

7 September 2020

NSW Legislative Council
Select Committee on the High Level of First Nations People
in Custody and Oversight and Review of Deaths in Custody
By email: First.Nations@parliament.nsw.gov.au

Dear Committee Members,

Re: Submission to the Inquiry into the High Level of First Nations People in Custody and Oversight Review of Deaths in Custody

Thank you for the opportunity to provide comment to this Parliamentary Inquiry. Community Legal Centres NSW endorses the submissions made by our member centres the Public Interest Advocacy Centre (PIAC), Western NSW Community Legal Centre, and Women's Legal Service NSW, as well as by the Aboriginal Legal Service (NSW/ACT) (ALS). We particularly draw the committee's attention to the recommendations made by the ALS in relation to the need to reform coronial processes based on the experiences of people and families who have lost family members in custody. This includes:

- Adequate resourcing for the ALS Custody Notification Service to continue, and for the ALS to establish a dedicated coronial inquest team.
- Genuine accountability for implementing coronial recommendations.
- Strengthening the role and efficacy of the Law Enforcement Conduct Commission.

This short submission addresses:

- Our concern that over-incarceration of First Nations people is not a new issue: successive governments have had ample opportunity to act on the hundreds of recommendations relating to this issue, and have collectively failed to act adequately.
- The failure of prison as a solution to crime, and the importance of adequately resourcing First Nations-led alternatives to imprisonment.
- The role of prejudicial, targeted over-policing of First Nations people and communities in the over-incarceration and deaths in custody of First Nations people.
- Necessary reforms to the Bail Act to add a standalone provision for Aboriginality.
- Several changes to the *Children and Young Persons (Care and Protection) Act 1998* (NSW) that are necessary in order to break the 'care-criminalisation' cycle that drives over-incarceration of First Nations people.

About Community Legal Centres NSW

Community Legal Centres NSW is the peak representative body for 40 community legal centres in NSW. Our team supports, represents and advocates for our members, and the legal assistance sector more broadly, with the aim of increasing access to justice for people in NSW.

Community legal centres are independent non-government organisations that provide free legal help to people and communities at times when that help is needed most, particularly to people facing economic hardship, disadvantage or discrimination.

Community Legal Centres NSW is advised on matters relating to justice for First Nations people by our Aboriginal Advisory Group, our Aboriginal and Torres Strait Islander Rights Working Group, and our Aboriginal-controlled member centres, as well as by the Aboriginal Legal Service (NSW/ACT).

Over-incarceration of First Nations people is not a new issue

The over-incarceration and disproportionate number of deaths in custody of Aboriginal and Torres Strait people and deaths in custody are not new issues. Aboriginal and Torres Strait Islander people in Australia are imprisoned at the highest rate of any people in the world, and at a rate 16 times higher than non-Indigenous Australians.¹ Aboriginal and Torres Strait Islander children are 26 times more likely to be incarcerated than non-Indigenous children.^{2 3 4} In 2018, a quarter of the people in full-time custody in NSW identified as Aboriginal or Torres Strait Islander,⁵ despite Aboriginal and Torres Strait Islander people making up just 2.9% of the NSW population.⁶

Aboriginal and Torres Strait Islander women are the fastest growing prison population in Australia.⁷ Eighty per cent are mothers.⁸ This disproportionate criminalisation of Aboriginal and Torres Strait Islander mothers is a significant contributor to the high rates of Aboriginal child removal, which in turn is a key driver of intergenerational imprisonment due to the well-established links between child removal, out-of-home care (OOHC), and criminalisation of young people.

The causes of, and measures to reduce, this over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system have been considered by inquiry after inquiry over at least the last three decades.

The Royal Commission into Aboriginal Deaths in Custody tabled its final report in April 1991. The report detailed investigative accounts of 99 deaths in custody, made 339 recommendations, and was intended to be a blueprint for reducing the disproportionate incarceration and deaths in custody of Aboriginal and Torres Strait Islander people. The Commission found that the over-incarceration of Aboriginal and Torres Strait Islander people

¹ Thalia Anthony and Eileen Baldry, "FactCheck Q&A: are Indigenous Australians the most incarcerated people on Earth?", *The Conversation*, 6 June 2017, <https://theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528>

² Dr Mike Roettger, Krystal Lockwood, Prof Susan Dennison, "Indigenous people in Australia and New Zealand and the intergenerational effects of incarceration" *Indigenous Justice Clearinghouse*, Research Brief 26, December 2019, <https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/intergenerational-effects-of-incarceration-fa.pdf>

³ Australian Bureau of Statistics. *Prisoners in Australia*, 2018, <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>

⁴ Australian Institute of Health and Welfare, "Youth detention population in Australia 2018", Bulletin 145, December 2018, <https://www.aihw.gov.au/getmedia/55f8ff82-9091-420d-a75e-37799af96943/aihw-juv-128-youth-detention-population-in-Australia-2018-bulletin-145-dec-2018.pdf.aspx?inline=true>

⁵ Corrective Services NSW, *NSW Inmate Census 2018*.

⁶ Australian Bureau of Statistics, *2016 Census QuickStats*, https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/1

⁷ Australian Bureau of Statistics, *4517.0 – Prisoners in Australia*, 2019, <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>

⁸ Lorana Bartels, "Painting the Picture of Indigenous Women in Custody in Australia", *QUT Law Review*, vol. 1, no. 2, October 2012.

and their deaths in custody were driven by prejudice at every stage of the criminal justice system, including:

- Prejudicial policing, particularly for minor crimes, and the tendency to charge and arrest Aboriginal and Torres Strait Islander people rather than issue warnings or court attendance notices
- Police and courts not granting bail to Aboriginal and Torres Strait Islander people
- Courts being more likely to sentence Aboriginal and Torres Strait Islander people to prison rather than non-custodial terms.

In the almost three decades since the Royal Commission, the state of Aboriginal and Torres Strait Islander incarceration rates and deaths in custody have actually worsened: over 400 Aboriginal and Torres Strait Islander people have died in custody since 1991.

Minor public order offences, such as offensive language and public drunkenness, continue to be harshly punished. Police powers in relation to public drunkenness and arrest have actually been extended. At the same time, the right to bail has been undermined, and maximum prison penalties and mandatory prison sentences have increased. Services for Aboriginal and Torres Strait Islander people have been mainstreamed or defunded, Aboriginal and Torres Strait Islander children are removed from their families at staggering rates, and vulnerable Aboriginal and Torres Strait Islander people are increasingly targeted and criminalised, particularly young people, women experiencing family violence and people experiencing mental illness.⁹

The Royal Commission was mindful that adequate implementation of its recommendations would require proper oversight. Unfortunately, this oversight has been inadequate and most Royal Commission recommendations remain unmet.¹⁰

While we welcome the renewed interest in this very important issue, we are concerned that, unless governments begin 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, this inquiry may have little fruitful outcome. It is important that state, territory and federal governments make a genuine commitment to reducing over-incarceration through setting up appropriate oversight mechanisms, to hold them accountable to specific state-based justice targets under the national Closing the Gap framework.

Implementation of recommendations from this inquiry, and of those recommendations outstanding from the Royal Commission and previous inquiries, should be guided by high-level principles including self-determination, and the prioritising of preventative and diversionary measures and justice reinvestment initiatives over punitive approaches. Implementation requires adequate resourcing, including of oversight mechanisms.

⁹ Thalia Anthony, "Deaths in custody: 25 years after the royal commission, we've gone backwards", *The Conversation*, April 13 2016, <https://theconversation.com/deaths-in-custody-25-years-after-the-royal-commission-weve-gone-backwards-57109>

¹⁰ The Guardian, *Deaths inside: Indigenous Australian deaths in custody 2019*, <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>

Recommendations:

1. State, territory and federal governments should introduce proper oversight for the implementation of recommendations in relation to reducing over-incarceration and deaths in custody of Aboriginal and Torres Strait Islander people.
2. Reforms to the justice system to reduce over-incarceration of First Nations people and address deaths in custody should be informed by high-level principles including self-determination, and the prioritising of preventative and diversionary measures over punitive approaches, with adequate resourcing.
3. As part of a shared decision-making model with Aboriginal and Torres Strait Islander people, the NSW State government should commit to a more ambitious justice target in the NSW Closing the Gap jurisdictional plan to ensure that Aboriginal people are not disproportionately incarcerated compared to non-Indigenous people within 10 years.

Adequate resourcing for First Nations-led alternatives to prison

Imprisonment fails as a solution to 'crime'

A wealth of cost-benefit data shows that prisons are an investment failure: they destabilise communities, individuals and families, exacerbate mental illness and substance abuse, and largely fail to rehabilitate people or provide them with the skills they need to reintegrate into the community.¹¹ This money would be better invested in enhancing communities' capacity to identify and tackle their own challenges.

Far too many people in NSW are sentenced to imprisonment for non-violent offences like non-payment of fines, traffic violations or drug offences, which are often linked to poverty and systemic discrimination. According to the latest Corrective Services NSW Inmate Census, in June 2018 almost 1 in 5 women and over 1 in 6 men who had been sentenced to a term of imprisonment, had non-violent drug charges as their most serious offence. The same census showed that over a third of people in full-time custody in NSW were unsentenced. The rates of Aboriginal and Torres Strait Islander women on remand are particularly concerning. As at June 2018, 42% of Aboriginal and Torres Strait Islander women being held full-time in prison were unsentenced.¹²

Rates of recidivism and inter-generational incarceration are key indicators of the failure of prisons to prevent crime. From 2011-12 to 2015-16, rates of imprisonment and recidivism in Australia both rose. In 2015-16, 44.6% of all Australian prisoners returned to jail within two years of release, compared with 39.5% in 2011-12.¹³ Children of parents who are imprisoned

¹¹ Baillie Aaron, "Prisons are failing. It's time to find an alternative", *World Economic Forum*, 9 January 2019, <https://www.weforum.org/agenda/2019/01/prisons-are-failing-time-for-alternative-sparkinside/>

¹² Corrective Services NSW, *NSW Inmate Census 2018*, <https://www.correctiveservices.justice.nsw.gov.au/Documents/research-and-statistics/sp47-nsw-inmate-census-2018.pdf>

¹³ Productivity Commission, *Report on Government Services 2017*, Volume C: Justice, <https://www.pc.gov.au/research/ongoing/report-on-government-services/2017/justice/rogs-2017-volume-c.pdf>

are themselves roughly six times more likely to end up imprisoned themselves – a statistic driven by racial and socioeconomic factors, stigma, and the out-of-home care system.¹⁴

Imprisonment is clearly failing to prevent crime – overcrowding and limited programs and services in prison are impediments to rehabilitation.¹⁵ ¹⁶ Rates of intergenerational incarceration similarly show that the prison system is a failed approach to reducing or preventing crime.

Key to reducing the over-representation of Aboriginal and Torres Strait Islander people in custody, and to ending deaths in custody, is adequate resourcing for community-focused, evidence-based alternatives to imprisonment, with a particular focus on those approaches that are First Nations-led.

Justice Reinvestment

Community Legal Centres NSW supports and promotes a justice reinvestment approach to criminal justice reform. Justice reinvestment is ‘a data-driven approach to improve public safety, reduce corrections and related criminal justice spending, and reinvest savings in place-based, community-led strategies that can reduce crime and strengthen communities.’¹⁷

According to the Australian Law Reform Commission:

A justice reinvestment approach to criminal justice reform involves a redirection of money from prisons to fund and rebuild human resources and physical infrastructure in areas most affected by high levels of incarceration. Justice reinvestment originated in the United States (US) as a response to an exponential growth in the rate of imprisonment since the 1970s.

Justice reinvestment suggests that prisons are an investment failure, ‘destabilising communities along with the individuals whom they fail to train, treat, or rehabilitate (and whose mental health and substance abuse are often exacerbated by the experience of imprisonment)’. Instead, to address the causes of offending, money is better spent—and indeed savings can be made—by reinvesting in places where there is a high concentration of offenders. Justice reinvestment ... can serve both the ends of economic efficiency and social justice: ‘the most efficient way to a just society is to reduce criminality at source through investment in social justice.’

As set out by Just Reinvest NSW:

The underlying causes of crime are varied and complex. Research demonstrates that individuals who come into contact with the criminal justice system are highly likely to experience multiple and severe social and economic disadvantage including poverty and inter-generational trauma. Justice reinvestment provides communities with the power and resources to support people tackling challenging circumstances through long-term measures tailored to local needs that address the underlying drivers of crime.’¹⁸

¹⁴ Rebecca Opie, “Children of prisoners six times more likely to end up in jail; SA judge calls for better support”, ABC News, <https://www.abc.net.au/news/2017-02-18/more-support-needed-for-children-of-prisoners/8282936>

¹⁵ Christopher Knaus, “Prisons at breaking point but Australia is still addicted to incarceration”, *The Guardian*, 29 December 2017, <https://www.theguardian.com/australia-news/2017/dec/29/prisons-at-breaking-point-but-australia-is-still-addicted-to-incarceration>

¹⁶ Penal Reform International, *Overcrowding*, <https://www.penalreform.org/issues/prison-conditions/key-facts/overcrowding/>

¹⁷ Just Reinvest NSW, *What is justice reinvestment?* <http://www.justreinvest.org.au/what-is-justice-reinvestment/>

¹⁸ Just Reinvest NSW

A 2018 Impact Assessment of the Maranguka Justice Reinvestment Project in Bourke by KPMG estimated that improvements in family strength, youth development and adult empowerment as a result of the project had an economic impact of \$3.1 million on NSW government spending in 2017. Empowering the community to identify and implement early support services on the ground has kept people out of court and prison. This is not only a positive outcome for the community but has also saved the government from spending money on criminal justice.¹⁹

Justice reinvestment is based on the simple premise that communities are best placed to solve their own problems, if they are given the opportunity to do so. One example of this principle working in practice is the learner driver support program under the Maranguka Justice Reinvestment Project. Data had shown that Bourke had the highest rate of driver licensing offences in NSW. Instead of increasing police presence on the roads and criminalising young people for driving without a valid licence, the community worked together to support young people to get valid licenses. Unsurprisingly, the number of driver licensing offences decreased. Another solution the Bourke community has identified to reduce criminalisation is a focus on early diagnosis of disability and adequate support for young people with disabilities so that those children can stay engaged in the classroom.²⁰

Walama Court

Community Legal Centres NSW strongly supports the calls from First Nations lawyers in NSW for the state government to establish the Walama Court. The Walama Court, named based on the Dharug word for 'come back', would be a dedicated, culturally appropriate court that would sit inside the NSW District Court to help divert Aboriginal and Torres Strait Islander people from prison and reduce re-offending.²¹²² It would involve Aboriginal and Torres Strait Islander Elders in sentencing decisions, rehabilitation and monitoring, and would help address over-incarceration of Aboriginal people through increasing the use of community-based sentencing for certain offences.

The argument for the establishment of the Walama Court is based on an understanding of the multitude drivers of over-incarceration of Aboriginal and Torres Strait Islander people. As the business case for the establishment of the Walama Court sets out:

*The main drivers of Aboriginal and Torres Strait Islander peoples' incarceration are complex and include intergenerational trauma, family violence and sexual abuse, social exclusion and racism, substance abuse, health, education, unemployment and child protection issues.*²³

¹⁹ KPMG, *Maranguka Justice Reinvestment Project: Impact Assessment*, 27 November 2018, <http://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>

²⁰ Simon Leo Brown, Chris Bullock and Ann Arnold, 'Three projects linking Aboriginal communities and police that are helping to stop more Indigenous people going to jail', *ABC News*, 10 July 2020, <https://www.abc.net.au/news/2020-07-10/indigenous-incarceration-rates-programs-community-police/12433372>

²¹ Michaela Whitbourn, 'First Nations lawyers call for urgent action on Walama Court', *Sydney Morning Herald*, 7 August 2020, <https://www.smh.com.au/national/first-nations-lawyers-call-for-urgent-action-on-walama-court-20200804-p55iqg.html>

²² Aboriginal Legal Service, 'Media release: ALS welcomes pledge to establish Walama Court', *ALS*, March 2019, https://www.alsnswact.org.au/alsnews_walama_court

²³ Michaela Whitbourn, 'Indigenous Walama Court would deliver millions in savings, costings show', *The Sydney Morning Herald*, June 24, 2020, <https://www.smh.com.au/national/indigenous-walama-court-would-deliver-millions-in-savings-costings-show-20200622-p554yy.html>

Alongside the clear benefits to people and communities of such an approach, the Walama Court would also deliver millions per year in savings.²⁴ The project would cost less than \$3.9 million per year to establish and run, and would generate potential savings over eight years of \$16.2 million on prison beds and \$5.6 million from lowered recidivism, as well as potential productivity gains.²⁵

As stated by Legal Aid NSW lawyer and member of the Walama Working Group, Teela Reid, the Walama Court would return Aboriginal people to the safety of their communities and ensure they don't 'languish inside a prison cell.'²⁶

Recommendations:

4. The NSW Government should commit to adequately funding Justice Reinvestment initiatives designed and led by First Nations people and communities across NSW.
5. The NSW Government should commit to, and dedicate sufficient funding in the 2020 State Budget to establish, the Walama Court within the District Court of NSW.

End targeted and prejudicial policing

Community Legal Centres NSW recognises that over-incarceration of First Nations people in part stems from targeted and discriminatory over-policing of First Nations people and communities. There are a multitude of examples of such approaches to policing; here we outline three.

The 'trifecta phenomenon'

Community Legal Centres NSW is concerned by the high numbers of people ultimately charged with 'assault police' as a result of the 'trifecta phenomenon.' Under this phenomenon, a person is initially targeted for a relatively minor offence ('offensive language' is a common first 'offence' in the trifecta). Police intervention escalates rather than diffuses the situation, and the targeted person responds angrily or aggressively. Finally, police charge the person with 'resist arrest' and 'assault police' in addition to the original, minor infringement.²⁷

Community Legal Centres NSW endorses the recommendations of the Aboriginal Legal Service (NSW/ACT) in relation to the 'trifecta phenomenon' and draws the Panel's attention to the case studies they provide, which demonstrate this phenomenon and the police's propensity to escalate rather than diffuse tension in interactions with Aboriginal and Torres Strait Islander people in particular.

²⁴ Ibid.

²⁵ Michaela Whitbourn, 'First Nations lawyers call for urgent action on Walama Court', *Sydney Morning Herald*, 7 August 2020, <https://www.smh.com.au/national/first-nations-lawyers-call-for-urgent-action-on-walama-court-20200804-p55iqg.html>

²⁶ Ibid.

²⁷ Australian Human Rights Commission, *Indigenous Deaths in Custody: Report Summary*, 1996, see: parts 4.5, 6.4, 7.2 and 7.3: <https://humanrights.gov.au/our-work/indigenous-deaths-custody-report-summary>

Suspect Target Management Program (STMP)

Under the NSW Police's Suspect Target Management Project (STMP), police create a list of young people they suspect may commit offences. Once identified, these young people are repeatedly stopped, detained and visited at home by police.²⁸ According to PIAC:

*The STMP is a very invasive police policy that has significant detrimental impact on the lives of young people who are subject to it, and their families. Some young people, as young as 13, report being stopped and searched in public, including on the train, sometimes several times a week, and visited at home by police, late at night, for no specific reason. We know that children as young as ten have been placed on an STMP. There is no publicly available evaluation or evidence that the STMP actually prevents or reduces crime.*²⁹

The program breeds distrust between police and the young people they target, and often leads to a cycle of criminalisation that follows young people into adulthood.

As of 2019, data shows that more than half of the young people targeted by the NSW STMP were Aboriginal.

Unequal approaches to illicit drug possession and use

Another example of unequal and harmful policing is the approach to illicit drugs. In June 2020, *The Guardian* revealed that between 2013 and 2017, the NSW Police pursued more than 80% of Aboriginal and Torres Strait Islander people found with small amounts of cannabis through the courts while letting others off with warnings. This forces young Aboriginal people into a criminal justice system that legal experts say they will likely never escape.³⁰ This is despite the existence of a specific cautioning scheme introduced to keep minor drug offences out of the courts. *The Guardian* reported:

*During the five-year period, 82.55% of all Indigenous people found with a non-indictable quantity of cannabis were pursued through the courts, compared with only 52.29% for the non-Indigenous population, the data compiled by the NSW Bureau of Crime Statistics and Research shows. The data shows police were four times more likely to issue cautions to non-Indigenous people.*³¹

This is illustrative of a targeted and discriminatory approach to drug use that results in systemic injustice and the over-incarceration of Aboriginal and Torres Strait Islander people, as well as people experiencing socio-economic disadvantage.

Harm minimisation approaches treat substance abuse primarily as a health issue rather than a criminal justice issue. They recognise that punitive responses will not stop the illicit trade and use of drugs and prioritise compassionate, person-centred responses to problematic drug use. Around the world, harm minimisation approaches have been demonstrated to save lives and to reduce the negative health effects of illicit drug use, including the spread of diseases like HIV

²⁸ Claudianna Blanco, 'Racist policing': NSW Police slammed as data reveals more than half of youth targeted by secret blacklist are Indigenous', *SBS News*, 19 April 2018, <https://www.sbs.com.au/nitv/nitv-news/article/2018/04/18/racist-policing-nsw-police-slammed-data-reveals-more-half-youth-targeted-secret>

²⁹ Public Interest Advocacy Centre, 'The Suspect Targeting Management Plan', *PIAC*, 23 November 2017, <https://piac.asn.au/project-highlight/the-suspect-targeting-management-plan/>

³⁰ Michael McGowan and Christopher Knaus, 'NSW police pursue 80% of Indigenous people caught with cannabis through the courts', *The Guardian*, 10 June 2020, <https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>

³¹ *Ibid.*

and Hepatitis C. They are also cost-effective: Australian Department of Health research conducted in 2009 found that for every dollar spent on needle exchange programs, twenty-seven dollars is saved in health care costs.

In Portugal, the only country that has decriminalised all drugs, drug-related deaths, levels of injecting drug use, HIV transmissions and incarceration rates have all reduced dramatically. At the same time, there has been an increase in voluntary drug treatment.³²

New South Wales' punitive approach to drugs does not and will not work. If we are serious about reducing the harm associated with problematic drug use in our communities, we must act on the clear evidence that harm minimisation and decriminalisation are more effective than criminal justice responses.

The Drug Court in NSW is a specialist court that attempts to address the issues underlying drug dependency that all too often result in a person becoming criminalised. It accepts participants who are over 18 years old, are willing to take part in the program, live in the appropriate local government areas, are likely to receive a sentence of full-time imprisonment for their charges, and who have plead guilty or indicated that they would plead guilty if accepted. The program begins with a detoxification and preparation phase in a specific section of a correctional centre. Participants then appear in the Drug Court to enter a guilty plea and receive a sentence, which is suspended on the condition the participant agrees to the terms of the program. Participants are supported through substance abuse recovery and to strengthen health, life and job skills. The program generally lasts for 12 months, and at the conclusion of the program, if the court finds that a participant has substantially complied, a bond is usually the final court order.

Evaluations of the NSW Drug Court have consistently shown that it is more effective than prison in reducing recidivism, is more cost-effective than imprisonment, and is more conducive to improvements in health and well-being of participants than a prison sentence would have been.³³ For instance, 2008 research showed that Drug Court participants are 17 per cent less likely to be re-convicted for any offence, 30 per cent less likely to be reconvicted for a violent offence, and 38 per cent less likely to be reconvicted of a drug offence. The same research showed that the Drug Court was also more cost effective than if the same person had been dealt with through the traditional legal system.³⁴

At present, the Drug Court of NSW sits in three locations: Parramatta, Toronto, and Sydney, but is far too limited in its participation numbers, eligibility requirements and size. The Drug Court

³² Naina Bajekal, 'Want to Win the War on Drugs? Portugal Might Have the Answer', *Time Magazine*, 1 August 2018, <https://time.com/longform/portugal-drug-use-decriminalization/>; Susana Ferreira, 'Portugal's radical drugs policy is working. Why hasn't the world copied it?', *The Guardian*, 5 December 2017, <https://www.theguardian.com/news/2017/dec/05/portugals-radical-drugs-policy-is-working-why-hasnt-the-world-copied-it>; Drug Policy Alliance, *Drug Decriminalisation in Portugal: Learning from a Health and Human-Centred Approach*, 2018, https://www.drugpolicy.org/sites/default/files/dpa-drug-decriminalization-portugal-health-human-centered-approach_0.pdf

³³ See, for example: NSW Bureau of Crime Statistics and Research & Centre of Health Economics Research and Evaluation, 'New South Wales Drug Court Evaluation: Cost-Effectiveness', *BOCSAR*, 2002, <http://www.austlii.edu.au/au/journals/NSWBOCSARLES/2002/15.pdf>; Arie Freiberg, 'Drug Courts: Sentencing Responses to Drug Use and Drug-Related Crime', *Alternative Law Journal*, vol. 282, 2002, <http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/AltLawJl/2002/99.html#Heading84>; NSW Bureau of Crime Statistics and Research, 'New South Wales Drug Court Evaluation: Interim report on health and well-being of participants', *Contemporary Issues in Crime and Justice*, no. 53, February 2001, <http://www.austlii.edu.au/au/journals/NSWCrimJustB/2001/1.pdf>

³⁴ NSW Bureau of Crime Statistics and Research, 'The NSW Drug Court: A re-evaluation of its effectiveness', *Crime and Justice Bulletin*, no. 121, September 2008, <https://www.bocsar.nsw.gov.au/Publications/CJB/cjb121.pdf>;

should be expanded across NSW so as to enable people impacted by substance abuse issues to access the support they need to heal.

The Jumbunna Institute for Indigenous Education & Research included the following recommendations in their June 2020 position paper, *Black Lives Matter: Our call on the NSW Government*:

‘Drug law reform to stop the over-incarceration of First Nations people, including:

- a) Legalise cannabis and MDMA for personal use*
- b) Decriminalise and regulate personal use of all drugs*
- c) Implement the recommendations of the ICE Inquiry, including the immediate establishment of the Walama Court*
- d) Expand the drug court to all of NSW noting its role will be reduced by decriminalisation.³⁵*

Community Legal Centres NSW endorses this harm minimisation position.

Recommendation:

6. The NSW Police Force should investigate and end the overuse of the ‘trifecta’ of ‘offensive language’, ‘resist arrest’ and ‘assault police’ that lead to the imprisonment of many Aboriginal and Torres Strait Islander people.
7. The NSW Government should end the Suspect Target Management Program immediately.
8. The NSW Government should adopt a harm-minimisation approach to drug use, including expanding the operation of the NSW Drug Court.

Reform the Bail Act

Legislation of bail should balance an individual’s right to liberty and presumption of innocence, with ensuring the individual’s attendance at court and the safety of the community. At present, the *Bail Act 2013* (NSW) (‘the Bail Act’) does not meet this objective.

Core to the legislation of bail should be the principle of detention as a measure of last resort. Detention should never result from minor offending. As noted by the Royal Commission into Aboriginal Deaths in Custody:

‘The lack of flexibility of bail procedure and the difficulty Aboriginal people frequently face in meeting police bail criteria by virtue of their socioeconomic status or cultural difference contributes to their needless detention in police custody. This is the case for both adults and juveniles.’³⁶

Community Legal Centres NSW supports the Aboriginal Legal Service (NSW/ACT) recommendations for reform of the Bail Act with a focus on:

- Consideration of the unique needs of Aboriginal and Torres Strait Islander people;*
- Consideration of the particular impact of remand on children and young people;*
- Greater consistency between police and court decision making;*

³⁵ Jumbunna Institute for Indigenous Education & Research, *Black Lives Matter: Our call on the NSW Government*, June 2020.

³⁶ Royal Commission into Aboriginal Deaths in Custody, Volume 3 paragraph 21.4.2 as at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/index.html>

- Greater accountability for police decision making; and
- Preventing the erroneous detention of individuals for minor offending.³⁷

It is particularly important that Aboriginality is considered in bail decisions. First Nations people are more likely to become criminalised than people who are not Aboriginal or Torres Strait Islander, due to targeted policing and racial discrimination. First Nations people also face unique impacts from imprisonment due to the historical and continued impacts of colonisation and intergenerational trauma. The Bail Act's current reference to 'any special vulnerability or needs' is insufficient. The Bail Act in its current form provides no requirement to consider a person's cultural background, cultural obligations or community ties in bail decisions. This omission disproportionately harms Aboriginal and Torres Strait Islander people. The Bail Act should be amended to include a standalone provision that Aboriginality should be considered in bail decisions.

Recommendation:

9. The *Bail Act 2013* (NSW) should be amended to include a standalone provision around Aboriginality, modelled on s3A of *Bail Act 1977* (VIC) and developed in collaboration with peak legal bodies, and with appropriate funding support.

Break the 'care-criminalisation' cycle

The Family Is Culture Independent Review was unique and unprecedented. Commissioned as a result of sustained community advocacy and conducted over nearly 3 years by a largely Aboriginal team, the final report reflects the lived experiences of Aboriginal people, families and communities forced into contact with the child protection system in NSW. Its 125 recommendations present a clear blueprint for further structural, legislative, policy and practice reforms to reduce the over-representation of Aboriginal children in the system – with a central focus on self-determination, transparency and early intervention.

As outlined in the Family is Culture final report:³⁸

As early as 1991, the Royal Commission into Aboriginal Deaths in Custody noted that almost half of the 99 Aboriginal and Torres Strait Islanders whose deaths had been reviewed had been removed from their families, either through 'intervention by the State, mission organisations or other institutions'.³⁹ More recently, the Australian Institute of Health and Welfare found that children and young people who were in OOHC were 16 times more likely than other children to be under youth justice supervision.⁴⁰

³⁷ Aboriginal Legal Service (NSW/ACT) Limited, *Submission to the Administrative review of the Bail Act 2013* (NSW), 12 August 2020, https://d3n8a8pro7vhm.cloudfront.net/alsnswact/pages/346/attachments/original/1597285461/20200812_ALS_BailActReview_FinalSubmission_%28002%29.pdf?1597285461

³⁸ Family is Culture, *Independent Review of Aboriginal Children and Young People in OOHC*, Review report, 2019, https://www.familyisculture.nsw.gov.au/_data/assets/pdf_file/0011/726329/Family-Is-Culture-Review-Report.pdf

³⁹ Royal Commission into Aboriginal Deaths in Custody (Final Report, 1991) vol 1, 2.2.9; Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 1997) 166.

⁴⁰ Australian Institute of Health and Welfare, *Young people in child protection and under youth justice supervision 1 July 2013 to 30 June 2017* (Report, No 24, 2018) 16. See also *Royal Commission into the*

Community Legal Centres NSW recognises the immense harm caused by ‘care criminalisation cycle’ and its disproportionate impacts on Aboriginal and Torres Strait Islander people, and the need to break the ‘care-criminalisation’ cycle as a vital component of reducing over-incarceration and deaths in custody of First Nations people.

According to the Family is Culture report, ‘care-criminalisation’ refers to:

[a] process, by which children and young people in OOHC are arrested for behaviour that would usually result in a disciplinary response from parents and not a criminal justice related response from police officers. For example, children may be arrested for offences that occur in their placements, such as damage to property or assaults against staff or kinship carers.⁴¹

The Family is Culture report cites clear evidence that the reason for over-representation of children in out-of-home care in the criminal justice system is the negative effects of out-of-home care on children: children placed in this care are maltreated, which exacerbates any existing risk that these children will go on to become criminalised.

Community Legal Centres NSW endorses the recommendations made in the Family Is Culture report related to ending ‘care-criminalisation’. The NSW Government must amend the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to reduce the rates of removal of First Nations children from their families and placement into out-of-home care, including through:

- Mandating the provision of support services to First Nations families to prevent the entry of First Nations children into OOHC.
- Requiring the Department of Communities and Justice to take active efforts to prevent First Nations children from entering into OOHC.
- Requiring judicial officers to consider the known risks of harm to a First Nations child of being removed from the child’s parents or carer in child protection matters involving First Nations children.

The NSW Government must also provide adequate funding to legal services for First Nations families so that they can access early intervention legal support. There is a considerable power imbalance between the parents of children involved in the child protection system and staff employed by the (now) Department of Communities and Justice (DCJ) or non-government OOHC providers. For many First Nations parents and families, this imbalance is heightened by past personal experience of the child protection system and intergenerational trauma arising from the history of targeted government intervention in Aboriginal people’s lives and communities. The Family Is Culture Report found that without access to free, independent, culturally safe supports, including legal advice and assistance, many Aboriginal families experience disempowerment and difficulties engaging with the system. This finding accords

Protection and Detention of Children in the Northern Territory (Final Report) vol 3B; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time— Time for Doing: Indigenous youth in the criminal justice system* (Report, June 2011) 3.134; Joy Wundersitz *Indigenous perpetrators of violence: Prevalence and risk factors for offending* (Report, No 105, 2010).

⁴¹ Judy Cashmore, *The link between child maltreatment and adolescent offending: Systems neglect of adolescents* (Report, No 89, 2011); Kath McFarlane, ‘Care-criminalisation: The involvement of children in out-of-home care in the New South Wales criminal justice system’ (2018) 51(3) *Australian and New Zealand Journal of Criminology* 412, 416; Kath McFarlane, ‘From care to custody: Young women in out-of-home care in the criminal justice system’ (2010) 22(2) *Current Issues in Criminal Justice* 345; Victoria Legal Aid, *Care not Custody* (Report, 2017); Alison Gerard et al, ‘‘I’m not getting out of bed!’ The criminalisation of young people in residential care’ (2019) 52(1) *Australian and New Zealand Journal of Criminology* 76.

with the experience of many child protection lawyers and advocates within the community legal centres sector.

Between 2014 and October 2019, many community legal centres received dedicated funding through the NSW Legal Aid Care Partners Program. This funding was provided specifically to deliver early legal supports to families engaging with the care and protection system. Importantly, community legal centres combine legal advice and assistance with specialist non-legal advocacy and casework for people and families with complex needs. This includes people with intellectual disability, women experiencing family violence and Aboriginal and Torres Strait Islander people.

The sudden cessation of Care Partners Program funding from November 2019 has severely limited community legal centres' capacity to deliver these critical services, including to Aboriginal and Torres Strait Islander families.

Community Legal Centres NSW recommends that dedicated funding for child protection legal services be significantly expanded to adequately meet need and ensure access to justice for families engaged with the child protection system in NSW. This should include adequate recurrent investment to enable:

- the Aboriginal Legal Service (NSW/ACT) to significantly expand its child protection and family law practice
- Community legal centres in NSW to re-establish and expand specialist child protection teams that deliver on early support for children and families engaged with the child protection system.

Recommendations:

10. The NSW Government should amend the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to mandate the provision of support services to First Nations families to prevent the entry of First Nations children into out-of-home care.
11. The NSW Government should amend the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to require the Department of Communities and Justice to take active efforts to prevent Aboriginal children from entering into out-of-home care.
12. The NSW Government should amend the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to require judicial officers to consider the known risks of harm to a First Nations child of being removed from the child's parents or carer in child protection matters involving First Nations children.
13. The NSW Government should provide adequate and sustained funding to the Care Partner Program to ensure that more First Nations families have access to legal advice to promote early intervention legal support.

More information

Thank you for taking the time to consider our submission.

If you have any questions or require further input, please contact Emily Hamilton via emily.hamilton@clcnsw.org.au or (02) 9212 7333.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tim Leach', with a stylized flourish at the end.

Tim Leach
Executive Director
Community Legal Centres NSW