

# JUDICIAL OFFICERS' BULLETIN

Published by the Judicial Commission of NSW

April 2021 | Volume 33 | No 3



## Thirty years on from the Royal Commission, what needs to change?\*

Professor Marcia Langton AM\*\*

This month marks 30 years since the final report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) was tabled. The author observes that

Australian governments of all jurisdictions have failed to give full effect to the Commission's two key recommendations: that imprisonment should be used as a sanction of last resort and those in custody are all owed a legal duty of care by those in authority.

The denial of rights of, and natural justice to, victims in the Aboriginal and Torres Strait Islander deaths in custody saga, and the arrest and incarceration of Aboriginal adults and children, have reached the level of a national crisis. This is the view of many Indigenous people, human rights advocates, many in the legal fraternity and thousands of citizens.<sup>1</sup> It is not the view, however, of the political leadership in Australian governments.

Even the most reasonable reforms have been rejected. Those who campaigned recently to raise the age of criminal responsibility from 10 to 14 years of age are bitterly disappointed by the Council of Attorneys-General delaying the decision in July 2020, citing as the reason the risk to community safety, particularly on behalf of the Western Australian government.

### How bad is it?

Throughout the first half of 2020, as people chanted "Black Lives Matter" across the world in protest of the killing of George Floyd and too many others, the Guardian Australia conducted a study of Indigenous deaths in custody in Australia.<sup>2</sup>

\* Based on "Black Lives Matter", Thea Astley Address, Byron Writers Festival 2020.

\*\* Associate Provost, Redmond Barry Distinguished Professor, Foundation Chair of Australian Indigenous Studies, Indigenous Studies Unit, Centre for Health Equity, Melbourne School of Population and Global Health, The University of Melbourne. Marcia Langton AM is a descendant of the Yiman and Bidjara nations.

1 Australian Law Reform Commission (ALRC), *Pathways to justice – Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133, 2018, p 22.

2 Guardian Australia, "Deaths inside: Indigenous Australian deaths in custody 2020", at <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>, accessed 29/3/2021.

## FEATURES

Thirty years on from the Royal Commission, what needs to change?

Professor Marcia Langton AM . . .25

Thirty years on from the Royal Commission, what can judicial officers do?

His Honour Judge Stephen Norrish QC . . . . .29

## REGULARS

Case updates . . . . .33

JIRS update . . . . .36

Legislation update . . . . .36

Continuing Judicial Education Program update . . . . .36

Judicial moves . . . . .36



After reading 589 coronial reports, the team at Guardian Australia found “a record of systemic failure and neglect” and reported on a number of key issues that are too often ignored by police and the criminal justice system. There are too many myths about trends in deaths and incarceration rates and how Aboriginal people in custody are treated, both by the police who charge them, and when they are in custody, whether in police custody or in a correctional facility.

The Guardian Australian team writes:<sup>3</sup>

The key finding of the Royal Commission was that Aboriginal people are more likely to die in custody because they are arrested and jailed at disproportionate rates. That remains as true in 2020 as it was in 1991. In 1991, 14.3% of the male prison population in Australia was Indigenous. In March 2020 it was 28.6%.

So, while the Royal Commission established that Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody the RCIADIC found that:<sup>4</sup>

Aboriginal people die in custody at a rate relative to their proportion of the whole population which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community.

What was overwhelmingly different in 1991 and more so 30 years on is the rate at which Aboriginal people come into custody. There has been a 190 per cent increase in the number of Aboriginal adults in prison over the last three decades.<sup>5</sup> In 2018–19, Indigenous young people were 22 times more likely to be in detention than non-Indigenous young people.<sup>6</sup>

The increasing incarceration rate was referred to the Australian Law Reform Commission (ALRC) in 2016. In its *Pathways to justice* report,<sup>7</sup> the ALRC found that, almost a third (31%) of Aboriginal and Torres Strait Islander defendants were jailed, compared to 18% of non-Indigenous defendants, despite the two groups having similar conviction rates: 85% to 81% respectively.<sup>8</sup>

The Guardian team's examination of coronial reports showed a stark difference in the treatment of Indigenous people who died in custody compared with non-Indigenous people. They write:<sup>9</sup>

While the most common cause of death for both Indigenous and non-Indigenous people in custody was medical issues, or what coronial reports referred to as natural causes, Indigenous people were much less likely to have been given all of the medical care they needed prior to their death.

Agencies such as police watch houses, prisons and hospitals failed to follow all of their own procedures in 37% of cases where Indigenous people died, compared with 21% for non-Indigenous people.

A recent study by the NSW Bureau of Crime Statistics and Research showed that Aboriginal people facing criminal charges were more likely to be refused bail than non-Aboriginal people.<sup>10</sup> The Guardian team also revealed that:<sup>11</sup>

Police in New South Wales pursued more than 80% of Indigenous people found with small amounts of cannabis through the courts while letting others off with warnings.

The Guardian concluded that:<sup>12</sup>

[b]etween 2013 and 2017 the police disproportionately used the justice system to prosecute Indigenous people despite the existence of a specific cautioning scheme introduced to keep minor drug offences out of the courts.

### No justice, no prosecutions

I worked for the RCIADIC from 1989 to 1990. After the primary recommendation of the Royal Commission that imprisonment of Aboriginal and Torres Strait Islander people should be a sanction of last resort (Rec 92), the key recommendation pertained to the principle and implementation of duty of care by all involved in the criminal justice system from police to correctional services officers to those in charge of juvenile justice centres (Rec 122).

We can see from the evidence unearthed by the Guardian team that the failure of police and correctional service

3 N Evershed, L Allam, C Wahlquist, “Deaths inside: how we track Indigenous deaths in custody and why we do it”, *The Guardian*, 12/6/2020 at <https://www.theguardian.com/australia-news/2020/jun/11/deaths-inside-how-we-track-indigenous-deaths-in-custody-and-why-we-do-it>, accessed 29/3/2021.

4 Royal Commission into Aboriginal Deaths (RCIADIC), *National Reports*, 1991, Vol 1, 1991, at [1.3.1]–[1.3.3].

5 Productivity Commission, *Overcoming Indigenous Disadvantage*, at <https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2020>, at [4.13]. See also L Doherty and S Bricknell, “Deaths in custody in Australia”, *Statistical Bulletin No 31*, AIC, p 13, at [https://www.aic.gov.au/sites/default/files/2020-12/sr31\\_deaths\\_in\\_custody\\_in\\_australia\\_2018-19.pdf](https://www.aic.gov.au/sites/default/files/2020-12/sr31_deaths_in_custody_in_australia_2018-19.pdf), p 4, accessed 29/3/2021.

6 Productivity Commission, *ibid.*

7 ALRC, *Pathways to justice*, above n 1, p 106, based on 2016 data.

8 *ibid.*

9 above n 3.

10 I Klauzner and S Yeong, “What factors influence police and court bail decisions?” (2021) 236 *Crime and Justice Bulletin*, BOCSAR.

11 M McGowan and C Knaus, “NSW police pursue 80% of Indigenous people caught with cannabis through courts”, *The Guardian*, 10/6/2020, at [www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts](http://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts), accessed 29/3/2021; based on data supplied by BOCSAR for *The Guardian*.

12 *ibid.* Section 19A *Criminal Procedure Act* 1986 provides that NSW Police may give a formal “cannabis caution” to a person aged over 18 and found with a small quantity of cannabis.

officers to exercise duty of care remains the primary contributing factor to Aboriginal deaths in custody. The Guardian team found that, for instance:<sup>13</sup>

An Aboriginal woman with a chronic injury and a tooth abscess was denied pain medication for six weeks after being transferred to Townsville Women's Prison in 2010. Her medical records had not arrived with her and apart from issuing Panadol, authorities did not believe she was in need of pain relief. Six weeks after the transfer she took her own life. The coroner said the pain was "a contributing factor in her despair" during her final weeks.

In another instance:<sup>14</sup>

An Aboriginal man in the grip of cardiac arrest was made to walk to a guard station to use a portable oxygen unit before an ambulance was called. Another Aboriginal man died of heart disease lying on a concrete bench in a Darwin police watch house cell. The coroner said "a sick middle-aged Aboriginal man was treated like a criminal and incarcerated like a criminal; he died in a police cell which was built to house criminals ... In my view he was entitled to die as a free man."

And:<sup>15</sup>

[T]he well-known case of Mr Ward, a Ngaanyatjarra elder, who the coroner found was "cooked" to death in a prison transport van in circumstances described as "wholly unnecessary and avoidable".

Families of those who die experience poor treatment. Coroners have criticised unnecessary delays in notifying next-of-kin. In one case a father found out his son had died when another prisoner called him several hours after the death, long before police notified him officially. In many cases police investigating a death on behalf of the coroner failed to interview anyone other than the prison or police officers directly involved. Aboriginal witnesses were left out.

There are many cases of Aboriginal women who have died in police custody; too many to recount here. Their lives were cut short by violence compounded by what seemed to be a contempt for Aboriginal women, that can pass for normal and acceptable across all classes and cultures in Australia.

There has been no justice, no prosecutions, just a cold silence from the authorities. Only their families, a few journalists and a very small number of people holding vigils, until the Black Lives Matter protesters in 2020, have brought these matters to our attention. The federal government has failed to implement most of the recommendations of the ALRC's *Pathways to justice* report.

Until measures are taken to prevent police and correctional services officers from failing in their duties to the Indigenous people they detain, or any person they detain, and ensuring that an encounter with them is not fatal, we must demand that all Australian governments implement the recommendations of the RCIADIC.

And here I want to be specific. Governments **must ensure that:**

Police services, Corrective Services and authorities in charge of juvenile centres recognise that they owe a legal duty of care to persons in their custody. That the standing instructions to the officers of these authorities specify that each officer involved in the arrest, incarceration or supervision of a person in custody has a legal duty of care to that person and may be held legally responsible for the death or injury of the person caused or contributed to by a breach of that duty; and that these authorities ensure that such officers are aware of their responsibilities and trained appropriately to meet them both on recruitment and during their service (Rec 122).

That Police and Corrective Services establish clear policies in relation to breaches of departmental instructions. Instructions relating to the care of persons in custody should be in mandatory terms and be both enforceable and enforced. Procedures should be put in place to ensure that such instructions are brought to the attention of and are understood by all officers and that those officers are made aware that the instructions will be enforced. Such instructions should be available to the public (Rec 123).

In all jurisdictions a screening form be introduced as a routine element in the reception of persons into police custody (Rec 125). That in every case of a person being taken into custody and immediately before for that person is placed in a cell, a screening form should be completed and a risk assessment made by a police officer or such other person, not being a police officer, who is trained and designated as the person responsible for the completion of such forms and the assessment of prisoners. The assessment of a detainee and other procedures relating to the completion of the screening form should be completed with care and thoroughness (Rec 126).

Recommendations of the RCIADIC included not just the compulsory Custody Watch Service be implemented in every jurisdiction, but also that:

Upon initial reception at a prison all Aboriginal prisoners should be subject to a thorough medical assessment with a view to determining whether the prisoner is at risk of injury, illness or self-harm. Such assessment on initial reception should be provided wherever possible by a medical practitioner (Rec 156).

And further:

That where persons are held in police watch-houses ... that authorities arrange in consultation with Police Services, for medical services (and as far as possible other services) to be provided, not less adequate than those that are provided in correctional institutions (Rec 128).

That the use of breath analysis equipment to test the blood alcohol levels at the time of reception of persons

13 N Evershed, L Allam and C Wahlquist, above n 3.

14 *ibid.*

15 *ibid.*

taken into custody be thoroughly evaluated by Police Services in consultation with Aboriginal Legal Services, Aboriginal Health Services, health departments and relevant agencies (Rec 129).

Protocols be established for the transfer between Police and Corrective Services of information about the physical or mental condition of an Aboriginal person which may create or increase the risks of death or injury to that person when in custody (Rec 130).

These recommendations of the Royal Commission are very detailed. In particular, they addressed the practices of police that we now know have not changed since the RCIADIC report was made public 30 years ago, with the result that, as of April 2021, 474 Aboriginal and Torres Strait Islanders have died in prison or police custody in Australia since 1991, with 5 dying since the beginning of March 2021.<sup>16</sup>

These recommendations also extended to correctional services officers and likewise, they too have failed in their duty of care far too many times.

Another important recommendation, Rec 127, was that:

Police services should move immediately in negotiation with Aboriginal Health Services and government health and medical agencies to examine the delivery of medical services to persons in police custody. Such examination should include, but not be limited to ... [t]he introduction of a regular medical or nursing presence in all principal watch-houses in capital cities and in such other major centres as have substantial numbers detained... In other locations, the establishment of arrangements to have medical practitioners or trained nurses readily available to attend police watch-houses for the purpose of identifying those prisoners who are at risk through illness, injury or self-harm at the time of reception.

Recommendation 127 also provides for the establishment of protocols in relation to those measures:

The development of protocols for the care and management of Aboriginal prisoners at risk, with attention to be given to the specific action to be

taken by officers with respect to the management of: intoxicated person; persons who are known to suffer from illnesses such as epilepsy, diabetes or heart disease or other serious medical conditions; persons who make any attempt to harm themselves or who exhibit a tendency to violent, irrational or potentially self-injurious behaviour; persons with an impaired state of consciousness; angry, aggressive or otherwise disturbed persons; persons suffering from mental illness; other serious medical conditions; persons in possession of or requiring access to medication; and such other persons or situations as agreed.

The tragedy of this situation is that hundreds of people have died because those recommendations were not implemented fully, if at all, and the responsible police officers should have been held responsible for those deaths and were not.

Not one of them has been convicted for the deaths of detainees in their care.

Governments need to recognise that Aboriginal and Torres Strait Islander people are particularly at risk of losing their lives when they go into detention.

It is now too late for those people who have died in custody but it is not too late for the generations to come. It is a primary responsibility of the Australian government and the State and Territory governments, to act immediately and responsibly to prevent further deaths in custody of Aboriginal and Torres Strait Islander people.

To achieve this, full effect needs to be given to Recommendation 92 that imprisonment be used "as a sanction of last resort". Arrest and imprisonment rates must be reduced. Australians like myself expect to see the principle of Black Lives Matter implemented as soon as possible and deaths prevented. Should we accommodate the tactics of governments who delay the implementation of these recommendations?

**I say no.**



16 *Guardian Australia*, "Deaths inside: Indigenous deaths in custody 2021" at <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>, accessed 9/4/2021.

Artwork on p 25 and 32 is reproduced with permission from Anna Petyarre's painting *Women's Ceremony*.