

# NJP POSITION STATEMENT: First Nations Over-incarceration and Deaths in Custody

## EXECUTIVE SUMMARY

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### National Justice Project position on First Nations Over-incarceration and Deaths in Custody<sup>1</sup>

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**')<sup>2</sup> there have been numerous reports and inquiries by human rights bodies, First Nations organisations and successive Federal, State and Territory governments,<sup>3</sup> as well as countless advocacy

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<sup>1</sup> 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.

<sup>2</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5 <<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>.

<sup>3</sup> See: Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No. 133, December 2017); Legislative Council of NSW, *Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody*, Report No 1 (April 2021) <[https://www.parliament.nsw.gov.au/lcdocs/inquiries/2602/Report No 1 - First Nations People in Custody and Oversight and Review of Deaths in Custody.pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2602/Report%20No%201%20-%20First%20Nations%20People%20in%20Custody%20and%20Oversight%20and%20Review%20of%20Deaths%20in%20Custody.pdf)>; Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing*

efforts and national campaigns,<sup>4</sup> 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.

## PRIORITIES & RECOMMENDATIONS

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### 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.

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*Our Rights, Securing Our Future* (Report, 2020) <<https://wiyiyaniuthangani.humanrights.gov.au/report>>; Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) <<https://www.royalcommission.gov.au/system/files/2020-09/findings-and-recommendations.pdf>>; Human Rights Council, Universal Periodic Review Report of the Working Group on the Universal Periodic Review: Australia, UN Doc A/HRC/WG.6/23/AUS/1 (7 August 2015); Human Rights Council, Report of the Special Rapporteur on the rights of Indigenous peoples on her visit to Australia, UN Doc A/HRC/36/46/Add.2 (8 August 2017).

<sup>4</sup> For example, the Black Lives Matter and Raise the Age campaigns driven by Change the Record: <https://www.changetherecord.org.au/>

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<sup>5</sup> and all relevant subsequent reports and inquiries into First Nations over-incarceration and deaths in custody,<sup>6</sup> 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

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<sup>5</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5.

<sup>6</sup> See: Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No. 133, December 2017); Legislative Council of NSW, *Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody*, Report No 1 (April 2021) <[https://www.parliament.nsw.gov.au/lcdocs/inquiries/2602/Report No 1 - First Nations People in Custody and Oversight and Review of Deaths in Custody.pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2602/Report%20No%201%20-%20First%20Nations%20People%20in%20Custody%20and%20Oversight%20and%20Review%20of%20Deaths%20in%20Custody.pdf)>; Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future* (Report, 2020) <<https://wiyiyaniuthangani.humanrights.gov.au/report>>; Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) <<https://www.royalcommission.gov.au/system/files/2020-09/findings-and-recommendations.pdf>>; Human Rights Council, Universal Periodic Review Report of the Working Group on the Universal Periodic Review: Australia, UN Doc A/HRC/WG.6/23/AUS/1 (7 August 2015); Human Rights Council, Report of the Special Rapporteur on the rights of Indigenous peoples on her visit to Australia, UN Doc A/HRC/36/46/Add.2 (8 August 2017).

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.<sup>7</sup>

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.<sup>8</sup>
19. First Nations-led anti-racism and cultural competency education and training should be resourced and embedded,<sup>9</sup> 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.<sup>10</sup>
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

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<sup>7</sup> United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia, 82nd sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) para 49(a); Australian Human Rights Commission, *Children’s Rights Report 2019* (2019) 244-5; AHRC, *Children’s Rights Report 2016* (2016), 187.

<sup>8</sup> United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia, 82nd sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) para 49(a); Australian Human Rights Commission, *Children’s Rights Report 2019* (2019) 244-5; AHRC, *Children’s Rights Report 2016* (2016), 187.

<sup>9</sup> United Nations Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the eighteenth to twentieth periodic reports of Australia’, 2610<sup>th</sup> and 2611<sup>th</sup> mtg, CERD/C/AUS/CO/18-20 (8 December 2017) (‘CERD’) <[https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/CERD\\_C\\_AUS\\_CO\\_18-20\\_29700\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/CERD_C_AUS_CO_18-20_29700_E.pdf)>; Wiyi Yanu U Thangani; Reconciliation Australia, *2021 State of Reconciliation in Australia Report* (2021) (‘Reconciliation Report’) <<https://www.reconciliation.org.au/publication/2021-state-of-reconciliation/>>; Concept Paper (n15).

<sup>10</sup> Basic Principles for the Treatment of Prisoners, adopted by General Assembly resolution 45/111 of 14 December 1990, [9].

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<sup>11</sup> and subsequent coronial inquests into First Nations deaths in custody that relate to health care.<sup>12</sup>

### 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.

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<sup>11</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, [122]-[167]; [246]-[271].

<sup>12</sup> For example: Inquest into the death of David Dungay, Coroner's Court of NSW, Magistrate Derek Lee, 22 November 2019 <<https://coroners.nsw.gov.au/coroners-court/download.html/documents/findings/2019/DUNGAY%20David%20-%20Findings%20-%20v2.pdf>>; Inquest into the Death of Naomi Williams, Coroner's Court of NSW, Magistrate Harriet Grahame, Deputy State Coroner, 29 July 2019 <<https://coroners.nsw.gov.au/coroners-court/download.html/documents/findings/2019/Naomi Williams findings.pdf>>; Inquest into the Death of Ms Dhu, State Coroner Fogliani, Coroner's Court of WA, 16 December 2016 <<https://www.coronerscourt.wa.gov.au/inquest-into-the-death-of-ms-dhu.aspx>>; Inquest into the Death of Shona Hookey, Coroner's Court of NSW, Deputy State Coroner H.C.B. Dillon, 22 December 2016 <<https://coroners.nsw.gov.au/coroners-court/download.html/documents/findings/2016/Hookey%20findings%20FINAL%2022%20Dec%2016.pdf>>.