

# National Justice Project

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Submission to the Federal Senate Standing Committee  
into Legal and Constitutional Affairs Inquiry into Missing  
and Murdered Indigenous Women and Children

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12 December 2022



***CULTURAL SENSITIVITY WARNING: First Nations readers should note that we are using the names of deceased persons with permission from their families.***

***CONTENT WARNING: This submission contains content that is confronting and distressing. Please take care when reading.***

## ABOUT THE AUTHORS

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This submission has been co-authored by the National Justice Project together with **the Mullaley Family**; Tamica Mullaley (Charlie's mother), Ted Mullaley (Tamica's father) and Kathleen Pinkerton and Yvette Harris (the aunts of Tamica Mullaley and sisters of Ted Mullaley), and **the Smith Family**; Dawn Smith (Jacinta's mother), June Smith (Mona's mother).

### **The National Justice Project**

The National Justice Project ('**NJP**') is a not-for-profit human rights legal service that works to eradicate institutional discrimination. 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 and discrimination.

Our key areas of activity include health justice, specifically for persons with disability and First Nations communities; challenging misconduct in police, prisons and youth services; and seeking justice for people seeking asylum and refugees. 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.

We create positive change through our key strategic areas:

- **Undertaking strategic legal action** including representing clients in public interest litigation, which leads to law reform, policy change, attitudinal change, improved services and accountability for people who have been harmed by injustice.
- **Delivering world class, practice-inspired and catalytic social justice education** for the community, and for current and future legal professionals and advocates.
- **Supporting grassroots advocacy** built on ethical, rigorous and fact-based research that amplifies the voices of communities harmed by injustice, and leads to law reform and policy change.

## ACKNOWLEDGEMENT OF FIRST NATIONS PEOPLES' CUSTODIANSHIP

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NJP 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. NJP recognises that throughout history the Australian health and legal systems have been used as instruments 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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## OVERVIEW

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### EXECUTIVE SUMMARY

NJP welcomes the Senate Inquiry into Missing and Murdered First Nation Women and Children (Senate Inquiry) as a starting point to a more substantive investigation. In this submission we outline the systemic causes of violence against First Nations women and children and the changes that are required to address violence, increase safety, ensure effectiveness in investigations, and appropriately commemorate.

Systemic prejudice, bias and racism against First Nations peoples in the justice system is rife. The failures to properly investigate the deaths or disappearances of First Nations women and children are a very clear and direct denial of justice for communities and families. These failures leave loved ones without closure.

The justice system, including the police and the criminal and coronial jurisdictions, has a responsibility to protect First Nations women and children, to investigate violence and harm, to hold perpetrators accountable, and to identify preventative actions. The realisation of justice is critical in order to honour and commemorate lives lost to violence. Without justice, closure is not realised and commemoration is fraught.

The prioritisation of the voice of First Nations families is critical to this Senate Inquiry. Throughout this submission we draw on the experience of two families, the Mullaley Family and the Smith Family, who call on the Senate to listen to their experiences and to make change in the hope that other families will be spared the ongoing injustice that has traumatised their communities.

#### **The Mullaley Family**

The Mullaley Family case study has been co-authored by NJP together with the family of Charlie Mullaley (**'Baby Charlie'**). Tamica Mullaley (Charlie's mother), Ted Mullaley (Tamica's father) and Kathleen Pinkerton and Yvette Harris (the aunts of Tamica Mullaley and sisters of Ted Mullaley) and have shown enormous strength and perseverance in their ongoing fight for truth, accountability, and justice since the murder of Baby Charlie in 2013. NJP have been working with the Mullaley Family since 2017, and we provide this submission on their behalf. Their story exemplifies the racial violence, abuse and neglect perpetuated against First Nations people by the Australian Government via its various agents. In sharing their story and their recommendations for change, the Mullaley Family hope to affect change and prevent other families from having to live through similar experiences.

#### **The Smith Family**

The Smith Family case study has been co-authored by NJP together with the family of Mona Lisa and Jacinta Rose Smith. Dawn Smith (Jacinta's mother), June Smith (Mona's mother), and their family have been fighting for answers in relation to Cindy and Mona's deaths for 35 years. NJP have been working with Dawn and June since 2018, and we provide this submission on their behalf. In sharing their story and recommendations for change, the Smith Family hope to effect change in policing, to uncover the truth, and to ensure that other families don't have to experience similar pain and trauma.

## TERMS OF REFERENCE

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On 25 November 2021, the Senate referred an inquiry into missing and murdered First Nations women and children to the Legal and Constitutional Affairs References Committee, to inquire into and report on the following. Our Submission will respond to submissions b, c, d, f and g in bold below

- a. the number of First Nations women and children who are missing and murdered;
- b. **the current and historical practices, including resources, to investigating the deaths and missing person reports of First Nations women and children in each jurisdiction compared to non-First Nations women and children;**
- c. **the institutional legislation, policies and practices implemented in response to all forms of violence experienced by First Nations women and children;**
- d. **the systemic causes of all forms of violence, including sexual violence, against First Nations women and children, including underlying social, economic, cultural, institutional and historical causes contributing to the ongoing violence and particular vulnerabilities of First Nations women and children;**
- e. the policies, practices and support services that have been effective in reducing violence and increasing safety of First Nations women and children, including self-determined strategies and initiatives;
- f. **the identification of concrete and effective actions that can be taken to remove systemic causes of violence and to increase the safety of First Nations women and children;**
- g. **the ways in which missing and murdered First Nations women and children and their families can be honoured and commemorated;** and
- h. any other related matters.

## ENDORSEMENT

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We have read, acknowledge and endorse the recommendations made by the Jumbunna Institute for Indigenous Education and Research in their submissions to this Senate Committee.

## KEY RECOMMENDATIONS

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Inspired by guiding principles of justice, accountability, transparency, cultural safety and the sovereign rights of First Nations peoples, we make the following overarching recommendations that apply to all representations made in this submission:

1. **Reform of police and government practices and policies.** Review of current policies and development of new policies around sexual abuse and domestic and family violence ('DVF') for First Nations people in consultation with First Nations women and Aboriginal Community Controlled Organisations working in domestic violence. This reform should form part of a standalone First Nations National Plan as part of 'The National Plan to End Violence against Women and Children'. Policies should be incorporated into the equivalent procedures and requirements of State police forces with a formalised review of on the ground implementation.
2. **Reform police and government investigative agencies.** First Nations communities deserve independent, transparent and accountable investigative bodies. Where First Nations people report violence to police, and make a complaint about the police response, there should be mandatory independent oversight of the police investigations and complaint allegations. These investigative agencies must have the power to examine complaints and police misconduct. These agencies should include First Nations staff and focus on accountability and reform of the justice system. This includes making recommendations, compelling responses to recommendations and referring matters for prosecution or disciplinary action.
3. **Reform the Coronial system.** First Nations communities deserve a coronial system that is trauma-informed and responsive to cultural needs. This includes the development and implementation of respectful and culturally safe protocols for investigations into First Nations deaths, which respect cultural practices in the Court and allow for transparent communication with families. Coroners must have the power to address systemic racism by investigating the conduct of police or other officials where their acts, omissions or systemic practices may have in any way contributed to the death of a person, particularly in the case of domestic violence or the death of a child, and to make appropriate systemic recommendations, including to refer for prosecution.
4. **Develop and implement First Nations-led anti-racism and cultural competency education and training<sup>1</sup>** for police and government agencies within the justice system and the professional conduct and accountability system. This includes all Integrity Agencies ('IA'), State/Territory corruption and complaints bodies, professional complaints bodies and Coroner's courts that engage with First Nations people. Education and training must be provided on an ongoing basis.

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<sup>1</sup> As identified in the concluding observations of the UN Committee on the Elimination of Racial Discrimination ('ICERD') which sets out a range of key issues to be addressed in relation to Australia's obligations under the ICERD; the Aboriginal and Torres Strait Islander Social Justice Commissioner's 2020 Wiyi Yanu U Thangani report; Reconciliation Australia's 2021 State of Reconciliation Report; and the Human Rights Commission's 2021 Concept Paper for a National Anti-Racism Framework.

Specific recommendations that relate to the circumstances of the Mullaley Family and the Smith Family are included below and following each case study.

## MULLALEY FAMILY RECOMENDATIONS

In seeking justice, the Mullaley Family offer the following strategies for systemic reform and redress that are needed to prevent and combat systemic violence against First Nations women and children.

5. Ongoing review and reform of police practices and policies relating to the treatment of victims of domestic and family violence and their children. This should include the role of police to de-escalate at the scenes of DFV and the implementation of best-practice, culturally appropriate trauma-informed care for First Nations women and children. This is to ensure that First Nations women are not at-risk of criminalisation when they themselves are victims of crime and reliant on police and the justice system. Systemic reform, from law and policy through to practice, with specific focus on women and children, is needed to address the criminalisation and hyper-incarceration of First Nations people.<sup>2</sup>
6. Law and policy reform to allow more scrutiny and freedom of information about police misconduct, including improved freedom of information policies to allow greater transparency of Police, the Crime and Corruption Commission ('**CCC**') and other institutions.
7. First Nations-led anti-racism and cultural competency education and training<sup>3</sup> to be delivered on an ongoing basis for police, integrity agencies, and State/Territory corruption and complaints bodies engaging with First Nations people (such as the CCC).
8. Reform of Integrity Agency practices, including increased transparency and accountability for police and the opportunity for complainants to submit victim impact statements and respond to allegations or criticisms made against them and their families. This includes introducing procedural fairness practices, such as right of reply, where racist and stereotypical slurs are made against victims of police and other state actors. Where IA bodies fail to fulfil their duties there should be structures in place to provide accountability and reform.
9. Appointing First Nations people to IAs and Coroner's courts to investigate matters where First Nations people are missing or murdered, the victims of crime, corruption or other malpractice. This includes developing pathways for First Nations people to be supported, respected and empowered investigators in IAs and the Coroner's courts to identify misconduct and systemic racism, make findings and make appropriate recommendations.
10. Law reform to ensure that coroners are required to investigate the conduct of police or other state actors or officials (including investigating systemic or structural discrimination) where their acts or omissions may have in any way contributed to the death of a person, particularly

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<sup>2</sup> Including but not limited to: a) alternatives to fines; b) abolishing mandatory sentencing, short term sentences and imprisonment for fine default and other minor offences; c) improved bail, remand, community-based sentencing and parole options; and d) funding and supports for the expansion of justice reinvestment programs and culturally safe and trauma informed services for at-risk First Nations women and their families.

<sup>3</sup> Above n 1.

in cases of DFV or the death of a child. This aligns to recommendations made by the Royal Commission into Aboriginal Deaths in Custody ('**RCIADIC**').

## THE SMITH FAMILY RECOMMENDATIONS

In seeking justice, the Smith Family offer the following strategies for systemic reform and redress that are needed to address violence against First Nations women and children.

11. Reform the Coronial system to require Coroners to consider and comment upon systemic factors including discrimination and bias by police forces and state prosecutors like the NSW Office of the Director of Public Prosecutions ('**DPP**') when racism, prejudice and/or bias may have contributed to the death or investigation of a death of any First Nations woman or child.
12. Reform the criminal law to ensure that alleged perpetrators of s 81C of the *Crimes Act 1900 (NSW)* 'Misconduct with regard to corpses' and of s 61I of the *Crimes Act 1900 (NSW)* 'Sexual assault' cannot escape prosecution because the precise time of a victim's death cannot be ascertained with sufficient precision to determine whether they were alive or dead at the time that sexual interference occurred.
13. Law and police reform to ensure that all suspected sexual assaults against First Nations women or children and/or any interferences with their corpses are properly investigated and appropriate charges laid where there is a suspected perpetrator.
14. First Nations-led development and implementation of respectful and culturally safe protocols for investigating First Nations deaths, and for these to be applied consistently across all Australian States/Territories. This includes, but is not limited to:
  - a) A First Nations liaison officer at the Coroner's Court to assist First Nations families where there has been a death, to explain the role of the Coroner's Court to them and guide them through the court processes, especially where they are not legally represented;
  - b) Communication with the family at key points of the investigation and coronial process to keep them informed and allow them to ask questions.

First Nations communities must be involved in and lead all relevant reforms of the justice system in relation to its impact on First Nations Peoples. This will ensure that changes are meaningful and address entrenched systemic racism. This extends to police policy and practice, as well as policy governing all investigative bodies. First Nations Peoples involved in advising on the justice system need appropriate and adequate funding and remuneration.



## CASE STUDY 1 – THE MULLALEY FAMILY

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### BACKGROUND

1. Charles “Charlie” Derschow-Mullaley (**‘Baby Charlie’**) was born on 18 May 2012 to Tamica Mullaley.
2. On 19 March 2013, Tamica was attacked by her then partner, Mervyn Bell (**‘Bell’**), on her way home from an event, following an argument with Bell. Bell stripped Tamica of her clothes and left her bashed and bleeding by the side of a road in Broome, Western Australia. A witness at the scene provided a fitted sheet to Tamica for cover and called police to report the domestic violence incident.
3. When police arrived at the scene, they treated Tamica as a problem rather than a victim. This treatment continued when her father, Ted Mullaley arrived to assist her. Instead of providing medical care and considering Tamica’s welfare, police continued to escalate the situation, which resulted in a physical altercation, with the police arresting both Ted and Tamica at the scene.
4. Baby Charlie was present when the police arrived and as the police confrontation escalated Baby Charlie was handed to witnesses. At no point during the incident did police attempt to ensure the welfare of Baby Charlie, despite arresting his mother and legal guardian and taking her away. Baby Charlie was simply left at the scene.
5. Following her arrest, Tamica was taken to hospital to treat her extensive injuries, a lacerated kidney and ruptured spleen, which was the result of the assault by Bell. Ted accompanied Tamica as a support person to ensure that she was taken to hospital and properly treated.
6. While Tamica and Ted were at the hospital, Bell returned to the scene and abducted Baby Charlie. When Ted found out, he went straight to police to report the abduction, but the police refused to take his reports seriously and threatened him with retribution if he made more reports. It took nine hours for WA Police to initiate a search for Baby Charlie. By that time, Bell had taken Baby Charlie hundreds of kilometres away and had tortured him.
7. Fourteen hours after the abduction, Bell brought Baby Charlie’s body into a Karratha roadhouse and he was pronounced dead shortly after. Bell was found guilty of Baby Charlie’s murder and convicted in 2014.
8. In the year after Baby Charlie was murdered, WA Police persisted with the charges against Ted and Tamica. Tamica was found guilty of assaulting a police officer and Ted was found guilty of obstruction for the events that occurred on 19 March 2013. In 2022, following years of advocacy, the WA Attorney-General pardoned these charges in a public apology that acknowledged WA Police and Government failures and mistreatment of the Mullaley Family.
9. The events of 19-20 March 2013 and the subsequent investigations into those events, reveal the multiple ways in which the Mullaley Family were subject to interpersonal, institutional, and structural racism at the hands of the WA justice system.
10. Baby Charlie was 10 months old. Baby Charlie’s murder was avoidable and was the direct result of the colonial legal response system and racist policing. The Mullaley Family are seeking justice, accountability, and change.

## SUBMISSIONS ON BEHALF OF THE MULLALEY FAMILY

The submissions below are made by NJP, on behalf of the Mullaley Family, and reflect the Mullaley Family's concerns regarding the racist and inadequate treatment by WA Police, the WA Internal Affairs Unit ('IAU') and the WA CCC into the events that led up to the abduction of Baby Charlie, during the period from when he was reported missing, and the investigations following his murder. We request that when reading these submissions, you also consider the Mullaley Family's Victim Impact Statement in [Appendix A](#) and the Mullaley Family Position Paper **attached** to these submissions.

## RESPONSE TO TERMS OF REFERENCE B AND D OF THE INQUIRY

### **Criminalisation of a victim of Domestic Violence**

1. We submit that the WA Police failed to respond to Tamica Mullaley, as a victim of a domestic violence, at the initial incident on 19 March 2013. This included a failure to:
  - a) identify Bell as the perpetrator of domestic violence, in the form of a vicious and brutal assault;
  - b) de-escalate the crime scene and provide appropriate welfare support to Tamica Mullaley and Baby Charlie as victims of domestic violence;
  - c) provide immediate access to appropriate medical assistance to Tamica Mullaley, despite multiple requests by her support person and father, Ted Mullaley at the scene.
2. The Police failure to treat Tamica Mullaley with respect, cultural sensitivity and dignity, and instead escalate the distress and violence she experienced at the scene of the domestic violence incident, led to the criminalisation and arrest of both Tamica and her father, Ted Mullaley.
3. It is imperative that WA Police are equipped to respond to domestic and family violence incidents in a culturally sensitive and trauma-informed way and to not criminalise victims and their families. Their failure to do so put lives at risk and contributed to the death of Baby Charlie.

### **WA Police failure to implement Missing and At-Risks Persons policy**

4. We submit that the WA Police failed to follow their 'Missing and At-Risk Persons' policy, which outlines the duties of officers where a person is missing and there is a genuine concern around their welfare and safety surrounding the disappearance. These failures delayed the search for Baby Charlie by 9 hours. Baby Charlie's family contend that these failures were based on race given the urgent, widespread and significant response of WA Police to the abduction of Cleo Smith and other non-Indigenous children.
5. There was no accountability for the failure of police to follow their procedures, even by the CCC. In fact, the CCC simply republished unfair and racist tropes without giving Ted or Tamica Mullaley the opportunity to rebut them. To prevent future similar incidents, it is imperative that robust policies are drafted and communicated to police officers. There also must be accountability for failures to adhere to policy.

## **Racism by WA Police Officers**

6. We submit that the Mullaley Family were subject to racist slurs and prejudice by WA Police Officers in the events leading up to and following the murder of Baby Charlie. Explicit examples of this included:
- a) The CCC report quoted Officer Connor's IAU Interview recording, stating "Connor said when he spoke to Mr Mullaley at the front counter, he smelt of alcohol and 'who else knows what else'"<sup>4</sup> In fact, Mr Mullaley has not drunk alcohol for over 30 years.
  - b) On 21 March 2013, Ted Mullaley was interviewed by Sergeant Wilson and during that interview Sergeant Wilson responded to Ted Mullaley saying, "well you played the black card a minute ago".<sup>5</sup>
7. Despite lodging formal complaints about the racism directed to the Mullaley Family, the IAU and the CCC investigations failed to consider these experiences and provided no formal or informal acknowledgment of the racism experienced by the Mullaley Family. The Mullaley Family Position Paper provides extensive details of these experiences.

## **Insensitive and unprofessional treatment**

8. We submit that the Mullaley Family were subject to insensitive and unprofessional treatment by WA Police. This included:
- a) Failing to de-escalate their interaction with Tamica Mullaley when she had been a victim of domestic violence and had life threatening injuries. Instead of supporting her, they assaulted and arrested her.
  - b) Requiring Tamica Mullaley to undertake a police interview after she had just been informed of the death of her Baby Charlie and then subsequently refusing to allow a support person to accompany her in the interview.
  - c) Taking personal possessions as evidence and then failing to return them after the investigations had ceased, including failure to clearly provide information regarding any potential compensation available to the Mullaleys.
9. These failures demonstrate that WA Police are incapable of providing adequate, culturally safe, unbiased and standard support to First Nations victims of crime.

## **Procedurally unfair investigations**

10. We submit that the Mullaley Family were provided no procedural fairness during both the IAU and CCC investigations. This included the failure to allow them to provide detailed statements

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<sup>4</sup> The CCC report, see paragraph [56].

<sup>5</sup> 2<sup>nd</sup> Statement Ted Mullaley Not Signed, paragraphs [156]-[157].

and/or refute the racist allegations made against both Ted and Tamica Mullaley by WA Police Officers during the investigation into Baby Charlie's abduction on 19 and 20 March 2013, and following the murder of Baby Charlie on 19 March 2013.

11. The family were also unable to have their significant allegations of racism, harassment and discrimination by officers at Broome Police Station investigated, or if so, the results were not communicated to them.

### **Culturally unsafe investigations**

12. We submit that the WA IAU investigation and the CCC investigation denied the Mullaley Family their opportunity to have a comprehensive and culturally safe investigation into the racially prejudiced conduct of the WA Police in the events that led up to the murder of Baby Charlie. Instead, the IAU investigation perpetuated the systemic racism experienced by Ted and Tamica Mullaley in the investigation into Baby Charlie's abduction and then subsequent murder. The IAU and CCC failed to:

- a) Consider the WA Police's responsibility for the custody and welfare of Baby Charlie at the scene of the domestic violence incident and following the arrest of his mother and whether this breached WA Police protocols and policies;
- b) Consider the Mullaley Family's concerns about the failure of WA Police to follow WA Missing Person's policy from the time Ted Mullaley reported that Baby Charlie had been taken by Bell;
- c) Consider the Mullaley Family's complaints about harassment and racism experienced at the hands of WA Police Officers;
- d) Provide the Mullaley Family with any opportunity to provide thorough statements about police misconduct in the events that led to the murder of Baby Charlie, and;
- e) Provide a copy of the IAU Report to the Mullaley Family or opportunity for the Mullaley Family to respond to the CCC report, prior to its publication.

### **WA Coroner's Court refusal to hold a coronial inquest into the murder of Baby Charlie.**

13. We submit that the WA Coroner's Court refusal to hold a coronial inquest into the murder of Baby Charlie is an act of systemic racism which has, again, denied the family any opportunity to assess the institutional failures that contributed to the murder of Baby Charlie in the lead up to and following his abduction by Bell.

14. The Coroner at the time undertook a desktop review of Baby Charlie's death and made initial findings without holding an inquest or inviting any submission from the Mullaley Family. The review findings included the factually incorrect statement that Baby Charlie was left with family members at the scene of the domestic violence incident when the child was in fact left with the relatives of his murderer. The Coroner concluded that "There is no reasonable appearance that any act or omission by any police officer who attended the scene of the assault on Ms Mullaley on 19 March 2013 caused or contributed to Charlie being Murdered by Mr Bell."

15. When the Mullaley Family requested a coronial inquest be held on the basis that Baby Charlie's death was caused or contributed to by the action of a member of the WA Police Force, the Coroner denied the request. The Coroner at the time was then quoted on television saying that they did not want to give the family any hope.

We contend that this refusal is in direct conflict with recommendations made by the RCIADIC which recommended an expansion of coronial inquiry. Recommendation 13 states "That a Coroner inquiring into a death in custody be required to make findings as to the matters which the Coroner is required to investigate and to make such recommendations as are deemed appropriate with a view to preventing further custodial deaths. The Coroner should be empowered, further, to make such recommendations on other matters as he or she deems appropriate."

The former Western Australian State Coroner, Alistair Hope took an expansive view of the Coroner's powers in the inquest into the death of Mr (Ian) Ward, endorsing the following quotation from Watterson, Brown and McKenzie (2008: 6):

*[The RCIADIC] provided an impetus for more widespread reform and modernisation of the coronial jurisdiction. It was concluded by the Royal Commission that Australian coronial systems should accord coroners the status and powers to enable comprehensive and coordinated investigations to take place. These investigations should lead to mandatory public hearings productive of findings and recommendations that seek to prevent future deaths in similar circumstances. The Royal Commission recommended an expansion of coronial inquiry from the traditional narrow and limited medico-legal determination of the cause of death to a more comprehensive, modern inquest; one that seeks to identify underlying factors, structures and practices contributing to avoidable deaths and to formulate constructive recommendations to reduce the incidence of further avoidable deaths. The Royal Commission provides a timeless reminder that every avoidable Indigenous death calls upon us to identify its underlying causes, consider Indigenous disadvantage, uncover the truth about the death and resolve upon practical steps to prevent others.*

Unfortunately, Coroner Hope's approach of making findings on broader systemic issues is not being followed by his successors.

16. We call for the inquiry to demand that RCIADIC Recommendation 13 be formally implemented and embraced across all coronial jurisdictions to ensure First Nations families are provided the opportunity for a comprehensive investigation that addresses the role of systemic racism in any deaths that occur where a First Nations person has had touchpoints with an institution.

## RESPONSE TO TERM OF REFERENCE G OF THE INQUIRY

### **Adequate and culturally sensitive investigations**

17. We submit that at all stages of the investigations the Mullaley Family's concerns and needs should have been centred and responded to in a culturally sensitive and trauma-informed way. This includes during the WA Police Force response to the domestic violence incident, the investigation into the abduction of Baby Charlie, and the investigations following his murder.

18. We submit that the Mullaley Family deserve a coronial inquest into the murder of Baby Charlie to examine the way actions of the WA Police force contributed to the death and to make recommendations to ensure these failures are not repeated. A coronial inquest would contribute to ensuring Baby Charlie was properly honoured and commemorated and that his family can attain some form of justice following his murder. We call on this enquiry to reinforce this by recommending reforms to WA coronial law and practice.
19. The Mullaley Family has welcomed the public apology by the WA Attorney-General, John Quigley, as genuine recognition of the systemic failures of the WA Police and Government and the immense pain and injustice that the family has endured since Baby Charlie was abducted and murdered. However, this in isolation is not enough and the family continue to call for accountability within the justice system and WA Police for these failures and for reform of the CCC and Coroner's Court.
20. The CCC should be called to account for its unfair and prejudiced practices that diminish the victims of police negligence, racism and violence.
21. The WA coronial jurisdiction is known to be culturally unsafe in the way inquests are conducted, and the treatment of the Mullaley Family is further evidence of this, and requires urgent reform.

## THE MULLALEY FAMILY RECOMMENDATIONS

In seeking justice, the Mullaley Family offer the following strategies for systemic reform and redress that are needed to prevent and combat systemic violence against First Nations women and children.

1. Ongoing review and reform of police practices and policies relating to the treatment of victims of domestic and family violence and their children. This should include the role of police to de-escalate at the scenes of DFV and the implementation of best-practice, culturally appropriate trauma-informed care for First Nations women and children. This is to ensure that First Nations women are not at-risk of criminalisation when they themselves are victims of crime and reliant on police and the justice system. Systemic reform, from law and policy through to practice, with specific focus on women and children, is needed to address the criminalisation and hyper-incarceration of First Nations people.<sup>6</sup>
2. Law and policy reform to allow more scrutiny and freedom of information about police misconduct, including improved Freedom of Information policies to allow greater transparency of police, the CCC and other institutions.
3. First Nations-led anti-racism and cultural competency education and training<sup>7</sup> to be delivered on an ongoing basis for police, integrity agencies, and State/Territory corruption and complaints bodies engaging with First Nations people (such as the CCC).
4. Reform of Integrity Agency practices, including increased transparency and accountability for police and the opportunity for complainants to submit victim impact statements and respond to allegations or criticisms made against them and their families. This includes introducing procedural fairness practices, such as right of reply, where racist and stereotypical slurs are made against victims of police and other state actors. Where IA bodies fail to fulfil their duties there should be structures in place to provide accountability and reform.
5. Appointing First Nations people to IAs and Coroner's courts to investigate matters where First Nations people are missing or murdered, the victims of crime, corruption or other malpractice. This includes developing pathways for First Nations people to be supported, respected and empowered investigators in IAs and the Coroner's courts to identify misconduct and systemic racism, make findings and make appropriate recommendations.
6. Law reform to ensure that coroners are required to investigate the conduct of police or other state actors or officials (including investigating systemic or structural discrimination) where

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<sup>6</sup> Above n 2.

<sup>7</sup> Above n 1.

their acts or omissions may have in any way contributed to the death of a person, particularly in cases of DFV or the death of a child. This aligns to recommendations made by the RCIADIC.



## CASE STUDY 2 – THE SMITH FAMILY

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### BACKGROUND

1. On 5 December 1987, cousins Jacinta Rose Smith ('Cindy'), a Kinja Budjiti and Wangkumara 15-year-old, and Mona Lisa Smith ('Mona'), a Murrawarri and Kunja 16-year-old, were last seen by their friends and family in Bourke, New South Wales (NSW).
2. According to Police records, at approximately 4am, Cindy and Mona were found by motorists at the site of a crashed car, along the highway heading out of Bourke. Mona was allegedly found face down in the gravel, partially scalped and without a pulse. One of her ears was missing. Cindy was allegedly first found lying nearby on a tarpaulin, naked from the waist down, with her pants around her ankles and her legs together. According to police statements, the motorists left to find the police, and when NSW Police arrived at the scene, they noted that Cindy's legs had been spread apart and her shirt and bra had been pushed up to expose her breasts. She had no pulse and had suffered massive internal injuries.
3. Lying next to Cindy, drunk, unhurt, with his arm over her body, was 40-year-old non-Indigenous man, Alexander Ian Grant ('Grant'). The position of Cindy's body when she was found, along with other evidence from the scene, suggest that Grant had sexually interfered with her body, either after she had passed away or as she was dying.
4. The manner and cause of Mona and Cindy's deaths are yet to be determined by the State Coroner. An inquest is set to be resumed in the latter half of 2023, 35 years after the girls passed away.
5. The family believe that there were serious inadequacies with the collection and analysis of evidence by NSW Police, which inevitably affected the outcome of the investigation and criminal trial that followed and have led to unanswered questions about the circumstances of that night, and the manner and cause of the girls' deaths. These perceived inadequacies included a failure to collect critical evidence from the scene, an absence of critical specimen samples and a failure to immediately interview Grant after the incident.
6. The family of Mona and Cindy believe that the investigation that followed the deaths of their loved ones would have been conducted differently had it been two non-Indigenous girls found on the side of the road.
7. Grant was charged with culpable driving causing the death of the two children and indecently interfering with Cindy's corpse. He was acquitted of the culpable driving charge by an all-white jury.
8. The charge of interference with a corpse was 'no-billed' by the DPP days out from the trial, with no consultation with Cindy and Mona's family. The family were not told that the charge of interference with a corpse had been dropped until the day of the trial. On 8 November 1988, a coronial inquest into Mona and Cindy's deaths was initiated but later adjourned due to pending criminal charges against Grant. The families expected that they would be updated when the inquest was resumed. However, for 35 years the inquest lay dormant. In July 2022, after relentless petitioning by the family and submissions from NJP and with assistance of barrister Julie Buxton, the NSW State Coroner agreed to re-open the coronial inquest.

The 35 years of inaction on this case have left the girls' families and the broader community of Bourke with immense uncertainty relating to many aspects of the alleged accident, the investigation and the decision making of the DPP. Mona and Cindy's family believe that if the investigation by the NSW Police had been performed properly, more serious charges may have been laid against Grant and more questions relating to the circumstances of their deaths may have been answered. While the Coronial inquest will be resumed, it will be affected by time, fading memories, and years of evidence which may have gone missing or been destroyed. The trauma for the girls' families and community that has been created and exacerbated by years of unanswered questions and inaction cannot be understated.

## SUBMISSIONS ON BEHALF OF THE SMITH FAMILY

### RESPONSE TO TERM OF REFERENCE B OF THE INQUIRY

#### **Adequate and culturally sensitive investigations**

1. We submit that systemic racism and racial tensions permeated all aspects of this case, informing the way that Mona and Cindy's deaths as First Nations children were understated, undermanaged, and mishandled by the NSW Police Force and the DPP in their investigations. In contrast to the treatment received by the girls and their families, throughout the processes of investigation and prosecution, the accused – Grant – received lenient treatment by both the police and the DPP. We submit that systemic racism informed:
  - a) the lenience shown to Grant throughout the investigation, despite changing his story in multiple instances and having been accused of engaging in inappropriate conduct, such as drinking with underage First Nations children;
  - b) the failure to collect key evidence, or the way in which key evidence appeared to be collected, but was subsequently lost or returned to the alleged perpetrator without explanation;
  - c) the failure to investigate key questions and inconsistencies;
  - d) the failure to consult or treat with respect the First Nations community throughout the investigation and criminal prosecution;
  - e) the failure to resume the coronial inquest in a timely fashion after the criminal proceedings were finalised;
  - f) the failure of the investigation and prosecution to attract significant media attention, unlike other similar cases in the same time period that involved non-Indigenous victims.
2. We submit that the significant extent to which systemic racism contributed to a flawed investigation, is evidence for the need for the scope of coronial inquests into deaths of First Nations people to consider systemic factors including racism and discrimination when investigating the causes of the deaths.

## RESPONSE TO TERM OF REFERENCE D OF THE INQUIRY

### Systemic causes of violence

3. We submit that the inadequate investigation, lack of justice, and lack of procedural transparency following Mona and Cindy's deaths has left unanswered crucial questions relating to the manner and cause of their deaths, including questions as to whether the girls experienced racially-motivated or sexual violence in the lead-up to or following their deaths and/or whether the deaths themselves were sexually or racially motivated.
4. We submit that the failure to collect and analyse evidence, including witness statements, means that we have little understanding of any other underlying social, economic, cultural, historical or institutional circumstances that could have potentially made the girls more vulnerable to violence or to being in a dangerous situation that ultimately led to their deaths. As a consequence, critical lessons which may have contributed to systemic changes to lessen the vulnerability of First Nations women and children and prevent similar deaths in the future have been lost. We hope that the recently resumed inquest will shed light on these previously uninterrogated circumstances.
5. We submit that repeated description of Mona and Cindy as "women" or "females" rather than 'girls' or 'children' throughout various official documents and transcripts demonstrates a lack of regard by authorities and the wider public for First Nations children that have been subject to harm. Repeated references to "women" or "females" implicitly assign Cindy and Mona more autonomy and self-responsibility in the situation than can be expected of minors. The resultant implication is that as grown 'women' they would have some degree of sexual autonomy, and would at least, in theory, be capable of consenting to or initiating sexual acts, as was claimed by Grant, rather than highlighting the possibility that these two children may have been victims of sexual crimes and exploitation by an older white man. This portrayal of the girls is consistent with a broader socio-legal prejudicial framing of First Nations women and children as reckless, promiscuous or deserving of violence.<sup>8</sup>

## RESPONSE TO TERM OF REFERENCE G OF THE INQUIRY

### Honouring murdered women and children

6. We submit that as First Nations children, Cindy and Mona can be honoured through closure, accountability and justice. The cause and circumstances of their deaths is yet to be ascertained, after 35 long years of waiting, due to a disregard for their lives and memories and continued failings by each State institution that has come into contact with this case. Therefore, we submit that:
  - a) the family and legacy of Cindy and Mona can be honoured by ensuring that the NSW Police and the NSW Office of the DPP are held accountable for any discriminatory

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<sup>8</sup> Bronwyn Carlson, 'No public outrage, no vigils: Australia's silence at violence against Indigenous women' [11]; Kylie Cripps, 'Media constructions of Indigenous women in sexual assault cases: reflections from Australia' (2021) 33(3) *Current Issues in Criminal Justice*, 300

policing, investigation and prosecutorial conduct engaged in and that these matters are investigated by First Nations investigators;

- b) It is imperative to ensure that all opportunities to achieve long-awaited justice are pursued. Coronial inquests must be mandated when a First Nations woman or child has died under suspicious circumstances;
  - c) If a coronial inquest is suspended due to a pending charge against an alleged perpetrator of harm against a First Nations woman or child and they are acquitted, it is imperative that the inquest be resumed in a timely fashion. The onus should never be on grieving families to call for the resumption of these processes.
7. We submit that First Nations women and children such as Cindy and Mona who are missing, murdered, or have died under suspicious circumstances, can be honoured through demonstrations of **respect and dignity** for the traditions and customs of First Nations communities. This includes:
- a) the participation of the families of victims in coronial and prosecutorial processes in a respectful manner;
  - b) ensuring that the families and wider communities of victims are interviewed and kept informed on the progress and the outcome of cases pertaining to missing and murdered First Nations women and children;
  - c) ensuring that cultural safety is observed at all stages of an investigation and proceedings;
  - d) taking care when referring to victims of sexual assault, especially children, so as to not perpetuate stereotypes or falsehoods. For example, by not referring to them as “women” or “female” when they are still children, as was the case with much of the early correspondence regarding the case of Cindy and Mona;
  - e) taking additional care in all stages of an investigation and prosecution when the victims of crime are children, especially First Nations children; and
  - f) ensuring that Coroners consider and make findings of a systemic nature, regarding issues of discrimination or bias that may have contributed to a death or the handling of a death, which will assist the legislature, the Police, and the community to protect First Nations communities and prevent future deaths.

## THE SMITH FAMILY RECOMMENDATIONS

In seeking justice, the Smith Family offer the following strategies for systemic reform and redress that are needed to address violence against First Nations women and children.

1. Reform the Coronial system to require Coroners to consider and comment upon systemic factors including discrimination and bias by police forces and state prosecutors like the NSW Office of the DPP when racism, prejudice and/or bias may have contributed to the death or investigation of a death of any First Nations woman or child.
2. Reform the criminal law to ensure that alleged perpetrators of s 81C of the Crimes Act 1900 (NSW) 'Misconduct with regard to corpses' and of s 611 of the Crimes Act 1900 (NSW) 'Sexual assault' cannot escape prosecution because the precise time of a victim's death cannot be ascertained with sufficient precision to determine whether they were alive or dead at the time that sexual interference occurred.
3. Law and police reform to ensure that all suspected sexual assaults against First Nations women or children and/or any interferences with their corpses are properly investigated and appropriate charges laid where there is a suspected perpetrator.
4. First Nations-led development and implementation of respectful and culturally safe protocols for investigating First Nations deaths, and for these to be applied consistently across all Australian States/Territories. This includes, but is not limited to:
  - a) A First Nations liaison officer at the Coroner's Court to assist First Nations families where there has been a death, to explain the role of the Coroner's Court to them and guide them through the Court processes, especially where they are not legally represented;
  - b) Communication with the family at key points of the investigation and coronial process to keep them informed and allow them to ask questions.

## FINAL COMMENTS

We implore the Committee to consider the lived experiences of the Mullaley Family and the Smith Family, and other families across the country that have experienced similar injustices. Urgent action is critical.

The Mullaley Family deserve accountability for the repeated failures and racial prejudice experienced at the hands of WA Police and WA Government, the WA CCC and the WA State Coroner.

For the Mullaley Family, systemic reform to address the systemic racism and violence that they were forced to endure following the domestic violence incident, abduction and murder of Baby Charlie in March 2013 and subsequent investigations is imperative to ensure no other families experience this trauma.

The Smith Family deserve accountability for the perceived failures of the NSW Police Force and Office of the DPP to date. For the Smith Family, this would contribute towards ensuring that Mona and Cindy are properly commemorated and honoured, enabling their family to move closer to some form of closure and long overdue justice.

Implementing the recommendations above would improve current practices surrounding missing and murdered First Nations women and children and contribute to a better understanding among authorities and the public of the systemic causes of violence. This includes an understanding of the deep-rooted colonial, historical, cultural, social and economic circumstances, and institutional failings which render First Nations women and children inordinately vulnerable to state-sanctioned violence.

## APPENDIX A: MULLALEY FAMILY VICTIM IMPACT STATEMENT

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*Family members that received physical injuries and psychological damage because of the incident night of 20 March 2013 and attended by the Broome police are:*

*Baby Charlie Mullaley (the deceased victim); his mother, Tamica Mullaley; his siblings, William Mullaley, Tyler Mullaley, and Lola Mullaley; and his Grandparents, Ted and Julie Mullaley, and Great grandmother, Myrtle Mullaley (now deceased).*

*These above named are the tip of a very large trauma that is embedded in the Mullaley family today.*

*Prior to the night of 20 March 2013, the Mullaley family were a strong bonded Widi Yamatiji family well known to the community, both Aboriginal and non-Aboriginal, as hard working and leaders in their community. The family, led by matriarch Myrtle Mullaley, engaged in supporting her family as well and working for a better future for the Aboriginal community across the state. Mrs Mullaley was a first Aboriginal employee in many WA Government departments over many years and in retirement founded and coordinated the now much celebrated Kookaburra Club providing health and respite for elderly Aboriginal women. Having been awarded Senior Aboriginal of the Year - TWICE - is testament to Myrtle's dedication and commitment to achieving better outcomes for Indigenous Australians. Myrtle had instilled in her, by her parents Norman Harris Snr and Eva (Phillips) Harris, who are also written into the WA history books, the value of family and pride in being members of the oldest living culture on the planet.*

*So, it is not surprising that having come from such a strong family base, Tamica and her two sons had the love and support of her parents Ted and Julie and her Aunties and Uncles. The combined years of experience of Ted having worked hard all his life in the building industry, and her Aunties and Uncle having managed programs across government, in both State and Federal Departments, in areas such as Child Protection, Community Legal and Mental Health services, Education, Community Safety and Indigenous Legal Aid as well as Land, Culture and Heritage, further demonstrates the very strong and multi-skilled supportive family behind Tamica.*

*This was the Mullaley family before 20 March 2013.*

*What is the Mullaley family today? Broken, beyond sad, traumatised, angry and in total disbelief. What was a call to the Police for protection and support for a victim of a violent life-threatening domestic attack, resulted in a living horror that is unbearable to recount? Actions by the WA police that night resulted in the brutal torture and murder of Baby Charlie Boy – an innocent 10-month-old baby with so much love to give and still receive from his family. The Mullaley family has had the shock of a first-hand demonstration on how the WA police handle a clear case of their officers not carrying out their duty, not following policy, and even worse, immediately acting to cover it up and move blame to the grieving family.*

*The Mullaley family are asking now and will continue to ask, why hasn't the WA Police Department shown any compassion or acceptance of neglecting their responsibility?*

*Unbelievably instead, the family experience the exact opposite. The WA police have targeted, convicted, harassed, and dismissed the Mullaley Family. Tamica's Aunties witnessed first-hand, again in utter disbelief, the disgusting response from the police only hours after our baby was found brutally beaten and dead. After finding out his 10-month-old grandson had been*

*murdered we had a Detective accuse Ted of “Playing the Black Card”, telling him that the night baby was abducted, his pleas for help at the Police Station “were likely not recorded because sometimes the cameras aren’t working at the front counter”.*

*For the Police Officers involved, both at the scene on 20 March 2013 or in the days, months and years since, there has been no consequence for what was clearly a neglect of duty, and total detraction from policy and procedure (for attending a Domestic Violence incident), but even more clearly a racist response to an Aboriginal family in crisis.*

### ***The Mullaley family is asking for Changes for Charlie!***

*We are calling for an explanation about why these officers were not reprimanded when they clearly neglected their duty that night resulting in the horrific death of an innocent baby? What is the consequence for a WA Police Officer who neglects his/her duty or fails to follow procedure and policy? We are asking for justice and real proof that this treatment cannot and will not happen to any other Aboriginal family seeking the WA police to execute their duty of care, the role they are trained for. We are asking for this to be independently scrutinised. Not by the CCC because they are clearly not independent of the WA Police Department.*

*We were told at the last meeting that the Police representative cried when she read the story.*

*Well, we are sorry that she had to read how our family was let down by her department and how our baby suffered and is now lost to us forever. But this is nothing new, non-Aboriginal people have been crying over treatment of Aboriginal people since the first contact. Nothing has changed... RACISM... STEREOTYPING...PATERNALISM... PATRONISING... they are still prevalent in so many people in authority, but they should not be so blatant as they were on 20 March 2013!*