

BRIEFING PAPER

DEATHS IN CUSTODY AND INCARCERATION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

THE **ESSENTIAL** MEMBERSHIP FOR
THE LEGAL PROFESSION

Prepared by the Law Society of Western Australia

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Introduction

15 April 2016 was the 25th anniversary of the Royal Commission into Aboriginal Deaths in Custody (Royal Commission).

The Royal Commission was established in October 1987 in response to growing public concern about the number of deaths of Aboriginal people in custody. The National Report of the Royal Commission was released in April 1991 (Report).¹ The inquiry was limited to the deaths of Aboriginal and Torres Strait Islanders after an arrest or conviction, whether by suicide, natural causes, medical conditions and/or injuries caused by police. The terms of reference for the inquiry limited it to such deaths between 1 January 1980 and 31 May 1989, which included 99 cases.

On 30 March 1991, the 339 Recommendations² (Recommendations) and the following brief report were submitted to meet the requirements of the Letters Patent (as they then existed):

“At an early stage in the Commission's inquiries, research strongly indicated that the disproportionately high number of Aboriginal people who die in custody appears to be directly related to the disproportionately high number of Aboriginal people who are arrested and imprisoned, with the rate of death of Aboriginal and non-Aboriginal people amongst incarcerated people being broadly the same.

Hence the Commission's examination of underlying issues focused on what it is about the interaction of Aboriginal people with the non-Aboriginal society which so strongly predisposes Aboriginal people to arrest and imprisonment.”³

In May 2015, a report entitled “Review of the Implementation of the Recommendations of the RCIADIC” (Review) commissioned by Amnesty International Australia and drafted by Clayton Utz, was released.⁴ This report sets out the extent to which, if any, the recommendations of the National Report of the Royal Commission into Aboriginal

Deaths in Custody (RCIADIC) (1991) have been implemented by State, Territory and Federal Governments.

Following a Coronial Inquest into the death of Ms Dhu, an Aboriginal woman who died in custody in 2014, and based on a recommendation from the Royal Commission Report, the Commonwealth Government offered partial funding to the states and territories for a Custody Notification Service (CNS). This service is designed to provide a welfare check and legal advice to all Aboriginal people taken into police custody.

The State Government announced in November 2018 that they had accepted the Commonwealth partial funding for the CNS, with the State Government providing the remaining funding.⁵

Issues

The Review suggests the Western Australian Government reported on their implementation of the Recommendations up until 1995, and only intermittently thereafter. In June 2001, the Government published an implementation report for the period ending 30 November 2000.⁶ Western Australia's implementation of the Recommendations leaves much to be desired, particularly in light of the statistics below.

As at June 2019, Indigenous people represented 28% of the total prisoner population nationally, while only accounting for approximately 3% of the population.⁷ The impact of being in prison can be severe, with the rate of deaths in custody much higher for Indigenous peoples⁸ and the impacts of imprisonment generally affecting not only the individual but also their family and community.⁹ Considering that, in Western Australia, in 2018-19, the cost per day, per young person subject to detention-based supervision was \$1,114.20,¹⁰ there is also a clear financial cost of these high imprisonment rates which would be better spent supporting healthy and productive communities.

In attempting to balance the approach taken in relation to the imprisonment of Indigenous peoples, it is important to note that Indigenous women and children in particular are experiencing increasing amounts of violence, with Indigenous women being 34 times more likely to be hospitalised as a result of family violence.¹¹

Policy Options

As was identified in the Report, the underlying issues causing the disproportionately high arrest and incarceration rates must be addressed in order to reduce the number of deaths in custody. We recommend investing in early intervention, prevention and diversion strategies to address the root causes of reoffending, cut imprisonment rates, and support stronger and safer communities.

The Change the Record campaign, overseen by a coalition of leading Aboriginal and Torres Strait Islander, human rights and community organisations including the Human Rights Law Centre, the Law Council of Australia, Oxfam, the Secretariat of National Aboriginal and Islander Child Care and others, has two overarching goals, to:

1. Close the gap in rates of imprisonment by 2040; and
2. Cut the disproportionate rates of violence to at least close the gap by 2040 with priority strategies for women and children.

In October 2018, Minister for Indigenous Affairs, Nigel Scullion, released an independent review of the Report, stating that the majority of the recommendations outlined in the Report had been adopted and implemented.¹²

However, Change the Record questioned the review released by the Minister for Indigenous Affairs, saying that '[in] 2015, Clayton Utz and Amnesty International had found that the implementation of most recommendations had been inadequate.'¹³ Change the Record also stated that as the review by the Minister was only based on self-reported actions by government agencies, the implemented actions don't appear to adequately address the recommendation.¹⁴

The Change the Record campaign key principles for reform, which the Law Society endorses, are:

“1) Invest in communities, not prisons

Evidence clearly demonstrates that strong, healthy communities are the most effective way to prevent crime and make communities safe. Prisons have been shown to be extremely costly, damaging and ultimately ineffective at reducing crime. Every dollar spent on prisons is one less dollar available to invest in reducing social and economic disadvantage through education, health, disability, housing, employment and other programs. Government funding must be reinvested into initiatives that address the underlying causes of crime.

2) Local communities have the answers

Directly affected people are best placed to identify local issues in their community and implement local solutions. Aboriginal and Torres Strait Islander community controlled organisations provide culturally appropriate services, and are able to develop localised, tailored solutions that have the support of the community.

3) Recognise the driving factors of imprisonment

Along with the experience of poverty and disadvantage, involvement in the child protection system and family violence are two of the clearest indicators of people who are more likely to end up in the criminal justice system. Early intervention strategies to prevent crime must include measures to stop domestic violence and avoid exposure to the child protection system by supporting families and strengthening communities. These strategies will decrease imprisonment rates.

4) Focus on safety

The impacts of crime are felt most keenly by people in that community, particularly women and children who are the victims of violent behaviour. Successful early intervention and prevention strategies will not only cut offending and imprisonment rates, but importantly will increase safety by addressing the root causes of violence against women and children and building stronger communities.

5) **Services, not sentences**

The criminal justice system is often an ineffective or inappropriate way to look after people who have a disability or are experiencing poverty, mental illness, drug or alcohol addiction, homelessness or unemployment. We need a social policy and public health response to such issues, not a criminal justice one. Services like adequate health care, disability supports, employment and training, drug treatment and affordable housing cost far less than prisons, and have a substantially better record of success.

6) **Community policing, not policing the community**

Police have an enormously important and often difficult role to play in dealing with offending behaviour and keeping us all safe. However, for many communities their experience of police includes over-policing, harassment and racism, which can sometimes exacerbate the situation for already marginalised and disadvantaged communities. Changes to the ways police interact with and enforce the law in communities experiencing poverty and disadvantage can play a vital role in building trust, promoting safety, reducing crime and building stronger communities.

7) **Smarter sentencing**

The hallmark of a justice system is fairness. Harsher sentences and laws that strip judges of their ability to make the sentence fit the crime, such as mandatory sentencing, need to be changed. A wider range of sentencing alternatives encompassing non-custodial options enables judges to ensure that sentences are tailored, fair and appropriate.

8) **Eliminate unnecessary imprisonment**

Many people are locked up because they could not pay off fines or were convicted for relatively minor offences. In many instances, sending a person to prison is unnecessary and can contribute to further involvement in the criminal justice system. We need to rethink the costly practice of keeping people behind bars and consider more effective community options.

9) **Adopt community justice approaches**

Serious crime, particularly violent offending, damages individuals and communities, and impacts women and children disproportionately. Evidence tells us that therapeutic and restorative processes, such as Koori and Murri courts, drugs courts and healing circles, are ways in which the criminal justice system can help to rebuild relationships and deliver positive outcomes for the entire community.

10) **Young people don't belong in prison**

Punitive 'tough on crime' approaches to youth offending and misbehaviour fail to recognise that young people are still developing and that far more appropriate opportunities for support and positive reinforcement exist than putting children behind bars. Exposure to youth detention also substantially increases the likelihood of involvement in crime as an adult. As much as possible, at risk young people must be supported to maximise their chances of achieving their full potential.

11) **Rehabilitation, not just punishment**

A prison sentence should not be a sentence for life. Just about every prisoner will be released back into the community at some stage. It is in all of our interests to ensure that people in prison are not just punished, but that there is an appropriate focus on rehabilitation that includes education, programs and support services.

12) **Reintegration not recidivism**

Unfortunately, far too many people fall back into crime soon after being released from prison. This tells us that not enough support is being provided to people while in prison and in their transition back into the community. Better support needs to be provided to assist people to lead productive lives and fulfil their potential, which includes the provision of affordable housing, health care

Proposals

We need to work with Aboriginal and Torres Strait Islander communities to invest in holistic early intervention, prevention and diversion strategies in the manner outlined above. These are smarter, evidence-based and more cost-effective solutions. While this is a long term goal, we recognise that there must also be short term solutions to address the problem.

We recommend that where there is a need to detain or imprison an individual, this is done in a manner consistent with cultural values. This has previously been achieved with the development of the West Kimberley Regional Prison¹⁵ design and philosophy¹⁶, which included the hiring of local and Indigenous staff where possible.¹⁷ The prison's philosophy is based on four key principles:

“Cultural responsibilities – there is recognition of and respect afforded to traditional law and cultural obligations, and support provided to Aboriginal prisoners maintaining and fulfilling their cultural obligations and responsibilities.

Spiritual relationship to land, sea and waterways – there is recognition and acceptance of the cultural and spiritual connection to their country, and recognition that they have custodial rights and interests.

Kinship and family responsibilities – there is recognition and acceptance that familial responsibilities are central to the fabric of Aboriginal society and critical to the well-being of the community and the individual, and there is recognition and acceptance of customary protocols that link kinship ties with reciprocal obligations.

Community responsibilities – there is recognition and acceptance by the Aboriginal community of its responsibility to address issues identified by Aboriginal people. Issues such as substance abuse and other anti-social behaviour and the development of skills to assist prisoners after release are necessary to promote the social and economic well-being and independence of Aboriginal people in the Kimberley.”

These values are easily translatable across different Indigenous groups in Western Australia, although

each group is likely to wish to develop its own specific content in order to create a sense of ownership of the prison and its philosophy. Such an approach would underpin the success of the philosophy itself by empowering the community to take ownership of the issues faced by the community locally and drive effective solutions.

From January 2008 to June 2020, there have been 164 Indigenous Australian deaths in custody.¹⁸

Goals:

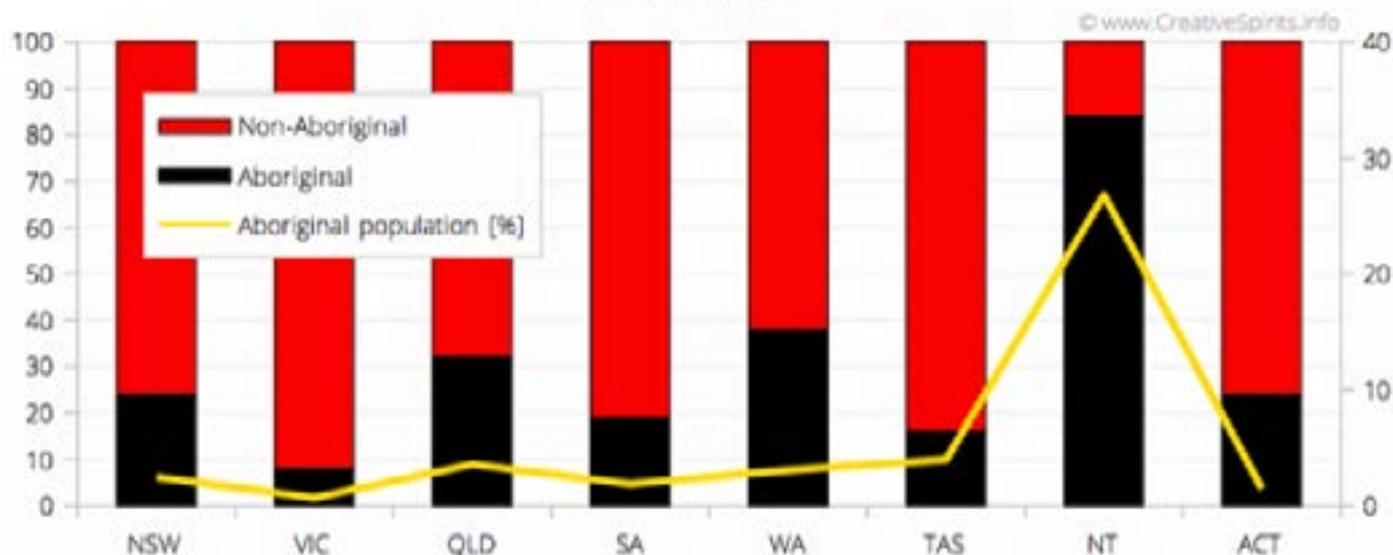
1. Close the gap in rates of imprisonment by 2040; and
2. Cut the disproportionate rates of violence to at least close the gap by 2040 with priority strategies for women and children.

The key principles for reform:

1. Invest in communities, not prisons
2. Local communities have the answers
3. Recognise the driving factors of imprisonment
4. Focus on safety
5. Services, not sentences
6. Community policing, not policing the community
7. Smarter sentencing
8. Eliminate unnecessary imprisonment
9. Adopt community justice approaches
10. Young people don't belong in prison
11. Rehabilitation, not just punishment
12. Reintegration, not recidivism

Aboriginal share of prisoners vs. Aboriginal population

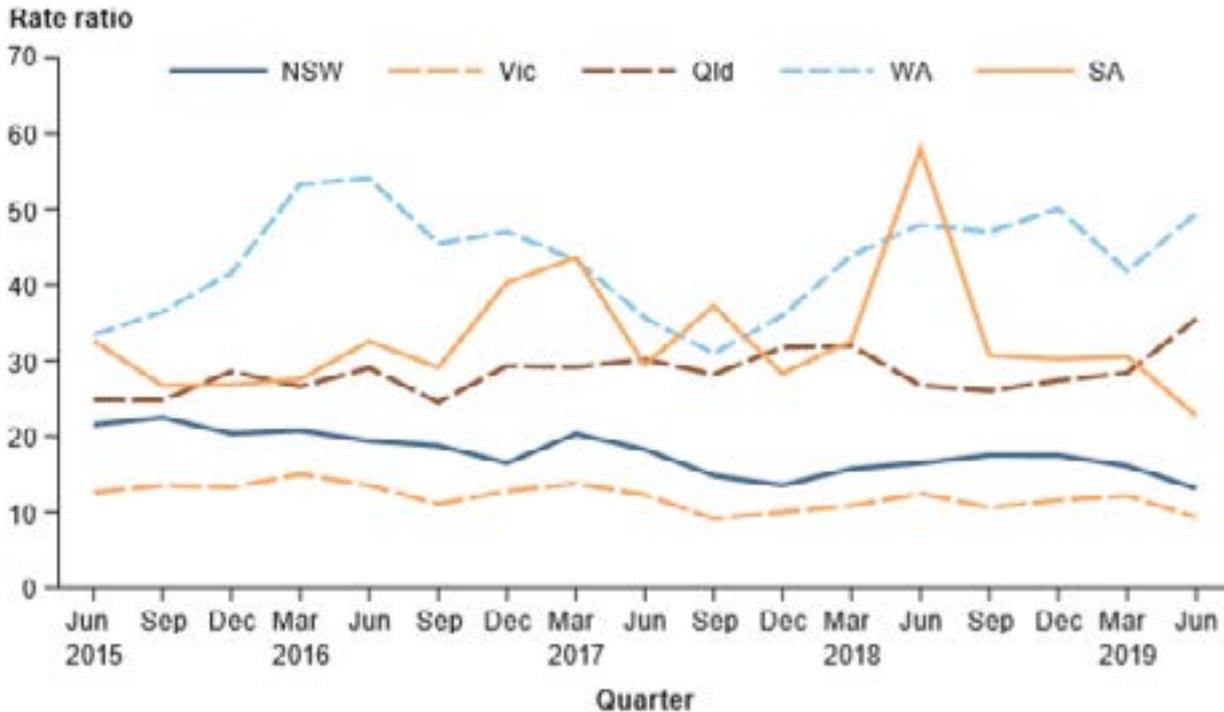
For 2016, in per cent



Imprisonment rate comparison	
Country	Rate*
Australia (WA Aboriginal only)***	4,066
Australia (Aboriginal only)****	2,440
Australia (NT only)**	2,748
USA	698
Russian Federation	445
Thailand	461
South Africa	292
Australia (WA only)**	335
New Zealand	194
United Kingdom (England & Wales)	148
Australia	216
China	119
Canada	106
Germany	78
Indonesia	64
Finland	57

* Per 100,000 of national population; sources: [44]. ** [45]. *** [23]. **** [35]. Source: <http://www.creativespirits.info/Aboriginalculture/law/Aboriginal-prison-rates#ixzz43W4xuGcN>

Figure 5.3. Young people aged 10-17 in detention, by selected states, June quarter 2015 to June quarter 2019 (rate ratio)



Source: <https://www.aihw.gov.au/getmedia/c3ba6d29-7488->

NOTES

1. 'Royal Commission into Aboriginal Deaths in Custody', Change the Record (Web page) <<https://www.changetherecord.org.au/RCIADIC>> .
2. Royal Commission, 'Recommendations, National Report Volume 5', Austlii (Webpage) <<http://www.austlii.edu.au/au/other/indigres/RCIADIC/national/vol5/5.html>>.
3. Ibid.
4. 'Review of the Implementation of RCIADIC – May ', Change the Record (Web page) <<https://www.changetherecord.org.au/review-of-the-implementation-of-rciadic-may-2015>>.
5. 'Joint Media Statement – Custody Notification Service a step closer to implementation in WA', Government of Western Australia (Media Statement, 23 November 2018) <<https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/11/Joint-media-statement-Custody-Notification-Service-a-step-closer-to-implementation-in-WA.aspx>>.
6. Review of the Implementation of RCIADIC, (Report, May 2015) <https://changetherecord.org.au/resources/files/Chapter%2001_%20overview.pdf> at 2.6.
7. Australian Bureau of Statistics (2019) 4517.0 – Prisoners in Australia, 2019; Australian Bureau of Statistics (2016) 3238.0.55.001 – Estimates of Aboriginal and Torres Strait Islander Australians, June 2016.
8. Ibid.
9. Ibid.
10. Productivity Commission, Report on Government Services – Youth Justice Services (2020) Table 17A.21 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/youth-justice>>.
11. 'Change the Record', (Web page) <<https://changetherecord.org.au>>.
12. 'Improving justice outcomes for Indigenous Australians', Department of Prime Minister and Cabinet (Media Release, 24 October 2018) <<https://ministers.pmc.gov.au/scullion/2018/improving-justice-outcomes-indigenous-australians>>.
13. 'Action still needed on Deaths in Custody Royal Commission recommendations', Change the Record (Blog post, 25 October 2018) <<https://www.changetherecord.org.au/blog/news/action-still-needed-on-deaths-in-custody-royal-commission-recommendations>>.
14. Ibid.
15. 'Prison locations', Department of Corrective Services (Web Page, 8 April 2019) <<http://www.correctiveservices.wa.gov.au/prisons/prison-locations/west-kimberley.aspx>>.
16. 'West Kimberley Regional Prison Philosophy', Department of Corrective Services (Information sheet, December 2012) <http://www.correctiveservices.wa.gov.au/_files/prisons/prison-locations/wkrp-statement-principles.pdf>.
17. Lucy Martin, 'Derby's West Kimberley Regional Prison hailed

as game changer for Aboriginal incarceration rates', ABC News (Article, 5 May 2014) <<http://www.abc.net.au/news/2014-05-02/derby-prison-hailed-as-game-changer-Indigenous-incarceration/5426036>>.

18. Guardian Australia, Deaths Inside: Indigenous Australian Deaths in Custody 2020 (Web Page, 5 June 2020) <<https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>>.

Policy Position

The Law Society of Western Australia supports the State Government to work with Aboriginal and Torres Strait Islander communities to invest in holistic early intervention, prevention and diversion strategies to mitigate against involvement with the criminal justice system and incarceration.

1. The Law Society recommends implementing smarter, evidence-based and more cost-effective solutions which drive sustainable change and which help to prevent deaths in custody by avoiding the use of incarceration, other than as a last resort. This is a long term goal which must be driven over a number of campaign cycles.
2. In the short term, we recognise that there are a significant number of Aboriginal and Torres Strait Islander people in incarceration. We recommend that cultural values are integrated into the prison system in a community-led manner to create a sense of ownership both of the prison and the processes it follows and, more importantly, the issues facing the community which are driving such high rates of incarceration.
3. Any solution to the high and growing levels of the incarceration of Aboriginal and Torres Strait Islander people must be developed in partnership with the community and provide for leadership by the community in order to be successful and sustainable.
4. Finally, we recommend that the 12 key principles for reform outlined by the Change the Record campaign are adopted by the government in order to close the gap in the rates of imprisonment by 2040 and cut the disproportionate rates of violence to at least close the gap by 2040 with a prioritised focus on strategies to assist women and young people.



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