NJP POSITION STATEMENT:

First Nations Over-incarceration and Deaths in Custody

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The National Justice Project

The National Justice Project ('**NJP**') is a not-for-profit human rights legal and civil rights service. Our mission is to fight for justice, fairness and inclusivity by eradicating systemic discrimination. Together with our clients and partners, we work to create systemic change and amplify the voices of communities harmed by government inaction, harm and discrimination.

The NJP creates positive change through strategic legal action, supporting grassroots advocacy, collaborative projects, research and policy work and practice-inspired and catalytic social justice education. Our focus areas include health justice, specifically for persons with disability and First Nations communities; racial justice, challenging misconduct in policing, prisons, judicial and youth services; and seeking justice for refugees and people seeking asylum. We receive no government funding and intentionally remain independent in order to do our work. We therefore rely on grassroots community, philanthropic and business support.

Acknowledgement of First Nations Peoples' Custodianship

The National Justice Project pays its respects to First Nations Elders, past and present, and extends that respect to all First Nations Peoples across the country. We acknowledge the diversity of First Nations cultures and communities and recognise First Nations Peoples as the traditional and ongoing custodians of the lands and waters on which we work and live.

We acknowledge and celebrate the unique lore, knowledges, cultures, histories, perspectives and languages that Australia's First Nations Peoples hold. The National Justice Project recognises that throughout history the Australian health and legal systems have been used as an instrument of oppression against First Nations Peoples. The National Justice Project seeks to strengthen and promote dialogue between the Australian legal system and First Nations laws, governance structures and protocols. We are committed to achieving social justice and to bring change to systemic problems of abuse and discrimination.

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EXECUTIVE SUMMARY

National Justice Project position on First Nations Overincarceration and Deaths in Custody[I]

The National Justice Project ('**NJP**') believes that everyone has the right to substantive equality and protection before the law, including safe and equitable access to justice, health care, education and other services free of racism and discrimination.

When race, gender, sexuality, health, disability and age intersect, First Nations people are put at unacceptable risk of coming into contact with the criminal justice system. These risks are compounded by the multiple levels of discrimination First Nations people encounter in the provision of health care, family and child services, housing, employment, education and other services.

We recognise that throughout history the Australian criminal justice system has been an instrument of oppression against First Nations people, with harmful, and at times fatal consequences. The deeply entrenched racism across our Federal, State and Territory justice, law enforcement, health and social systems continues to deny First Nations people access to equitable outcomes and fails to protect their rights by applying the rule of law in an unfair and unjust manner.

Many First Nations people who come into contact with the criminal justice system have experiences of intergenerational and interpersonal trauma. These traumas directly stem from colonisation, and are often compounded by poverty, social and economic inequality, a lack of access to adequate, appropriate and equitable standards of health care, and inequitable access to justice and equality before the law – often as a result of racism. Comprehensive structural reform is urgently needed to address the inequalities and traumas perpetuated in the criminal justice system. Critically, the system needs to be redesigned to prioritise rehabilitation, care and humanity, and First Nations people must also be involved in the design of the systems that directly affect them.

In the more than 30 years since 1991 Royal Commission into Aboriginal Deaths in Custody ('**Royal Commission**')[1] there have been numerous reports and inquiries by human rights bodies, First Nations organisations and successive Federal, State and Territory governments,[2] as well as countless advocacy efforts and national campaigns,[II,3] without meaningful action or improved circumstances. The NJP denounces the lack of commitment by governments to eradicate the pervasive and entrenched racial violence toward First Nations people by its various agencies and institutions. This ongoing failure to challenge systemic racism and hold governments, institutions and individuals accountable for their actions (and inaction) is not due to a lack of practical solutions but an absence of political will and is a crisis that needs to be remedied with urgency.

[I] The NJP Position Statement on First Nations Over-incarceration and Deaths in Custody is part of a series of position statements. Please also see: NJP Position Statement on Health Justice; NJP Position Statement on Discriminatory Policing; NJP Position Statement on Immigration Detention.

[II] For example, the Black Lives Matter and Raise the Age campaigns driven by Change the Record.

National Justice Project approach to First Nations Overincarceration and Deaths in Custody

The NJP's Health Justice, Racial Justice and Just Systems programmes challenge systemic discrimination by defending and extending the rights of First Nations Peoples experiencing racism and discrimination in law enforcement, the courts, and custodial settings as well as in health care, child 'protection', education and other services.

The NJP supports clients in their pursuit of justice through legal processes including litigation, conciliation and complaints. We also pursue justice through education programmes, advocacy and collaborative projects. We contribute to public debate, awareness and make powerful submissions to public inquiries to draw the attention of decision-makers to the systemic injustices affecting First Nations communities and pressure governments to implement the recommendations of coronial inquests and parliamentary inquiries through petitions and open letters. We support our clients to tell their stories, helping to educate and raise awareness in the wider community and inspire others to fight for justice.

Our Copwatch programme promotes police accountability, provides critical community rights education and challenges systemic issues in policing, in particular police violence and over-reach. Our Tech4Justice programme is in development and aims to create technological solutions to enable users to make complaints, navigate the complex complaint pathways and access support, as well as gathering evidence to inform advocacy strategies driven by communities affected by discrimination to drive systemic change.

We collaborate with stakeholders to amplify our collective impact. Together with the Jumbunna Institute for Education and Research, we have developed *Call it Out*, an online register to record instances of personal or systemic racism towards First Nations people and promote anti-racist policy and practices.

We work with a range of community organisations to address individual, institutional and systemic racism in the criminal justice, health and social systems. We are an active member of the Partnership for Justice in Health; we work closely with the Queensland University of Technology Indigenist Health Humanities project; we have developed an Aboriginal Patient Advocacy Training programme with the Aboriginal Health Council of Western Australia (ACHWA) and the Health Consumers' Council of WA (HCCWA); and we work closely with Deadly Connections to deliver the Bugmy Justice Project.

In partnership with Larissa Behrendt AO, we have created a number of digital roundtables with a range of expert panellists on the topic of Health Justice for First Nations people, including: Fighting for the Rights of First Nations People with Disabilities in the Justice System; Spotlight on the NSW report into First Nations deaths in custody; and Exploring health justice beyond the courtroom.

Working with a range of stakeholders from the legal, community and advocacy sectors, and with support from our partners, donors and sponsors, we delivered our inaugural *Law Hack 2021: Disability Justice* in a unique event where participants worked in teams to solve some of the most challenging problems and injustices facing people living with disability, including in relation to criminal justice and policing. A panel of judges selected a new emergency services branch to support people with disability (and others requiring specialist support) and divert them from police and the criminal justice system as the winning pitch.

Many of our clients have been directly impacted by injustice, often as a result of discrimination. We represent individuals and families of loved ones who have been harmed or have died because of poor or discriminatory attitudes in our justice and health systems. We facilitate legal action and complaints against government, health and custodial institutions that have failed in their duty to eradicate systemic bias and to ensure First Nations people receive substantive equality before the law. We are motivated and informed by the strength and experiences of our clients and their communities and it is from this perspective that we present the NJP's Position Statement on First Nations Overincarceration and Deaths in Custody.

PRIORITIES & RECOMMENDATIONS

Overarching priorities and recommendations

1. Governments have a responsibility to assess, acknowledge and address the systemic racism within Australia's criminal justice system, including the profound and direct impact on First Nations people's right to equality before the law. Significant reforms are urgently needed to identify and eradicate the pervasive and entrenched racism in law enforcement, the courts, and custodial settings as well as in healthcare, child 'protection', education and other services.
2. Eradicate racist and discriminatory policing and ensure police accountability by ending the practice of police investigating the actions of police and prison guards and legislating genuinely independent investigations of deaths in custody.
3. Law and policy reform to decriminalise poverty, addiction, mental ill-health and disability.
4. Monitor, record and report on police and court statistics specific to First Nations arrests, bail determinations, convictions and incarceration.
5. Reforms to increase police accountability and oversight, including the development of key performance indicators for police to divert First Nations people away from the criminal justice system.
6. Police should not be first responders to critical situations involving people with disability, mental ill-health and/or addiction. Alternative response pathways that prioritise de-escalation, compassion and safety, and promote ongoing recovery oriented, trauma informed support and treatment over a police response are urgently needed.
7. Systemic reform to ensure appropriate, trauma-informed and culturally safe health care is delivered in custodial settings and delivered by culturally appropriate services with such care to include holistic health care, mental health care, disability support and rehabilitation.
8. Increased resourcing for diversion and justice reinvestment programmes that promote culturally safe and trauma-informed rehabilitation and healing.
9. Enhanced complaint and redress mechanisms, ensuring these are person-centred, trauma-informed and better attend to the intersectional nature of discrimination.

10. Urgently implement the recommendations from the Royal Commission[4] and all relevant subsequent reports and inquiries into First Nations over-incarceration and deaths in custody,[5] and

11. Ensure that all future inquiries include investment for the meaningful implementation of recommendations, with First Nations groups leading the design, implementation, monitoring and evaluation processes.

12. Build and maintain robust nationally consistent data based on First Nations-defined, objective and meaningful measurements of institutional racism and implicit bias in the criminal justice system with the results published annually and utilised to implement evidence-based reforms.

First Nations over-incarceration

13. First Nations-led reforms to outdated policy and laws are urgently needed to address the criminalisation and over-incarceration of First Nations people and implement policing and sentencing measures that are appropriate, proportionate and measured. Key reforms include:
    a. Decriminalising minor offences, mental illness and addiction;
    b. Improved bail, remand, community-based sentencing and parole options;
    c. Alternatives to fines and fine-default penalties, abolishing mandatory sentencing and short term sentences for minor offences; and
    d. Funding and supports to expand justice reinvestment programmes, specialised courts and culturally safe and trauma-informed rehabilitative and healing supports and programmes.

14. Governments should mandate imprisonment as a last resort and instead prioritise and fund community-controlled early intervention, diversion and rehabilitation pathways.

15. In order to prioritise reintegration over recidivism, governments must properly fund education programmes inside youth and adult prisons and provide culturally safe multi-disciplinary services and supports to First Nations people upon release from custody. At a minimum, such services and supports should include family reunification, housing, education, training and employment.

16. Children deserve special protection and do not belong in prisons. Nationally, the minimum age of criminal responsibility should be raised from 10 years (an age that disproportionately impacts First Nations children) to at least 14 years for all offences, consistent with medical and scientific evidence pertaining to child and adolescent neurodevelopment and in line with international standards.[6]

17. First Nations children under 18 years of age should be supported through culturally appropriate community-based responses, with a focus on prevention, diversion and support rather than punishment.

18. The minimum age of criminal responsibility should be raised to at least 14 years for all offences. Establishing 14 years as the minimum age of criminal responsibility is consistent with medical and scientific evidence pertaining to child and adolescent neurodevelopment and is in line with international standards.[7]

19. First Nations-led anti-racism and cultural competency education and training should be resourced and embedded,[8] updated regularly and delivered on an ongoing basis to police, corrections, the courts, corruption and complaints bodies, child 'protection', healthcare, and social and other services.

Custodial health and safety

20. People in custody have the right to receive adequate health care without discrimination at a standard equitable to that available in the community and proportionate to the needs of the individuals and communities it serves.[9]

21. Governments must urgently mandate equitable access to adequate medical staff and facilities within the community and for the closure of all remaining prison hospitals, including Long Bay Prison Hospital in New South Wales (NSW).

22. First Nations people in custody have the right to receive health care that is culturally safe, anti-racist, non-discriminatory and trauma-informed. Mainstream health care services must be made responsive, appropriate, trauma-informed and culturally safe, and increased resourcing and support is urgently needed for Aboriginal Community Controlled Health Organisations (ACCHOs) to ensure continuity of care is provided both in custody and upon release.

23. People in custody are entitled to receive access to health care benefits at a standard equivalent to that provided in the community, including full access to the Medicare Benefits Scheme (**Medicare**), Pharmaceutical Benefits Scheme (**PBS**) and National Disability and Insurance Scheme (**NDIS**).

24. Expand the scope of coronial inquests and mandate that coroners examine and make recommendations relevant to systemic issues including the quality of care, treatment and supervision of people in custody, and for these to be applied consistently across all Australian States and Territories.

25. Urgently implement the recommendations of the Royal Commission that relate to health care[10] and subsequent coronial inquests into First Nations deaths in custody that relate to health care.[11]

Investigating First Nations deaths in custody

26. Expand the scope of the coronial jurisdiction to require that coroners consider and comment on broad systemic factors, including discrimination and bias by police, corrective services and health services, with a view to prioritising the protection of lives and the prevention of death and injury, and for these to be applied consistently across all Australian States and Territories.

27. Expand the scope of the coronial jurisdiction to require coroners to investigate the conduct of police officers, corrections officers and other officials (including investigating systemic or structural discrimination), make appropriate recommendations, and refer for prosecution or discipline where their acts or omissions may have in any way contributed to the death of a First Nations person.

28. Establish and properly fund a culturally appropriate, First Nations-led and staffed independent oversight and investigative body into deaths in custody. The body should have a statutory focus on transparency, accountability and systemic reform of the justice system, and with powers to examine the death of a First Nations person in all custodial settings including in prisons, police cells, remand

centres, detention centres, custodial transportation, and healthcare. The body should have real powers to identify misconduct and systemic racism and to make appropriate recommendations, including to refer for prosecution and to undertake regular inspections of prisons, remand centres and youth detention facilities.

29. Encourage the substantive participation of families in the coronial process by developing and implementing trauma-informed and culturally safe practices and policies. The wishes and rights of the family of the deceased must be respected and prioritised at all times throughout the process.
30. Significant resources should be dedicated to ensure that First Nations families are fully supported (including but not limited to, travel costs, accommodation, legal and psychological support) to facilitate engagement with the coronial system in an informed and culturally safe way.

THE JUSTIFICATION

Legislative, policy and service issues

Racism is an endemic problem in Australia and these attitudes permeate into our criminal justice system. The disproportionate contact First Nations people have with the criminal justice system is directly attributable to the systemic prejudice and bias in the way our laws are enforced by police and the courts. Successive governments have repeatedly failed to take immediate, specific and meaningful action to achieve First Nations healing, equality, justice and self-determination and ultimately end the hyper-incarceration and the senseless and avoidable custodial deaths of First Nations people in this country.

Current legislation and policy instruments are inadequate to ensure First Nations people receive safe and equitable access to justice free of racism and discrimination. Rather, these laws, policies and practices continue to systematically discriminate based on race and function to perpetuate the disparity between First Nations people and the general population in criminal justice, youth justice, health justice, child 'protection', education, employment, life expectancy and other indicators.

Throughout history, the Australian justice system has been an instrument of oppression against First Nations people. The traumatic effects of First Nations over-incarceration and deaths in custody are felt across every community and every generation, shattering First Nation families and communities who are left to deal with legal processes which only re-traumatise them.

More than 30 years since the Royal Commission, successive Federal, State and Territory governments have failed to substantively implement the recommendations and deliver justice and self-determination to First Nations Peoples. Government inquiries, reports and promises persist, without meaningful action or improvement of circumstances. Rather, the normalised and damaging patterns of racism against First Nations individuals, families and communities by police, the courts, and a range of government agencies, institutions and oversight bodies have become further entrenched.

The Royal Commission into Aboriginal Deaths in Custody

The Royal Commission was established in 1987 to investigate 99 of the 105 First Nations deaths that occurred in custody between 1 January 1980 and 31 May 1989, and made 339 recommendations for change at all levels of government.[12] Of these, 107 recommendations relate to First Nations deaths in custody, 106 to First Nations over-representation in the criminal justice system, and 126 to social justice.[13] Notably, these recommendations include developing pathways to achieving First Nations self-determination, and the critical need to progress meaningful reconciliation to achieve the systemic changes recommended in the report.

Since the Royal Commission, there have been at least 495 First Nations deaths in custody[14] and the number of First Nations people in prisons has more than doubled.[15] Data from the NSW Bureau of Crime Statistics and Research (**BOCSAR**) has revealed that between 1990-1995, First Nations people were 14.7 times more likely to die in police custody and 17.4 times more likely to die in prison than the general population.[16] Despite this, the Royal Commission and successive Australian governments continue to erroneously maintain that First Nations people in custody do not die at a higher rate than their non-Indigenous counterparts.[17]

The inadequacies of current legislation and policy instruments to ensure First Nations people receive safe and equitable access to justice free of racism and discrimination is particularly evident in the Deloitte Access Economics ('**Deloitte**') review of progress (or lack thereof) made by Federal, State and Territory Governments to implement the Royal Commission's recommendations.[18]

Deloitte's review, commissioned by the then Minister for Indigenous Affairs, Nigel Scullion, reported that of the 339 recommendations made by the Royal Commission, 64 per cent had been fully implemented, 14 per cent had been mostly implemented and 16 per cent had been partially implemented.[19] However, their report has been widely criticised by academics and experts, particularly the rating scale used to determine the implementation status of the recommendations.[20] Deloitte's rating scale assessed each recommendation in terms of 'actions taken towards implementing the recommendation' – such as through the introduction of or amendments to policies and programmes. However, their assessment process failed to examine 'how effective these actions have been'. Specifically, the review does not assess and determine whether a policy or programme has been successful in achieving its intended outcomes for First Nations people in its practical application.[21] The review has also been criticised for relying heavily on data and reports provided by governments and their agencies without critical assessment of the information provided and for failing to consult with First Nations experts and communities at any stage of the review process.[22] Unsurprisingly, the limited parameters of Deloitte's review produces a misleadingly favourable assessment of the progress governments have made in their implementation of the recommendations.

Policy and laws that fail to respect principles of self-determination remain inextricably linked to the continuance of destructive practices that intensify and perpetuate the violence and injustice perpetrated by governments against First Nations people.[III, 23] Significant investment in First Nations-led policies, practices and supports are urgently needed to reduce this violence, including through self-determined

[III] For instance, the Federal Government's suspension of the Racial Discrimination Act in 2007 in order to execute the Northern Territory Emergency Response.

strategies and initiatives that give First Nations individuals, families and communities the right to influence policy development and implementation to protect themselves from the violence and discrimination of the state. [IV, 24]

The Royal Commission recognised the importance of self-determination in reducing First Nations over-incarceration and deaths in custody more than 30 years ago.[25] Despite decades of persistent advocacy, First Nations people are still fighting for a Voice to Parliament to be enshrined in the Constitution,[26] despite substantial public support.[27] In the absence of substantive Constitutional change and structural reform, First Nations people continue to be denied their inalienable right to self-determination by a political system created to perpetuate their oppression.

The over-incarceration of First Nations people[28]

The impacts of racism and discrimination in the criminal justice system

Far too often in Australia, First Nations people are denied access to substantive equality before the law, often as a result of prejudice and bias. First Nations people encounter racism and discrimination at every stage of the criminal justice process. This prejudicial system is demonstrated in well-known statistics, most notably in the disturbing reality that Australia's First Nations Peoples are the most incarcerated people on the planet.[29]

For decades, numerous commissions and inquiries have repeatedly recommended that the arrest, detention or imprisonment of a person should be used only as a measure of last resort and for the shortest possible time. However, despite the repeat warnings and recommendations, successive governments have continued to ignore how existing law and policy, and their implementation by police and the courts, plays a key role in the disproportionately high rate of contact First Nations people have with the criminal justice system[30] – all too often as a result of arrest, detention and imprisonment being applied as a *first resort*.[V]

The majority of First Nations people have never been incarcerated; however, First Nations people have disproportionately higher rates of contact with the criminal justice system, as both offenders and victims, than non-Indigenous Australians.[31]

The Australian Law Reform Commission's *Pathways to Justice* report (2017) found that, compared with the wider population, First Nations people are seven times more likely to be prosecuted and appear in court, and 12.5 times more likely to receive a prison sentence. First Nations people are more likely to have been in prison previously (76 per cent) compared with non-Indigenous offenders (49 per cent) and are less likely to receive a community-based sentence.[32] First Nations people are also more likely to receive a short prison sentence of less than six months (45 per cent) when compared with their non-Indigenous counterparts (27 per cent);[33] most commonly for offensive language, public intoxication, non-payment of fines and other

[IV] For instance, exercised through a constitutionally enshrined First Nations Voice to Parliament and Makarrata Commission to oversee treaty-making processes between Australian governments and First Nations people towards truth telling, justice and self-determination.

[V] For more information on the role of discriminatory policing in the criminalisation and over-representation of First Nations people, please see the NJP Position Statement on Discriminatory Policing.

minor non-violent offences as well as breach of custodial or community-based orders, breach of protection orders and failure to appear in court.[34]

Despite First Nations people accounting for 3.3 per cent of the Australian population,[35] First Nations men, women and children continue to be grossly over-represented in both adult and youth prisons at rates of 30 per cent, 39 per cent[36] and 54 per cent,[VI,37] respectively.[38] Incarceration rates for First Nations women and children have escalated sharply in recent years.

First Nations women's experiences of the criminal justice system[VII]

The vast majority of First Nations women will never enter the criminal justice system as offenders or be incarcerated.[39] However, First Nations women are vastly overrepresented in the criminal justice system and are the fastest growing demographic in Australian prisons.[40] First Nations women in Australia are also imprisoned at more than 20 times the rate of non-Indigenous women.[41] Between 2013 and 2020, there was a 49 per cent increase in the sentencing of First Nations women (compared with just 6 per cent for the general female population). Prior to sentencing, First Nations women are also less likely to be granted bail by police[42] and are more likely to be held longer on remand.[43]

The rising and disproportionate incarceration rates of First Nations women is interwoven with experiences of violence and trauma, as well as the pervasive and systemic racism and discrimination in our law enforcement, health and justice systems. First Nations women's interactions with these systems and the grossly inadequate, inequitable and culturally unsafe treatment they receive further compounds existing traumas and perpetuates long lasting disparities in health, mental health, poverty, homelessness, domestic, family and sexual violence, as well as a range of other social and economic indicators.[44]

The harmful impacts of disconnecting women from family were recognised by the NSW Supreme Court in 2015.[45] Despite this recognition, in cases where suitable accommodation is limited or unavailable, First Nations women are increasingly being placed on so-called 'therapeutic remand', further exacerbating the cycle of trauma, injustice and disadvantage for First Nations women, their families and communities. [46]

First Nations children and young peoples' experiences of the criminal justice system[VIII]

Systemic racism, including racial profiling and other discriminatory police and court practices directly contributes to the criminalisation and over-incarceration of First Nations children and young people.[47] First Nations children and young people are more likely to be targeted and subject to racially biased and illegitimate police surveillance, monitoring[48] and strip searches.[49] First Nations children and young people are also more likely to be charged, refused bail, convicted and sentenced[50] and are 187 per cent more likely to reappear in court.[51]

[VI] This figure represents First Nations children aged 10-17 years, the rate for First Nations children aged 10-13 is staggeringly higher at a rate of 65 per cent.

[VII] For more information on the role of discriminatory policing in the criminalisation and over-representation of First Nations women experiencing domestic, family and sexual violence, please see the NJP Position Statement on Discriminatory Policing.

[VIII] For more information on the role of discriminatory policing in the criminalisation of First Nations children and young people, please see the NJP Position Statement on Discriminatory Policing.

First Nations children and young people are imprisoned at 22 times the rate of their non-Indigenous counterparts.[52] Despite comprising 6 per cent of the total population of children aged 10-17 years, First Nations children account for 54 per cent of all children in youth prisons.[53]

Actual criminal offending by children is predominantly non-violent[54] with more than 50 per cent of crimes relating to theft, burglary or property related offences.[55] A snapshot of children in youth prisons reveals that, at any one time, over 50 per cent are on remand without having been convicted or sentenced.[56]

Children are entitled to special protection due to their age.[57] Despite this fact, across all Australian jurisdictions the minimum age of criminal responsibility is set at 10 years of age[58] – an age that disproportionately impacts First Nations children. In 2019-2020 alone, 499 children aged between 10 and 13 were imprisoned, and of these 65 per cent are First Nations children.[59]

In 2019, the UN Committee on the Rights of the Child specifically recommended that Australia raise the minimum age of criminal responsibility from 10 to 14 years,[60] a call reiterated by the Universal Periodic Review in 2021.[61] However, as at May 2022, the Australian Capital Territory[62] and Tasmania[63] are the only governments committed to raising the age of criminal responsibility to 14 years as remaining States and Territories continue to lag defiantly behind.[IX, 64]

The over-representation of First Nations children in out-of-home care

The strong link between contact with child 'protection' services and experiences of long-term socio-economic disadvantage, adverse health outcomes and subsequent contact with juvenile and adult criminal justice systems is well established.[65] Despite this, First Nations children continue to be disproportionately over-represented in the out-of-home care (OOHC) system in every jurisdiction in Australia. The increasing rates of First Nations children being removed from their families and cultures and placed in OOHC presents profoundly troubling parallels to the Stolen Generations.[66] As at 30 June 2020, there were a staggering 21,523 First Nations children in OOHC across Australia,[67] accounting for almost half (47 per cent, or 21,523/45,996) of all children in OOHC.[68] New South Wales alone accounts for one-third of First Nations children in OOHC.[69] Failing significant reforms, the number of First Nations children in OOHC nationally is projected to increase by 54 per cent by 2030.[70]

Ongoing connection to community, culture, Country and kin has been proven critical to the social and emotional wellbeing of First Nations children.[71] Despite this, First Nations children spend longer periods in OOHC[72] and are less likely to be reunified with their families when compared with their non-Indigenous counterparts.[73] The rate of permanent care and adoption orders for First Nations children is high and escalating, with a significant majority being place with non-Indigenous adoptive parents.[74] The rate of First

[IX] For example, In December 2019, the Meeting of Attorneys-General (MAG) called for submissions on whether to raise the minimum age of criminal responsibility and what an alternative system would look like. While the 88 submissions received by the MAG have not been published, a communiqué was released on 15 November indicating a potential move towards raising the age of criminal responsibility from 10 to 12 years. This response not only ignores the consistent evidence and recommendations in the majority of submissions (48 of which are self-published on the 'Raise the Age' campaign website), it also ensures the least impact: In 2019-2020, just 43 of the 499 children aged 10-13 years in prison were under the age of 12.

Nations children placed with kin rather than non-Indigenous family has also been steadily declining since 2006.[75]

The intersection of these and other factors, including inadequate, discriminatory and culturally unsafe health care, education and other services, puts First Nations children and young people at unacceptable risk of coming into contact with police and the criminal justice system at a young age.

The criminalisation of disability, mental ill-health and addiction

The criminalisation and over-incarceration of First Nations people living with disability

People with disability are disproportionately represented in Australia's criminal justice system as a result of an institutionalised process whereby certain acts and behaviours are criminalised and consequently policed and punished.[76] People with disability account for roughly 18 per cent of the Australian population while comprising about 29 per cent of the prison population.[77]

More than one in five First Nations children and almost one in two (48 per cent) First Nations adults live with disability and it is accepted that these figures are under-representative.[78] First Nations people with a disability are 14 times more likely to be imprisoned than the general population.[79] Since 1991, over 40 per cent of deaths in custody have involved First Nations people living with disability.[80]

Incarceration also disproportionately impacts First Nations children and young people living with disability. When race and disability intersect, First Nations young people face a double disadvantage. First Nations children living with cognitive and/or psychosocial disability are more likely to be criminalised[81] and have substantially higher rates of contact with police than their non-indigenous counterparts. First Nations children who have been imprisoned also face higher rates of violence and abuse by prison staff and police.[82]

Within the criminal justice system, people with disability are at grave risk of verbal, physical and sexual violence as well as bullying and harassment.[83] Due to a lack of adequate and appropriate health services and trained staff, prison staff responses are often punitive, resorting to the use of physical restraints and prolonged solitary confinement and isolation.[84]

People living with disability, and children in particular should be supported through culturally appropriate community-based responses, with a focus on prevention, diversion and support rather than punishment. Children and young people with disability and complex needs, and their families, are particularly vulnerable to inadequate, discriminatory and culturally unsafe health care, education and other services provided in custodial settings. Such measures are cruel, inhumane and degrading and violate international laws and obligations.[85]

The criminalisation and over-incarceration of First Nations people experiencing mental ill-health

The prevalence of people with mental illness in prisons is almost double that of the general population.[86] Across Australia, the demand for mental health care in custodial settings far exceeds service capacity, with patients being held in environments unsuitable for their needs.[87]

Nationally, over 75 per cent of imprisoned children and young people are living with one or more mental illnesses. The causal link between incarceration and poor mental health is well established, with some

studies showing that one third of incarcerated youth diagnosed with depression experienced its onset following incarceration.[88] For First Nations children and young people in particular, the additional trauma from exposure to institutional violence, abuse and neglect coupled with removal from family, kin and Country has been found to further exacerbate these risks.[89]

People in prisons are 10 times more likely to report a history of suicidal ideation and suicide attempts.[90] The suicide rate is also five times higher for men and twelve times higher for women in prisons when compared with the general population.[91] People in prisons commonly suffer from depression, anxiety, drug and alcohol dependence, and post-traumatic stress disorder.[92] Prison staff do not have the skills and training to manage the specialised physical and mental health care demands of people in prison experiencing mental ill-health and/or living with disability.[93] In many cases, these inadequacies result in prison staff using solitary confinement as a strategy to cope with 'difficult' behaviours rather than providing essential and compassionate medical care and supports.[94]

The Royal Commission recognised that solitary confinement causes 'extreme anxiety' and has a particularly detrimental impact on First Nations people in prisons, many of whom are already separated from family, kin, culture and Country.[95] Since then, Corrective Services Australia has been repeatedly found to have failed to properly address the poor conditions in their prisons, including the deteriorating conditions of confinement, inadequate access to culturally safe and trauma informed mental health services and supports, and the overuse of solitary confinement and resulting harms. Human Rights Watch remarked that the fundamental approach to the issue of mental health and self-harm in prisons relies heavily on confiscating items that can be used to self-harm and applying strict isolation and observation strategies for the most at-risk.[96]

People in prison commonly suffer from depression, anxiety, drug and alcohol dependence, and post-traumatic stress disorder.[97] Prison staff do not have the skills and training to manage the specialised health care demands of people in prison living with cognitive and psychosocial disability or experiencing mental ill-health.[98] In many cases, this inadequacy results in prison staff inappropriately applying strict observation, solitary confinement and confiscation practices to cope with behaviours of people with complex health needs rather than providing essential supports or treatments.[99]

First Nations people with complex needs, and their families, are particularly vulnerable to the inadequate, discriminatory and culturally unsafe health care, education and other services provided in custodial settings. Such measures are cruel, inhumane and degrading; and violate international laws and obligations.[100]

Abuse of remand systems and failure to divert First Nations people away from the criminal justice system

Bail determinations

Bail determinations and conditions act as significant drivers for the over-representation of First Nations people on remand, with devastating consequences. In 2019, 34 per cent (or 4,128/12,195) of all First Nations people in prisons were unsentenced.[101] Guardian Australia's Deaths Inside project found that,

nationally, more than half (54 per cent) of all Aboriginal people who died in custody between 2008 and 2021 were on remand.[102]

A recent NSW BOCSAR study (2021) reviewed more than 500,000 bail decisions made by police and courts in NSW between 2015 and 2019.[103] It found that factors, including the number and seriousness of offences and previous criminal history of a defendant, impacts the likelihood that the courts will overturn police bail decisions. This suggests that police are setting a lower threshold than the courts to refuse bail. The study also found that police are 20.4 per cent more likely to refuse bail to First Nations defendants based on 'extra-legal factors', including Indigeneity.[104] Alternatives to the current bail laws are urgently needed to address the imbalance created by extra-legal factors impacting bail decisions made by police and the courts. For instance, section 3A of the *Bail Act 1977* (Vic) includes a provision *requiring* (rather than *permitting*, as is the case in Queensland*)* a court to consider issues relating to a person's Indigeneity, including cultural background, ties to extended family or place and other relevant cultural issues or obligations.[105]

Diversion from custody

First Nations children and young people are also less likely to be diverted away from the criminal justice system by police[106] despite being are roughly 13 times more likely to be placed under youth justice supervision orders.[107] Across Australia, legislation aimed at diverting children, and First Nations children in particular, away from the criminal justice system is failing. For example, the *Young Offenders Act 1997* (NSW) (YOA) specifically provides for the use of warnings, cautions and conferences instead of court proceedings for certain non-violent offences.[108] It was enacted specifically to address the over representation of First Nations children in the criminal justice system. Despite its legislated intentions, First Nations children do not enjoy equal access to diversion under this policy.[109]

Another example is the Bail Assistance Line (BAL), a service designed to reduce the number of young people held in detention on short-term remand. It is mandated to target vulnerable young people and over-represented groups, including First Nations people.[110] The BAL partners with non-government organisations to assist with short-term accommodation and other supports and is intended to work with police to ensure remand is used as a last resort.[111] Despite the fact that the BAL is intended to specifically target First Nations children and young people, a recent BOCSAR study found that the programme mostly benefits non-Indigenous female defendants with shorter criminal histories, and that First Nations young people comprise a significantly smaller proportion of BAL placements (24 per cent) when compared with the general youth bail population (38 per cent).[112]

Custodial Health and safety[X]

First Nations people are put at an unacceptable risk of death or harm in custody due to a lack of cultural safety, inadequate supervision and inadequate healthcare. The sub-standard health care provided in prisons, and the lack of culturally safe and trauma informed care afforded to First Nations individuals within

[X] Please refer to the NJP Position Statement on Health Justice for a detailed overview of issues relating to the provision of health care in custodial settings.

the healthcare and justice systems, is one of many contributing factors to the unacceptably high rate of First Nations deaths in custody.[113]

Australian State and Territory legislation provides that people in prison have the right to timely access to health care of equitable standard to that which is provided in the community,[114] also known as the 'equivalence of care' principle.[115] However, prisons and youth detention facilities are not adequately equipped to provide health services and supports to people with complex and multiple physical health, mental health, disability and rehabilitation needs. Instead, they often function as warehouses, particularly for people from lower socio-economic circumstances, people with a history of trauma, people with addiction, people experiencing mental ill-health and people living with disability.[116] To achieve the goal of equitable health care for people in custody, governments must urgently address the inadequate and inferior health care services available in adult and youth prisons and the long waiting times for accessing what limited services are available.[117]

The specialised needs of people in prisons, and First Nations people in particular, are well established.[118] Despite this fact, the quality of health care provided by governments and private contractors in custodial settings remains wholly inadequate to meet the complex and multiple health, mental health, disability and rehabilitation needs of people in prisons.[119]

Specialised, equitable and culturally safe health services must be made available to all in carceral environments whether privatised or publicly operated. Achieving this goal requires legislation mandating a) the closure of all remaining prison hospitals, including Long Bay Prison Hospital in NSW;[120] b) equitable access to proper medical staff and facilities within the community; c) full access to Medicare, PBS, and the NDIS; and d) increased funding and supports for the expansion of Aboriginal Community Controlled Health Organisations, Aboriginal Health Liaison Officer programmes and programmes to enhance the employment and retention of First Nations healthcare professionals.

Alternatives to incarceration

Alternatives to incarceration, delivered by specialist courts and community-led justice reinvestment programmes, provide inclusive and culturally appropriate alternatives to police and traditional court orientated justice. These courts and programmes reduce First Nations incarceration and recidivism rates while improving individual, family and community outcomes in health and well-being, education, employment and other indicators. These courts and programmes are vital as they promote healing, equality, justice and self-determination; all of which are necessary to effectively combat the over-incarceration of First Nations people.

Despite having legislation and programmes that aim to divert First Nations people away from the criminal justice system, including the YOA and BAL, First Nations people do not enjoy equal access to, and benefit from, these initiatives. Their exclusion is often as a result of racism. Meaningful diversion and justice reinvestment is urgently needed to address these disparities, with significant input from First Nations communities in the drafting, monitoring and application of these programmes.

Justice reinvestment

Justice reinvestment is an emerging approach to tackle the high incarceration rates of First Nations people by diverting funds currently being spent on policing and prisons and reinvesting in community programmes. The recent international 'Black Lives Matter' protests following the death of George Floyd, and the similar protests here in Australia following the death of Mr David Dungay Jr and other First Nations people, have drawn increased attention to justice reinvestment as an alternative to police and court orientated 'justice'.[121]

Case study: Justice Reinvestment

The Maranguka Justice Reinvestment Project in Bourke, NSW exemplifies the effectiveness of justice reinvestment. The project effectively reduced the overall crime rates in the Bourke area while providing substantial economic savings by diverting people away from custodial and criminal justice settings.[XI,122] The project saw a clear increase in the number of people gaining licences, while the number of driving offences decreased.[123] Its effectiveness can be attributed to its focus on targeting the underlying factors which may cause driving offences, such as lack of access to vehicles and supervisors, identification documents, and language and literacy issues which may be obstacles for written tests.[124]

As the first major justice reinvestment project in Australia, the Maranguka Justice Reinvestment Project works in coordination with government and non-government agencies to create targeted methods of crime prevention, diversion and community development.[125] The Maranguka project effectively implemented the Royal Commission's recommendation to identify and address the relevant factors or causes of motor vehicle offences and to design community projects to address those factors.[126]

The Yiriman Project is a successful youth project in the Kimberley, and is currently based in Fitzroy Crossing, Western Australia. Originally conceived and developed in 2000 by Elders from four Kimberley language groups – Nyikina, Mangala, Karajarri and Walmajarri – the project focuses on supporting and reconnecting young Aboriginal people to culture and Country to address issues affecting young people in the community, including self-harm and substance use. [127]

Justice reinvestment is the leading recommendation in the *Pathways to Justice Report.*[128] The Special Rapporteur on the rights of Indigenous peoples has also highlighted the urgent need to 'move away from detention and punishment towards rehabilitation and reintegration' in her country report from her visit to Australia.[129] Consequently, what is now required is a commitment from the Government to implement programmes suitable for, and in partnership with, community. However, the onus cannot simply be on First Nations communities to reduce contact with the criminal justice system.

Specialist courts

Specialist courts provide inclusive and culturally appropriate alternatives to traditional courts, by focusing on principles of validation, respect and self-determination. Specialist courts seek to directly engage with

[XI] Key findings of the 2018 KPMG Impact Assessment the project included: 23% reduction in police recorded incidence in domestic violence and comparable drops in rates of reoffending; 31% increase in year 12 retention rates; 38% reduction in charges across the top five juvenile offence categories; 14% reduction in bail breaches; and 42% reduction in days spent in custody.

the person appearing before them, provide individualised case management and address key challenges in culturally appropriate ways, including through participation of Elders in sentencing discussions and minimising the use of legalese during proceedings.

The first Aboriginal Community Court was established in South Australia in 1999, following the Royal Commission.[130] Since then, several other jurisdictions have adopted comparable models, including Victoria,[XII,131] NSW,[XIII,132] Queensland[XIV,133] and Western Australia.[XV,134] Victoria is the only Australian jurisdiction to have enacted specific legislation to recognise and give effect to its Aboriginal courts (*Magistrates' Court (Koori Court) Act 2002*).[135] The Victorian Aboriginal Justice Agreement, developed in response to recommendations from the Royal Commission and subsequent Summit,[136] contains strategies and opportunities that are designed to strengthen First Nations oversight and focus on the important roles of family and therapeutic, cultural healing to tackle offending.[137] The Agreement aims to improve Aboriginal justice outcomes, family and community safety, and reduce over-representation in the Victorian criminal justice system.

Case study: Koori Courts

The Koori Youth Justice Program (KYJP) in Victoria[138] was developed in 1992, in response to recommendations from the Royal Commission. The KYJP is operated in the community, mainly by Aboriginal Community Controlled Organisations. The KYJP aims to prevent offending or re-offending behaviour by ensuring that young Aboriginal people are connected to their families and communities and provided with access to the supports and services they require.[139] An evaluation of the KYJP found it to be 'more engaging, inclusive and less intimidating than the mainstream court'.[140]

The Youth Koori Court (YKC) in NSW[141] commenced as a pilot programme at the Parramatta Children's Court in 2015. The YKC is a modified process within the usual Children's Court process. It has the same powers as the Children's Court but uses a different process to better involve First Nations young people, their families and the broader First Nations community in the court process.[142] An evaluation of the pilot programme found it significantly reduce the average number of days spent in detention from 57 days down to 25 days on average. The evaluation concluded that it is 'an effective and culturally appropriate means of addressing the underlying issues that lead many Aboriginal and Torres Strait Islander young people to appear before the criminal justice system'.[143] The YKC was expanded to the Surry Hills Children's Court in 2019.[144]

A public health approach over criminalisation

Substance use, misuse, and dependence should not be considered in isolation from experiences of trauma, poverty, mental ill-health and cognitive and/or psychosocial disability. The co-existence of these factors is

[XII] There are a number of Victorian Koori Courts, these are located in Bairnsdale, Broadmeadows, Latrobe, Valley (Morwell), Mildura, Shepparton and Warrnambool.

[XIII] The Youth Koori Court in NSW, commenced as a pilot programme at the Parramatta Children's Court in 2015 and was expanded to the Surry Hills Children's Court in 2019.

[XIV] For example, the Murri Court in Queensland.

[XV] For example, the Aboriginal Community Court in Western Australia.

the norm rather than the exception for people, and First Nations people in particular, coming into contact with the criminal justice system. Community-based services that can adequately meet complex health needs are urgently needed alongside reforms to policies and laws that criminalise so-called 'problematic' behaviours related to trauma, mental ill-health, disability, poverty and addiction. Such reforms must prioritise recovery oriented, trauma-informed support and treatment over a police response.[145]

Case Study: Alternative response pathways

The Denver STAR (Support Team Assisted Response)[146] program, based in Denver, Colorado, launched mid-2020 in partnership with local health, mental health and police departments. It is closely modelled on the CAHOOTS (Crisis Assistance Helping out on the Streets) program[XVI,147] and responds to calls that have a mental health or substance use component. Staff are trained to de-escalate situations and connect individuals in distress with appropriate services. It In its inaugural year, the pilot program (including a single vehicle and operating between 10 a.m. and 6 p.m., five days per week) responded to 1,400 emergency calls. Of these, no calls required the assistance of the Denver Police Department, no individuals were arrested, and no injuries were recorded. The programme has been welcomed by the Denver Police Department and its officers, with police accounting for 34.8 per cent of calls.[148] The programme has since been expanded with the purchase of five additional vans and 13 additional staff to respond to calls city-wide between the hours of 6 a.m. and 10 p.m. seven days per week.[149]

First Nations deaths in custody

Investigating First Nations deaths in custody

First Nations deaths in custody occur against a backdrop of over-incarceration, dispossession, intergenerational trauma, and continued oppressive systemic discrimination. Australia's public systems were created and operated as an instrument of colonial control against First Nations people and have resulted in extreme poverty, disadvantage and over-representation in the criminal justice system.

The right to life is a fundamental human right and yet many avoidable deaths pass through the coronial system each year. An avoidable loss of life causes irreversible effects to families, communities and is a stain on society as whole. When a death occurs at the hands of state institutions, purportedly designed to serve and protect the community, additional scrutiny is required to promote accountability and prevent future deaths from occurring.

[XVI] CAHOOTS, based in Eugene, Oregon, launched in 2014. CAHOOTS is funded through the Eugene Police Department and is staffed and operated by the White Bird Clinic. The programme has multiple vans that operate 24 hours a day, seven days a week, 365 days a year, with an equivalent of 60 service hours per day. More than 60 per cent of CAHOOTS clients are homeless, and 30 per cent live with severe and persistent mental illness. The programme is equipped to provide a range of interventions and services including de-escalation; crisis counselling; suicide prevention; conflict mediation; grief and loss support; welfare checks; substance use support; housing crisis; harm reduction; information and referral; transportation to services; first aid and non-emergency medical care. In 2019, CAHOOTS diverted 5-8 per cent of calls from police. Of the estimated 24,000 calls CAHOOTS responded to in 2019, only 250 required police backup. CAHOOTS has reported estimated annual savings of 14 million on emergency/ambulance treatment and 8 million on public safety.

The coronial jurisdiction has a unique role in investigating the circumstances that lead to a death. This can be the ultimate opportunity to provide truth, healing, closure and justice to families. However, the adversarial nature of the coronial process contributes to the sense of disempowerment experienced by First Nations families. While coronial proceedings are 'ostensibly inquisitorial', they are increasingly conducted in an adversarial manner.[150] One consequence of this is that First Nations families feel 'as if they are on trial and that the process is more about suppressing their voices, defending state actors or blaming their deceased family member, rather than seeking truth or justice'.[151]

Police and corrections officers retain a significant role in coronial inquests and are generally responsible for the initial fact-finding investigation.[152] This lack of independence not only further entrenches the existing mistrust First Nations people have in the legal system but also denies First Nations individuals, families and communities a sense of justice following the death of a loved one in custody.[153]

The critical lack of fairness and independence of investigators, the courts and integrity agencies throughout all levels of investigation and complaints processes, further reinforces existing mistrust of government systems by First Nations people seeking justice and redress for the violence they experience.[XVII]

More than 30 years ago, the Royal Commission recommended that a Coroner inquiring into a death in custody should make broad recommendations with the view to prevent further custodial deaths.[154] In the Australian Capital Territory, the Northern Territory, Western Australia and Tasmania, where there is a death in custody, coroners are mandated to make recommendations pertaining to the quality of care, supervision and treatment of the deceased to prevent similar deaths occurring.[155] In NSW, making such findings remains at the Coroner's discretion.[156] However, Newhouse, Ghezelbash and Whittaker (2020) found that even in jurisdictions where such recommendations are mandated, it is the general practice of coroners to deliberately confine their investigations to avoid addressing systemic issues relating to First Nations deaths in custody.[157] For example, they note that the inquest into the death of Jayden Stafford Bennell in Western Australia, where Coroner Linton ruled that the:

> *questioning of witnesses, other than the lead police investigators, was generally to be limited to other relevant issues … [and] questioning directed towards any potential systemic issues and preventative comments/recommendations must relate to the particular circumstances of Jayden's death rather than extending into a broad-reaching inquiry into prison systems as a whole.*[158]

Many foreign jurisdictions have also managed to establish coronial inquest processes with investigations that are independently conducted. For example, New Zealand's Independent Police Conduct Authority (a statutory body) provides independent oversight of police conduct, including monitoring places where police detention occurs. The Authority is itself empowered to investigate complaints and has a statutory mandate to operate with complete independence from both the police force and other parts of the state.[159] A similar degree of independence in the oversight of police and prison guard conduct across all Australian States and Territories is crucial to creating a system of accountability that First Nations people can trust to operate impartially and in the interests of justice.

[XVII] For more information and specific case study examples, please see NJP's Submission to the NSW Select Committee on the High Level of First Nations People in Custody Oversight and Review of Deaths in Custody, Oversight and Review of Deaths in Custody (2020), 17-18.

Genuine accountability for wrongdoing is critical for deterring future misconduct, and for providing justice for the families and communities of First Nations people who have died at the hands of police and prison staff. Despite coroners having the power to refer for prosecution or disciplinary review, this rarely occurs.[160] To those who are the victims of state violence, the existing investigative procedure lacks fairness and independence. An independent investigation requires that those conducting it have no interest in the outcome to ensure unconscious bias does not influence the investigation. First Nations people can have no faith in a coronial inquest process that appears from the outset to be biased against the interests of the victim and in favour of the state.

Establishing an independent review body

Existing oversight bodies tasked with investigating First Nations deaths in custody, including the Coroner's Court, police investigators and oversight bodies, have failed to implement the recommendations made by numerous commissions, inquests and inquiries and are not meeting the needs of First Nations people. In particular, the lack of First Nations involvement in these systems and a general lack of oversight and accountability, threatens the integrity of the investigative process, the prospect of accountability for perpetrators and a sense of justice for families.

The Royal Commission recognised that an institution 'which has rules, practices, habits which systematically discriminate against or in some way disadvantage Aboriginal people, is clearly engaging in institutional discrimination or racism'[161] and envisaged that post death investigations could lead to systemic change.[162] At present, coronial jurisdictions across all Australian States and Territories fail to implement those recommendations by generally avoiding addressing systemic issues relating to First Nations deaths in custody.[163]

Fundamental changes are required to re-establish the coronial jurisdiction as a vehicle capable of delivering justice through truth, accountability and prevention. However, to date no Australian jurisdiction has established a system for a completely independent investigation into deaths in police and prison custody[164] and this lack of independence has led to mistrust in the system by First Nations families seeking justice.[165] It is unsurprising that the criminal justice system is perceived as a tool for perpetuating the suffering, impoverishment and punishment of First Nations families, while police, under the sanction of the state, operate with impunity for the violence and suffering they inflict.

It is therefore imperative that all State and Territory Governments urgently establish and properly fund a culturally appropriate, First Nations staffed and led, independent oversight and investigative body into deaths in custody with a statutory focus on accountability and reform of the justice system. Such a body must have real powers to make recommendations, compel responses to recommendations, refer matters for prosecution or disciplinary action and to undertake regular prison and youth detention inspections.

Promoting a culturally responsive coronial system

Cultural safety is borne of shared respect, shared meaning, shared knowledge and experience, and involves learning, living and working together with dignity and truly listening.[166] It encompasses self-reflection by officials on individual cultural identity and a recognition of the impact of another individual's culture on their professional practices.[167]

The experience of many First Nations people is that the Australian legal system is fundamentally structured against their interests. A key issue is the failure to accommodate cultural and religious concerns about the treatment of bodies of the deceased or other expressions of culture throughout the inquest.

In Victoria, for example, there is a culturally specific unit within the Coroner's Court. The Coroner's Court has recruited a Koori Registrar and a Koori List Engagement Registrar to manage Aboriginal coronial cases to ensure that coronial practices are culturally sensitive and appropriate.[168] Victoria is also in the process of engaging Aboriginal Elders in the Coroners Court to provide cultural advice to ensure that coronial practices are culturally appropriate and safe.[169]

In Tasmania, the engagement of a First Nations organisation is mandatory where the coroner suspects that a death involves human remains of a First Nations person.[170] This direction ensures the treatment of a First Nations person's body post-death can be conducted respectfully and that cultural protocols are adhered to.

In contrast, in NSW, as the current coronial system stands, First Nations cultural practices and values are not accommodated for *at all*. Without the appearance of independence and integrity, the coronial inquest process will only serve to further validate this perception, alienating First Nations people from institutions which are intended to protect *all* Australians in a manner that is just and equitable. In almost all cases, these processes function to re-traumatise First Nations people who have spent lifetimes contending with institutions and officials who systematically fail to protect their most basic interests.

Human Rights Framework

Australia's obligations under international law

The right to substantive equality before the law, including safe and equitable access to justice, health care, education and other services free of racism and discrimination and discrimination is enshrined in international law.

The rights of First Nations Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**)[171] is the most comprehensive international instrument on the rights of First Nations Peoples. The UNDRIP establishes a universal framework of minimum standards for the survival, dignity and well-being of First Nations Peoples globally and elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situations and circumstances of First Nations Peoples.[172] The UNDRIP specifically provides for the right to self-determination[173] and a life free of discrimination,[174] as well as the right to liberty and security of person,[175] the right to the highest attainable standard of health[176] and the right to effective remedy.[177]

While not binding, the *United Nations 2030 Agenda for Sustainable Development* includes 17 Sustainable Development Goals (**SDG**) for the realisation of human rights for all, including economic, social and environmental rights.[178] Goal 10 of the SDG aims to 'reduce inequality within and among countries', and specifically provides for the right to equal opportunity through the elimination of 'discriminatory laws, policies and practices' and the promotion of 'appropriate legislation, policies and action'.[179] Goal 16 of the

SDG specifically provides for the right to 'equal access to justice for all';[180] 'effective, accountable and transparent institutions at all levels';[181] 'responsive, inclusive, participatory and representative decision-making at all levels';[182] and 'public access to information and [protection of] fundamental freedoms'.[183]

The right to life, liberty and security

Articles 6 and 9 of the *International Covenant on Civil and Political Rights* (**ICCPR**)[184] and article 3 of the *Universal Declaration of Human Rights* (**UDHR**)[185] recognise the universal right to life, liberty and security of person. The right to be free from arbitrary arrest or detention is also protected in article 9 of the ICCPR[186] and affirmed in article 9 of the UDHR.[187]

Article 1 of the UDHR affirms that '[a]ll human beings are born free and equal in dignity and rights', and article 10 of the ICCPR recognises the rights of all persons deprived of their liberty to be treated with humanity and with respect for their inherent dignity.

The Committee on the Elimination of Racial Discrimination ('**CERD Committee**') makes it clear that de facto and de jure racial profiling is a violation of international human rights law, a position supported by other treaty monitoring bodies including the Human Rights Committee[188] and the Committee against Torture.[189] Racial profiling can lead to infringements of other rights, such as the right to liberty and security of person, the right to the highest attainable standard of health and the right to an effective remedy. First Nations people have been identified as particularly vulnerable to racial profiling.[190] In this context, racial profiling is understood as described in the Durban Programme of Action, that is, 'the practice of police and other law enforcement relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity'.[191] The Human Rights Committee identifies the link between racial profiling and stereotypes and biases – including conscious, unconscious, individual, institutional and systemic (or structural) – and identifies stereotyping as a violation of international human rights law when these assumptions are put into practice to undermine the enjoyment of human rights.[192]

The rights of people in custody

Article 7 of the ICCPR affirms that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[193] This right is further protected in the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**)[194] whereby state parties agree to meet international standards which aim to prevent cruel, inhuman and degrading treatment or punishment within closed environments.[195] The OPCAT also requires that state parties establish a system of regular visits, to be undertaken by independent international and national bodies, to all places of detention including police cells, adult and youth prisons and forensic hospitals.[196]

The Human Rights Committee[197] makes it clear that state obligations relating to the rights of prisoners extend to privately run institutions and has previously expressed concerns regarding the impact of the privatisation of prisons and related services on states in meeting their human rights obligations.[198]

Article 7 of the UDHR affirms that '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law'.[199] Similar protections against discrimination can be found in article 2 of the

Basic Principles for the Treatment of Prisoners which prohibits discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[200]

Article 37 of the *Convention on the Rights of the Child* (**CRC**)[201] details the obligations of state parties to ensure that '[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment'[202] and that '[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.[203] The Committee on the Rights of the Child ('**CRC Committee**') has repeatedly urged Australia to urgently raise the minimum age of criminal responsibility to an 'internationally acceptable level' of a minimum of 14 years.[204]

The right to equitable health care free of discrimination

The United Nations' *Standard Minimum Rules for the Treatment of Prisoners* ('**Nelson Mandela Rules**'), establishes the minimum requirements for the treatment of all persons in prisons, youth detention, and remanded in custody.[205] The Nelson Mandela Rules are based on the overarching principle that 'all prisoners shall be treated with the respect due to their inherent dignity'[206] and recognises that states are responsible for guaranteeing this right, including by ensuring people in custody receive a standard of health care equitable to that which is available in the community, without discrimination; a right emulated in the Royal Commission recommendations.[207]

The Committee on Economic, Social and Cultural Rights ('**CESCR Committee**') also details the obligations of state parties to respect the right to healthcare, particularly for prisoners, detainees and minorities and to abstain from enforcing discriminatory practices in the delivery of health services.[208] The CESCR Committee is clear that this right is violated by denying 'access to health facilities, goods and services to particular individuals or groups as a result of de jure or de facto discrimination'.[209] Similar rights are also found in Article 9 of the *Basic Principles for the Treatment of Prisoners* which affirms that people in prison have the right to access 'health services available in the country without discrimination on the grounds of their legal situation'.[210]

Obligations under Australian law

Australia has agreed to be bound by a series of international human rights treaties, optional protocols and reporting and communications obligations,[211] which set out in clear terms Australia's international human rights obligations. Under international law, Australia is bound to comply with their provisions and to implement them domestically.[XVIII, 212] However, they do not form part of Australia's domestic law unless the treaties have been specifically incorporated into Australian law through legislation.[213]

[XVIII] Section 51(xxix) of the Australian Constitution, the 'external affairs' power, gives the Commonwealth Parliament the power to enact legislation that implements the terms of those international agreements to which Australia is a party.

Australia has ratified all the international human rights treaties mentioned above,[XIX] meaning that it has agreed to be bound by their provisions. Several rights have made it into Australian law at the Federal level, including the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Australian Human Rights Commission Act 1986* (Cth), the *Disability Discrimination Act 1992* (Cth), and the *Age Discrimination Act 2004* (Cth), and at State and Territory levels, including the *Human Rights Act 2004* (ACT), *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2019* (Qld). The principles can also be found in common law.

Significantly, Australian does not have a Bill of Rights in our Constitution. In the absence of Constitutional protections, the safeguards against human right violations provided in domestic legislation remain susceptible to override by the legislature and the courts continue to be denied power to deprive legal validity to legislation that contravene their terms.

CONCLUDING COMMENTS

Successive Governments have repeatedly failed to take immediate, specific and meaningful action to achieve First Nations healing, equality, justice and self-determination and ultimately end the over-incarceration and the senseless and preventable custodial deaths of First Nations people.

At the National Justice Project, we continue to fight for justice alongside our clients who have been discriminated against in prisons, youth detention, health care and other institutional settings. We continue to work tirelessly to hold Governments to account for the harms caused by their actions (and inaction) and represent families who've lost loved ones because of discrimination in policing and places of detention.

Time and time again there has been a lack of genuine and lasting political commitment to implementing the recommendations that have been made in numerous inquests, inquiries and Royal Commissions. This lack of accountability and reform is at the heart of the problem. Continued advocacy is needed to ensure the priorities and recommendations made in this Position Statement are implemented in a manner that is meaningful and proportionate to the deeply disturbing entrenched racial bias within existing systems.

[XIX] Australia is also a party to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention on the Rights of Persons with Disabilities*, the *1967 Convention relating to the Status of Refugees* and the *1967 Protocol relating to the Status of Refugees*.

ADDITIONAL RESOURCES

- Igniting Change interview - George Newhouse with Dan Mori (2022).*
- Submission to the Special Rapporteur on violence against women, its causes and consequences (2022).
- Submission to the Australian Human Rights Commission National Anti-Racism Framework (2022).*
- Submission to the Queensland Parliament Community Support and Services Committee - Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (2021).
- Submission to NSW Select Committee's Inquiry into the Coronial Jurisdiction in New South Wales (2021).
- Submission to the Australian Law Reform Commission: Judicial Impartiality Inquiry (2021).
- Submission to the NSW Law Reform Commission - Open Justice Review (2021)
- Health Inquiry into Health Outcomes and Access to Health and Hospital Services in rural, regional, and remote New South Wales (2021)
- Law Hack 2021: Disability Justice Final Report (2021).
- Law Hack 2021: Disability Justice Kick-Off Event (2021).
- Law Hack 2021: Disability Justice Pitch Event (2021).
- Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Submission on laws, policies and practice affecting migrants, refugees and citizens from culturally and linguistically diverse backgrounds (2021)
- Submission to the NSW Select Committee on the High Level of First Nations People in Custody Oversight and Review of Deaths in Custody, Oversight and Review of Deaths in Custody (2020)
- Submission to the NSW Civil and Administrative Tribunal Statutory Review (2019).

* Publication pending.

ENDNOTES

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[212] See: *The Commonwealth of Australia v Tasmania* (The Tasmanian Dam Case) (1983) 158 CLR 1.

[213] *Kioa v West* (1985) 159 CLR 550.