHOEBRIDGE: Could I deal with the police one first. If an adverse finding is made in the Law Enforcement Conduct Commission's inquiries, there at least is a reporting to the police and there is some kind of feedback loop. What additional measures do you think should happen in that loop?

Ms SINCLAIR: I would preface by—again, I am not an expert in this area and I would defer to the experts who have made comprehensive submissions about this. However, in our opinion LECC can make a recommendation to the police commissioner. That recommendation can be completely disregarded without reasons. A big issue here is about the enforceability of LECC's recommendations. There should be more accountability placed on the commissioner to be feeding that information down. Currently, there is not.

Mr DAVID SHOEBRIDGE: At a minimum, a clear rationale about why the recommendation was not accepted and an explanation.

Ms SINCLAIR: Yes.

Mr DAVID SHOEBRIDGE: But at least there is that feedback loop with the Law Enforcement Conduct Commission. When there are adverse findings made against individual police for their conduct in a civil matter where there might be a damages claim brought or a criminal matter where a credit finding has been made against the police officer or perhaps even more adverse findings made against the police officer, there is absolutely no feedback loop. Do you think that is something that should be formalised? If so, how do we do it?

Mr O'NEIL: Absolutely, it is something that requires a formal process. I would endorse the submissions of the Redfern Legal Centre in particular around LECC and, in addition, that LECC should have the power to make its own binding findings of misconduct independent of the Police Force. It perhaps should also have the power of resourcing and function of perhaps dealing individually with the officers who are the subject of complaints and not putting that onus on the police to have that internal culture shift but perhaps empowering LECC to bring individual officers into the room, inform them of their finding, remind them of the expectations of police conduct and behaviour and perhaps have some formal training processes run through LECC or some kind of system where LECC is able to directly interact with the officer rather than it being done through the police.

Mr DAVID SHOEBRIDGE: I have a question for both the PIAC and the Australian Lawyers for Human Rights. I might start with Ms Hey-Nguyen, because I have your submission open in front of me. At page 4 of your submission you say that none of the existing oversight bodies, Inspector of Custodial Services or ICAC or any of the professional standards units, meet the criteria of independence necessary for the oversight of deaths in custody. Then you talk about what would be needed if the LECC was to assume that role. Do you want to expand on that al little?

Ms HEY-NGUYEN: Yes, sure. The terms of reference asked us specifically to go into a couple of examples of existing New South Wales bodies and there were just a range of shortcomings from not only independence but also mandate, resources, the ability to conduct full investigations, for example by civilian officers, not necessarily with the police involvement. Our recommendation with LECC, there are multi layers in that, in that LECC itself only monitors internal investigations conducted by New South Wales Police of police conduct. Part of deaths in custody could involve other parties, so our recommendations go into that as well, which I do not think we have elaborated extensively in our written submission, but I have done it in my verbal one, hopefully, today. It would need some quite comprehensive overhaul of LECC's functions and that will ensure its independence as well.

Firstly, their mandate needs to be expanded so they do investigate the whole process of custody and what led to the death in custody itself. Secondly, at the moment they only monitor investigations that are currently taking place, they do not have the ability to conduct their own. There should be some kind of threshold in place in which they can conduct an independent investigation with full investigative powers with the involvement outside the police with the ability to collect evidence, for example. Those thresholds need to be obviously balanced against resources as well. The third thing we have got in our recommendation and our submission today is that

there needs to be follow up. There needs to be some kind of recommendations and findings released publicly, there needs to be follow up to those recommendations by the appropriate body, a response to those findings within a reasonable time. We note that other organisations have suggested three months.

There also needs to be a more systemic review, not an individual case by case basis of each death. There needs to be probably a review of what has led to deaths in custody, is there a pattern emerging and what kind of recommendations that will put forward. Elements of all of these exist in some form in the current bodies but either they are not strong enough or they are not being implemented or they are not explicit enough. It is quite confusing at the moment. There is not a clear authority to conduct all these. At the moment it looks like LECC might be able to work with the New South Wales State Coroner with its existing functions and mandate. That is pretty much the bulk of our recommendation.

The CHAIR: Ms Hey-Nguyen, in terms of existing bodies, the Coroner seems to have the widest current legislated remit.

Ms HEY-NGUYEN: That is right.

The CHAIR: Albeit it appears that its resources are compromised or not sufficient for the task.

Ms HEY-NGUYEN: Yes.

The CHAIR: There seems to be some legislative restriction on its jurisdiction, but why is the Coroner not the most relevant body here? Should that not be strengthened? Could it not be the independent investigative body or should it, for example as it currently accesses police expertise for its current role, could the LECC be the source of the independent investigators it sources to do deaths in custody reviews?

Ms HEY-NGUYEN: Yes, and I think you did pose that question earlier to those that appeared today. On face value that seems to be something that can be married together or hybrid together. Whichever form it takes, it is currently not working right. There has not been a single conviction, even though the New South Wales State Coroner has complete ability to conduct these investigations. It has not led to any disciplinary or conviction that we are aware of as a result of a death in custody. There are obviously some shortfalls in addition to the resourcing and the timeliness of investigations that are conducted. If it is LECC that they work with, yes, what I said before, they only conduct internal monitoring and of the Police Force. That needs to be expanded. There is really again the feedback loop or the review of those recommendations and the findings and what is next? Is it referred for a criminal procedure? Is it referred to a disciplinary action? That is the other shortfall. Whatever form it takes I think it is more important that the elements are there.

Mr DAVID SHOEBRIDGE: The PIAC has had some interaction with the LECC through some of the work you have done. Do you have a view about whether or not, it may not be the only model, the expansion of the LECC's investigative powers to cover deaths in custody would have sufficient independence, or would be a potentially viable model?

Ms SMITH: We are not in a position to contribute to a submission in relation to oversight mechanisms for deaths in custody. We have not focused on that in our submission. I am not in a position to assist one way or the other in relation to that question.

Mr DAVID SHOEBRIDGE: Ms Sinclair and Mr O'Neil, that kind of model where you have an independent body, in this case the Law Enforcement Conduct Commission, rather than the police or custodial services doing the on the ground initial investigation. What is your thought on that?

Ms SINCLAIR: Yes, we support that. It seems like a no-brainer that investigations must be independent, therefore they should be conducted by an independent investigator. I guess the outside view looking in as a First Nations person is that there is currently too much mistrust by the police to conduct these investigations properly, and even if it is only for the purpose of making sure that the investigation appears independent, it cannot be conducted by police officers and the custodial services that were involved in an incident or death.

Mr O'NEIL: Obviously, while LECC may be able to serve that function quite well, I think there are important considerations around, obviously its resourcing and its reliance on police evidence and in its investigation of police. It is important to note that LECC relies very much on the voluntary participation of police in its investigations and there may be perhaps a culture or an appearance that LECC's relationship with police, if it is not given greater powers to make binding decisions, that could influence its independence and the success of its investigations. I also think there is a point to note that obviously a lot of deaths in custody happen within Corrective Services, so it would require an expansion of LECC.

Mr DAVID SHOEBRIDGE: The mandate would have to be included.

Mr O'NEIL: Absolutely. But there is also, thinking systemically, there may be situations where there is a death in custody in a medical facility that would benefit from an independent investigation that the Coroners Court may be able to deal with that LECC may not be able to do for First Nations people in terms of systemic issues.

Mr DAVID SHOEBRIDGE: I cannot say I have read every single submission, but I have read the great bulk of them, and I have not seen a single submission that endorses or supports the current role played by the Inspector of Custodial Services. Is that a body that is fit for purpose?

Mr O'NEIL: I do not think we have a strong view on that. We have no strong views.

Mr DAVID SHOEBRIDGE: Does anyone know what it does?

The CHAIR: Perhaps people can take those sorts of questions on notice if they are not in a position to respond immediately.

Mr DAVID SHOEBRIDGE: I do not mean that in a critical way of you.

The CHAIR: No, no.

Mr DAVID SHOEBRIDGE: "Does anyone know what it does?" is more a statement about the general public knowledge about the role of the inspector.

The Hon. PENNY SHARPE: Ms Hey-Nguyen does.

Mr DAVID SHOEBRIDGE: Ms Hey-Nguyen?

Ms HEY-NGUYEN: Look, I do not have the expertise to go into detail today, but in our submission we do outline that their current function only relates to standards, there is no investigation function that they perform. It would be great if we could get a submission from them in addition to the NSW State Coroner and others we have discussed today. Frankly, at the moment in the way they are set up it appears they only review the standards and monitor the standards and conduct inspections. They do not then do the backend of what would happen if misconduct or a death in custody occurred. That is where we stopped our submission and did not elaborate further, given there was a coroner and the LECC.

Mr DAVID SHOEBRIDGE: Surely one of the aims of any kind of review would be to have transparency and clear lines of responsibility and if you were going to expand the role of the Law Enforcement Conduct Commission it would make sense not to have duplicate functions in the inspector of custodial services but to roll them into an expanded LECC, do you agree? That would also be a source of resourcing as well for the LECC.

Ms HEY-NGUYEN: In terms of how you would set up the structure and rolling into functions, of course we would agree that you should avoid duplication, you should use resources most efficiently. But how that is done, I apologise, we do not have the expertise for that. We assume there are other functions that the custodial services performs that may best fit with them as well, for example, that we are not familiar with at the moment.

The Hon. ROD ROBERTS: I have a question for Ms Hey-Nguyen. You talked about the Coroner's role and you said—this is my recollection of your words, I am not trying to verbal you in any way, shape or form—after all those investigations there had been no convictions. Is it possible there is no convictions because there is no evidence?

Ms HEY-NGUYEN: Absolutely. That is possible.

The Hon. ROD ROBERTS: Ms Sinclair, you talk about the optics of police investigating police. Are you aware of the conviction last Wednesday in the Goulburn Local Court of Senior Constable Murray who was convicted on two counts of assault on a young Indigenous male.

Mr DAVID SHOEBRIDGE: And who is still employed on full pay by the NSW Police Force.

The CHAIR: One person speaking at a time, please.

The Hon. ROD ROBERTS: Chair, this is my time, I let the member speak uninterrupted.

The CHAIR: It is your time, Mr Roberts.

The Hon. ROD ROBERTS: That is not the question. The question is police investigating police. That was an investigation conducted by the New South Wales police and a prosecution by the New South Wales police and a successful conviction of a police officer who is not deemed and should not be employed in the New South Wales police any longer. Are you aware of that investigation?

Ms SINCLAIR: I am not. But, that is one investigation. There are numerous incidents, decades of incidents that have gone uninvestigated or inappropriately investigated.

The Hon. ROD ROBERTS: I am drawing your attention to this particular one of recent times.

Ms SINCLAIR: Okay.

The Hon. ROD ROBERTS: There was a conviction on two counts of assault, are you aware of that?

Ms SINCLAIR: I am not.

The Hon. ROD ROBERTS: I would like to have that on the record. That there was a police investigation of police that resulted in this police officer—

Ms SINCLAIR: My response would be that one anecdote of an investigation is not reflective of a system of investigations.

The Hon. ROD ROBERTS: Perhaps when there is evidence the police can launch prosecutions and convict.

Ms SINCLAIR: Again, one anecdote.

The Hon. ROD ROBERTS: That is your interpretation.

The Hon. NATALIE WARD: Thank you for coming along today, I am appreciative of your evidence. I have some questions around the Indigenous commissioner. Please correct me if I have the incorrect phrase. A couple of suggestions were made. It is difficult to see who was speaking, if you spoke to it can I ask you to answer the question. Firstly, does the proposal for an Indigenous commissioner exist in any other jurisdiction? If so, how does it compare, how is it going? If you want to take it on notice that is fine. Secondly, would that sit as part of the Coroners Court or did you see it sitting somewhere else?

Mr O'NEIL: Thank you, Ms Ward. I think that is referring to the suggestion of a First Nations Commissioner within the Law Enforcement Conduct Commission. I am not personally aware if that role exists in other jurisdictions. I will take that on notice to give you a proper response. There are also proposals for a First Nations stream within the Coroners Court from some submissions which might serve a similar but separate function in terms of deaths in custody, whereas the First Nations commissioner at the LECC would be addressing police conduct more generally.

The Hon. NATALIE WARD: Thank you. Does any other witness have a comment on that proposal?

Ms SMITH: No, thank you, Ms Ward.

The Hon. NATALIE WARD: I am assuming that you agree with it?

Ms SMITH: I do not have anything to assist in relation to that particular proposal.

Ms HEY-NGUYEN: I think that we have always put forward that any mechanism in place for investigating death in custody needs to occur in consultation with First Nations people. So, if it is an Indigenous commissioner it should not be a tick the box exercise, it should not be put in there as a place holder or a name, comprehensive consultation needs to take place and how best to fulfil that.

The CHAIR: Perhaps more broadly for the panel witnesses, in the submissions before us there is a suggestion that section 23 of the Coroners Act jurisdiction is restricted in that it does not include within the jurisdiction of the coroners the actions of prison officers. It also does not extend to include deaths caused or contributed to by traumatic injuries sustained while in custody or detention or, more importantly perhaps, caused by a lack of proper care while in detention. Given some of the tragic cases that we have seen that may or may not relate to issues of the standard of care provided is that something that could or should be remedied? The Coroner's jurisdiction should be broadened to at least include those? I think that was specifically recommended by the Royal Commission into Aboriginal Deaths in Custody, I think it was recommendation 6. I do not think it has been taken up yet.

Ms SINCLAIR: I think if the Coroner is deemed by this Committee to be an appropriate body that is conducting and delivering these oversight functions, then yes it makes sense to expand that definition. However, critical to expanding its remit is expanding its resources and funding. It is, as you all know, underfunded for its, not limited role, but currently it is limited compared to what it would expand to be.

The CHAIR: I think it is fair to say that each of the bodies that we are discussing here today all seem to have resource constraints, including the LECC.

Mr DAVID SHOEBRIDGE: I have a question about recommendation three from Ms Hey-Nguyen. It is about the repeal of sections 4 and 4 (a) of the Summary Offences Act. We had some evidence from the earlier panel indicating that those two Summary Offences Act provisions of offensive conduct and offensive language are often used as the excuse for the initial engagement with police that can then escalate. That may be the initial engagement which then escalates into charges that carry custodial sentences or goes on someone's record and it is then used as the basis for a custodial sentence when there have been further engagements with the criminal justice system. Do you want to speak to that?

Ms SMITH: Yes, thank you Mr Shoebridge. I also had the benefit of hearing the evidence earlier today from Mr McAvoy, SC, and Sarah Crellin, and I echo their sentiments. I note that, as has been explained, these minor offences, and particularly these ones which have been repeatedly recognised in previous inquiries, including the "Pathways to Justice" report, as disproportionately affecting First Nations people. It is an opportunity for an interaction with police that leads to an unnecessary arrest. Serious consideration should be given to whether these types of offences are kept on the books, when they so readily lead to escalation and someone coming into contact with police and ending up in a cell in custody. For those reasons we think that certainly the review of whether these offences are still required should be closely considered.

Mr DAVID SHOEBRIDGE: Sorry: The review of whether they are still required to be closely considered? We had a call for us to be more about doing rather than reporting. Should we just repeal?

Ms SMITH: The recommendation of the Public Interest Advocacy Centre in the submission, as for the *Pathways to Justice* report is the same as the recommendation from that report, which did, I suppose, in each jurisdiction look at the individual requirements of each State. We are glad that this inquiry is looking closely at these issues of what drags people into custody. We recommend that this be considered as part of the review. That is the extent of PIAC's submission in relation to those two offences.

Mr DAVID SHOEBRIDGE: Ms Sinclair or Mr O'Neil?

Mr O'NEIL: We would echo Mr McAvoy's reflections earlier this morning. I think that the offensive language provision is one of the clearest examples you have of police being given a discretion that they actively and disproportionately use against Aboriginal people very regularly across New South Wales. I think when you consider that provision and the case law on that provision and the regularity with which offences are thrown out of court because of the standard in the community around offensive language, it is just not worth having and it is used in a way that contributes directly to the institutionalisation and criminalisation of Aboriginal people through those interactions with police that end in ways that are completely unnecessary.

Mr DAVID SHOEBRIDGE: A series of submissions have spoken about Justice Reinvestment. It is a term that you can pretty much bring anything to. Normally it is something positive but you can bring anything to. But what should the next step that Parliament or the Government takes in terms of delivering Justice Reinvestment? I think you all support it in one form or another but what do we next to? Do we expand the Maranguka Project to be across the State—not expand it, but do we replicate that across the State? What should be the next step in the Justice Reinvestment space?

Mr O'NEIL: I think the most important consideration in Justice Reinvestment and the reason we have seen it work in the communities that it has is because at its heart is the principle of self-determination and endorsing funding, enabling programs that are run by First Nations people for First Nations people to address the systemic issues that they know exist and that they know the solutions to within their communities. So it is not a program where the State Government can take a cookie-cutter approach and say, "It's worked here. Roll out the exact same program in every community." It is one that requires leadership from the First Nations community and very close partnership and support of, perhaps, existing organisations to expand their services. And at its heart it is about funding the services we know work to address the issues that lead to interactions with police and lead to the socio-economic factors that place people in situations where they are likely to offend. And, at the heart of that, obviously, is working to support First Nations communities to implement solutions that they know work to problems that they know exist.

The CHAIR: So in that respect it is more appropriate to say it is not so much a specific program or function; it is more a state of mind about how Government engages with local communities to design a program responsive to the community's situation. When it is being done in that way it has produced—I think in the KPMG report of 2018—some quite startling positive outcomes but sourced in that local knowledge and local implementation and design. Is that correct?

Mr O'NEIL: Yes, absolutely. I think it is a very clear example of the effectiveness of community initiated, run, and focused services, and what can happen if the State Government is willing to come to the table and support that kind of systemic approach.

Mr DAVID SHOEBRIDGE: Ms Sinclair, did you have something to add?

Ms SINCLAIR: Yes. If I could just add one comment about Justice Reinvestment. It is a point that we pick up in our submission about the importance of data collection and the placement of that data with community. It centres around concepts of data sovereignty and, again, the self-determination of Indigenous people. I think in any program for Justice Reinvestment you need to have at its heart a built-in feedback loop of data collection, re-evaluation of the success of that program, adjusting, and then roll out again. The power of Justice Reinvestment is that it is flexible and able to be not only tailored to a community but also it can respond flexibly and quickly to negative feedback about the success of the program. So any program of Justice Reinvestment that this Committee may recommend or that the Government roll out across New South Wales, data has to be at the heart of that.

Mr DAVID SHOEBRIDGE: Do you endorse the observations on data sovereignty and First Nations control of data that were contained in the *Family is Culture* report? If you are not familiar with them, do you want to take that on notice, Ms Sinclair?

Ms SINCLAIR: To give a thorough response, I would take it on notice; but, on principle, yes I support data sovereignty located with First Nations communities.

Mr DAVID SHOEBRIDGE: Ms Smith, do you wish to speak on this Justice Reinvestment point?

Ms SMITH: Yes. Perhaps firstly directly in relation to the topic of data, one piece of information that has come out of the Law Enforcement Conduct Commission interim report into Operation Tepito was this revelation that the stats that the Law Enforcement Conduct Commission found in relation to the proportion of the numbers of Aboriginal and Torres Strait Islander people being targeted, those numbers look quite different from the reports from the NSW Police Force. The reason for this is elaborated somewhat in the Law Enforcement Conduct Commission's report but at the outset it is a positive indication of the independence of the Law Enforcement Conduct Commission looking at these numbers as opposed to the police looking at these numbers and reporting them themselves because the new eyes took a new look at the information and came to different conclusions about the number of people being targeted. This is from the report:

> The NSW Police Force advised it does not rely on self-identification figures as recorded in COPS—

That is the computer operating system that the police use—

> to calculate the number of people who are Aboriginal and Torres Strait Islander.

So the NSW Police Force did not agree with the commission's calculation of the number of young Aboriginal targets in the cohort. They do not provide the policy in place or the reasons as to why they say that the LECC is exaggerating—or that, sorry, that the method of—sorry, I will start again. To be most accurate:

> The NSW Police Force advised:
>
> This method has been shown to be an exaggeration of the actual representation of indigenous persons in crime statistics … [because] a person accidentally … or maliciously, identifies as indigenous in a police interaction.

The concern here between the Law Enforcement Conduct Commission identifying one set of statistics and one rate of application of a policy on First Nations people being so different from the numbers that the police numbers estimated in their approach—that Indigenous people made up 47 per cent of the cohort compared to 72 per cent of possibly Aboriginal and Torres Strait Islander as the Law Enforcement Conduct Commission found.

The broader point here is that the policies or the method here for the police, if they are not going to rely on self-identification figures to calculate the number of Aboriginal—or who is Aboriginal and Torres Strait Islander, their method, or algorithm as they suggest, or policy must be made public so that it can be scrutinised, most crucially by Aboriginal and Torres Strait Islander people. Mr O'Neil and Ms Sinclair have spoken about data sovereignty. Transparency about this process is crucial so that we all know exactly what these numbers look like and what is really the rates at all levels of First Nations people being affected would look like.

The CHAIR: There are two issues. One is whichever set is the more correct, they are still way beyond the representation of First Nations people in the broader community.

Ms SMITH: Certainly.

The CHAIR: Secondly, if the police have a methodology that they are relying upon, which is not made available to the public, does that not just invite us and other observers to simply adhere to the LECC methodology or the LECC assessment to the extent the police will not make their views able to be more readily scrutinised?

Ms SMITH: Certainly. Without any proper examination of how they have arrived at these figures, we can certainly lean towards the figures that the Law Enforcement Conduct Commission has arrived at.

Mr DAVID SHOEBRIDGE: It is a little counterintuitive on the part of the police to suggest that people are falsely and deliberately claiming to be Aboriginal or Torres Strait Islanders in their interactions with police, given the systemic discrimination that Aboriginal and Torres Strait Islander people face at the hands of the police. Is there any understanding about why the police say people are falsely claiming to be Aboriginal and Torres Strait Islander?

The Hon. TREVOR KHAN: I do not think you can say that.

Mr DAVID SHOEBRIDGE: Why are the police saying that the data exaggerates the number, I think it was for malicious or other purposes?

Ms SMITH: The only comment that I can give in response to Mr Shoebridge's question is, and I am not aware whether the NSW Police Force has made other public comments in relation to this, but from the Law Enforcement Conduct Commission report, their response to the report—this is included in the footnotes, to be as clear as possible—was that there are many instances where a person accidentally, for example a Pacific Islander thinking that Islander equates to Torres Strait Islander, or maliciously identifies as Indigenous in a police interaction.

Mr DAVID SHOEBRIDGE: Does anybody know how someone maliciously identifies as Aboriginal in a police interaction?

The Hon. TREVOR KHAN: Firstly, I apologise for being late, I double-booked myself this morning. I go back to section 4 of the Summary Offences Act. I will deal with you, Ms Smith, since you started it off when I came in and I missed most of what Mr McAvoy had to say. I understand the point that is made but I am also interested in the primary point that Mr McAvoy made, that is writing a report for the sake of writing a report is fairly pointless, indeed I think it is destructive at this stage. So I will come at this from the grumpy old man position and say making a recommendation which inevitably will fail is pointless, in fact destructive. If one is to look at section 4, I notice that recommendation 3 posits two alternatives, one of which Mr Shoebridge picked up, and that is simply repealing the sections. I think that is unlikely to happen. The second alternative is to limit it in some way to abusive or threatening language. Have any of you got a view as to how you would limit it to abusive and threatening language? I am attracted by it, you see.

Mr O'NEIL: We are happy to take that on notice. We are not criminal law experts so we are not sure how we would perceive of such a section, such a new limit on that provision. At the heart of it I suppose would be the need to up the threshold above from where it is right now and to avoid situations where someone using the F word is enough to have police—

The Hon. TREVOR KHAN: I absolutely accept that. That is a pointless charging exercise and likely to lead to the trifecta. I absolutely accept that. My concern is there are vulnerable groups in society, women, the LGBTI community, we can pick a whole range, who can be the subject of abusive and threatening language which if you simply remove it may in fact leave them more vulnerable to oppressive conduct and language. That includes women in the Aboriginal community as well. I am interested in seeing a recommendation go forward that actually has a chance of success and protects those vulnerable groups in the community who are deserving of continuing protection. Anything you can give would be greatly appreciated.

Mr DAVID SHOEBRIDGE: I think that is an opportunity to take it on notice.

Ms SMITH: Ms Crellin this morning spoke of the other existing offences which could potentially capture the circumstances that you are talking about. I would also be happy to take that on notice too.

The Hon. TREVOR KHAN: I can see circumstances where "threatening" conduct is clearly going to be captured by a lot, but "abusive" in itself may not, but abusive conduct can be quite hurtful.

Ms HEY-NGUYEN: I was not sure which time to bring it up. I just wanted to follow up from your question earlier about there being a lack of evidence, possibly leading to the reason why there are no convictions. We just wanted to put this on the record. We just want to avoid the implication that there is no evidence, that is why there has been no conviction. I think what has been outlined and well known is there are several shortcomings in the existing structure from independence, from a lack of investigatory powers, a lack of resources, a lack of explicit authority, for example the NSW State Coroner and the prison guards being able to investigate them that you have outlined just now. We still find it concerning that over 400 deaths and there has not been a single conviction, and more broadly, conviction is not the only end game. Obviously justice incorporates also preventing future deaths and find out the truth of what happened as well. I just wanted to ensure that there was no implication that just because there had been no convictions meant that there had been no evidence. There are reasons possibly for why there has been no evidence. I hope that is what the inquiry is able to address to prevent and avoid that going in the future.

The Hon. ROD ROBERTS: Ms Hey-Nguyen, you say 400 deaths in custody. That is something you just quoted. Where do you get that figure from?

Ms HEY-NGUYEN: We got that figure from—let me find it—it is 434 First Nations individuals have died since the 1991 royal commission.

The Hon. ROD ROBERTS: What about in New South Wales, because bearing in mind our remit is about New South Wales? How many people died in custody in New South Wales?

Ms HEY-NGUYEN: I am not sure I have that on hand. So I have to take that on notice.

The Hon. ROD ROBERTS: If I said it was 112.

Ms HEY-NGUYEN: Yes.

The Hon. ROD ROBERTS: Would you accept that?

Ms HEY-NGUYEN: I would have to, yes, take that on notice.

The Hon. ROD ROBERTS: I also put to you then—

Ms HEY-NGUYEN: But any more than one death is more than—

The Hon. ROD ROBERTS: Sure, but let us agree and let us be factual here today, that 50 per cent to 60 per cent of those deaths in custody are from natural causes. I think it is imperative that we speak on facts and evidence.

Ms HEY-NGUYEN: Yes. And it is not necessarily only police conduct, like my colleagues raised earlier as well. It could be in medical facilities, it could be the situation in which they had been held in custody as well. There is a holistic picture that needs to be looked at and the evidence collected to look at that holistic picture at the moment, we think there are shortcomings in that and hopefully that can be part of the inquiry's recommendations going forward.

The CHAIR: And if you do have any further information that you wish to provide on notice in relation to Mr Roberts' question please feel free to do so.

Ms HEY-NGUYEN: Thank you.

The CHAIR: The Committee has resolved that answers to questions taken on notice be returned within 21 days. The secretariat will contact you in relation to the questions you have taken on notice. On behalf of the Committee I thank you all for taking the time and coming to share your expertise and insights with us today.

(The witnesses withdrew.)

(Luncheon adjournment)

BRENDAN THOMAS, Chief Executive Officer, Legal Aid NSW, sworn and examined

DAVID EVENDEN, Solicitor Advocate, Coroniall Inquest Unit, Legal Aid NSW, affirmed and examined

JULIE TONGS, Chief Executive Officer, Winnunga Nimmityjah Aboriginal Health Service, before the Committee via videoconference, affirmed and examined

KARLY WARNER, Chief Executive Officer, Aboriginal Legal Service NSW-ACT, affirmed and examined

JEREMY STYLES, Managing Advocate, Aboriginal Legal Service NSW-ACT, affirmed and examined

The CHAIR: Would each of the organisations here this afternoon like to commence by making a short statement, bearing in mind that you have already made a written submission that we have read?

Mr THOMAS: Aboriginal people are significantly represented at every stage of the criminal justice system despite a constantly low crime rate in New South Wales. Current COVID period aside, New South Wales has the largest Aboriginal prison population it has ever seen. With such significant overrepresentation of people in the system concerns over deaths in custody will continue. Of the people proceeded against in court by police 18 per cent are Aboriginal, 22 per cent of finalised court cases involve an Aboriginal defendant, 40 per cent of all prison terms are handed to Aboriginal defendants and one quarter of the prison population is Aboriginal. Some deaths in custody are the product of disease, old age and sickness, however, others are avoidable. For every avoidable death there are one or more systemic problems to fix.

The current coronial system lacks effectiveness. Well considered recommendations are made but without assistance to ensure that they lead to change. There is no mechanism to guarantee and maximise the benefits of these detailed inquiries and to ensure the coronial system serves its death prevention function. Systemic changes is just one function of that system and it is not only what Aboriginal families are fighting for. When they have the death of a loved one in unexpected circumstances, particularly in jail or police custody they want accountability. When these families come before the coronial system there is also untapped potential for something else—for healing and reconciliation—but most of the time, unfortunately, that does not happen. Aboriginal families of those dying in custody, or elsewhere, are not well served by the current coronial system. There are not even any Aboriginal staff employed in the current Coroners Court or as counsellors at the Institute of Forensic Medicine, for example.

Investigations are not culturally appropriate and contact between police and families is fraught with difficulties. There is enormous distrust in the correctional system and police and the result is a lack of confidence in the process and the outcomes and often an alienation with both. Aboriginal controlled organisations play a vital role in the changes that we need to make. We are happy to be sitting alongside our colleagues at the Aboriginal Legal Service [ALS] and together with Julie Tongs from Winnunga Nimmityjah Aboriginal Health Service in Canberra. We see great potential for the healthcare model being run in Canberra jail by Winnunga for Aboriginal prisoners and for potential application in New South Wales. The current trend in juvenile detention and the trends in prison during the COVID-19 period show that custodial numbers can be significantly reduced without increases in crime. Thank you for the opportunity to appear today.

Ms WARNER: I acknowledge the Gadigal people and pay my respects to the Elders past and present of Country. I thank the Committee for the opportunity to provide a brief opening statement. I do not seek to go into the particulars and details of our submission at this time. It is almost 30 years since the Royal Commission into Aboriginal Deaths in Custody which highlighted the mass incarceration of Aboriginal people right around the country. We see a continued overrepresentation of Aboriginal people. I know that the royal commission did highlight the grossly disproportionate numbers compared with non-Aboriginal people and also of this fact that provides the immediate explanation of the disturbing number of Aboriginal deaths in custody. What we have seen since then is a number of those recommendations that have not been implemented and the continued shortcomings of the system.

There have been numerous other royal commissions, inquiries and recommendations which have focused on ending the imprisonment of Aboriginal people and preventing Aboriginal deaths in custody, yet many of these recommendations sadly continue to sit on the shelf and gather dust, quite frankly. Aboriginal people continue to offer up solutions but their solutions appear to be largely ignored. While governments fail to act more Aboriginal people are dying in custody and more families are being forced to grieve and to seek justice simultaneously. This is not a choice that we need to keep making. We are not lacking in solutions to address these issues, but we have been lacking in some political will. Aboriginal people are now imprisoned at a higher rate than at the time of the

Royal Commission into Aboriginal Deaths in Custody. As you all know more than 440 Aboriginal people have died since that time.

It is critical, from the ALS' perspective, that the New South Wales Government uses this process as an opportunity, without delay, to rapidly and radically transform the justice system. Nathan Reynolds, Rebecca Maher, Steven Freeman, David Dungay Junior, Tane Chatfield, Patrick Fisher, and so many more. They are some of the names of Aboriginal people who have been ripped from their families unnecessarily. It is important in a statistic ridden environment that we continue to remember those people and the families that sit behind those statistics. The ALS is currently acting for families in nine different coronials. These include deaths in corrective services facilities due to ineffective medical care, suicide, matters relating to police pursuit and unexplained circumstances. The ALS plays a critical role in providing Aboriginal families with culturally safe legal support and assistance.

However, we are currently constrained in our ability to provide wraparound support and help to vulnerable people taken into custody and the families whose loved ones have died in police or corrective services custody. The ALS is not provided with specific funding to help support families during coronial inquests, to provide legal support to Aboriginal people once they are in prison, nor to provide through care support to Aboriginal people exiting custody. This funding has not been reinstated. The ALS currently provide legal outreach support to children in a number of Juvenile Justice facilities across New South Wales but it is not specifically funded to do that either. The ALS is best placed to provide the support to families. Culturally appropriate services designed and delivered by Aboriginal people for Aboriginal people so that the solutions are in community controlled hands are critical.

I wish to draw the Committee's attention to the recent changes to the way that the Coroners Court of Victoria investigates Indigenous deaths in custody and to reflect upon recommendations made in a royal commission almost 30 years ago, including the development of a practice in relation to the royal commission recommendation eight. We urge the development of a similar suite of reforms in New South Wales. Similar to the Victorian model the ALS would welcome the introduction of Aboriginal liaison officers as part of the Coroners Court. However, beyond this it is also critical that the moment a death in custody occurs the ALS is able to provide legal support and wraparound support to families. Finally, I note the importance of ensuring that the forces of Aboriginal and Torres Strait Islander people with lived experience of the criminal legal system and families who have had loved ones dying custody are centred in all policy responses and law reform initiatives. To that point I thank the Committee for hearing throughout this inquiry from families themselves.

Ms TONGS: Mr Chairman and Committee members, my name is Julie Tongs and I am a proud Wiradjuri woman. I have been involved with Winnunga Nimmityjah Aboriginal health and community services for the past 27 years and the last 23 as CEO. Thank you for inviting me to give evidence to this inquiry into the high level of First Nations people in custody, which is regrettably something that in Canberra we have a lot more experience in than we would like. The ACT currently ranks equally with Western Australia in having the highest rate of Aboriginal incarceration in Australia. Sadly, here in the ACT we also have by far the highest rate of increase of Aboriginal imprisonment in Australia. Winnunga provided health services to Aboriginal prisoners in New South Wales at Goulburn jail from 2000 to 2010 and Cooma jail from 2004 to 2010. However, I understand that an issue of particular interest to your Committee is the decision to establish within the ACT prison, the Alexander Maconochie Centre [AMC], an independent Aboriginal community-controlled health and wellbeing clinic.

The clinic, which is managed by Winnunga, was established following an independent inquiry into the care that a young Aboriginal man, Steven Freeman, received as a detainee in the period of his detention up until the day he died whilst in prison in the AMC. The inquiry, which was led by Philip Moss, was established as a result of calls led by Winnunga for the nature and quality of care which Steven had received for the entirety of his incarceration to be investigated, which is generally restricted to just the care directly connected to or otherwise relevant to his death. Steven Freeman died as a result of a reaction to a prescribed dose of methadone. The coronial inquest focused on that event and the decision relevant to his being prescribed methadone. Steven Freeman and his family were known to Winnunga as clients.

Whilst Steven had a substance abuse issue, he was not to our knowledge ever a user of opioids. Steven had also been savagely beaten on the first day of his imprisonment and he was placed in an induced coma for a week in the Canberra Hospital. It was as a result of not just our existing relationship with Steven as a client and member of the community, but also our experience as an Aboriginal community-controlled health service, and due to our deep understanding of the nature and range of health and other issues which so many Aboriginal peoples

have and how they typically respond to them, that we believe that, had Steven had access to our service in AMC or an Aboriginal community-controlled health service in prison, he may not have died. Accordingly, we made submissions to that effect to the Moss review, which resulted in the recommendation that Winnunga be invited to establish a clinic in the AMC.

I believe the Winnunga model will, in time, and particularly when it is fully operational, have a dramatic impact on the health status of Aboriginal detainees in the AMC. In the 2019-20 financial year, Winnunga provided 274 clients in the AMC with 10,960 occasions of service, noting an increase of 164 per cent from the previous financial year's occasions of service provided. Services have been delivered by GPs, nurses, psychologists and the Winnunga Social Health Team, which is the team that attends to all matters referred to as psychosocial and which is staffed entirely by Aboriginal or Torres Strait Islander workers. It may be of interest to the Committee that I recently met with Deputy Premier John Barilaro, who is my local member, to brief him about the Winnunga clinic in the AMC. The Deputy Premier advised me he was very interested in the model and would be supportive of seeing this trial in New South Wales prisons. Thank you for the invitation to address this Committee. I am happy to take any questions.

Mr DAVID SHOEBRIDGE: First of all, I might just ask a question of Legal Aid. You have some submissions in relation to the Suspect Target Management Plan, or STMP-II, not the domestic violence element, and in particular a concern about how that brings Aboriginal children into the criminal justice system. Could you speak to that briefly?

Mr THOMAS: We do have some concerns about how that brings Aboriginal children into the criminal justice system and people more generally into the criminal justice system. If you have a look at the increase in Aboriginal prison populations over the last few years, the biggest offence category seeing an increase are offences against justice procedures, which largely has to do with the enforcement of conditional liberty and the heavy policing of Aboriginal communities. That has a number of effects. It brings a lot more people into contact with police. A lot of the conditions placed on people's liberty are so broad that they allow increased police contact. For instance, a bail condition for a child that requires that child to obey the direction of a reasonable adult is so broad. I have four children and I do not know any of them who would obey the reasonable direction of an adult. It allows for a lot more contact with the justice system than would normally be warranted, I would suggest. When that is heavily focused in an area with large numbers of police and large numbers of Aboriginal people, it just brings volumes of people into contact with law enforcement, more than otherwise.

The STMP program deliberately does that. It focuses on people who are identified as repeat offenders. I know there is a NSW Bureau of Crime Statistics and Research review of STMP that suggests that it has a dampening effect on the overall crime rate, but we know that it is leading to significant numbers of Aboriginal people, children and adults, coming into contact with the police more often. They are more likely to be subject to bail dealings, they are more likely to be bail refused and we know that all of that has a compounding effect on people's ongoing involvement in the criminal justice system. The more likely you are to have your bail breached, the less likely you are to have a future bail determination. Statistically, we know that if you have your bail refused even one time, you are more likely to get a prison term on a subsequent court appearance. That heavy focus at the front end of the justice system has a compounding effect on people's involvement from the very start, all the way through the system.

Mr DAVID SHOEBRIDGE: Ms Warner?

Ms WARNER: Thank you. I think the STMP is a secret New South Wales police policy and practice that is used by police to target individuals for proactive attention, including random personal searches and home visits at all hours of the day. It is our experience that Aboriginal and Torres Strait Islanders people are disproportionately targeted by this. As my colleague from Legal Aid just said, this is disproportionately targeting not just Aboriginal people, but it is also targeting non-Aboriginal people as well. We have had clients, young Aboriginal people, who have had to move towns because they have been targeted by this scheme for no other reason than they have had a parent who has been involved in the custodial setting. For us, this just reeks of a system that has no accountability, that is further entrenching Aboriginal people into the quicksand of the justice system and that should be repealed.

Mr DAVID SHOEBRIDGE: Well, you say repealed.

Ms WARNER: Sorry.

Mr DAVID SHOEBRIDGE: One of the other remarkable features of this is that there is no legislative underpinning.

Ms WARNER: There is no legislation, that is right, hence it being a secret and us not having an understanding of it, but only on the impacts of it. For this reason we have been—specifically for young people, and because of the impact on them—suggesting that the STMP should be stopped immediately.

Mr STYLES: Just to add to that, if I can just draw the Committee's attention to the case study named as Jake at page 11 and 12 of our submission. That is a fairly shocking example of the beginning of the problem that comes with STMP. At paragraph 3 on page 12 it says:

> Before Jake turned 10, he was already being targeted by [police] and monitored on a Suspect Target Management Plan. On the date of Jake's 10th birthday, he was visited by Police who interviewed him, openly recording that they were doing so, in order to create evidence to rebut the presumption of Doli Incapax …

The problem with that is that it is a clear demonstration of the dragging in of a young person into the criminal justice system at a point when there is absolutely no basis for criminal liability. That is an example of our experience in practice with children, particularly, who are dragged into STMP by police. Some of them for their own behaviour but others for behaviour of their peers and the behaviour of their family. It has been our recommendation that it be avoided, repealed, or legislated over for all children—all people under the age of 18—for this reason.

Mr DAVID SHOEBRIDGE: That goes to the issue of the age of criminal responsibility. We have already had some evidence from the two prior panels pointing out that raising the age of criminal responsibility to 14 should be one of the potential principle outcomes from any inquiry that is trying to reduce the number of Aboriginal people in jail. What are the views of the panel?

Mr THOMAS: Most criminological research would show that most people who go on to have a persistent involvement in the criminal justice system start that involvement very early and anything that can stop or stem that involvement early is likely to have a dampening effect on a person's future involvement in crime and the criminal justice system. In particular, the number of young Aboriginal people who come into the criminal justice system almost all have intellectual disabilities and almost all have experiences of their own personal trauma. They are people coming with a lot of needs to be addressed and behavioural challenges to be addressed, and a focus on remediating that behavioural challenge rather than criminalising people's behaviour, we believe, would have a positive effect on the future engagement of those people in the criminal justice system.

The Hon. TREVOR KHAN: What is the model to deal with those kids? If the State were simply to raise the age of criminal responsibility—and I know 14 has been talked about, but some European countries are much higher than 14, but if we say 14—what is the support structure that is set up for kids—

Mr DAVID SHOEBRIDGE: Eleven to 13.

The Hon. TREVOR KHAN: Well, 11 through to 16 that will provide them with the level of support that is necessary?

Mr THOMAS: If you have a look, firstly, the number of kids you are talking about is relatively small—

The Hon. TREVOR KHAN: I absolutely accept that.

Mr THOMAS: And if you have a look at the changes that have been put in place in the criminal justice system since the introduction of the Young Offenders Act, you have seen a significant diversion of a whole bunch of people who used to come to court out of that system altogether. The system now deals with people through warnings and cautions and conferences who previously we used to say had to come to court for all of that kind of behaviour. They no longer come and we have, arguably, a lower crime rate than we had at the point when they were coming to court.

The CHAIR: Taking into account the success of the Young Offenders Act, we have got submissions to this inquiry that suggest that Aboriginal youth are comparatively disadvantaged in accessing the diversionary programs or opportunities available under the Young Offenders Act and that the exclusions in the Act disproportionately impact Aboriginal youth. Can you speak to those two concerns?

Mr THOMAS: There is a lower rate of diversion for Aboriginal young people under the Young Offenders Act than people generally and the rate of diversion from people at the point of court rather than police is higher for young Aboriginal people—meaning they are coming to court when they could have been diverted earlier through the Young Offenders Act. There are a number of barriers to that. There are caps on the number of cautions people can get, which is a barrier for people to get diverted under the Young Offenders Act. The rate of police diversion of people under the Young Offenders Act varies widely from police command to police

command. In some areas police are very active in using the Young Offenders Act to divert people from court. In other areas not so, without a lot of objectivity, I must say, as to why that difference is there. There is also the requirement under the Young Offenders Act for people to admit the offence to get access to those diversions which does create challenges in terms of people being diverted from the point of police. We have made submissions to the Government to remove that to allow greater levels of diversion for young Aboriginal people under the Young Offenders Act.

The Hon. TREVOR KHAN: You have got me on board in terms of raising the age of criminal responsibility but it seems to me that if you simply raised the age of criminal responsibility and that was the only thing to come forward that actually still leaves a glaring hole. Again, I ask: What is set up to support young kids that either have an intellectual disability, a substance abuse, have left school early or have limited parental support? If they have not got themselves into trouble by 14 they might well end up in trouble by 16, then we will have delayed the problem rather than resolved it.

Mr THOMAS: Yes. There are very few young people committing what would be serious criminal acts without some kind of underlying serious problem—behavioural disorder; mental health condition; intellectual disability—that needs to be managed and treated in a way that is going to reduce the risk that person might pose to the rest of the community. But I would argue that a stronger therapeutic approach to that very small number of people—and it is a very small number of people—is a much better investment than the heavy and costly criminal justice system that really does nothing to stop their trajectory into adult prison at the moment.

The Hon. TREVOR KHAN: Sure, because for every kid in a juvenile justice centre, what does it cost? Does it cost $80,000?

Mr DAVID SHOEBRIDGE: It is northward of $150,000 a year.

Mr THOMAS: It is more than a hundred. It is a lot of money.

The Hon. TREVOR KHAN: So we have got all of this money that is being spent on this.

Mr DAVID SHOEBRIDGE: You could send them to Harvard for the same cost that we put someone in jail for three years.

The Hon. TREVOR KHAN: They will not get in at the moment and I do not think they would want to go. Ms Warner, do you have any proposals?

Ms WARNER: Yes. Thank you for the question. I think, even as your question highlights, that the best way to prevent future offending and to make our communities safe is to give children the best possible chance at a good life; to support and build the capacity of families; to engage and support kids to stay in school, as you say; to address family violence; to make sure that there is housing stability; and to identify and respond to any health and disability needs. But there is just one small thing that we are forgetting about with all of this deficit focus on how we can strengthen these families, these individuals, these individuals, and that is also that—and some of our case studies will show this—these kids should never have been brought in to the criminal justice system in the first place. We talk, in one of our case studies, of a kid climbing on a fence at a school which then brings them into the criminal justice system.

At the other end of the spectrum, and as Legal Aid was just saying, if a child has done something that we consider as a society to not be the right thing, we need to understand their situation and what support they need to heal. We need to bring kids in rather than pushing them away and rather than punishing them, and think about the kind of society that we want to create here in New South Wales. There can be accountability, learning and healing without forcing kids into a prison. Often—and we see it through our custody notification service—there are kids as young as 10 who are then at risk of being taken to a barbed-wire facility and strip searched on entry. You will see that in another one of our case studies where there was a young kid with attention deficit disorder who was strip searched in one of those facilities, who had been the victim of child sexual abuse, and who told people "I have a coin in my undies" and the reason that he did that is because he wanted to buy something when he got into juvenile detention. This is a kid who loved to tell his lawyers all about the nature documentaries that he watched on television and he could tell you all about the weather, but the trauma that he would have suffered as a result of that will continue throughout the rest of his life and this is not something that we should be subjecting kids to.

The Hon. TREVOR KHAN: I have not heard a lot of talk so far—I was missing for part of this morning because I double booked myself—about the relationship between out-of-home care and exposure to the criminal justice system subsequently. Do you have any views on that correlation?

Ms WARNER: I might start and just say, as we saw almost 30 years ago when you look at the 90 people who were the subject of the Royal Commission into Aboriginal Deaths in Custody, more than half had actually been involved in the child protection system and had been removed from their families and communities. That statistic has not changed and we absolutely see that high correlation of removing kids from key protective factors like their culture, their country and their family and placing them in the juvenile justice—or prisons, really, as we could call them—and then going on to become involved in the criminal justice system. There is evidence of that correlation and we absolutely see that through our work.

Mr THOMAS: There is no doubt that there is a correlation. The proportion of kids in juvenile justice who are also clients of Family & Community Services or have been clients of FACS at some point is the majority of them. That is not just for Aboriginal kids. Again, if you look at the criminological research around the world, we know that if a young child does not establish an emotional bond with a parental figure between the ages of one and five their likelihood of future involvement in crime is significantly increased. Removing them from the opportunity to establish that bond increases the likelihood of their future involvement in crime. But it is kind of a cyclical thing, because there is a significant proportion of those kids who are going in and out of home care who are going in there because the adult parent is in custody or involved in the criminal justice system. It is kind of a cycle that is feeding itself.

Mr STYLES: It is also important to emphasise in this context the Aboriginal placement principles in the care jurisdiction and the importance of emphasising the placement of Aboriginal youths with other Aboriginal families, or within their greater family, when there are actions by Family & Community Services. There is very strong evidence of that connection through research by Kath McFarlane, who has spoken to us about it on occasion. But it is absolutely critically important that care structures in care law emphasise those Aboriginal placement principles. Family & Community Services does not operate to de-identify Aboriginal youths who self-identify in that way, which is a problem we have seen in our practice from time to time.

The Hon. PENNY SHARPE: This question is actually for all the witnesses. I wanted to talk about the health care that people receive within the system. Obviously both of your submissions speak to this, but the statistics are pretty significant. There have been many reports about this; this is not an unknown thing. First of all, perhaps just from Legal Aid NSW and from ALS—but Ms Tongs, I am very keen to come to you—in terms of how you have seen it played out. You gave us some statistics before, but what difference does it make around the care that people are getting? Obviously my big focus, too, is mental health and cognitive disability, both of which Aboriginal people who find themselves incarcerated are very over-represented.

Mr EVENDEN: I think what we are seeing when we look at the deaths in custody inquests is that health care is consistently coming up as an issue. There are about 20 deaths in custody—Aboriginal and non-Aboriginal—per year in New South Wales, and a large number of those are "natural causes" deaths. In some cases, the mandatory inquest that takes place afterwards does not identify any issue with the health care, but in a number of other cases there are often issues identified with inadequate health care in custody. Time and time again in the inquests that I have been involved in there is evidence of incredible resourcing pressures and inadequacies in the health care delivered. It is particularly the case with mental health care. There are numerous inquests where people who have identified risk factors, particularly for suicide but also for risk of harm to others, do not have their health care properly attended to.

There are blockages to the system from jails in regional locations through to the Metropolitan Remand and Reception Centre [MRRC] through to Long Bay Hospital, so that if you are a prisoner with a mental health issue you do not get the proper attention that you need. The result of that is that people are dying, either because they are killed by psychotic inmates—and there have been a number of recent examples of that; for example, I think two last year, in 2019, at MRRC and Parklea—or people are killing themselves, Aboriginal and non-Aboriginal alike. These are people who have gone into custody with clear self-harm issues and have not been seen, or have at least received very inadequate mental healthcare treatment. It is a major issue, and that is one reason why we are particularly interested in the idea of health care in custody delivered by Aboriginal-controlled organisations.

Mr DAVID SHOEBRIDGE: Do you then support the Australian Capital Territory model?

Mr EVENDEN: Absolutely. In fact, we have been working with Winnunga, and it has come out of the death of Jonathon Hogan at Junee in February 2018. There were findings delivered in that matter earlier this year. One of those was that Junee jail look at putting together some Aboriginal health-work positions, including particularly in relation to mental health. From an early stage Winnunga had in fact been supporting our client Matt Hogan—who was the father of Jono, who hanged himself—who is an Indigenous man from Canberra.

Through our involvement in that inquest we came to learn of what Winnunga was doing. Since the inquest, there have been discussions that really have highlighted the potential for this program—or for an Aboriginal medical service [AMS] somewhere in New South Wales—to deliver similar services in a jail in New South Wales.

The Hon. PENNY SHARPE: Sorry, I have scribbled down notes and I cannot give you the source—it might actually have been the work that was in *The Guardian*—but my question is on the analysis of deaths in custody. There was a failure to follow procedure in 41 per cent of cases; medical assistance required but not given in 38 per cent of cases; and mental health and cognitive impairment was a factor for 42 per cent of people in the system, but only half of them have received any care at all. Is there an appreciable difference between the treatment of Aboriginal people in custody and non-Aboriginal people in custody? I particularly want to go to the underlying health issues as well, and whether they are getting picked up at any screening level at all upon entry.

Mr EVENDEN: The answer is I do not think there is necessarily an appreciable difference in what is being given to prisoners, whether they are Aboriginal or non-Aboriginal—

The Hon. PENNY SHARPE: There is a level of inadequacy across the system generally?

Mr EVENDEN: There are resourcing pressures that are extreme in numerous jails, which means both in relation to primary health and mental health care that prisoners are not getting proper health care. But in relation to Aboriginal people, we know that they go into custody with greater issues in terms of their own health. We also would say that not delivering health care in a culturally appropriate way means that it is less effective. If you can have, for example, a mental health worker from an Aboriginal medical service who goes in and talks to a dual-diagnosis Aboriginal prisoner who has both mental health and substance abuse issues—and is even using while he is in custody—there is more chance that person is going to meaningfully engage with someone from an independent organisation than engage with someone from Justice Health. I think that there is the potential for health care to be delivered in a more effective way so that the actual results for Aboriginal prisoners are better. It will be very interesting to hear what comes from Winnunga, once its efficacy is ultimately assessed, as to whether it is delivering better healthcare outcomes for the Aboriginal prisoners in Canberra.

The Hon. PENNY SHARPE: Ms Tongs, I think it is over to you. Tell us what you are doing.

Ms TONGS: We provide comprehensive primary health care. We do not do body parts; we see whole people. The model that we deliver on the outside is the model that we would want to deliver on the inside. We have made some gains, but it is very challenging. We are working in a controlled environment. On the outside we are an Aboriginal community-controlled health service, and we see a lot of the men and women who are incarcerated on the outside before they go into prison. We are limited in what we can do on the outside, but we are methadone prescribers, we have a mental health nurse, psychiatrist, psychologist, drug and alcohol workers and a national social health team. We provide a service from 6:30 in the morning to 8:30 at night where we have nurses based in the AMC as well as a doctor that goes in either of a morning or an afternoon. The challenge for us is that we just want to go in and provide health services because I believe that, regardless of whether you are on the inside or the outside, you are entitled to proper health care, and as we know when somebody is incarcerated they lose their rights to Medicare. That has its challenges, but the way that we deliver our services to our clients in AMC is the same as what we do on the outside.

Even though we do not get funded, we still do an Aboriginal health check, we do a mental health care plan, we do a diabetes or asthma care plan—whatever the need of the client is—often because we already know the people that we are working with. We have already got their history documented in our system because we have an electronic patient information record system that works between the outreach or the inreach at AMC and back here at Winnunga. It alerts the doctors and nurses to any medication that a client or patient may be allergic to. We are very innovative in the way that we do our business and we strive for best practice in everything we do.

The Hon. PENNY SHARPE: Now that you have had that experience—and you indicated that you are obviously trying to operate in a very controlled environment—what have been the challenges or barriers to getting that model up and working? What has had to be changed which has required a lot of negotiation to get where you have gotten to with the prisoners?

Ms TONGS: The challenge is that I am constantly reminded that it is a prison—it is a correctional facility—and that we have no control over that. Even with our experience of going to Goulburn jail all of those years ago and to Cooma, it depends off and on who the officers are that are on there on any particular day and how that movement moves within the system. For us, we see the men and women at their worst in the community. We do not have any security and yet we are able to manage that.

We know that the majority—98 per cent—of those Aboriginal men and women incarcerated in the Australian Capital Territory have either substance misuse, mental health or historical trauma issues, and most of them have got all three. It is the way that they are using substances to take away the pain. We want to be able to work with them through the trauma. It is like peeling an onion—it is layer after layer after layer—but we need to start somewhere because in my experience of the last 23 years people are not coming out in a better health condition or in better condition.

The crimes that they commit the next time on the outside are much more violent than the ones they did before. Until we get serious about providing that comprehensive holistic health care, working through the issues, and working with the family, you cannot isolate one from the other and even with children. We have to work with the families to work with that child to be able to give them an opportunity, and until we address the issues of racism and poverty it is a really hard road, but we have put our hands up, we are in there and we are doing the best we can.

The Hon. PENNY SHARPE: Is there an appropriate understanding of people that are coming through with a disability? Are there any opportunities for you to get people support through the NDIS upon leaving?

Ms TONGS: We have really struggled with the NDIS.

The Hon. PENNY SHARPE: You are not alone.

Ms TONGS: It is very difficult to get access to, particularly for those vulnerable men and women that are leaving prison, because at the end of the day people make their own judgements and I do not think that is fair. It is not up to us to make those judgements. We work with people where we do not necessarily need to know why they are incarcerated. All we need to know is that they have got some serious mental health, drug and alcohol disability. It is hard to show somebody that you have got serious mental health issues when they cannot see it. It is really difficult to try and get NDIS, and I know I have got some really close friends who have been high-level public servants and have really struggled and been in tears over the NDIS.

The Hon. ROD ROBERTS: Mr Thomas, thank you very much for your submission. I found it quite a balanced approach. Thank you for that. On page 18 of your submission you state:

> Legal Aid NSW solicitors have, in recent years, observed an increase in the number of cautions given to younger children, particularly Aboriginal and Torres Strait Islander children and children living in remote areas.

I would think that should be something that should be applauded, but I continue to read on and it states:

> This increases the impact of the cap on cautions, as children will reach their limit of three cautions much earlier, and therefore have more limited opportunity for diversion.

We have got a butting of heads where, I assume, at this stage police have used a diversion rather than court, which should be applauded, yet because they have used it we are reaching this limit on cautions. How many cautions do you think somebody should be given?

Mr THOMAS: I think there are a couple of answers to that. The Young Offenders Act provides a graded level of interventions which starts at warnings. The first question would be, could some of those young people have been dealt with more appropriately by a warning than a caution? That would keep them at the lower end of that level of intervention. I think the experience our solicitors have is that some of those people could probably be better dealt with via a warning. The second answer to your question of: Should there be a legislative cap on the number of cautions that a young person should get? To which, I suppose, the answer should be: Should there be? We do not necessarily think that there should be a cap on the number of cautions that a young person is eligible for before they go to the next stage of the system.

We think there should be some discretion there that allows for the seriousness of the behaviour to determine the nature of the level of intervention rather than purely and simply counting the number of cautions a person has previously got. If that young person is coming before the police for relatively minor behaviour and it is the same behaviour all the time, should that necessarily ratchet that person up in seriousness in the criminal justice system? Or should we be looking at other ways of dealing with that young person rather than effectively bringing them before a court when we know that simply bringing a young person before a court increases the likelihood that they are going to come back again and again?

The Hon. ROD ROBERTS: To clarify one of your earlier answers, we talked about offences against judicial procedures, and, in fact, the figures from BOCSAR are that 16.5 per cent of Indigenous inmates are there for breaches of judicial procedures. Would it be fair to state that of that 16.5 per cent, 15 per cent are there for a breach of community-based orders where a diversion has been offered other than a custodial sentence?

Mr THOMAS: It depends on what that breach is. Those breaches against justice procedures are where the offence is the breach as opposed to another crime being committed, so what is recorded there in those BOCSAR figures are the most serious offence a person presents with. Those offences against justice procedures are often the criminalisation of behaviour. If it was not for that, it would not be criminal—for example, breaching a curfew. Breaching a curfew when you have got a curfew on an order can bring you before a court. Simply being out after 11 o'clock if you do not have an order is clearly not a criminal offence—we have a whole nightlife in Sydney that involves people going out late at night. So the engagement of people in the justice system that results in increasing controls being put on their liberty means, almost by definition, the likelihood of those people being arrested for breaching those controls increases.

The Hon. TREVOR KHAN: Does it include breaches of AVOs?

Mr THOMAS: It does include breaches of AVOs, yes. Those breaches of justice orders are pretty much any breach of a condition on liberty.

The Hon. TREVOR KHAN: Are we able to break down the breaches, for instance, of bail conditions from breaches of AVOs and the like?

Mr THOMAS: The Bureau of Crime Statistics, yes, can do that.

The Hon. TREVOR KHAN: It would seem to me there is a difference in nature. I absolutely get breaching a curfew may or may not be a serious matter, but breaching an AVO can be a very serious matter because it actually involves potentially a victim—normally a woman.

Mr THOMAS: And we know AVOs generally work to reduce the rate at which people experience violence.

The Hon. TREVOR KHAN: Absolutely, yes—and deaths.

Mr THOMAS: I think it does go to what is at the heart of the current Aboriginal over-representation in the criminal justice system, and that is the way we deal with domestic violence. So as the system deals with domestic violence far more seriously, you are getting more people into the system with those orders, you are getting a heavier policing of those orders, an increased breach of those orders and an increase in imprisonment flowing from those breaches, as opposed to flowing from the original domestic violence incident.

The Hon. TREVOR KHAN: The reason I raised it is this does seem to be one of the significant issues.

Mr THOMAS: It is.

The Hon. TREVOR KHAN: But if you do not come down hard on men beating up women, then we have got another generation coming forward who have witnessed that, who may or may not do the same but at least will be traumatised by that experience as well. So it is sort of a no-win situation, is it not? There have got to be some lines drawn on some of these things.

Mr THOMAS: It is an inherently complicated problem, there is no question. I would just draw the Committee's attention to an example where there is a positive example of dealing with this. You have possibly come across Operation Solidarity in Bourke, the policing of domestic violence or of policing of Bourke. That is a great example of where the police local area commander said, "I am not going to measure myself by the number of people I arrest but by the crime rate and the number of people who experience harm", and he established a model of policing in that town where every morning he would go to Maranguka, talk about the call-ups they had the day before, talk with community members about what needed to be done or what could possibly be done to address the issues that they were called out to, talk to them about how they were going to do that, would often take Aboriginal community members and respected members on visits to victims of domestic violence or potential offenders, and what we saw in Bourke was a significant reduction in arrests, but not only a reduction in arrests; a reduction in police call-outs for almost every type of crime on record.

Mr DAVID SHOEBRIDGE: I recall being in Wilcannia and seeing the police in Wilcannia about six years ago and they had a calendar on the wall and they had fluorescent crosses marked on certain days with initials and they were telling me they were the days on which certain men were going to be released from Broken Hill jail and they were diarising to go to the family's house that night to arrest them for a further domestic violence offence because there were not services, there were no diversions, and the expectation was that that was how the cycle would start again. I do know what the Aboriginal Legal Service's perspective on this issue about those kinds of justice breaches and alternative ways of dealing with them is but I would be interested.

Ms WARNER: Yes, thank you. Thanks for the opportunity. I might go back three steps, if I can, because we have got a couple of comments that we would like to make on previous ones. The first one I would say is that placing a non-discretionary restriction on the use of cautions can operate arbitrarily, inconsistently and result in missed opportunities for diversion. That would have been the comment we would have made if we were asked. But also I would like to go back a further step and suggest and highlight the model that Winnunga and, of course, the other Aboriginal medical services can provide in justice settings. This is a way of addressing some of the things that we see currently and that is that even in some of the identified roles that are set up within these institutions, they often end up being used for the majority of the population. They are stretched, at best, even to provide services to Aboriginal people in custody.

But you take something like the Aboriginal Chronic Care Program that Justice Health has got, we see people going in, getting onto a waiting list for that program as soon as they go into custody and not actually even being seen by the time they leave. So often nurses are going to be short on the ground and, of course, an Aboriginal medical service model of actually providing services to Aboriginal people within custodial settings would make sure that this goes some way to alleviating that issue. Of course, it is the responsibility of Justice Health to make sure that that they are providing these services at the moment to Aboriginal people.

The third point, and I might need the Deputy Chair to remind me, but as we talk about the policing and the accountability for domestic violence orders and community corrections orders, I highlight for the Committee that during the pandemic the ACT—relaxed is not the right word—I would suggest improved their model of making sure that there was not a straight breach for these orders, that the corrections officers had some discretion in those circumstances and, indeed, could take it back to court if they wanted to, and I would suggest that this is a model that needs to be extended sort of within jurisdictions beyond the pandemic, because of course if we do something in the pandemic which provides discretion and builds the trust between Aboriginal people and corrections officers and then withdraw it, what we are going to see is more people in prison because they, after the pandemic, will of course go to their corrections officer and say, "This has happened as a result", and we are back into that harsh penalised system that we saw prior to March of this year.

To come back to the question that was asked of me, we at the ALS have got one family law lawyer to service the entire New South Wales and ACT Aboriginal population. The way that our family law service has been set up is to help Aboriginal women who are in contact with that system as a result of domestic violence. We saw that spike during COVID but we absolutely did not have the resources prior to COVID to deal with the number of Aboriginal women who were subjected to family violence within their communities, and that needs to change.

The CHAIR: I have got two questions, noting that we are running short on time. One is, do we have any kind of statistical handle on the rate of deaths in custody that are what I will call preventable—that is, not natural causes—and what the differential impact is between First Nations people or not and whether there is a breakdown of what appear to be the causes of those deaths? That is the first part. The second part is, in relation to the oversight of who looks at deaths in custody, there seems to be an acceptance in the submissions that there is a number of bodies but none of them do their job perfectly. There are two regularly cited pathways of improvement; one is to improve the resources and jurisdiction of the Coroners Court, which obviously is an independent, sort of judicial office that does important work in this space, but some submissions talk about the creation of a new independent investigative body, some submissions saying that should be located in the Law Enforcement Conduct Commission. What do you think about those two differential models, noting what is already in your submissions, and is there another possible model where the Coroner has more jurisdiction, more resources to do the important work, but, to the extent that they need to access investigators who are not police, should those investigators be located in an agency like the LECC?

Mr EVENDEN: Thank you, Chair. Dealing firstly with causes of death in custody, the statistics generally show that about 65, 70 per cent of deaths are natural causes. A number of the people dying in custody are old, they have diseases which inevitably are going to lead to them dying, but there is no doubt that in a number of inquests there are deficiencies within the way in which they receive their treatment. So whether or not that means that the death is avoidable is another question, but certainly there are cases where it can be said that the inadequacies in health care have contributed to death. Suicide makes up about 25 per cent of deaths. Whether or not that is avoidable, again, is a question to be asked, but certainly coroners have concluded that inadequacies in mental health care treatment may have made a difference.

Homicide is a small part of the deaths in custody—so, prisoners killing other prisoners. But in the cases that I have been exposed to, that is almost invariably because we have psychotic prisoners who are later found not

guilty—mental illness—who have been put into a cell with someone else. I think the short answer is that there is a subset of deaths where there are not issues. But there are other deaths, and they are going to be the larger coronial findings, where there are significant issues with the health care that has been delivered. It always comes back to under-resourcing, and there are other common issues such as record keeping and obtaining information outside. So, when someone comes into custody, their medical records are not obtained and they are not put onto their medication when they should be—those sorts of issues.

Dealing with the oversight issue, at Legal Aid we represent people in deaths in custody, but also in a number of critical incident matters involving the New South Wales police; for example, police shooting matters and police chases. We are representing families of the deceased in those matters. We are seeing investigations undertaken by police of police in critical incident matters. And then, we are also seeing investigations by police of Corrective Services in the vast majority of deaths in custody which occur in prison custody, not in police custody. My view is that the way to fix the system is by better resourcing the Coroners Court. The actual investigations that are taking place are in many cases very good investigations. We have not only what happens in terms of the primary investigation by police, but in complex cases the Crown Solicitor's Office are normally engaged to assist the Coroner. They have a number of solicitors who work tirelessly to make sure that all lines of inquiry are looked at. They brief experts to do with causes of death and all sorts of other things.

In the larger cases there is almost invariably a very detailed review of what took place. In the critical incident cases that I have been involved in—police investigating police—there is actually what I would call a reasonably robust model in terms of the police critical incident guidelines, to try and ensure independence and prevent the obvious concerns that we have of police investigating police. Whether something like that is needed—particularly LECC oversight in terms of deaths in custody—is another question. If we want to improve the experience for Aboriginal families, in my view better resourcing of the Coroners Court—making it something that is adapted so that it can service the needs of Aboriginal families—is far more important. Reducing the delays that happen—three or four years to finish a death in custody matter. There are, I think, over 120 of these mandatory inquests that are outstanding now. We are seeing very large numbers of deaths in custody in the last year or two years. That is going to feed into these delays. So, resourcing is definitely an issue.

The Hon. TREVOR KHAN: What sort of time frame would you say is, in all the circumstances, appropriate?

Mr EVENDEN: A number of the smaller death in custody matters are actually dealt with quite quickly. But a number of the ones that involve extra investigation and going to the Crown Solicitor's Office and getting expert reports are taking, as I said, two or three years, sometimes longer—four years. I think if something came before the court within 18 months or two years, then that is something that is a bearable process for families. The Coroners Court is working to try and finalise a practice note, which will actually do things like mandate an early directions hearing when we have a death in custody and set a timeline for provision of the brief and for setting down the hearing.

If that comes into play and the court is also properly resourced to follow it, then it will actually result in some improvements. But for Aboriginal families—I mean, there are 6,000 reportable deaths every year and 99 or 98 per cent of them are not going to inquest. A large proportion—we do not even know how many—are Aboriginal families and Aboriginal deceased. There is a real need for the court to actually become more culturally competent—to employ Aboriginal staff, to have an Aboriginal liaison and to do those sorts of things which will mean we can lessen this divide which exists. It is no doubt exists between the Aboriginal community and what is happening in terms of deaths in custody and other matters, and it is really a fault of the system that it is there.

Mr DAVID SHOEBRIDGE: What is the ALS's view on independence?

Mr STYLES: We support resourcing in the court, but it is important to say that one of the problems that has been raised by the questioning is the independence of the investigators at the time. We had an inquest that was concluded last year—the death of Jordan Cruickshank—and we have got another one ongoing where the behaviour of investigating police at the scene of the investigation, in their contact with the families, gave those Aboriginal families the view that something was being papered over and something was being covered up.

Mr DAVID SHOEBRIDGE: Were they investigators for the Coroner?

Mr STYLES: They were police critical incident investigators—

Mr DAVID SHOEBRIDGE: Investigating the death?

Mr STYLES: —who were at the scene of the death and dealing with the family at the scene. In Cruickshank, the ranking officer initially told the family that they could not observe the body of the deceased. In the other matter there are ongoing questions as to the suspicion of the family as to police behaviour throughout the conduct of the investigation. Critically the ultimate cause of death in both those matters appears to be fairly clear, but the police investigating police gave rise to very real concerns and, indeed, process trauma for those Aboriginal families.

Mr DAVID SHOEBRIDGE: Both the Chatfield and the Dungay families say in their respective submissions that within 24 hours of the deaths of their boys Corrective Services had come out and made a statement that there were no suspicious circumstances.

Mr STYLES: Yes.

Mr DAVID SHOEBRIDGE: From that moment trust is lost, isn't it?

Mr STYLES: That's right.

The Hon. TREVOR KHAN: I suppose the problem—and it was faced when we looked at the establishment of LECC and what actually they would do. This issue about critical incidents was high on the agenda at the time when the model was being looked at. The problem of resourcing in the sense of—where do you get the talent to undertake the investigation? If you have got a critical incident in Tamworth and you have got a LECC that essentially is established in Sydney, how are you going to get the resources to Tamworth to do that initial critical incident attendance? Obviously Tamworth is a damn sight easier than a lot of other places in the State. I think it is a very valid question or a very valid issue, but the question is: Where do you get the bodies who are going to do this? Equally the problem becomes—where have they come from? The likelihood is that even if you have them employed by LECC they are likely to be police who have just changed from one uniform to another. That actually, in a sense, papers over the problem.

Mr EVENDEN: If I could comment on that, if you have seen the extent of a critical incident investigation you will see how many police are involved. I have been involved in a number of police shootings and the police—when I say that, I mean representing the families. Police mobilise straight away and have critical incident investigators from other police area commands attending. There are many, many police involved. To try and replicate that throughout the State with another body like LECC—I just think it is unrealistic.

Mr DAVID SHOEBRIDGE: But the difference between what is happening in deaths in custody and what is happening in deaths in police operations—

The CHAIR: It is very different now.

Mr DAVID SHOEBRIDGE: —is that in police operations, from the outset, LECC are notified. They are doing the oversight. They are there with the police. They have that ability to call up papers and direct the investigation. When the death happens in a custodial setting, there is nobody doing that. The LECC do not have a role.

Mr THOMAS: I think the difference with the LECC is they have tried to make that balance between who does the on the ground work but having an independent level of oversight of that work—

Mr DAVID SHOEBRIDGE: Do you support the LECC having that role in Corrective Services? That is the key point.

Mr THOMAS: We did not submit on this obviously but I think there is a strong argument to say independent oversight of that process would be quite valuable.

Mr DAVID SHOEBRIDGE: ALS?

Ms WARNER: We think there needs to be independent oversight and there absolutely needs to be independence in those investigations. We query whether LECC is the responsible body to do this or whether it is another agency that does need to be set up specifically.

The CHAIR: Your submission is that it should be the Coroner, isn't it? Shouldn't the Coroner do this?

Ms WARNER: We have also submitted that the Coroner should have some oversight. But also, to the points that have been made about the courts needing more resources, we absolutely agree with this. You have got circumstances where this is not going to the Coroners Court for many years. We are not served with briefs until the week before this goes to the Coroners Court. It put us and the families on the back foot for so many years.

The Hon. TREVOR KHAN: Mr Evenden, do you find that?

Mr EVENDEN: It can vary. In some cases we have had Aboriginal death in custody matters with some coroners falling over themselves to get information to the families quickly. But in other matters you might not get a very large brief until six weeks before the inquest. There are definite improvements in providing information to families that could happen all through the system. Can I just quickly revisit the point of police investigations, we have made a number of recommendations. One of them in relation to deaths in custody specifically is that a couple of years ago, the police devolved their investigation function from the Corrective Services Investigation Unit, which was a number of experienced police investigators—detectives—who were doing that work all the time. They now have a situation where police area commands individually investigate deaths in custody. The product of that someone who has never investigated a death in custody could be the investigating officer in one of these matters.

Mr DAVID SHOEBRIDGE: That is a loss of expertise and—

Mr EVENDEN: That is right. Corrective Services have a lot of paper-based systems. They have information that unless you are an experienced investigator, you just would not know. Bring that investigative function back to the Corrective Services unit and resource that better because it was also poorly resourced because that would actually improve investigations by police. They also need to be culturally appropriate investigations. So having Aboriginal liaison officers involved where there is an Aboriginal death in custody and having these investigators culturally competent. I have seen a number of critical incident matters where non-Aboriginal families have very good relationships with the officer in charge of the police investigation. I have never seen that sort of relationship in the numerous Aboriginal families that I have represented in these sorts of matters.

The CHAIR: Okay. We will have to pause there as we have run over time but for very good reasons. The Committee has resolved that answers to questions taken on notice be returned within 21 days. The secretary will contact you in relation to the questions you have taken on notice and behalf of the Committee, I thank this panel of witnesses for their time, their insights and their expertise.

(The witnesses withdrew.)

(Short adjournment)

YASMINE KHAN, Community Access Worker, First Nations Women's Legal Program, Women's Legal Service NSW, affirmed and examined

GAIL THORNE, Community Access Worker, First Nations Women's Legal Program, Women's Legal Service NSW, affirmed and examined

CAROLYN JONES, Senior Solicitor, Women's Legal Service NSW, affirmed and examined

SAMANTHA LEE, Solicitor, Redford Legal Centre, affirmed and examined

TIM LEACH, Executive Director, Community Legal Centres NSW, affirmed and examined

EMILY HAMILTON, Policy and Advocacy Manager, Community Legal Centres NSW, affirmed and examined

PATRICK O'CALLAGHAN, Principal Solicitor, Western NSW Community Legal Centre Inc and Western Women's Legal Support, before the Committee via videoconference, sworn and examined

MELISSA SHENNAN, Aboriginal Support Worker, Western Women's Legal Support, before the Committee via videoconference, affirmed and examined

The CHAIR: Noting that the organisations have all made written submissions, would any of the witnesses like to make a very brief opening statement?

Mr LEACH: Thank you for the opportunity to give evidence today. We would like to begin by acknowledging we are on Aboriginal lands. Here we are on the lands of the Gadigal people of the Eora nation and we pay our respects to Elders past and present. We would like to acknowledge and honour Aboriginal and Torres Strait Islander people who have died in custody and acknowledge their families' tireless fight for justice. We recognise that Aboriginal and Torres Strait Islander people know where the problems lie with our justice system. They know the causes and, critically, they know the solutions. Community Legal Centres NSW is the peak body for 40 community legal centres across the State, including the centres represented here today.

Community Legal Centres are independent, non-government, non-profit organisations that provide free legal assistance to people experiencing financial hardship, social disadvantage or discrimination to over 55,000 people in New South Wales just last year. Our membership includes specialist services which provide expert advice on specific legal issues or to specific communities, for example Women's Legal Service. It also includes general centres like Redfern Legal Centre and Western NSW Community Legal Centre, which service geographic communities. We are advised on matters relating to First Nations justice by our membership, our Aboriginal advisory group and also by the Aboriginal Legal Service and its national peak.

Briefly, our submission focuses on preventive and diversionary responses that would reduce the criminalisation and over-incarceration of Aboriginal and Torres Strait Islander people, including investing in community-led place-based reinvestment initiatives, reducing targeted and discriminatory policing practices like the Suspect Target Management Plan, establishing the Walama Court and expanding the drug court, breaking the care criminalisation cycle and implementing all the recommendations of the Family is Culture report. In our view, these and other preventive responses, like raising the age of criminal responsibility to at least 14 and bail reform, must the prioritised. Reducing contact with the criminal justice system and the number of people in prisons will help reduce the number of people who die in custody, and the need for coronial inquests. We commend the Committee's commitment to considering these important issues. We also note that these issues are not new. We call on governments to take seriously and implement the recommendations that have already been made in relation to reducing the over-incarceration of Aboriginal and Torres Strait Islander people and ending deaths in custody. We hope that this Committee will make the same call. Thank you.

Ms THORNE: Firstly, I would like to acknowledge the traditional custodians of the land on which we meet today, the Gadigal people of the Eora nation. I would also acknowledge all the Elders past and present, and any Aboriginal and non-Aboriginal people here today. My name is Gail Thorne. I am a proud Aboriginal woman from the Kamilaroi and Wiradjuri tribe. I am a community access officer with First Nations Women's Legal Program with Women's Legal Service NSW. First Nations Women's Legal Program was developed in 1995 and was formerly known as Indigenous Women's Legal Program. The aim of First Nations Women's Legal Program is to provide a culturally safe service.

Part of my role is supporting First Nations women who are experiencing domestic and family violence and sexual assault, and who are navigating their way through the legal system, especially in family law. We are

here today to talk about the inquiry into the high level of First Nations people in custody and the review of deaths in custody. In 1991, the final report was published from the Royal Commission into Aboriginal Deaths in Custody. There were 339 recommendations and almost 30 years later, key recommendations are still not fully implemented. Yet here we are, and there have been over 400 Aboriginal deaths in custody. Shame on Australia. Out of those 339 recommendations, only five of them refer to First Nations women. And yet it is getting worse for our women. Nothing has changed. Systemic racism is a huge part of the problem. We are sick of all these inquiries. We need to see change, we need to see action and we need to see accountability.

Ms KHAN: My name is Yasmine Khan and I am a proud Aboriginal Muslim woman from the Bundjalung nation of the far North Coast of New South Wales. I would also like to pay my respects to the traditional people of this land, the Gadigal people of the Eora nation. I pay my respects to Elders past, present and future. I am also the Aboriginal community access worker with the First Nations Women's Legal Program at Women's Legal Service. First Nations women are the fastest growing prison population in New South Wales. One in three women in prison are Aboriginal, and the majority of them are mothers. We urgently need culturally safer alternatives led by our First Nations people rather than direct incarcerations. The Government continues to invest into prisons and policing instead of community-based alternatives. They put $700 million into the Clarence Correctional Centre in Grafton and another $38.8 million into the Dillwynia Correctional Centre. Our people have been surviving since the invasion or colonisation of our country. How can our people heal when they have been always locked up behind bars? The justice system is broken, and our people are continually criminalised. Thank you.

Ms JONES: Thank you for the invitation to speak today. I acknowledge and pay my respects to the traditional owners of the lands on which I was born, the Wiradjuri people, and the lands where I grew up, the Kamilaroi people, and the peoples of the many lands on which I have studied, worked and lived. I also acknowledge the guidance of my First Nations clients and colleagues, particularly Gail and Yasmine, and Dixie Link-Gordon Gordon, who is here supporting us today. I am constantly inspired by the bravery, dignity and resilience I witness every day as they push back against the impact of harmful history, laws and policies. I have worked at Women's Legal Service NSW for over 10 years. I primarily work with criminalised and incarcerated women. I have spoken with hundreds of First Nations women in custody and under supervision in the community. I am also a convener of Community Legal Centres NSW's Prisoners' Rights Working Group.

Our work with criminalised women at Women's Legal Service New South Wales is largely focused on safety, victim support and maintaining relationships with children. Our approach is culturally safe, gendered, trauma-informed, sexual, domestic and family violence informed and holistic. Sexual, domestic and family violence are the primary reasons that First Nations women come into contact with police and prisons. They are often misidentified as an aggressor, when they are actually the person most in need of protection. They rarely feel safe or supported to report the true extent of the violence that they suffer. Prison is not the answer. The impact of ongoing injustice is enormous, with intergenerational consequences. I understand that the Committee has a strong interest in oversight mechanisms, and we support the call for First Nations-led independent investigative powers, but we also call for a genuine commitment to keeping First Nations women out of custody. First Nations women have been an oversight, and largely invisible and silenced. We need to create space for First Nations women, including women with lived experience of criminalisation, to lead radical change and not simply reform a broken system. Thank you.

Ms LEE: I would also like to acknowledge the Gadigal people of the Eora nation and pay my respects to Elders past, present and emerging. I thank the Committee for having Redfern Legal Centre present as a witness. The current New South Wales police oversight model has huge deficiencies. It does not provide justice for First Nations people. There is an important connection between the exercise of police powers and the rate of incarceration of First Nations people. It is therefore critical that the inquiry considers what may limit the improper exercise of police powers and improve police accountability.

There are major flaws with the current system. Firstly, the oversight system is chronically under resourced while police numbers are to be increased, with an additional 1,500 offices, with an investment of more than $583 million over four years. Yet the Law Enforcement Conduct Commission is facing $6 million in funding cuts. Last year, the LECC assessed over 2,500 complaints against police, but was only able to properly investigate two per cent of those matters. Secondly, because police investigate most complaints it is not an independent complaints system. What we have is a system where police are their own judge and jury, determining their own professional culpability, with the majority of complaints assessed and investigated by police.

Since its inception in 2010, Redfern Legal Centre Police Accountability Practice has lodged hundreds of complaints on behalf of clients, including First Nations people. The matters have ranged from complaints about being king hit in custody to being stripsearched on the street, and just plain daily police harassment. Out of the hundreds of complaints we have lodged, only a very small percentage are sustained by New South Wales police. But this is not to say that these complaints did not have merit, because some go on to lodge matters in the civil courts and get awarded funds in settlement. This contradicts the internal police investigations. In fact, we now know through documents released by this very Parliament that nearly $19 million of taxpayers' money has been paid out to New South Wales police in hundreds of civil tort claims.

Thirdly, the LECC lacks the necessary tools and powers to detect and deter misconduct. Its investigative powers have been restricted to the most serious misconduct, meaning that routine and pervasive conduct impacting on First Nations communities lacks effective oversight. The LECC is unable to make its own findings of misconduct, and has no power to compel the police to change their decision in respect of a misconduct matter. Given that it cannot compel the police to make findings of misconduct and cannot make its own decisions about what disciplinary action is appropriate, the LECC appears hesitant to exercise its powers where it considers the police will not be responsive to its recommendations. For these reasons, the police complaints system as it currently stands cannot deliver real change and recourse for First Nations people. Thank you.

Ms SHENNAN: We would like to acknowledge the traditional lands that this hearing is being held upon today, those of the Eora nation, and the lands we join you from today, those of the Wiradjuri Nation. We would like to acknowledge Elders past, present and emerging. May our ancestors' strength and wisdom fight our truth. We would like to thank the Committee for inviting us today. We hope to share our personal insights and expertise in addressing the confronting questions raised by the inquiry. Why are Indigenous people being incarcerated at such high rates? Why are Indigenous people dying in custody? And why, despite recommendations from numerous inquiries, are Indigenous peoples powerless in helping to solve issues which affect our future? In our submission we sought to highlight a few of the major contributing issues, issues that have been forcibly tethered to Indigenous people for generations, issues that have become hereditary and inescapable, issues that have fed our inherently racist justice system for centuries, and issues that have manifested in unjust governments and biased policies.

Since the Royal Commission into Aboriginal Deaths in Custody in 1991, there have been over 434 Indigenous deaths in custody. The rate of incarceration of Indigenous people has almost [audio malfunction]. Indigenous people are 15 times more likely to be incarcerated and almost 18 times more likely to die in custody. Those numbers do not happen by mistake. Those numbers are the result of continued government failing, a justice system that punishes us for its own mistakes and oversights, never-ending cycles of insincere apologies, empty promises of equality, displacement, discrimination, child removal, incarceration and poverty. My voice shakes because these deaths and these numbers in front of you have names, families and communities. Their families stood silent at premature funerals and went home with pained hearts. Your systems have failed us and continue to fail us. What is the acceptable number? How many more will die? How many more of our kids won't come home? How many more inquiries will we need to attend to give the answers you already have? These are our fathers. These are our mothers. These are our children. These are our communities. It has been 29 years since the royal commission. It is about time the Government heeds our voices and gives us equal justice.

The Hon. PENNY SHARPE: I might actually go to Ms Shennan and Mr O'Callaghan. I particularly wanted to ask you about Yetta Dhinnakkal and its impact. Your submission mentions it. I am interested in your insight into the impact that it had and the necessity for it to be reopened. Your submission suggests a slightly different approach to where it had been. Do you have comments about that?

Mr O'CALLAGHAN: Yes, sure. Since about 2008 we have conducted outreaches to that prison on a monthly basis. I myself have been the one who has conducted those outreaches. That came about because there was a lack of access to any legal assistance for prisoners in that correctional centre. Just to give you some reference point, Dubbo is 400-odd kilometres north-west of Sydney and Yetta Dhinnakkal is about 330 kilometres further north-west of us. It is in a very remote part of New South Wales. It opened in 2000. It was set up primarily partly as a response to the Royal Commission into Aboriginal Deaths in Custody and recommendations that were made within that report. It was conducted very much on a basis of—within the prison system itself, it was almost a diversionary program, for want of a better phrase, where young male Aboriginal inmates were provided the opportunity to go to that correctional centre. It was a minimum security prison and very much had at the forefront of its focus and programs a diversionary and rehabilitative restorative practice.

As part of it, it incorporated Aboriginal staff within the centre itself and, where they were able to do so, those from one country to support the inmates in that prison. They did often usually have three or four older inmates, who might have been in their early forties, to act in mentor-type roles for the younger inmates so that they had a responsibility and accountability to them as well as directly to the corrective staff. They found that to be a very effective mechanism within the system itself—that there were these layers of responsibility, whether they were formally or informally charged with doing these roles. These older inmates served a very helpful and positive function being there as support for the younger inmates. When I was out there, there were frequently and invariably programs running for the boys—I call them boys but young men—to provide them with education and upskilling. For example, they would provide construction courses and teach skills around buildings, creating building structures and concreting. They would get their white ticket licenses so that they could drive heavy machinery, including forklifts, graders and those types of vehicles.

They also did conservation and land management courses that gave them skills to work within Parks and Wildlife. Many of these guys ended up in jobs, whether it was a local council or through private employment in properties in regional and remote New South Wales to do construction-type work. Being able to drive forklifts and those heavy machinery type vehicles gave them jobs in these spaces. I know of some of them who, through connections they had at Parks and Wildlife, were able to get jobs working in that field as well. They were also very much engaged in cultural practices. A lot of these young men had been disconnected and displaced from their culture. A lot of them come from out this way and were able to be housed in a correctional facility on their country, which facilitated and helped them learn about what was going on. They engaged very much in artwork, whether that was painting or making didgeridoos and being given stories and lore and knowledge around what they were doing.

They often expressed to me very deep connections to this understanding and this awareness that they just had not been exposed to previously for various reasons in their personal lives and that they found really deep and profound. Of course, the amazing part about it was just the talent that they had in doing stuff. It was not just a fluke. It was not just magic. It was that they had discovered this part of themselves that let them express it through the work and the art they produced for themselves and for their family and for people further afield. The other obviously significant benefit of it was that a lot of them were close to family so, whether it was their partner with young children or their direct family and extended family, they were able to travel to the prison on visiting days and were able to see them and stay connected to them. Upon the closure of the correctional centre, they have been—

The Hon. PENNY SHARPE: Sorry, it was shut in July this year, wasn't it?

Mr O'CALLAGHAN: Yes, sorry. It closed in July this year. They have since, as I understand it, been relocated to various prisons of different nature and varieties, including Wellington Correctional Centre, which is a maximum security prison hub. Obviously the significant impact of that is that they lose the access and opportunity to try and take all these things that I have just discussed. A number of the men in these facilities also expressed directly to me just how safe they felt there, physically safe and culturally much safer in a prison such as this, as well as obviously gaining all of those skills and opportunities that I have talked about. A lot of them were in for very low-level offences. A lot of them were in for driving offences, which I think is an issue in itself in terms of criminalising a lot of that behaviour. It might have primarily been that they get to a level where they have been incarcerated for driving whilst disqualified. Never had any offences of a violent nature or anything like and they were ending up in this facility—now these young men are potentially being housed in maximum security correctional centres for these types of offences. It is just wholly inappropriate for young men with these types of offences and with their backgrounds to be then housed in these large-scale maximum prisons.

These correctional centres played an extremely important part in their rehabilitation, in their education and in their gaining knowledge around different skills and opportunities that then greatly improved their chances to engage upon being released. Part of the service that we were providing was helping them to address issues around civil and family law so that they could have control and manage any debt issues that they might have, as well as getting rid of habitual offender declarations that they had sitting on there. We have dealt with young guys who were 20 years old and disqualified until they were 45. It was never going to work as a deterrent for them to not thrive again. They did not have that option, as often as not, in the communities that they lived in.

The Hon. PENNY SHARPE: Thank you. Can I just stop you there, Mr O'Callaghan, because I am just conscious that we have a lot of people. It is safe to say that at this point the type of service needed and some of that wraparound support around transition is just not available in the current environment, let alone all of the other therapeutic basis.

Mr O'CALLAGHAN: That is correct.

The Hon. PENNY SHARPE: I will come back to you about that. While we have the Women's Legal Service here, we have not had very much of a focus around women prisoners. As your very good submissions suggest, First Nations women are the fastest-growing prison population. I am particularly interested in two things, if Ms Thorne, Ms Khan, Ms Jones or anyone else wants to jump in. When we have seen a reduction in the way in which jails have been managed during COVID, why have we not seen that for Aboriginal women? And as a separate issue, I particularly want you to talk to me about women being seen as aggressors and being prosecuted when they are actually victims. I do not know who wants to take either one of those.

Ms JONES: I will start by looking at the issue of why we have not seen a reduction in First Nations women in custody during the pandemic. I think that is because there is no addressing of the issues that are leading to First Nations women being incarcerated at any point. We still have extreme levels of homelessness. It is worse during the pandemic. We hear from First Nations women and all of our women clients that it was actually harder to access refuges and other crisis housing during the peak of the pandemic. They often did not feel safe to go into those spaces. Domestic and family violence is at the heart of everything that we see and all of the injustice in terms of pathways to prison. That does not change.

First Nations women in my experience—and Ms Thorne and Ms Khan may want to comment on this—are not generally comfortable to report their experiences to police even if there is an AVO in place, which is not often the case for a lot of our First Nations clients. It is very hard for them to get AVOs. There can be AVOs in place against everybody in a community but it may not be actually responding to a domestic and family violence incident that is actually at the heart of the harm for that particular woman. It is very unlikely that they will report a breach and probably fair to say that it is quite unlikely that action will be taken on that breach. Did either of you want to comment on any of the other things, in terms of what is keeping women in prison?

The Hon. PENNY SHARPE: I am particularly concerned about the homelessness issue. I know that the New South Wales Government put a lot of money into actually housing people and had some very good results that have been reported to us. This is the first that we are hearing that Aboriginal women were unable to do that, which I assume then completely leads into the ability to get bail.

Mr DAVID SHOEBRIDGE: And keep the kids.

The Hon. PENNY SHARPE: And there are issues about reporting, which is also about losing your kids.

Ms JONES: Absolutely. Absolutely, but I think it is also the definition of homelessness. When we look at it, we know that so many women are couch-surfing or entering dangerous environments because they need somewhere to stay and those households are not safe for them. They may not get picked up in the statistics of what is homelessness.

The Hon. PENNY SHARPE: They are just not captured.

Ms JONES: They are not on the radar. Certainly for women cycling in and out of prison, the information that I receive from clients is that they are lying about bail addresses or parole addresses because they are desperate to get out of prison. They might say there is somewhere safe to go and someone might pick up the phone and say, "Yes, it's safe for them to come here," but it is not actually safe to go there and they do not actually go there. They might go to a house and then experience a sexual assault or domestic violence incident pretty quickly on arriving. They might then go to another location to keep themselves safe and then they breach bail or parole conditions. It is just a constant cycle of insecure housing for First Nations women. I have had a recent experience with a client who finally has her first home and she has not reoffended for 18 months. That is the difference. She has a house in her own name, she is not dependent on a male person to look out for her, she can control who comes in and out of the house and she is not reoffending. She has pride in where she is living, she has opportunities to engage with the local community and other programs and it has broken the cycle for her. They are not stories that we get to share very often because we do not hear them very often.

Mr DAVID SHOEBRIDGE: Ms Thorne, Ms Khan and Ms Jones, is part of why there is an under-reporting of Aboriginal women's homelessness because there is a real concern that if you report to a government department that you do not have a home—particularly if you have kids—then the response will be instead of giving you a home that you will lose your kids? Is that a reality?

Ms THORNE: Yes, it is. Absolutely. Aboriginal women are not going to say that they are homeless and do not have anywhere to live if they have kids because they are scared of losing their kids. And that is the

reality: they do. If their kids are not in their care then they cannot apply for appropriate housing to get their kids back, because you have to have your kids with you at the time you apply for a three- or four-bedroom house. You are only entitled to a one-bedroom if you do not have the kids.

Mr DAVID SHOEBRIDGE: Ms Khan, is this part of the dynamic for the women you have worked with—the fact that they are sometimes punished for being homeless by having their kids taken, and then obviously that the next step in that cycle of state violence against a family is that they can find themselves imprisoned?

Ms KHAN: That is correct. I will add to what Ms Thorne has said. We work with women who have to face that in their daily lives. They would rather be homeless because they do not want to report to agencies and lose their families. That is reality for most First Nations women.

Mr DAVID SHOEBRIDGE: We keep hearing about the need for Aboriginal-led organisations and Aboriginal-controlled organisations. In the housing space, is part of the answer if Aboriginal women can go to an Aboriginal-led organisation for their housing concerns and not go to the Department of Communities and Justice, what used to be FACS or DOCS?

Ms THORNE: Absolutely. Women would absolutely go to Aboriginal organisations if it meant getting a house. They would trust them more than they trust non-Aboriginal services. I worked with a client who had four young children. She was living in a property, the lease was up and she had to get out. FACS said to her, "Let your mum take the kids while you go and get a house". But little did she know that she could not apply for a three- or four-bedroom house because she did not have the kids in her care. When they went to the mum, she had historical criminal charges and so they removed them from the mum. The kids were separated in four different foster homes and the mum ended up in jail. If she had had appropriate services to help her with appropriate housing—an Aboriginal service—she would probably still have her kids with her. She would not be in jail.

The Hon. PENNY SHARPE: I want to go to the issue about women being misidentified as aggressors rather than victims. There is an emerging body of evidence around this that is pretty stark, if you could just speak to us about that.

Ms JONES: Thank you, yes. This is an issue that Women's Legal Service has focused on for decades. We are aware now—and it is not just our service but the Institute of Criminology and other academics—that at least half of women who are either defendants to AVOs or have charges in relation to domestic incidents are actually the primary victim. It comes down to policing practices where basically it is incident-based rather than being context-based. When police arrive on scene, they are looking at an incident. They are looking at what has happened, who appears to have an injury and who appears to be distressed by what has happened. They respond to that rather than looking at the context: that there might have been previous AVOs and lots of other evidence of historical violence and fear on behalf of the female person in the household.

That is certainly the most common story that we hear from the women that we work with in prison. They have often been in a circumstance where there has been a domestic violence incident and police have been called. The male person in the household has manipulated the evidence, has lied about what has happened and has sometimes injured themselves and told police that the woman did it. Sometimes we know that the way that women fight back is to pick up a weapon like a knife or something a little bit more heavy-handed that they can use because they do not physically have the capacity to dominate a male person that has been scaring them, intimidating them or threatening their children or animals. The charges that result from that are often more serious, because the system is not set up to recognise the way that women use violence as a way to protect themselves and their children or to look at that context about what has actually happened over a long period of time for that particular woman.

I think the misidentification is something that people are really starting to understand, but I do not know that it is translating into better opportunities for women to be able to give that information to first responders. Part of the problem is that you are dealing with male police, male lawyers, male judges and male psychs, so women do not actually have the opportunity to disclose the context of the violence they have experienced, particularly with sexual violence. The amount of sexual violence that we hear about in the immediate 24- to 48-hour period before an arrest for a woman, that is not disclosed to anyone and that is not taken into account in the charging or in the sentencing.

The Hon. TREVOR KHAN: Sorry, could you say that again?

Ms JONES: It is very common with the women that we work with that within the 24- to 48-hour period before they might be arrested for an offence, they will have been sexually assaulted. They will not have had an opportunity to disclose that sexual violence to anyone. They are dealing with a series of young male duty lawyers

who have busy dockets. They have five minutes with them and they cannot actually connect with them. We are talking about Aboriginal women who are trying to disclose a rape to a 25-year-old white male lawyer, then there is the cop who was first on scene, or there may have been two male officers, and then you are dealing with judges who are also male. No-one talks about that.

When they get into custody, they might have been recently sexually assaulted, but there is no medical response to that and there is no trauma counselling in custody as a general rule. There are opportunities for some counselling, but it is inconsistent, it is in no way satisfactory and it is certainly not culturally safe. That is an ongoing issue. Women cannot disclose the full extent of the violence they experience in a criminal context. That is not taken into account in terms of whether they should be charged and certainly in terms of the sentencing and the appropriate response. None of it is therapeutic healing or reparative and it is just constant.

The CHAIR: Are these assaults coming from the supposed victims in these interactions?

Ms JONES: Not necessarily. I think that is part of it. I have clients who will say to me, "I was drugged and raped. I don't even know how many people were involved. Then I got on the grog and when I was driving I got picked up for drink driving. I didn't tell anyone what happened, I was angry and I probably had a go at the cops while I was picked up." There is just so much injustice. So much of this comes out constantly. That obviously triggers past trauma and women really feel like—I mean, where is the justice? You go to jail for a drink-driving offence, and obviously we do not condone drink driving, but if you have been sexually assaulted and you do not feel like you can even report it, or even expect that there will be an appropriate or proportionate response, where is the justice? Why would you even bother? You just give up and you just cycle in and out of prison because it is too hard and you do not believe that anyone really cares.

Mr DAVID SHOEBRIDGE: Ms Tongs from Winnunga, the Aboriginal health service that is now providing some of that primary care in the ACT prison, spoke about it as peeling back the onion of trauma.

Ms JONES: Yes.

Mr DAVID SHOEBRIDGE: Should that be almost like a compulsory part of particularly our regional women's engagement in the criminal justice system? There needs to be that space, that time apart and that expert Aboriginal-led health care to deal with those layers of trauma?

Ms JONES: Absolutely, yes.

Ms THORNE: Yes, definitely. That is what we need. We need Aboriginal people to support Aboriginal people. We need organisations that are Aboriginal led that Aboriginal people can turn to to get support, to help to get through the trauma and to peel back the onion.

Ms JONES: I was going to say, I think someone earlier today—it may have been in the first session—talked about an initiative in the Northern Territory. There is a new diversionary program that holds life skills camps that are specifically for First Nations women in the Northern Territory in Alice Springs. The goal of that is what they call "educaring". There is a program in which they teach people education and training in life skills so that they can get employment after their exit from that system, but they are also looking at healing frameworks that combine traditional healing and western therapeutic care, because they have identified that for a lot of the First Nations women in Alice, the violence that they may have perpetrated is completely connected to their trauma history. They help women to actually understand why they are reacting with anger, or why they have those responses and the emotions that they have, and then they provide the proper healing in a culturally safe healing program. I think that is an amazing thing that they have implemented. We have not seen the results. It is very new, it only opened in the last couple of weeks, but that is the sort of thing that we absolutely need here. We need a diversion from custody into a culturally safe healing pathway.

The Hon. PENNY SHARPE: I have one more question. In your submission you talk about this. The New South Wales Coroner has commented in relation to needing to see the broader context in which women are presenting or coming into contact with police, but I was particularly interested in the Domestic Violence Death Review Team, which has actually recommended specific action from the NSW Police Force around how it is capturing data on domestic violence and, again, looking for more holistic analysis and understanding before taking a woman into custody. Do you know the status of those recommendations? Where are they up to?

Ms JONES: No, I am sorry, but we can certainly take that on notice.

The Hon. PENNY SHARPE: That would be great.

The Hon. TREVOR KHAN: Can I just say that the evidence that you are giving is highly consistent, for what it is worth, with evidence that Mr David Shoebridge and I received in a previous inquiry into prisons, with the evidence being given by prison officers and Justice Health. Regrettably, your evidence is confirmed by other experiences. So, accepting that it is supported evidence, the question is: how do you break that cycle? I have heard about the setting up of Aboriginal organisations, but if we talk on the individual case of a woman who is arrested after a violent incident—and I accept your description of the use of a knife, for instance, in circumstances where you are getting beaten up—what needs to change to allow a better ventilation of the circumstances for that woman?

Ms JONES: There is probably a lot. In the first instance, it would be great to have a criminal law practice that is culturally safe and gendered. There is a service that has started in Victoria that is having amazing results and that was set up by a couple of feminist legal practitioners down there. Cultural safety is a big thing. I think the answer requires us to set up opportunities—I do not know whether it is a First Nations justice advisory group or council—where we talk to First Nations women around the whole State about what works for their nations and in their country in terms of what justice would look like and how First Nations women can actually be supported to disclose these incredibly sensitive, private and traumatic experiences and expect somebody to do something with that information.

The Hon. TREVOR KHAN: Having worked in north-western New South Wales, getting young, competent lawyers is difficult. I will not say it is impossible, but it is difficult. Getting them to move to a centre like Tamworth is difficult enough.

Ms JONES: I accept that.

The Hon. TREVOR KHAN: Getting them to move to smaller centres is even harder, irrespective of gender.

Ms JONES: No, I accept that. Absolutely. We are a statewide service. We do the best that we can to reach women in all the far-flung parts of the State. We have a great network of community legal centres and colleagues, like Patrick O'Callaghan and Melissa Shennan in Dubbo, who are well placed to do that work. Part of it is thinking about that. Okay, if we cannot get the right professional people in every part of the State, how else do we support them? Do we train up and skill First Nations women in those communities to be first responders? We are doing that within our service. We are skilling up our First Nations staff to be incredibly competent in complex legal environments without having to be a lawyer, because they bring an expertise that the lawyers certainly do not have. They create a space for First Nations women to be able to talk safely about these issues. Sometimes it is actually really only appropriate to speak to other First Nations women about it in the first instance. You might then bring in other professionals, but I think it is about how we work together. We need to look to other First Nations women to guide us on what that would look like.

The CHAIR: Apart from those things you have identified, what is really profoundly concerning to me is not just how vast the representation of First Nations women in the custodial system is, but also how over-represented they are. They are more over-represented than men in the justice system. Apart from those factors that you have identified about the misidentification of who the offender is and the context in which women resort to violence, what other factors are present? This can go to other people who are present as well. What other factors are driving that really gross over-representation of First Nations women?

The Hon. TREVOR KHAN: Putting it in the context that the increase of women in corrective services is increasing at a far greater rate than the male population.

The CHAIR: Absolutely. This is a much greater crisis.

Ms THORNE: From my experience, it is hard for women to get support these days for some reason. I am not sure why, but the clients I come across end up in the system because they are not getting the right support at the right time. They are getting their kids removed, then they have to jump through this hoop and then they have to do that. When they have done that, then it is like they take one step forward and 10 steps back. To me, it seems like they are getting pulled into that system. They are getting known by the police for hanging around this person or for being on drugs here. That is just me. I think there are not enough services to support First Nations people. I think kids are getting removed too easily. There is not enough family support. There is not enough working with the whole family instead of separating them. I think there needs to be more support services and that is how women are ending up more on drugs or in the criminal system.

The CHAIR: Would any other witnesses like to add to the issue?

Ms LEE: I think it is no different to male numbers in prison. It is over-policing of First Nations people for various reasons and if we tackle trying to ensure that police meet legal thresholds before they stop and search or arrest as a last resort then these certainly will have an impact on First Nations women.

The Hon. TREVOR KHAN: But the problem is the rate of incarceration of Aboriginal women is increasing at a frightening rate—at a rate far higher than Aboriginal men. So it is not simply that police are over-policing, because if that was the case I would have thought you would expect that there would be a similar rate of increase. There is an additional factor there that seems to be driving this outcome.

The CHAIR: Is it because women have greater vulnerabilities in that situation than men? I guess because they more often than not have primary responsibility for children whereas men tend not to. Is that one of the key drivers?

Ms LEE: Well their vulnerabilities are not policing them, it is the policing that is actually getting them into custody. If I go back to domestic violence and what Ms Sharpe was talking about, we have complainants that contact our service. They have rung police because of a domestic violence dispute. They have called 000. Police have come to their place of residence. The woman obviously is afraid at what the police are going to do. The police then go speak to the husband and they form the view that they are going to take the husbands story and put that ahead of the woman's story. What they do is they end up arresting the person who has called 000 and then they place them into custody.

If we go back to a point I made that there is $90 million going out in civil suits against New South Wales police, one of those suits is for false imprisonment and that false imprisonment involves women being taken into custody for the wrong reason. That is one example of a wrong reason. If police were to look at the reasons why they are having civil suits, they will identify systemic problems with their policing procedures, and one of the problems is that they are quick to judge, and usually they are very quick to judge First Nations people and women.

The CHAIR: Would any other witnesses like to address what is driving this crisis of overrepresentation of First Nations women in custody?

Mr LEACH: No. We would generally defer to those of our centres that are working in this space, particularly Women's Legal Service and Wirringa Baiya Aboriginal Women's Legal Centre. These are complex problems and we are so lucky that we can look to community-based organisations that are working with these communities for solutions. No doubt over the course of your hearing of evidence you will hear from a number of those. We have heard about the importance of Aboriginal community-controlled organisations and the knowledge that only those organisations will have, and Aboriginal-led programs. It is really critical. So, complex problems but that is where to go to find the solutions.

The Hon. ROD ROBERTS: I do not direct my question to any one particular member of the panel because I do not know who has the expertise on this, so I am open to anyone able to answer it. Looking at BOCSAR statistics for incarceration of Indigenous people both male and female, I find a glaring anomaly and I am wondering if you can help address it: 6.6 per cent of the female population that is incarcerated are in there for fraud offences, yet in the male Indigenous population it is only 1.1 per cent. We have got a huge disparity between males and females, and to the defence of the Police Force, fraud offences are not a "stop, search and detain on the street" offence and cannot be over-policed. So what is behind the fraud issues? It is specified here as "obtain benefit by deception". It is a big jump between the male and females. Can anybody guide us as to what the cause is?

Ms LEE: I am not familiar with the study but I used to work in criminal lawyer as a lawyer and a big fraud offence is Centrelink fraud. The fact is that there is just not enough money coming into families and this puts a lot of strain, particularly, on women.

Mr DAVID SHOEBRIDGE: Women trying to feed and house their families and going to jail for it.

Ms THORNE: Yes.

Ms LEE: Exactly.

The Hon. ROD ROBERTS: That could be one. Could be.

Mr O'CALLAGHAN: Can I just say that we would reiterate that concern. We have seen similar experiences around that Centrelink issue and it is often related to the need to feed the family versus the income you are getting.

Ms JONES: Can I also add that we see women being pressured by male partners to commit fraud as well and that is part of the domestic violence and financial control that they are experiencing.

Mr DAVID SHOEBRIDGE: Of all the evidence you hear, you hear this evidence repeatedly. The fact that we have—Rod did you say 16 per cent of the women's prison population?

The Hon. ROD ROBERTS: No. 6.6 per cent for fraud versus males at 1.1 per cent.

Mr DAVID SHOEBRIDGE: They are in there at six times the rate of men and from the best evidence we have they are going to jail because they are trying to feed and house their family. It shows the interaction between poverty, the ongoing effects of colonialism and the criminal justice system—going to jail because you are trying to feed and house your family.

Mr LEACH: I think that is a very clear link. That is the criminalisation of poverty—one example thereof.

The Hon. PENNY SHARPE: Ms Lee has gone to the point of over-policing. Around the issues with Centrelink debt, are you aware if there is any difference in terms of the way that First Nations women experience having the debt collectors come from Centrelink? If you do not have anything, it is okay. I am just wondering if you, from your experience, has seen a difference in the way that is dealt with.

Ms LEE: That is a good question. Probably our credit and debt practice would be better placed to answer it. I am afraid I cannot provide much insight.

The Hon. PENNY SHARPE: Could you take it on notice? If you do not have anything, that is fine, but I would be very interested in that. Mr O'Callaghan and Ms Shennan, we are grappling with some very big issues that are very difficult but I was drawn to your recommendation around changes to bail laws that allow people to list more than one house as where they might be living. That seems to me to be something that is actually quite straightforward. I am a non-lawyer on this Committee, so I do not know whether that is actually possible. Can you tell us about your experience with that?

Mr O'CALLAGHAN: We are not a criminal law practice either. Our feedback from people within the community we have spoken to around this—and my understanding is from a previous life in crime—is when a person is given bail it is to a specific address. So in the context of the issues that we are dealing with here and in particular First Nations people it can be problematic—especially in regional and remote areas—where the person often might be given bail of a condition of which is not to reside within the community that they do live in and so they have to live somewhere else.

A benefit, if that is a requirement, would be if they did have obviously different options around where they could live—and part of it obviously would be keeping the police informed as to which address they are going to be at—it allows them to have different options to suit their needs so that, again, it minimises or reduces the risk of breaching the bail because they are either not at the address and they are living somewhere else and they have not, in the meantime, gone back to court to seek a variation of that bail condition. It ultimately results in them back in the criminal system for a breach of the bail and potentially incarcerated on remand because then they were bail refused. It is an example of situations that we have seen out this way, especially when you have got distances involved between towns and communities, that we see as a potential option for people within the community we have spoken to as a way of helping to minimise and reduce the risk of breaching bail conditions.

Mr DAVID SHOEBRIDGE: We talk about low-hanging fruit and doing rather than recommending. If the Committee was to take one thing away from this session that you could do before Parliament concludes it is to allow First Nations defendants to give more than one bail address. Do you all agree that would be a major immediate positive impact?

Ms JONES: Yes. I think it also saves money, in terms of having to return to court for bail variations. I have a lot of clients who have to seek a bail variation every other week because they get kicked out of the house they are in and then their Aboriginal Legal Service or Legal Aid NSW lawyers take it back just simply to get a bail variation.

Mr DAVID SHOEBRIDGE: In fact, in the youth sector one of the major reasons why we are seeing many more kids not being put into juvenile detention is there is an informal way of approaching the registrar to get a change of address for bail without actually having to have a full hearing. Would you support that kind of administrative option for a change of address?

Ms JONES: Yes, but I think it would be great to have at least a couple of addresses, particularly for people in rural and regional areas. Quite commonly we see people just moving between towns that are not that far apart, but then they get there and they may not have a licence, they cannot get back home that night and then they get picked up on a breach.

The Hon. TREVOR KHAN: There is actually no reason now under the Bail Act 2013 that you cannot have more than one. The problem is whether if the lawyer is acting on the instructions they actually ask for it and have an explanation for it.

Ms JONES: Okay.

The Hon. TREVOR KHAN: That can be done, whereas what Mr Shoebridge suggests is quite right: You do not actually have to go back to court, but the registrar is empowered to vary the condition with regards to an address. It would make it a damn sight easier, I think—

Ms JONES: Absolutely.

Mr DAVID SHOEBRIDGE: I just looked up—the law may be silent on it, but I have just looked up the conduct requirements on the Legal Aid NSW website. The second dot point states, "live at a specific address". It is the culture, if not the law.

The Hon. TREVOR KHAN: No, you can have more than one.

The CHAIR: It sounds like the practice.

The Hon. PENNY SHARPE: Yes, but I am very attracted—given the evidence that we have had around women particularly, it actually would allow them to hedge their bets in some way around that, particularly if they are having to say they are going to live with someone with whom they know they are not safe. They can kind of deal with that but actually have other options. I think that that has a lot of protective factors that have not been considered before.

Mr DAVID SHOEBRIDGE: Implicit in a number of the submissions that this panel has brought before us is this breakdown of trust between First Nations peoples, police and the criminal justice system more broadly.

The Hon. TREVOR KHAN: Breakdown?

Mr DAVID SHOEBRIDGE: "Breakdown" is a polite description, but a non-relationship in some cases, or a very adverse relationship. One of the repeated themes that particularly comes from the families of people who have died in custody or been killed in custody is independent investigations of the circumstances of a death in custody. Do any of the witnesses want to address that? We have had different models talked about, but do any of you want to address the need for both the perception and the reality of an independent investigation when there is a death in custody?

Ms THORNE: I think it needs to happen. There needs to be an external body or someone—

The CHAIR: Could I ask that you please speak into the microphone so we could hear you better?

Ms THORNE: Sorry. Yes, I think it needs to be an external body investigating. I do not think it should be police investigating police and Corrective Services investigating the Corrective Services. That itself puts us off track straight away; we do not have any confidence in the system because of that reason.

The CHAIR: What about police investigating Corrective Services?

Ms THORNE: Maybe.

The CHAIR: The issue was raised in the earlier round about finding skilled investigators who have the background to be able to do this work. Whether they are oversighted by the Law Enforcement Conduct Commission or possibly by a strengthened Coroner, the people who do the investigation of this kind are likely to have been police at some point in their career—

Ms THORNE: Yes.

The CHAIR: —just because it is the skill set you need.

The Hon. TREVOR KHAN: You only have to look at ICAC. The investigators at ICAC are almost invariably coppers. They are not wearing a uniform anymore, but they are still—

The CHAIR: They were coppers, at least.

Ms LEE: But I think the point is—I listened to the previous witnesses, and it was all very interesting. I think, though, the problem is the perception. Even if police do a good job, as Legal Aid NSW witnesses did say, the perception of independence is just as important as independence itself. Redfern Legal Centre does support the Jumbunna Institute of Indigenous Education and Research submission that it should be an independent Aboriginal-led body. The reason for that is you will gain more confidence of First Nations people in particular, even if there was a move away from police. But if you think about it, there is no other government-led professional body that is actually investigated by itself. In health, you have the Health Services Commission; with us lawyers, where there are many complaints, you have the Office of the Legal Services Commissioner. There have been no problems with these independent bodies actually investigating outside of the actual organisation. I see no reason why you cannot have that model with police.

The Hon. TREVOR KHAN: But Ms Lee, there is a big difference between investigating a lawyer for either overcharging or fraud or some other conduct and what essentially is a police investigation which involves a forensic examination on a site and the interviewing of a variety of witnesses contemporaneously with the event. That is not what happens either with the Health Complaints Commission—if that is what it is called now—or the Law Society of New South Wales. Those are long after the event. The problem is what Mr Evenden identified—that is that where you have got a critical incident that calls for an investigation it requires bodies on site very quickly if it is to be effective. "Lawyering up", or whatever, the LECC would be both extraordinarily complex and, I think, beyond the resources of the Government—of any government—to do. I just do not think you can put one sort of investigation with another and say, therefore, there is the model. Actually, it is not that long since the lawyers have stopped investigating each other—or it is at least in my time, anyway.

Mr DAVID SHOEBRIDGE: That worked really well.

The Hon. TREVOR KHAN: I do not know if it works that well now.

Ms LEE: There are huge practicality issues, there is no doubt. But I do not think that is a good enough reason not to consider alternatives because of the implications that we have seen for decades of what the results have been, particularly for First Nations people. Police had to learn somewhere along the line how to do their work. There is no reason why other people cannot learn the same. Obviously it would take a fair bit of time and experience. I do not think we can write it off. I think we can look at jurisdictions other than just Australia and see what else is out there. I do not think we can just make quick decisions. I think it is something that needs to go to a well set-up reference body that has very good knowledge of some of these areas and can make very wise, well-informed decisions.

Mr DAVID SHOEBRIDGE: Of course, it is not all or nothing.

The Hon. TREVOR KHAN: Yes, I agree with that.

Mr DAVID SHOEBRIDGE: One of the other models is to extend the jurisdiction of the statutorily independent Law Enforcement Conduct Commission so it takes over that immediate supervision and following of critical incidents where there has been a death in both police operations and in Corrective Services operations. While they may not be the investigators, from day one of a death in custody someone from the Law Enforcement Conduct Commission is in there, they are observing how the crime scene is maintained, and they are following the investigation done by police. You have that degree of independent oversight from day one, which then feeds into the coronial system. That is a kind of intermediate step, is it not, Ms Lee?

Ms LEE: Mr Shoebridge, I do not know. I think it needs a lot more thinking than just what is around this table. It is not that we are not all capable of putting good thought into it, but it is a really big decision and it requires really big thoughts to try to come up with an alternative model. I think it is going to take a bit of time to get there.

The CHAIR: I guess this is the nub of the point: We around this table are going to have come to grips with the evidence we have got and try to formulate some of these views or some of these proposals. The Committee is really looking to you and to other people who are coming before it to give us the material about what it is you think needs to be put in place.

Mr DAVID SHOEBRIDGE: If our recommendation is that there should be another panel to review it, those Aboriginal families who are coming before us asking for solutions will quite rightly throw rotten fruit at us when they see us in the street. We kind of have an obligation to come up with a solution that is going to fix something—it may not be perfect. Given the LECC has that function already it is one of the options on the table. I do not know if any other panel member has a view about it?

Mr O'CALLAGHAN: Obviously there is this complex issue around the investigation itself and how that looks and is undertaken. Stories that we have been told, and certainly information that has been fed back to us, is that together with that a really critical part of it that seems to be important is that it is done in a really culturally safe and appropriate way. And so, there is that aspect of it that is running alongside it where, as we have alluded to in our report, there are independent people involved—Aboriginal and Torres Strait Islander people, as appropriate to the inquiry that is needed—that are ensuring there is this direct line of communication that is happening with the family at all stages of this process and that they are being kept engaged, informed and up to date with what is happening, as opposed to being very much cut out of the process, or left out of it, or not getting information for significantly lengthy periods of time, including potentially days of even just being informed that somebody has passed away. And so, I think that is really crucial and needs to be factored into this stuff, as well as the actual way the investigation is conducted itself in terms of gathering the evidence and all of those sorts of things.

Mr DAVID SHOEBRIDGE: If you were going to do that model you would need to ensure you had some critical First Nations engagement, like an express First Nations commissioner or the other, to lead that within the organisation. Ms Thorne?

Ms THORNE: Yes. You need to have Aboriginal First Nations people involved in the investigation to give the community and the family some confidence that it is going to be done right, it is going to be done fair and it is going to be done in a culturally appropriate way. You need to be talking to the families. You need to be listening to the community. They are the ones who should be leading or involved in the investigation, not just police officers, Corrective Services and LECC. There are no Aboriginal people involved in these investigations. That is why there is so much—

The CHAIR: Is part of the problem that you do not have enough Aboriginal police officers, lawyers and coroners?

Ms THORNE: You do not have to be a police officer. You just need to—I do not know. I do not have all the answers either.

The CHAIR: One of the complaints we have heard, understandably, is that you have had many deaths in custody and no accountability, and there is an expectation that at least some prosecutions should have followed these deaths.

Ms THORNE: One-hundred per cent.

The CHAIR: Now, of course, that is always a matter for the evidence. But if you are to have any chance of a prosecution you do need police to gather admissible evidence that lawyers can bring to a court, which means you have to have these people involved in the process. Part of the problem seems to be that First Nations people are not engaged sufficiently in those other walks of life. They are not represented in the coronial service, on the bench, sufficiently in the Police Force or amongst the legal profession, who are interacting at each step of the process. Is that not at least part of the problem?

Ms THORNE: Yes, maybe.

Ms LEE: But they are going into a culture which may not be one that does ensure that they get a voice or that the procedures change. I think the problem is that you just do not throw these additional resources at the LECC or at police without looking at the systemic problems that are going on and the cultural changes that need to happen. The LECC is so under-resourced at the moment. You are going to then throw at them the deaths in custody without increasing their budget. That is just setting them up for failure.

The Hon. TREVOR KHAN: Well, that is making the assumption.

The CHAIR: No. That point we can readily accept.

The Hon. TREVOR KHAN: That is making that assumption. I think you are quite right. If you add on an extra responsibility—and, look, I will make the obvious case that in some of these bodies we increased it from one commissioner to three commissioners without increasing the funding. That worked well. So, that is clearly a problem. But implicit in any recommendation that is made—and, indeed, hopefully through the process of consideration—would be, "If you're going to do this, you need a bigger budget." I am sure the chief commissioner for LECC would make that very clear to the oversight bodies, as he has done now on a number of occasions, in terms of his funding issues. Two of them have, now.

The CHAIR: Well, at least two.

Mr DAVID SHOEBRIDGE: There have only been two chief commissioners and I think they have both made the same submission.

The CHAIR: They have.

The Hon. TREVOR KHAN: They have.

Mr DAVID SHOEBRIDGE: There is an existing independent Inspector of Custodial Services in the mix. But I have said earlier in this hearing that of the 126-odd submissions that I have read, I have not seen a single person refer to it in a positive light, indicate that it is performing useful work or suggest that it is a body that is relevant to the kind of work we are talking about. Does anybody on this panel want to put a submission to suggest that that is a body that is fit for purpose in terms of providing an independent Inspector of Custodial Services?

Ms JONES: I do not know if that would be the role that I would give to the Inspector of Custodial Services without some more thought about that. I find that their role is very useful in terms of their thematic reports. For example, they have done a *Women on Remand* report, which was incredibly useful to highlight some of the systemic issues that women are experiencing in custody. I think part of it, again, is resourcing.

The Hon. TREVOR KHAN: You may not have seen it but she has recently done one with regards to juvenile justice, which was quite critical in a lot of ways.

Ms JONES: Absolutely. Look, I think the thematic reports can be very useful. There have been quite a number of them that have looked at fairly sensitive issues that no one else can look at in that kind of coordinated way. So, they get that access to the correctional centres. My understanding is that they are meant to visit each centre twice a year, I think, and provide—

Mr DAVID SHOEBRIDGE: Which they have told us that they do not have anywhere near the budget to do.

Ms JONES: Correct, and that is what we hear. I have clients who have been cycling in and out of prison for 20 years and never had any contact with anyone from the Inspector of Custodial Services. They may know an official visitor occasionally, but even the official visitor service is not as frequent as people would like.

Mr DAVID SHOEBRIDGE: But in a system where we have the Inspector of Custodial Services having one role, official visitors having another role, the ombudsman having another role, internal complaints and reviews in custodial services having another role, the police having another role, the Coroners Court having another role—there are at least six so-called independent bodies. Surely one of the recommendations out of this inquiry should be bringing many of those powers and oversight roles into a single body so that there is sufficient gravity and oversight to actually have a statutory oversight body that can do something in corrective services?

The Hon. TREVOR KHAN: Mr Shoebridge, you cannot bring coronial services in with the ombudsman.

Mr DAVID SHOEBRIDGE: I am not saying that you bring them all in. I am just pointing out—I pointed out at least six and that smattering of different agencies does not seem to be working.

Ms LEE: I will have to take that on notice. It is a big leap. I can see the pros and cons in regards to that, but it is something that I think needs further consideration.

Mr DAVID SHOEBRIDGE: I am not saying, "Put all six in one." I am saying that six is surely not the best starting point. You would not want to end here.

The Hon. TREVOR KHAN: I think there is a submission from the ombudsman to consolidate services oversight into three, and that excludes the ombudsman. But that would bring the Inspector of Custodial Services under the ombudsman as a deputy ombudsman. So, that has been thought of.

Mr DAVID SHOEBRIDGE: My final question is to Redfern Legal Centre. In your police accountability role you are involved in both criminal and civil proceedings involving the police. Is that right?

Ms LEE: We give advice in regards to the complaint and the potential for civil action. And then, if they have a criminal matter, then we give some general advice. But we generally give that over to Legal Aid.

Mr DAVID SHOEBRIDGE: The data that we got recently from the police shows that there are at least 300 civil claims commenced against the police in any given year, but at no point is it apparent that there is a feedback loop between the courts and the findings that happen in the courts, which can sometimes be deeply

critical of officers and the police themselves. From what I can tell there is no feedback loop in the criminal justice system either. Adverse findings about police—there is no systematic capturing of that data and its analysis by the NSW Police Force. How much do you think capturing that data and requiring the police to follow through the data and use that as an accountability measure—how important do you think that is in the mix?

Ms LEE: You seem to be talking about different things. You can have a case where a person has been charged with a certain offence and then taken to the court and the judge finds that there was no reason for the search or the search was unlawful and that there was no particular reason for the person to be in the court, and makes those comments. Obviously, that comment should be used in a form of a complaint against the police and should be used if the person wants to then go and commence civil proceedings, but that does get lost in the process and it does not form part of the LECC considerations as well. Obviously, a finding by a judge is very important in terms of whether that matter should have been before the court in the first place and the actual behaviour of police. So it would be beneficial to the complainant and to the police for that matter to be directed to the LECC. There was another aspect though to what you were asking in regards to civil claims.

Mr DAVID SHOEBRIDGE: There does not seem to be any feedback loop between the findings in the court, whether the case was brought without merit and the charges should never have been laid, or a police officer may be found to be a witness of no credit and the evidence not believed, there seems to be no feedback loop between what happens in that public justice sphere and the Police Force itself.

Ms LEE: Exactly, but that is also the case with civil matters. The majority of torts matters against police are settled outside of court, and with that settlement contract comes a gag clause or confidentiality clause, so the person cannot share what has gone on between the police and themselves. What it also means is that the police do not go back and have a look at this case and identify any systemic problems and how they can prevent civil cases from happening in the future. You would think that a really integral part of an accountability system is to identify systemic problems and prevent them from occurring in the future, but we do not have that occurring here in New South Wales.

The CHAIR: I thank the witnesses for their time and their insight into these difficult and challenging issues. The Committee has resolved that answers to questions taken on notice be returned within 21 days. The secretariat will contact you in relation to the questions that you have agreed to take on notice. On behalf of the Committee, I thank you for attendance.

(The witnesses withdrew.)

GEORGE NEWHOUSE, Adjunct Professor at Macquarie University, Director and Principal Solicitor, National Justice Project, affirmed and examined

LEETONA DUNGAY, Mother of David Dungay Junior, affirmed and examined

PAUL SILVA, Nephew of David Dungay Junior, affirmed and examined

LIZZIE JARRETT, Cousin of David Dungay Junior, affirmed and examined

CYNTHIA DUNGAY, Sibling of David Dungay Junior, affirmed and examined

The CHAIR: Would anyone like to give an opening statement?

Ms LEETONA DUNGAY: My name is Leetona Dungay. I am the mother of David Joseph Dungay. I want to start by thanking the Legislative Council committee for allowing me to make submissions to your inquiry. I address you on behalf of myself and also my three children, Christine, Ernest and Cynthia, also for our old mob, the whole family based mostly at Kempsey. The first thing I want to do is acknowledge the traditional owners of the land where we meet—the Gadigal people. I acknowledge the Eora Elders past and present too.

Let me explain where we came from. The people around Kempsey are called the Dunghutti people. My son, David Dungay Junior, was a proud Dunghutti man. He was dearly loved by his two elder siblings, Ernest and Christine, and also his younger sister, Cynthia. As he got older Junior learned as he grew up how to take responsibility for his own diabetes condition. He carried jelly beans, Jatz and a glucagon kit around in case his blood sugar levels became low. This condition was a constant burden, but Junior was also very knowledgeable about diabetes and proud of his own ability to manage it independently, which I taught him. I was his nurse and his diabetes educator. He impressed his high school teachers, who also gave him praise and encouragement.

He completed the Year 10 certificate successfully—something we were very proud of. After David left school he got a job with Community Development Employment Projects. It is a government-funded program for Aboriginal youths. He used to mow lawns and collect rubbish. He worked a couple of days a week and got paid. It was very hard for young adults who had left school in Kempsey to find employment but David was keen to do it. He was growing into a lovely young gentleman. Later David made some mistakes and was locked up for this. He did his time and he paid his debt to society. He was determined to come out and start a new life. He was so close to being free and being with us all again.

Next I want to share with you all some stories about my son David and what he meant to our family. We all heard his voice on the phone call he made to his younger sister, Cynthia Dungay, just an hour or two before he died. He was a kind, loving, caring and beautiful person. This is the son, the brother, the uncle that we all knew and loved. When we learned of my son's death, we were all in shock. No mother should ever have to feel the pain of burying a son and watching a video showing how he died begging to breathe. The world has seen the footage of David begging for his life, screaming, "I can't breathe," to his last gasp—just like George Floyd. One minute my beautiful son was alive and healthy; the next he was dead because no one listened to him when he said he could not breathe. No-one showed any compassion to my son. A few days later I viewed my son's body in the morgue, all battered, flat face, broken nose and flesh here—battered and bruised. The pain has stayed with us all for nearly five years now.

At his inquest we heard experts say there was never any serious immediate risk posed by David eating the biscuits and he posed no security risk in his cell. Why then did the prison officers have to raid his cell and assault David? Remember, he was in a hospital. Why was he not in a proper hospital? That is where sick people should be. New South Wales is the only State in Australia that has hospitals in prison and where guards get involved with medical decisions. My family is extremely disappointed that just after David died a Corrective Services NSW assistant commissioner told the media that the police were not treating the death as suspicious. Imagine if that was your son. My son was held face down by six prison officers until he lost consciousness and his heart stopped. Those are the simple facts. We are listening to the apologies that have been made for what happened to David. We know that some changes have been made but they are not enough and they are not systemic.

Some recommendations came out of the inquest to improve the jail's operations, but there has been no justice for me, my family and my people from the New South Wales State after the death of my son. SafeWork NSW will not investigate my son's death and the Director of Public Prosecutions says he cannot investigate my son's death, even though one of Sydney's leading criminal barristers says that there is sufficient evidence for

charges to be considered by the DPP. That is why my people are crying out that black lives matter. When will you take our deaths seriously? When someone cuts off a finger at work SafeWork NSW are all over their employer like a rash, but if you are black, SafeWork NSW will not lift a finger to investigate and prosecute your death in custody. Someone needs to ask SafeWork what is going on in that organisation. When a barrister like Phillip Boulton SC says that there is evidence for prosecuting individuals, the DPP says that the department cannot investigate my son's death. That response is a slap in the face to any parent.

I attached a copy of Mr Boulton's advice for you to read for yourself. With such a strong opinion, my son's death deserves to be investigated by DPP. Black lives do matter. Me and my family are not going to stop until someone is held accountable. The system is broken and the Parliament has the power to fix it. You should be able to change the law so there is a pathway for DPP to investigate my son's death. You should be able to change the law to make SafeWork NSW investigate my son's death when there have been public apologies by those responsible for the care of my son for what happened to him. We do not want any family to have to suffer what we are going through. We want black lives to matter.

There is one strong burning desire that I have and that my whole family has. It is something that has kept us together through the ongoing trauma. We wanted to see justice for David's death. Changes and improvement are one thing but we believe someone or some organisation must be held accountable. Thank you for listening to me and please help us Dungay family and other families in deaths in custody for justice. Please stop black deaths in custody.

The CHAIR: Ms Dungay, thank you for your evidence and on behalf of the Committee allow me to express our deepest condolences for your terrible loss. As a parent, I cannot begin to imagine how that must be for you and your family.

Mr DAVID SHOEBRIDGE: Does any other family member want to say something at the outset?

The CHAIR: Okay, please.

Ms JARRETT: On behalf of David Dungay Jr's little sister, Cynthia Dungay, I will read this as it is too traumatic for her.

> I would like to acknowledge the Gadigal people and pay my respects to Elders both past and present. I am Cynthia Dungay. I am a proud Dunghutti woman and the baby sister to David Dungay Jr. We were born a year apart. We shared a happy childhood and I have lots of good memories growing up at the mission at Burnt Bridge in Kempsey. We went to school together, always had fun playing touch footy or bullrush, stuck in the mud. He grew up loving sports and always did well in his football games. He was funny and he would hang around me to help me with my homework. My brother was always there for me through all of my problems. I really miss him. We believe that the prison system killed him and now he is not with me, it has been so devastating for the family. We want justice for my brother's death and for every other Aboriginal death in custody and inside and the cops in prison with the police as well. If you see footage of what they did to my brother, without the blur, it would show how six officers killed him. There were six officers in the cell that day, one with a handheld camera, and five others on top of him, squashing him until he stopped breathing. He cried out 12 times, "I can't breathe, please I can't breathe." He was just eating biscuits to try and keep his blood sugar level normal.
>
> He was not bothering anyone. He was happy. He had a buyout of biscuits and he knew he was coming home. We even got to talk on the phone at 1.00 p.m. that exact day. We were talking and laughing. He was happy. That night at about 8.00 p.m. my sister told me what had happened. I said: "No, no. We were just talking." And she told me: "No, it is true." My life and my family's life has never been the same. So many unanswered questions as to why this has happened. We were always concerned for the state of his health because I knew they were not giving him the appropriate care for his diabetes. They did not care properly because they were giving high doses of antidepressant tablets on top of his diabetes medication which made him very sick and drowsy. My brother was killed at the hands of these murderers and they have gone back to their jobs in jails where they kill people. All correctional service officers, police, doctors and nurses of the Justice Health should be held accountable and convicted of their crime and put an end to killing First Nations people. They have taken the life of my brother, David Dungay Jr, and that means there must be justice. Justice today for David Dungay. Thank you.

The CHAIR: Thank you.

Mr SILVA: My name is Paul Silva. I am the nephew of David Dungay Jr and I am a proud Dunghutti Aboriginal man, located in Kempsey, New South Wales. From the day that the police came to my grandmother's house and notified me and my mother that David Dungay Jr was tragically killed in a correctional facility just weeks shy from being released on parole, days later I brought to my family's attention that I did not believe that we would receive any justice as I have never seen a prison guard be criminally charged, found guilty and put in jail in regards to an Aboriginal death in custody. But I have kept fighting nonetheless. The colonials took all of our beautiful land and killed so many of our people. The massacres were perpetrated by many people, including police officers and no one was ever held accountable for that. This has continued right down until today.

It is like being Aboriginal means our lives are not valued by the justice system. We have waited so long for a coronial inquiry into David Dungay Jr's death and received no accountability from the process at all. However

in the inquest we found out some important things that should have been known from day one. The Coroner found that there was no medical or security emergency for David or for the staff on 29 December 2015. He was safely secured in his cell and the raid on his cell should never have happened. I believe that the Immediate Action Team [IAT] raided the cell on that day to show their power and authority over a young Aboriginal man within their facility. It was a clear message to say that they own and control the facility and that David was just a visitor who had no rights at all.

We also found out in the inquiry that the guards did not get the proper permission that they needed to raid the cell. It was a medical facility and they did not receive the correct orders or documentation from the medical professionals that was required for proper authorisation to raid the cell. As Phillip Boulten, SC, has said this means that the cell raid was unlawful. It shows a power that had no lawful authority behind it and it killed my uncle. Upon dressing and viewing of David's body, three weeks after this tragic incident took place, I was exposed to lacerations on his face, a size 10 boot mark imprint on his lower back, not to mention that his nose was basically flat to his face.

He did not look like my uncle. He looked like someone badly brutalised due to the unnecessary force applied by a Corrective Services IAT team. Years later I know that they had no lawful authority to assault him or kill him in this way. So why was the incident not investigated as a homicide from day one? Why did the Commissioner for Corrective Services go on television straightaway to say nothing was suspicious about the death? Why was no one charged? I believe it is because if the police are in charge of investigating deaths in custody, they are never going to do their job properly and charge police or prison guards with homicide. They work to protect each other, to protect other law enforcement officers and uphold that unwritten rule that they will all have each other's back regardless of the situation that occurs.

People say that the Coroner is independent. It is, but it is the police that gets all the evidence for the Coroner early on in the investigation. You need to understand that Aboriginal people will never trust the police to pursue justice for us. Since I was a youth, I have been constantly targeted by police. Just doing my daily routine walking my dog, I would be stopped and questioned, my profile checked to fit descriptions of recent break and enters around my local community. As I became older, I became aware that this treatment was because of the colour of my skin. I became aware of systematic racism that is a part of this whole system of policing here in Australia.

Out of this inquiry, our family are pushing for reform. We want to see an independent body set up with the responsibility to investigate any further Aboriginal deaths in custody, as much as I do not want another Aboriginal deaths in custody for another family to be traumatised by the actions of other people. That body needs to be led by Aboriginal people. They could be first on the scene, be the ones asking questions, be the ones making decisions about whether to refer to the DPP for prosecutions or not. They could even be given powers to prosecute themselves if needed. This could stop further deaths in custody, because it would cause prison officers and police to think twice about using unlawful force against Aboriginal people. They would know that, unlike in the past, they may have to answer for their actions and could be criminally charged. Imagine if it was a group of six Aboriginal people who held down a white man begging for his life until he died in a prison. Imagine if they had no lawful authority to do this. There would never be a coronal inquiry. This matter would go straight to the DPP with homicide charges.

I will never stop fighting for justice. No family should ever have to suffer the trauma that we have gone through, and will continue to go through due to the actions of others. You can take action out of this inquiry to ensure that killings stop and families will not forever be traumatised by these events. You can make change to ensure that guards are responsible for David's death and charged with manslaughter, based on the information provided by Philip Bolton. And you can make sure that there is an independent body to investigate if there is any further deaths.

I do not want this inquiry to fall on deaf ears. We had the royal commission almost 30 years ago now. Today is the day, guys. Let us do something with it, let us use this inquiry to put prevention steps in. I know that it is not going to bring David Dungay Jr back, but my main aim is to prevent another family from sitting in another one of these inquiries 30 years from now when I am an old man. I want changes so that we do not have to protest in the streets, so that we do not have to demand the justice. We want the Aboriginal deaths to stop. We want the high rate of Aboriginal incarcerations to stop. We want people who are looking at jail time to go into community programs before they step foot into that jail. Because when they step foot into that jail, being an Aboriginal person you are immediately exposed to systematic racism and exposed to an Aboriginal death in custody. Thank you.

Mr DAVID SHOEBRIDGE: Thank you all for your evidence. Cynthia, thank you for your evidence put through Lizzie. Leetona, I know that it is tough to go back to that place, but how did you feel when so soon after you heard about David's death, you heard a report from Corrective Services that the police are not treating the death as suspicious? What did you feel at that moment?

Ms LEETONA DUNGAY: I felt very, very, very upset, so I asked them for apologies. The ABC said that it was not suspicious too. They took up the commissioner's words and put them on TV—"not suspicious". So you tell me how suspicious is it when you are looking at that video of my son with six prison guard officers, and there are about—how many pounds would they be? Seven-footers—big, hefty people. To put in some of these recommendations, we should put a lot of things forward to the Corrective Services officers and police. They should be privately investigated before they go through their doors to work. They should be investigated for any drug handling, or anything whatsoever. And to work out if they are on steroids—they are in there building up to kill our people. That is one recommendation that I would like to put forward. Get nurses and doctors in those vulnerable places to check for drugs et cetera—every employee.

Mr DAVID SHOEBRIDGE: Paul or Cynthia or Lizzie, do you remember when you first heard that the police were saying that they were not treating the death as suspicious, and what your thoughts were?

Mr SILVA: Yeah, I recall mostly everything of the event since the past five years. So yes, I do recall the correctives commissioner get on ABC and a few other outlets, and he stated that the death was not being treated as suspicious. I find that very appalling coming from a commissioner in that position, due to the fact that there was not an investigation into the matter and it was released hours after the event. In future, I believe that corrective Minister should be allowed to approach the media and make any comment due to the fact that the family has just lost a loved one. To make a comment like that—I will go back to the fact that it shows that Aboriginal lives are not valued in the justice system.

Ms JARRETT: I definitely remember those words, they ring in my head every day. Because the way that we feel—any Aboriginal death in custody is suspicious. If you are in a place—institutionalised—and all of a sudden you pass away—we did not even know how he had died. And the world is being told that it is not suspicious. So like my nephew, my auntie and my beautiful sister, it is appalling. It is heartbreaking to know that one man has the power to tell the world that our cousin's death was not suspicion.

Ms LEETONA DUNGAY: They never had no evidence—

Ms JARRETT: In hindsight now, five years later, you can look it up on CCTV and it is very suspicious.

Ms LEETONA DUNGAY: —to say those words.

Ms CYNTHIA DUNGAY: Yes, my heart broke, and I miss him every day. The words that he said to me over the phone, "Do you believe me, Sis?" I said, "Yes. I believe you more than—"no offence—"the Government."

Mr DAVID SHOEBRIDGE: Mr Newhouse, you act for a number of Aboriginal families. This suspicion of the police, this sense of institutional distance between the police and First Nations peoples, how important is it to understand that as the starting point for reform?

Adjunct Professor NEWHOUSE: I was actually helping Leetona on the day that statement was made. I think that the reality is that it just deflates families, because any trust they have in the system is broken at that point. They are hearing a prejudgement about the circumstances of that death from a person in authority, and therefore everything begins to unwind at that point. Any faith they have that the death will be adequately investigated and people will be held accountable begins to fall apart when they hear someone in authority say, "We are not treating it as suspicious." One thing you should also know is that evidence was disposed of in the cells. That came out during the inquest. The guards say that it was accidental, but the family are left with question marks about the fact that CCTV footage went missing. Leetona still even asked me today, "Why can't we see that missing footage?" Evidence was disposed of. The cells were wiped clean after David's death but before the investigators arrived.

Ms LEETONA DUNGAY: The blood spurts.

Adjunct Professor NEWHOUSE: From the get go there is a breakdown in trust and then to have police, you know—you have heard from Paul explaining how he feels harassed by the police and subject to systemic discrimination. Having those same police then investigating guards is another breach of faith. Therefore, it would be in my view extremely beneficial to have an Indigenous organisation or an Indigenous coroner at the very

least—and there are Aboriginal lawyers and Aboriginal police officers who can fill these roles; it is not that they are not available—to at least understand the lived experience of these family members and others and perhaps encourage some faith in the system. I think that you are seeing them here today begging for justice.

From the get go they felt let down by the system, even after the Coroner made findings—and some of them were excellent—for example, that there was no need for the guards to go into the cell. David would still be alive today if those guards had not gone into his cell. He was eating a packet of biscuits. But my point—I've lost my thread—is that they are still waiting for justice today because you have got an eminent silk in New South Wales, Philip Bolton SC, who has been prepared to put his name to an opinion that the raid on David's cell was unlawful and therefore there are grounds to take this matter to the DPP. Yet the family have no pathway. The DPP has written back and said, "I'm sorry. I do not have the power to investigate your inquiry." SafeWork NSW, for the life of me I cannot understand, why refuse to even investigate this matter notwithstanding that they have the power to do so.

Ms LEETONA DUNGAY: They have got the power to kill and to make decisions.

Adjunct Professor NEWHOUSE: I can understand Leetona's frustration. There was a shocking mauling by a lion in a zoo recently. SafeWork NSW was all over that. But her son is dead. You have had apologies and acknowledgements from Corrective Services NSW and Justice Health, saying they really let David down. Yet, despite that, SafeWork NSW refuses to lift a finger.

The CHAIR: Mr Newhouse, was the problem expressed by the DPP that the police were not investigating it? Is that why the DPP's hands were tied?

Adjunct Professor NEWHOUSE: The DPP's response is that he cannot investigate unless he is given a brief by police.

The Hon. TREVOR KHAN: That is right. He needs a brief delivered to consider it.

The CHAIR: Someone needs to investigate.

Adjunct Professor NEWHOUSE: I can deliver him a brief.

Mr DAVID SHOEBRIDGE: Is there potential to have a referral out of the Attorney General's office to the DPP? Do you know if that is another alternate pathway?

Adjunct Professor NEWHOUSE: There is a separation between the Executive and the DPP, but I think the DPP—Let me take SafeWork NSW first. I think any Minister has the power to ask SafeWork to investigate. SafeWork could be asked to investigate. As for the DPP, I think only the Attorney General has the power to engage with the DPP. Off the top of my head I do not think he has a power to order an investigation, but he can consult.

The Hon. PENNY SHARPE: Or seek a review of the decision, not to—

The CHAIR: I think the Attorney General can direct that.

The Hon. TREVOR KHAN: But it still requires that there be a police brief in their hands.

The Hon. PENNY SHARPE: So it's a circular argument.

The CHAIR: Someone has to do an investigation.

The Hon. PENNY SHARPE: As the non-lawyer on this Committee, the SafeWork angle is not something that I have previously considered. What powers under the SafeWork Act allow it to investigate in other circumstances and why is it declining now? I just do not understand. Is it because David was not working there?

Adjunct Professor NEWHOUSE: It is a death in a workplace. They have the power. They acknowledge that they have the power. They say, "Oh, it has been investigated. We are not going to take any action."

The Hon. PENNY SHARPE: They are saying that the Coroner's investigated it and they did not recommend a referral to the DPP, so it is therefore not their problem. That is the decision process.

Adjunct Professor NEWHOUSE: Correct. But if you look at the protocols between the police, SafeWork and the DPP, they have a separate duty to examine. They have two years from the date of the findings of the inquest to charge but have decided repeatedly—we have asked them twice—not to investigate. They do not believe that it is worth investigating.

The Hon. PENNY SHARPE: Have they ever previously investigated circumstances similar to this one?

Adjunct Professor NEWHOUSE: Well, not in New South Wales, but Western Australia charged Serco in relation to the death of Mr Ward, who was, as you know, tragically cooked in the van.

The Hon. PENNY SHARPE: In the back of the van. That was awful.

Adjunct Professor NEWHOUSE: In a transport van. There were significant fines in the case. There is no reason why SafeWork NSW cannot take action.

Ms LEETONA DUNGAY: And why have criminals working in these places, jails and police stations?

The Hon. TREVOR KHAN: Mr Newhouse, could I just go back a little bit? It arose earlier today and it relates to essentially the chain of events that led up to the Coroner's finding. I am interested in why, with David's death in 2015, it took until November or December 2019 for the Coroner to deliver his decision. I am just interested in what the chain of events were and what, if any, delays occurred along the way. It might have been that there were none, but it seems a heck of a long time.

Ms LEETONA DUNGAY: It wasn't the traineeships. Give them a long time for that to come back.

Adjunct Professor NEWHOUSE: The coronial process does take a lot of time in all States. Coroners are generally under-resourced in my view and they have a lot of work to do. It is a minimum of 12 to 18 months before you can get to a Coroner, even if it is a fast process. But that said, I have actually just written an academic article with a couple of other academics from Jumbunna Institute—I am happy to distribute it to the Committee—about the experience of Indigenous people through the criminal process. They are retraumatised through the process. It is not a process that is therapeutic. The scope of the Coroner's jurisdiction is such that they do not—it is about the manner and cause of death. You have heard the family here today wanting justice. It does not deliver justice. People go there hoping for justice. I am not saying that coroners are unjust, but their work does not deliver the outcomes that families want and it is not a culturally safe process. I think you have heard that a number of times. I think Ms Lee mentioned it earlier. Whatever structure you set up must be Indigenous led because the experience of Aboriginal and Torres Strait Islander people through the system is traumatic.

To answer your question, I will provide you with the article. It is not to be published until 1 December. It is under embargo, but I am happy to provide it to you confidentially and it can be released after it is published. But the experience is one of a breach of trust from day one. Leetona was fortunate in that I do have experience in the inquest process so I could guide her through it. But if you come at this process cold, it is incredibly alienating. It is alienating to anyone who does not understand the justice system, but it is particularly alienating to Aboriginal and Torres Strait Island people, who do not have faith, not only in prison guards or police, but in our justice system. When I see a death in custody, it is the final systemic failure that has been built up over the years starting with healthcare, education, social services, child safety, police and justice. Then why would you expect any different experience from that system at the end, after death? In fact, this is a speech I often give to Aboriginal families because they come hoping that they will hear the truth and that they will get justice. They are, as you have heard today, often disappointed. The process does need some reform.

The Hon. TREVOR KHAN: I accept all of what you say, but I suppose I am interested somewhat in the mechanics because we are told and we—or I—accept that the original advice was that there was nothing suspicious. At some point the Coroner became involved. I am assuming that with the Coroner becoming involved there would have been notification to the family of the intention to hold an inquest because it was a death in custody. Are you able to map out how long it took until for we can describe as that initial step and then how long it took from there?

Adjunct Professor NEWHOUSE: I can tell you that I believe a Coroner attended that night. David died during the day but a Coroner attended that night, by which time some evidence had been cleaned up and disposed of.

Ms LEETONA DUNGAY: And his clothes were not even given back to us because there would have been all the blood.

Adjunct Professor NEWHOUSE: They never received his clothing or his possessions after he passed away but I think they were notified pretty quickly. It was within the same day or the next day.

Mr SILVA: Yes.

Adjunct Professor NEWHOUSE: But having a police officer turn up at your door and say—they were not offered counselling. There was none of that- it was just, you know, "Your son's died". From that point you have about a year wait, or 18 months, until you get a brief. During that time—the Coroners Court does have psychologists but they are not Indigenous. I think the Victorian Government has recently employed a dedicated Indigenous counsellor but we do not have that in our system here. I can recommend that Leetona goes to see a counsellor but that counsellor is based in Sydney and she is in Kempsey. The system really does not work. Essentially families have to wait 12 to 18 months before they really hear anything.

They do have contact with the investigating police officers. They do not trust the police because they have had poor experiences with them. I must say that in this case the officer went out of his way to try to keep Leetona informed, but they did not know what pathway the officers were investigating. When they heard the assistant commissioner say that there was nothing suspicious, they gave up. That is what is happening in this process. It takes a long time for the officers to gather the evidence. It takes 18 to 24 months to get a brief and only then do you actually swing into action with the family. I want to give the Coroner credit for one thing in this case. The Coroner did let the family see some video—not all of it—early, which did help. But I find in many jurisdictions that Coroners even refuse to provide that video evidence early. You have to wait 18 to 24 months before you actually know what is going on.

The CHAIR: Two things, Mr Newhouse. We have had a lot of submissions to this inquiry so far about strengthening and better resourcing the Coroner and widening the Coroner's jurisdiction in relation to these matters. But taking your point about the lack of faith in the police as an institution and the need to create a special investigative body to look at these deaths in custody—leaving aside the provision of dedicated Aboriginal personnel, whether they are coroners, police or other investigators—what are the concrete steps that you think need to be taken at an institutional level to create a system in which your clients or people like them in the future can have faith?

Adjunct Professor NEWHOUSE: I think the secrecy of the investigation needs to be punctured. Would you agree that you really did not know anything about what was going on until you got the coronial brief?

Mr SILVA: Yes.

Adjunct Professor NEWHOUSE: It is not a therapeutic pathway.

Ms LEETONA DUNGAY: Why would they say it is not suspicious? They should not even say if it is suspicious if it was not investigated. So who is in the wrong?

The CHAIR: No-one should say anything until there is an investigation of some kind, you would think.

Mr SILVA: That is true.

Ms LEETONA DUNGAY: That is what I am saying.

Adjunct Professor NEWHOUSE: The Coroner's jurisdiction was broadened after the Royal Commission into Aboriginal Deaths in Custody. Up until then, it was really the cause of death. It was not a rubber stamp, but—

The CHAIR: It was limited.

Adjunct Professor NEWHOUSE: It was limited. There was law reform 30 years ago to expand the jurisdiction. Different States went further than others but the Coroners really go out of their way not to blame anyone. They really want to find a cause of death but they are not prepared to look at systemic failures. It is very hard to get Coroners to look at systemic prejudice. We were able, in the case of Naomi Williams, who passed away after being turned away from hospital, to look at how prejudice against her—that she was seen as a drug addict—had caused or contributed to her death. But it is really difficult to get a Coroner to look at the systemic failure in David's case and the prejudice that went into the powerplay that ended in his death. They will not look at it. If you look at the recommendations in the Royal Commission into Aboriginal Deaths in Custody, I do think there is scope to broaden the Coroner's jurisdiction.

Mr DAVID SHOEBRIDGE: Could I just ask a question of the Dungays? What was your experience of that four-year process before the Coroners, which ended with a couple of hours of judgement in the court?

Ms LEETONA DUNGAY: Straightaway the Corrective Services commissioner asked us Dungays to have a meeting. We had a meeting with the commissioner. My family and I sat down watching them and they were all twiddly and blame game. They were blaming each other over who killed Dave. I stood up and I said,

"Well, you know what? Better wait for the autopsy report." I said, "The blame game is over. Stop blaming each other. That is how we are going to know how it happened."

Adjunct Professor NEWHOUSE: She is talking about Justice Health and Corrective Services.

Ms LEETONA DUNGAY: I had a meeting with all of them, yes: Justice Health and the commissioner.

Ms JARRETT: To your question, Mr Shoebridge, in those four years being a traumatised family it was hard. As you have heard we do not have enough faith in this system, even sitting in this room. I do thank each and every one of you for listening to us and making sure that we may finally get some change. But why is it taking so long when there was already a royal commission that should have prevented David Dungay Juniors? We had four years of being led like a horse with blinders and the crowd's justice.

Mr DAVID SHOEBRIDGE: Yes.

Ms JARRETT: We only see tunnel vision. No justice, no equality, no fairness, no respect enough from the system that took Junior's life away from us to come and sit with us and say, "How are you dealing? Here is counselling. Here is anything that could help you deal as a family with not understanding anything." Every time we tried to ask, we were told no. We turn the TV on and see the commissioner telling the whole world, for public ears and eyes, to expect that our cousin's death was not suspicious. We are supposed to wait four years to come back and be told again by a Coroner that there was no emergency, but she did not say that it was suspicious. We are still sitting here now, nearly five years later. December this year will be five years. We are begging, we are asking and we are knocking on any door and any window that will listen to us to really help make some change.

You cannot be sitting in these positions of power and keep listening to family after family after family deliver the same outcries of trauma and death in custody. As I said, every single one is suspicious in my eyes. Maybe not yours, but that is my opinion. If you are in jail, you are supposed to be seen to. You are supposed to be looked after no matter what colour, creed or race you are. You are supposed to be protected by those that are the screws, that are Justice Health in Junior's case. He was let down so badly. For four years, we have been just kicked in the dirt.

Mr DAVID SHOEBRIDGE: I suppose that is what I wanted to get an understanding of. How much did you know in those four years? Mr Silva, how often did the police sit down and explain to you what the process was? After you saw that traumatic video, were you offered counselling support? Was it done in a culturally safe way? What was that process like?

Mr SILVA: Basically three officers came to the address, notified us that he had passed away and handed us the investigating officer's number. After that, we obviously reached out to lawyers due to the fact that it was a death in custody. And then, like Professor Newhouse said, we saw a video early on before the inquiry. We travelled from Sydney to Kempsey and viewed that video. That was the most traumatic thing that I have ever viewed in my life—to witness someone being thrown around and for no-one to really care. We had a meeting with Justice Health staff and Corrective Services staff here in Sydney. But other than the short videos that we saw, we were basically blind and we did not know what really happened to David until the coronial inquiry. As to the counselling side of things, other than George Newhouse, Lizzie Garrett and the people who were around to offer counselling, the Corrective Services did not offer me counselling as a family member, or Nan, being the mother of the person who had just died in custody. They did not offer any immediate counselling to the family. The police who attended did not offer any immediate counselling.

Ms LEETONA DUNGAY: They were not compassionate whatsoever.

The Hon. TREVOR KHAN: Can I just go back? I am just interested in why it took so long. There was a brief after 18 months.

Mr SILVA: So there was a delay.

The Hon. TREVOR KHAN: I am not being critical. There was a brief after 18 months. It has still taken something in the order of a further two years to get to a hearing. Is that right?

Adjunct Professor NEWHOUSE: Yes.

Mr DAVID SHOEBRIDGE: Paul, do you know why?

Mr SILVA: There was a delay in the coronial inquiry with David Dungay Jr. There was a delay due to time to listen to the witnesses. We sat in at the Downing Centre courts for one week, which was—

Ms JARRETT: July something.

Mr SILVA: On 18 July.

Ms LEETONA DUNGAY: The judge gave them a line-up to go to training. None of them had trained until they came to court. There was one, was there?

Adjunct Professor NEWHOUSE: One.

Ms LEETONA DUNGAY: Only one had been trained.

Adjunct Professor NEWHOUSE: And there was a delay. We did not get through all of the witnesses, then there was about a six-month delay and then there was an adjournment for decision-making. It just took years.

The Hon. TREVOR KHAN: Right. The counsel assisting, he or she, what was that person like? Was that person cooperative in the process?

Adjunct Professor NEWHOUSE: Mr Evenden was our barrister. I found him counsel assisting quite amenable, but the problem is that I am a middle-aged white man who is part of the legal system.

The CHAIR: That is a common problem around here.

Adjunct Professor NEWHOUSE: I get it, and I can talk to him on the same level, but no-one understood the family's need.

The Hon. TREVOR KHAN: I suppose that was where I was getting to: whether there were appropriate communications at various stages along the way.

Adjunct Professor NEWHOUSE: Unfortunately not. I do not want to criticise counsel assisting. He is a very decent person and he did a good job as a lawyer and as a barrister, but that is very different from dealing with the trauma that this family is facing.

The Hon. TREVOR KHAN: Sure.

Adjunct Professor NEWHOUSE: Also, he is working within the very narrow legalistic structure of our coronial system.

The Hon. TREVOR KHAN: Don't we all.

Adjunct Professor NEWHOUSE: But that is not what they wanted to hear. There is an enormous gulf between what justice means for this family and what the justice system delivers. It is very different.

The Hon. TREVOR KHAN: Do you think it would have assisted if, say, a body such as the Law Enforcement Conduct Commission had been oversighting the investigation?

Adjunct Professor NEWHOUSE: I can only speak from a recent experience. We act for the family of a young man who was taken down by a police officer in a Surry Hills park. The family did feel some comfort. They would have preferred to have an Indigenous organisation, let me say from the outset, but they did feel some comfort that there was independent oversight of the police. They did not trust police investigating police. I think the same applies here and, in my experience, the same applies amongst most families. They did appreciate that the LECC was independent, but the LECC is not perfect either.

The CHAIR: But, Mr Newhouse, I guess one of the issues is, particularly if families want to see what they regard as justice and, in the appropriate case, a prosecution, evidence needs to be gathered by people with the requisite training and legal expertise. Essentially we are talking about police investigators, whether they are Indigenous people in the police or whether you have it as a separate organisation. You need people with those skills, otherwise you will never get the evidence to warrant prosecution.

Adjunct Professor NEWHOUSE: Yes. I think it is a false assumption to think that there are not Indigenous people who can fill that role.

The CHAIR: I am not making that assumption, but I am assuming that those persons would have had training similar to police officers.

Adjunct Professor NEWHOUSE: Yes, but they could be taken into a different organisation. For example, the Australian Securities and Investments Commission launches prosecutions and SafeWork NSW is supposed to launch prosecutions.

Mr DAVID SHOEBRIDGE: That is not your best argument.

The CHAIR: No, that is not a good argument. What is your next example?

Adjunct Professor NEWHOUSE: No, I was being sarcastic.

Mr DAVID SHOEBRIDGE: Ms Leetona Dungay, I saw you put up your hand.

Ms LEETONA DUNGAY: Yes, what I was going to say is: not only the police and the Corrective Services officers should be charged in this case, but so should the nurses and doctors, because they never committed to do anything whatsoever for my son and they were bullied by the correctional A-team. "You move aside." That nurse ran away because she feared those big monsters.

Adjunct Professor NEWHOUSE: I do agree, by the way.

Ms LEETONA DUNGAY: Also, two weeks prior to my son's death he was supposed to be put into a private hospital. Why did the nurses and doctors not do that? He would have been home with me today if that had happened. It is malpractice, plus these people that we want charged, the whole lot who were in the room at the time of the crime.

Mr DAVID SHOEBRIDGE: Can I put to the family, Cynthia Dungay, Lizzie Jarrett, Paul Silva and Leetona Dungay—

Ms LEETONA DUNGAY: Charges and changes.

Mr DAVID SHOEBRIDGE: Ms Leetona Dungay, I hear your call for justice. We have heard that. Let me assure you, we have all heard that. But even if we cannot get to a system where tomorrow we create a whole body of fresh investigators who are entirely outside of the police and who are an Aboriginal-led organisation, which I understand is your preferred model, what if we could get to a system where, even if police are still doing the investigation, you have an independent statutory body that is sitting on their shoulder, sitting with them from the outset, critiquing what they do, following what they do, particularly if you had an Indigenous commissioner as part of that, would that be a step forward?

Ms JARRETT: That is what we are asking for, Mr Shoebridge. We understand that the police have to be involved, otherwise we do not get a brief, like old mate said. Sorry, I do not know your name.

The Hon. ROD ROBERTS: That is at you.

The Hon. TREVOR KHAN: Me.

Ms JARRETT: Yes. But that is the reality. We fully accept that we cannot just come in here and smash down a system that has been brought here for 250 years, but we are trying to accept the fact. Please listen to us: an independent body that is Aboriginal led is the ideal, but an independent body to look over the police investigating. If it is not all blacks, at least if it is independent we can have a little bit of faith as a family in the system that keeps letting us down, because somebody independent outside the police, outside of Justice Health and outside of this system, that would be a win for me and my family, personally. Independent self-determination. Let Aboriginal people be involved in their livelihoods. Give us some voices. Like George Newhouse said, there are plenty of learned mob—plenty. Although they might wear the badge and they might wear the uniform, they are still black underneath. They still have the cultural awareness of how to work with us. They still understand how to really investigate with a cultural sense of being First Nations in this country before they put that badge on. That is why it is so important, we believe, to have an independent body. The police have to work with us, obviously. We are not so lame that we do not know that, but we would like to know that there is an independent body that is keeping police in check and making sure that cells do not get wiped over. That should never have been done.

Ms LEETONA DUNGAY: See where you have the training issue that you have in the prisons and in the Police Force. They should not be given that badge until they are fully qualified to walk into those vulnerable places, with the mentally ill patient, my son, who should not have been assaulted by anyone. By law you are not allowed to assault or kill a mentally ill patient. You have to talk them down, not go in there and bash them to death.

Ms JARRETT: Exactly. The essential part of the independent body could have been on that day. Another Aboriginal inmate at least could have addressed Junior first.

Ms LEETONA DUNGAY: You need to be well trained and then you can get your certificate.

Ms JARRETT: And Aboriginal community liaison officers could have come and addressed Junior first.

Adjunct Professor NEWHOUSE: That was one of the recommendations of the Coroner: why did the officers not try to de-escalate? This was over a packet of biscuits. David was in his cell, he was not doing anything wrong and he was no risk to anyone or to himself.

Ms LEETONA DUNGAY: Why make it a case where they come in and call him down?

Adjunct Professor NEWHOUSE: That is right.

Ms JARRETT: That is what a fellow inmate would do.

Adjunct Professor NEWHOUSE: What Leetona Dungay is really asking for is cultural training of officers so that they understand that and so that their first response is not to escalate with violence and to overpower a prisoner.

Ms LEETONA DUNGAY: A mental patient.

Adjunct Professor NEWHOUSE: That would not have happened if David was in hospital. Let me just make this very clear. I said before that New South Wales is the only state in this country that has a hospital in a prison. If David had been in a public hospital he would not be dead. They do not do that in a public hospital. You do not have that dysfunctional relationship between guards and hospital staff. Leetona is right. What she was saying before was that the hospital staff were afraid of the guards. They were not in control of that situation and they gave evidence at the inquest that they did not ask the guards to go in there. No. So, I think that Leetona's point is valid. There really needs to be cultural safety training at all levels, whether it be police, whether it be coroners, whether it be guards—

Ms LEETONA DUNGAY: Fully trained—

Adjunct Professor NEWHOUSE: —but real understanding and not just tick a box—smoking ceremonies. It has got to be a real understanding and listening to the evidence that this family has gone through.

Ms LEETONA DUNGAY: They were all non-experienced and still on a traineeship. Now look where my son is. That should be stopped. They should be all trained with a badge and then walk in—

Adjunct Professor NEWHOUSE: I understand Leetona's point, too, and I will just clarify it. Only one of the officers on the day that David died had been trained in positional asphyxia.

Mr DAVID SHOEBRIDGE: Which is where somebody dies when they are pressed face down and their breathing is suppressed.

Ms JARRETT: Yes, prone position.

Ms LEETONA DUNGAY: With too much force.

Mr DAVID SHOEBRIDGE: And this is of the IAT, basically the intervention team whose job it is to do that day in, day out. Only one of five had training. That was the point.

Ms JARRETT: Yes.

Adjunct Professor NEWHOUSE: And I think he was junior and did not have any ability to instruct the others on what to do.

Ms JARRETT: Through the inquest we heard that they had policies and training that were emailed to them.

Ms LEETONA DUNGAY: They had only done it on a computer. Not physical. How does that work?

Ms JARRETT: How do you learn anything about physical contact with an inmate through an email? Then they came back saying, "Oh, we didn't read that email, so we didn't attend that training session" that was online.

Ms LEETONA DUNGAY: What an excuse.

Ms JARRETT: How do you learn to physically deal with sick inmates, maybe aggressive, any sort of inmate like this?

Ms LEETONA DUNGAY: No qualified certificate.

Adjunct Professor NEWHOUSE: I am going to provide, with your consent Ms Sharpe, a case study of a woman that was criminalised by the West Australian police. I know it is West Australian but it is a shocking story that ended up in the death of her baby because police left the baby at the scene of a violent domestic attack, arrested the mother and the baby was ultimately killed by the perpetrator of the domestic violence. It was the most horrific story.

The Hon. PENNY SHARPE: Yes, I followed that quite closely.

The CHAIR: I think we have come to the end of our time. I think you might have taken one question on notice, Mr Newhouse but in any case the Committee has resolved that answers to questions taken on notice be returned within 21 days. The secretariat will contact you in relation to anything that has been taken on notice. I would like to thank the Dungay family for coming here and sharing with us their insight and their experience. Ms Dungay, I think you had your hand up. Did you want to say something final?

Ms LEETONA DUNGAY: As I was saying, they need their qualified certificates. They did not get a medical certificate to go into my son's cell, whatsoever. They have got to get a pass to go into that cell and they did not. They rushed into that cell.

The CHAIR: Understood.

Adjunct Professor NEWHOUSE: She is right. To undertake a cell transfer you are supposed to get authority from a medical practitioner. That was not done and therefore that cell transfer, which ended up in David dying, was totally unauthorised. That is her view and I think it is supported by the evidence. Can I ask one last thing? I gave some evidence earlier about the power of the DPP and SafeWork NSW to investigate, and in particular whether the Attorney General could refer matters. Do you mind if I clarify that?

The CHAIR: Please take that on notice and come back to us. That will be fine. Thank you very much for your time and your insight.

Ms JARRETT: Thank you all.

Mr SILVA: Thanks for having me.

Ms JARRETT: Thank you.

(The witnesses withdrew.)

The Committee adjourned at 17:40.