Supplementary Submission No 3a

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

Organisation: New South Wales Bar Association

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SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

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

25 September 2020

Promoting the administration of justice

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,400 barristers who principally practice in NSW. We also include amongst our members judges, academics, and retired practitioners and judges.

Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's Joint Working Party on the over-representation of Indigenous People in custody in NSW, which comprises representatives of its Criminal Law, Human Rights and First Nations Committees in addition to judges, academics and experts. If you would like any further information regarding this submission, please contact the Association's Director of Policy and Public Affairs, Elizabeth Pearson, at first instance on

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A. Executive summary and recommendations

1. In July 2020 the New South Wales Bar Association (**the Association**) made a preliminary submission (**the Preliminary Submission**) to the Select Committee's inquiry into the high level of First Nations Peoples in custody and oversight and review of deaths in custody (**the Inquiry**).

2. As foreshadowed, the Association is pleased to make a further, more detailed submission to assist the Inquiry with its important work. Part B of this submission addresses the unacceptably high level of First Nations Peoples in custody in NSW (terms of reference (a) and (e)) while Part C considers the oversight and review of deaths in custody (terms of reference (b), (c) and (d)).

3. The Association's Preliminary Submission made the following recommendations:

> **Recommendation 1:** That the Committee inform itself and build upon the work of previous reports and inquiries into First Nations Peoples in custody, including but not limited to:
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> i. The 1991 Royal Commission into Aboriginal Deaths in Custody Final Report (**RCIADIC Report**);[1]
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> ii. Australian Law Reform Commission's (**ALRC**'s) 2018 *Pathways to Justice—An Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples—Final Report*[2] (**ALRC Report**);
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> iii. The Senate Finance and Public Administration References Committee 2016 *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* report (**Senate Finance Report**);[3]
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> iv. The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory 2017 Final Report;[4]
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> v. PwC's Indigenous Consulting 2017 *Indigenous Incarceration: Unlock the Facts* report (**PwC Report**);[5]
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> vi. The *Closing the Gap Report 2020* (**Closing the Gap Report**)[6]; and
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> vii. The NSW Law Reform Commission's 2000 *Sentencing of Aboriginal Offenders (Report 96).*
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> **Recommendation 2:** That the Committee need not wait until its reporting date of March 2021 to advocate to the Parliament that it respond to and implement recommendations of the ALRC Report, including the following 10 urgent priorities:

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1 *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 1998).

2 Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples – Final Report* (2017, ALRC Report 133).

3 Senate Finance and Public Administration References Committee, Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (27 April 2015).

4 *The Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Final Report.

5 PwC Indigenous Consulting, *Indigenous Incarceration: Unlock the Facts* (Report, 2017).

6 Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap)* (Annual Report, 2020).

i. the establishment of an independent justice reinvestment body, overseen by a Board with Aboriginal and Torres Strait Islander leadership, and the initiation of justice reinvestment trials to promote engagement in the criminal justice system;

ii. the establishment of properly resourced specialist Aboriginal and Torres Strait Islander sentencing courts to be designed and implemented in consultation with Aboriginal organisations, including the Walama Court in the NSW District Court;

iii. repeal of mandatory or presumptive sentencing regimes which have a disproportionate effect on Aboriginal offenders;

iv. the expansion of culturally appropriate community-based sentencing options, resourced and supported by the State Government;

v. the diversion of resources from the criminal justice system to community based initiatives that aim to address the causes of Indigenous incarceration;

vi. the revision of bail laws to require bail authorities to consider cultural issues that arise due to a person's Aboriginality;

vii. raising the minimum age of criminal responsibility and the minimum age of children in detention to 14;

viii. the abolition or restriction of offences relating to offensive language to genuinely threatening language;

ix. fine default should not result in imprisonment in lieu of or as a result of unpaid fines; and

x. the introduction of specific sentencing legislation to allow courts to take account of unique systemic and background factors affecting Indigenous peoples.

4. The Association further recommends:

Recommendation 3: That the Committee advocate to the NSW Government to voluntarily adopt a justice target to end the over-imprisonment of Aboriginal people within 10 years in NSW.

Recommendation 4: That the Committee advocate for the NSW Government to commit to funding the Walama Court to operate on a trial basis for five years, at a cost of approximately $3.1 million each year.

Recommendation 5: That the Committee advocate for the NSW Government to commit to funding community-led justice reinvestment at a total of $11.1 million over four years. This would provide core operational funding for backbone teams and external support for four sites.

Recommendation 6: That the Committee advocate to the NSW Government for one or more Aboriginal liaison officers to be based at the Coroner's Court.

B. Unacceptably high level of First Nations Peoples in custody in NSW

5. Recent events have highlighted the urgent need to address the continued over-representation of First Nations Peoples in Australia's criminal justice system. The Chief Justice of New South Wales, the Honourable TF Bathurst AC, recently remarked that:[7]

> The Black Lives Matter movement has brought the racism, inequality and abuses of power that have haunted our nation for so long to the forefront of public consciousness. This year marks 250 years since Captain Cook first landed in Australia. Despite this significant passage of time, the Black Lives Matter movement has exposed that our criminal justice system remains a tool of injustice for Indigenous Australians, who are one of the most incarcerated people in the world■

6. The Indigenous imprisonment rate in Australia rose 63 percent from the time the *Royal Commission into Aboriginal Deaths in Custody* reported in 1993 to 2016.[8]

7. The Indigenous population of NSW is around three percent. Yet, as at 9 August 2020, 25.7 percent of all men and 32.7 percent of all women imprisoned in NSW were Indigenous.

8. This level of over-representation has remained steady in this State for some years. Not only is this an indictment on the justice system, the flow-on costs to the community in areas such as the cost of imprisonment, unchecked drug and alcohol abuse, ongoing domestic violence and out-of-home care are enormous. Action must be taken urgently to address this persistent problem.

9. As outlined in Recommendation 1, there have been a series of substantial reports and inquiries concerning First Nations Peoples in custody, a number of which contain recommendations which are yet to be implemented, including the ALRC Report. The Association urges the NSW Government to promptly fund and implement the *Pathways to Justice* recommendations and, to assist the Committee, a copy of the Association's submission to the ALRC is enclosed at Annexure I. This chapter focuses specifically on the following issues:

   a. the importance of establishing more ambitious justice targets in NSW; and

   b. the urgent need to establish the Walama Court in the District Court of NSW and fund community-led justice reinvestment.

Justice targets

10. In July 2020 the Federal Government announced a national justice target aimed at reducing adult incarceration of First Nations Peoples by 15 percent by 2031. This target has attracted widespread criticism as being unambitious and inadequate from a number of organisations.

11. The Aboriginal Legal Service NSW/ACT (**ALS**) has called on the NSW Government to voluntarily adopt stronger jurisdictional-based justice targets that aim to end the over-imprisonment of First Nations Peoples within 10 years, as part of the State's plan to progress action

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7 The Hon TF Bathurst AC, 'Admission of Lawyers', Address in the Supreme Court of NSW Banco Court, 18 August 2020.

8 Don Weatherburn and Jessie Holmes, 'Indigenous imprisonment in NSW: A closer look at the trend' (BOCSAR, 2017) 1 <https://www.bocsar.nsw.gov.au/Publications/BB/Report-2017-Indigenous-Imprisonment-in-NSW-BB126.pdf>.

under the national *Closing the Gap* Agreement.[9] The Association strongly supports the ALS's recommendation.

12. The Association considers that higher targets to reduce the over-representation of First Nations Peoples in the criminal justice system in NSW could be achieved more quickly and safely. A commitment to reduce incarceration rates by 15 percent by 2031 is clearly insufficient, when the evidence suggests it is realistically possible to end First Nations over-representation in custody during that period.

13. Research released in August 2020 by the NSW Bureau of Crime Statistics and Research (**BOCSAR**) indicated that the State's prison population had been reduced in eight weeks by 10.7 percent and the youth detention population by 27 percent from February to June in response to the threat of COVID-19.[10]

14. This data illustrates that the Commonwealth justice target is unambitious and that reducing the prison population can evidently be done successfully, efficiently and more quickly, without impermissibly compromising community safety.

15. BOCSAR's research further indicated that the total number of Aboriginal persons in custody in NSW had been reduced by 11.3 percent between February and May 2020.

16. BOCSAR attributed these reductions to several factors including operational changes in the justice system, such as more favourable bail decisions by police and courts and an increase in people released from remand to await court cases in the community.

17. However, despite the decrease in the total number of Aboriginal persons in custody, the percentage of Aboriginal persons as a percentage of total inmates consistently remained around 26 percent, reflecting ongoing over-representation by a factor of 9-10.

18. In the Association's view, there is no reason to expect that similar results could not be achieved to address the significant and unacceptable over-representation of First Nations Peoples in Australian prisons.

19. First Nations-led organisations, including the ALS, have consistently advocated that governments can end the over-incarceration of First Nations Peoples within a decade. BOCSAR's figures substantiate this claim.

20. These new figures confirm that where there is a political will, there is a way to practically achieve a substantial and swift reduction in the number of First Nations Peoples in custody. Addressing this crisis must be a matter of national urgency for State and Commonwealth Governments alike.

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[9] Aboriginal Legal Service NSW/ACT, 'ALS urges NSW and ACT governments to lead, adopting 10 year justice targets to end imprisonment' (Media Statement, 7 August 2020) <https://www.alsnswact.org.au/als_urges_nsw_and_act_governments_to_lead_adopting_10_year_justice_targets_to_end_imprisonment>.

[10] BOCSAR, 'NSW Custody Statistics: Quarterly update June 2020' (Media Statement, 4 August 2020) <https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2020/mr-custody-Jun-2020.aspx>.

The Walama Court and justice reinvestment

21. The Association urges the NSW Government to commit to funding and implementing the Walama Court in the District Court of NSW. The recognition of First Nations voices in our criminal justice system and sentencing processes is integral to any serious attempt to significantly reduce the terrible incarceration rates of our First Nations Peoples. Establishing a specific Indigenous sentencing court will meaningfully address the underlying issues that give rise to repeat offending, in order to reduce the disproportionate rate of Indigenous incarceration.

22. As noted in the Preliminary Submission, the ALRC recommended the establishment of properly resourced specialist Aboriginal and Torres Strait Islander sentencing courts to be designed and implemented in consultation with Aboriginal organisations, including the Walama Court.

23. The Association has persistently advocated for the Walama Court to be established in NSW to reduce recidivism rates of First Nations Peoples through increased cooperation between the criminal justice system and respected persons in First Nations communities, and the use of more rigorous supervision orders and diversionary programs in the sentencing process.

24. The Walama Court involves a hybrid model incorporating aspects of the Victorian Koori Court and the NSW Drug Court and would operate at the District Court level. The Walama Court model proposes that the judge has greater capacity to monitor the progress of the individual post-sentence.

25. The proposal is designed to reduce recidivism rates of First Nations people through the use of more rigorous supervision orders and diversionary programs in the sentencing process, as well as increased cooperation between the criminal justice system and respected persons in the Indigenous community.

26. The NSW Youth Koori Court was expanded by the NSW Government because of its acknowledged success. There is no reason to believe that the Walama Court would not produce similar results.

27. Research released by BOCSAR in May further supports the case for the Walama Court by demonstrating the effectiveness of Circle Sentencing in lowering rates of imprisonment and recidivism for First Nations people.[11] Their research found that Aboriginal offenders who participated in Circle Sentencing are 9.3 percentage points less likely to receive a prison sentence, which represents a 51.7 percent decrease from the rate at which offenders undergoing traditional sentencing are incarcerated. Offenders who underwent Circle Sentencing are 3.9 percentage points less likely to reoffend within 12 months and take 55 days longer to reoffend if and when they do, than Aboriginal offenders sentenced in the traditional way.

28. Under the proposal, an offender may elect to be referred to the Walama Court where they have pleaded guilty to an offence, are appealing a Local Court sentence of imprisonment or are to be sentenced for a breach of a community order.

[11] BOCSAR, 'New circle sentencing evaluation finds positive results' (Media Statement, 26 May 2020) <https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2020/mr-circle-sentencing-cjb226.aspx>.

29. Once the offender's cultural background has been determined, a Sentencing Conversation would be held in Court in the presence of the judge, involving two Elders, the prosecutor, the offender and their lawyer, a Community Corrections officer and any other person at the judge's discretion, such as the victim and a domestic violence support person or mental health workers. Like other Courts, proceedings would be open to the public.

30. The Conversation would involve discussion about the nature of the offending, the effect on any victims, the offender's background and problematic areas in the offender's life which may need to be addressed. Post sentence, under the Walama Court the judge would have greater capacity to monitor an individual's progress, including through an intensive period of monitoring and supervision by Community Corrections in the community.

31. If a sentence of more than three years is imposed, the offender will serve it in the normal course. Nevertheless, the offender would have benefited from participating in a culturally appropriate Sentencing Conversation and better understood, with the input of the Elders, the impact of their actions on the community.

32. The Walama Court would not create two systems of justice in NSW. Rather, the Walama Court will still be required to deal with proceedings in accordance with the legislative regime and sentencing principles that apply to proceedings generally. It will be bound to have regard to the purposes of sentencing contained in sentencing legislation and the various legal principles relevant to sentencing set by decisions of the Court of Criminal Appeal, and subject to review by that Court.

33. The difference in approach is related to the objectives of the Walama Court which include seeking to:

    a. reduce the over-representation of First Nations Peoples in the criminal justice system;

    b. reduce the frequency and seriousness of offending by First Nations offenders;

    c. increase the level of compliance by First Nations offenders with community-based orders;

    d. promote community safety by reducing recidivism;

    e. enhance the level of court support provided to First Nations offenders and victims; and

    f. enhance the confidence of First Nations communities in the courts and the administration of justice by promoting closer engagement.

34. The Walama Court proposes an effective way to sentence First Nations offenders which would reduce the disproportionate rate of incarceration and meaningfully address the underlying issues that give rise to repeat offending. This will be achieved in the following ways.

35. First, it will involve Elders and other respected community members in the sentence proceedings. This will serve to involve people whom the offender respects and who can serve as mentors throughout the process. The involvement of Elders will also mean that offenders will be held to account in a more substantive way.

36. Second, the Walama Court's proceedings will involve a multi-agency approach to sentencing which will provide wraparound services such as medical and mental health services, substance abuse

treatment, employment programs and housing. This will provide meaningful support to the offender which will thereby reduce the likelihood of reoffending.

37. Third, proceedings before the Walama Court will involve more intensive supervision on the part of service providers and more intensive monitoring by the Court. Under the present system the court has no power to monitor the offender post-sentence. Under the proposed model, the Walama Court will have power to continue monitoring the offender and holding him/her to account even after sentence has been imposed.

38. The Walama Court proposal is supported by a sound business case, prepared by the Walama Working Group led by Her Honour Judge Dina Yehia SC of the District Court. It also has the support of the Police Association of NSW,[12] the Law Council of Australia, the ALRC,[13] and the 2020 Special Commission of Inquiry on 'Ice' which recommends that:[14]

> the NSW Government implement the Walama Court proposal, including through adequate funding and resourcing, to improve access to culturally appropriate diversion programs for Aboriginal people.

39. Importantly, the proposal has support from the NSW Department of Communities and Justice. Secretary Coutts-Trotter told an estimates hearing in September 2019 that the Walama Court was "an excellent proposal" being considered alongside "a range of other proposals, in the 2020-21 budget cycle" and "the issue is simply one of funding".[15]

40. The Association recommends that this Committee advocate to the Government and to the Parliament to commit to funding the Walama Court as a priority during the delayed 2020-21 Budget. The Association appreciates the significant budgetary pressures facing the NSW Government at this time. However, failing to commit to and invest in remedying the continued injustices faced by First Nations Peoples is not acceptable. Initiatives to address the over-representation of First Nations Peoples should not be placed in competition with other justice initiatives when there is no question of this pressing need for change endorsed by the ALRC.

41. The Walama Court will need to be adequately resourced and funded to ensure its success. In the long term the proposal will realise savings for the Government as fewer First Nations Peoples will be imprisoned and reduced recidivism rates would mean generations of people will no longer continue to cycle through the criminal justice system. It will deliver further social benefits to the community, as the model would involve community participation and more supervision resulting in reduced recidivism and increase compliance with court orders to better protect the community.

42. In 2018 it cost the NSW Government $181 per day to incarcerate one adult offender.[16] This is in addition to the cost of social and medical services provided to offenders while in prison and

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[12] New South Wales Bar Association and Police Association of NSW, 'New South Wales Bar Association and Police Association of NSW unite to support Indigenous sentencing court' (Media Statement, 24 June 2018) <https://inbrief.nswbar.asn.au/posts/bb24741e67431b27a08039cbb311bba3/attachment/JMR_24.6.18.pdf>.

[13] Recommendation 10-2.

[14] Prof Dan Howard SC, *Report of the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants* (2020) lxvii, recommendation 61 <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Drug-ice-1546/02-Report-Volume-1a.pdf>.

[15] New South Wales, *Parliamentary Debates*, Legislative Council, 2 September 2019, 84 (Mr Coutts-Trotter).

[16] See New South Wales Bar Association, *Briefing Note: Indigenous Incarceration and the Walama Court* (2018).

when they leave and return through the criminal justice system. Incarceration has an unquantifiable social impact on First Nations families and communities.

43. In 2015 the Walama Working Group[17] arranged for cost/benefit projections to be prepared regarding the estimated savings and benefits that would flow from the establishment of the Walama Court based on reduced rates of recidivism of 20 percent, 37 percent and 50 percent.

44. To provide context, in about 2015, the reduction in recidivism rates of individuals who had their matters considered by the NSW Drug Court was 37 percent. The Association is confident that if the Walama Court were to be established, it would achieve at least a similar result. On that basis, analysis showed that if the rate of reduced recidivism was 37 percent with an investment of over $8 million over 4 years, it would result in a 64 percent annualised return on the investment (the benefit). For every $181 per day spent in incarcerating an adult Aboriginal offender, the Government would recoup $115.84 per day. On a conservative analysis, where the rate of reduced recidivism was assumed to be 20 percent with a financial investment of over $4 million over 4 years, it would result in a benefit of 36 percent annualised return on the investment. That would realise a saving of $65 for every $181 per day spent on incarcerating an adult Aboriginal offender.

45. For the Walama Court to be administered successfully, the NSW Government would need to allocate approximately $15.5 million over five years (or approximately $3.1 million each year) for the Court to operate on a trial basis for that duration. Of that figure, $12,178,387 million would be directed to Corrective Services NSW while the only funding sought by the District Court of NSW for the successful establishment of the Walama Court is $60,000 per year for a five-year period for the purposes of employing an additional court officer. This is a relatively small amount of funding required, as compared with the long term social and economic costs to the NSW community and continued injustice to First Nations Peoples. Accordingly, the Association recommends that investing in the Walama Court must be a priority of the upcoming Budget.

46. Further, the Association recommends that the Committee advocate for the NSW Government to commit to funding community-led justice reinvestment as a priority during the 2020-21 Budget, at a total cost of $11.1 million over four years. This would provide core operational funding for backbone teams and external support for four sites. The proposal to fund community-led justice reinvestment similarly has support from the NSW Department of Communities and Justice. Funding in line with the business case prepared by the Department would give effect to key recommendations of the ALRC Report tabled more than two years ago. Specifically, the ALRC recommended that Commonwealth, state and territory governments provide support and resources for the establishment of an independent justice reinvestment body and for community-led place-based trials.[18] Further information regarding justice reinvestment reforms, including the Maranguka Project which has been run by NSW Just Reinvest in Bourke for some years, is outlined in section 13 of the Association's submission to the ALRC at Annexure I of this submission.

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[17] The Walama Working Group comprised of Her Honour Judge Yehia SC (Chair), Mr Brendan Thomas (CEO Legal Aid NSW), Ms Annmarie Lumsden (Director – Criminal Law, Legal Aid NSW), Mr Richard Funston (Executive Director of Crime, Legal Aid of NSW), Mr Lloyd Babb (Director of the NSW DPP), Ms Janet Manuell SC (Public Defender), Ms Nadine Miles (Chief Legal Officer, Aboriginal Legal Service), Mr Craig Hyland (Solicitor for Public Prosecutions), Ms Teela Reid (Solicitor, Legal Aid NSW), Ms Rosemary Caruana (Assistant Commissioner / Executive Director – Community Corrections, Western District) and Mr Luke Grant (Assistant Commissioner, Corrections Strategy and Policy).

[18] ALRC Report, recommendations 4.1 and 4.2.

C. Oversight and review of deaths in custody

47. The Inquiry's terms of reference primarily focus upon deaths which give rise to disciplinary issues or issues relating to individual misconduct or failure to comply with law, policy or protocol. While accountability of individuals and systems is extremely important, the Association considers that this Inquiry represents an opportunity to consider equally important systemic, restorative and therapeutic matters.

48. The multiple agencies identified in the Inquiry's terms of reference reflect the fragmentation of functions concerning review of deaths in custody, which carries real risks of ineffectualness and counter-productivity. Functions intended to protect and support First Nations Peoples in relation to deaths in custody, and incarceration generally, should be concentrated and consolidated in agencies with appropriate depth of expertise and resources.

49. The Association considers that the office of the NSW State Coroner and the coronial system, when properly resourced, are most appropriate to provide independent oversight and conduct inquiries into deaths in custody. According to the *Coroners Act 2009* (NSW), a senior NSW coroner must conduct an inquest into every death in custody (police or corrective services) in NSW. This suggests that Parliament intended the coronial system to be the principle agency which investigates these deaths in NSW. The Association suggests that close scrutiny should be given to the extent to which functions and resources conferred upon other bodies detract from or hamper senior Coroners in NSW in discharging this role.

The State Coroner and coronial system

50. There are several important features of the office of the State Coroner and coronial system. Coroners have an established and unique capacity to marshal resources from different disciplines, test hypotheses and robustly analyse disquieting facts in connection with deaths.[19]

51. The coronial jurisdiction is embodied, by history and statute, with features to enable effective and multi-faceted inquiries into deaths in custody. The Coroner's Court has an established and independent oversight role, and coroners discharge independent and flexible judicial power and functions. The system is inquisitorial and investigatory, both important to enable effective inquiry in these circumstances. The very purposes of the jurisdiction include satisfying the concern of the public in the proper administration of gaols and other institutions, and the care of persons in custody.[20] The jurisdiction is preventative, with potential to identify systemic failures in custodial practices and procedures which may, if acted upon, prevent future deaths in similar circumstances.[21]

52. There are several ways in which a coroner's functions to inquire into First Nations People deaths in custody could be enhanced. First, increased recognition of its critical oversight role, and associated enhanced standing and resources, should be given to the Coroner's Court as a specialist

[19] See *Waller's Coronial Law and Practice in NSW* (4th ed) 1.

[20] *Bilbao v Farquhar* [1974] NSWLR 377, 388.

[21] Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 1, AGPS, Canberra 1991, [4.7.4], cited in Waller, above n 19, [1.75].

jurisdiction. In that respect, a District Court judge presiding would assist in promoting and implement sustainable cultural and practice reforms.

53. Second, section 78 of the *Coroners Act 2009* (NSW) should be amended. Currently, the high threshold imposed creates an impediment to appropriate referrals to the Director of Public Prosecutions (**DPP**), one which duplicates the DPP's function (and the DPP is the appropriate agency to perform the function). Section 78 provides for a coroner to forward a case to the DPP if the coroner forms the opinion that:

    i. The evidence is capable of satisfying a jury beyond reasonable doubt that a known person has committed an indictable offence;

    ii. There is a reasonable prospect a jury would convict;

    iii. The offence would raise the issue of whether the known person has caused the death.

54. The limb in ii. is one of the factors that will bear on the decision made by the DPP whether to commence a prosecution. From the perspective of the coronial process, that limb is superfluous to a coroner's modern functions. If it was removed, referrals to the DPP may occur earlier without substantial compromise of safeguards, in turn providing better efficiency throughout the process including, ultimately, any earlier resumption of the inquest to examine any systemic or public interest issues surrounding the death.

55. The terms of section 78 may reflect former committal processes under the common law and the predecessors of *Coroners Act 2009* (NSW) whereby a coroner could commit a person for trial directly from a coronial inquest. However, a coroner no longer has the power to commit persons for trial and they can only refer a matter to the DPP. Even Local Court Magistrates, who do commit persons for trial, no longer make any assessment of evidentiary sufficiency following the Early Appropriate Guilty Pleas reforms in 2018.[22] Further, rules of admissibility of evidence do not apply in coronial proceedings, yet section 78 requires a coroner to assess the prospects of conviction by a jury based upon admissible evidence and anticipating legal directions which form no part of a coroner's function.

56. The Association suggests that the coronial capacity to effect positive systemic review and change in relation to deaths of First Nations People in custody could be enhanced by a resource similar to the Victorian Coroners Prevention Unit (**CPU**). The CPU is a specialist service to strengthen coroners' prevention role and provide them with expert assistance in reviewing deaths, collecting and analysing data, and developing prevention-focused recommendations. The need for a longitudinal assessment of systemic and recurring issues to prevent deaths in custody is well recognised and the Coroner's Court is well placed to perform this role through its recommendations function, if adequately resourced.

57. The NSW State Coroner is required to report to parliament on deaths in custody every year, under section 37 of the *Coroners Act 2009* (NSW). Presently the Association understands that despite compliance with the provision, there is ample scope for this reporting process to achieve greater

[22] Department of Communities and Justice, *Early guilty pleas reform* <https://www.justice.nsw.gov.au/Pages/Reforms/early-guilty-pleas.aspx>.

outcomes in the public interest. A CPU would enable greater depth and utility to a section 37 report in addressing emerging patterns or systemic issues.

58. The bodies referred to in the terms of reference all play important roles. However, none have the long term expertise or experience of the Coroner's Court in investigating death, making recommendations to prevent future deaths and engaging in a therapeutic manner with grieving families.

Aboriginal liaison officers

59. The Association considers that locating one or more Aboriginal liaison officers at the Coroner's Court would be of significant value. These officers would ideally be made available to families immediately upon a death occurring, and would remain working with families throughout any coronial investigation and inquiry.

60. Much confusion, distrust and exacerbated grief experienced by families can occur in the course of a death and immediately afterwards, in custodial contexts. Enabling earlier appropriate engagement with a family and earlier meaningful access to information may assist in alleviating such experiences. A liaison officer could more broadly build rapport and provide an alternative voice for families in the coronial system, and assist to address barriers and misapprehension between families and the agencies of government who may have been involved in the death (such as Corrective Services and police).

61. However, it is also important to recognise the limitation that an Aboriginal liaison officer has no control over or insight into the investigative decisions, and therefore cannot be expected to assume all responsibility. Although it is not the intended purpose of a liaison officer, the reality is that a family may expect the officer to be able to provide answers for the process.

62. The Association considers that in addition, greater involvement of the ALS, with proper funding, in Aboriginal deaths in custody inquests would assist in building trust with family members and ensure that information was conveyed by lawyers with some cultural understanding of grieving families. Ongoing legal representation by one agency would also assist in identifying recurring and systemic issues. Further, the Association suggests that consideration should be given to the court appointing counsel assisting, to ensure there is someone that the community and family might have some confidence in.

63. Importantly, consideration should also be given to amending the *Coroners Act 2009* (NSW) to enable an Aboriginal Commissioner to sit with the Coroner, similar to the process that occurs in Aboriginal land claims. The Association considers this measure would make a significant difference to the perception that Aboriginal parties have of the process. First Nations oversight of investigations, coronial investigations and the implementation of recommendations is critical.

Coronial findings and previous reports

64. It is widely accepted that a substantial reason for the rates of death in custody of First Nations Peoples is over-representation in the prison environment, as well as common requirements for enhanced physical and mental health care. It is incumbent upon the State, having prescribed incarceration - and its associated deprivation of personal resources - as a penalty for offending in

any given case, to provide health care to those incarcerated that is appropriate in every respect, including culturally.

65. The creation of full-time Aboriginal health worker roles at Junee correctional centre was recommended by the Deputy State Coroner in the Inquest into the death of Jonathon Hogan,[23] as an intervention that could potentially make a difference to an Aboriginal inmate with whom non-indigenous doctors and nurses were unable to establish significant or consistent rapport.

66. Recruitment of Aboriginal health workers was also recommended by the Deputy State Coroner very recently on 26 August 2020, in the Inquest into the death of Tane Chatfield, a death resulting from impulsive indigenous suicide in custody (one of a number in 2020). Her Honour's findings, and the reasons for them, explain the value in providing expanded culturally appropriate Drug and Alcohol and Mental Health Services and workers with expertise in suicide prevention strategies. The Deputy State Coroner was confident that input and involvement from an Aboriginal Mental Health Worker could have been important in improving care and support for the deceased.[24] The Association considers that these recommendations could be appropriately extended to and implemented in other correctional centres.

67. The Chatfield and Hogan coronial investigations and findings clearly illustrate why the coronial system is most appropriate to oversee inquiries into deaths of First Nations People in custody in NSW. In summary, the appropriate body and framework already exist. The coronial jurisdiction has relevant expertise, legal foundations, structure and experience. When properly resourced, reinforced and understood, and with recommendations such as those of the Chatfield and Hogan inquests prioritised, the Association considers this jurisdiction is key in addressing the issues the subject of this Inquiry.

68. In addition, as referred to in the Association's Preliminary Submission including Recommendation 1, there have been a number of inquiries touching upon the subject of First Nations deaths in custody, which may contain relevant, but unimplemented, recommendations. These include the ALRC Report which was tabled on 28 March 2018 and contains important recommendations on issues including justice reinvestment, bail, sentencing, prison programs, parole and access to justice which are yet to be enacted more than two years later.

69. As outlined in Recommendation 2 of the Preliminary Submission, the Association strongly recommends that implementing the ALRC's recommendations would be instrumental in addressing over-representation of First Nations People in custody and associated deaths.

Conclusion

70. Thank you again for the opportunity for the Association to make a submission to this Inquiry. The Association would be pleased to assist the Committee with any questions it may have. If you would like any further information, or to discuss this submission, please contact the Association's Director of Policy and Public Affairs, Elizabeth Pearson,

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[23] See *Findings of Inquest into the death of Jonathan Hogan*, Coroners Court of New South Wales, 6 May 2020, [220], [236], [273]-[275], [302] and recommendation 4.

[24] See, eg, *Findings of Inquest into the death of Tane Chatfield*, Coroners Court of New South Wales, 27 May 2020, [23], [40], [120], [133]-[136], [146].