Indigenous deaths

Australian Prison Reform Journal

Volume 1, Issue 1, Article 2, 2021

Cameron I Russell

View ORCID profile

URL: www.aprj.com.au/articles/APRJ-1(1)-2-Indigenous-deaths.pdf

---

Abstract

It is exactly 30 years since the Royal Commission into Aboriginal Deaths in Custody released its findings, and Australia still has a long way to go in reducing Indigenous, as well as non-Indigenous, deaths in custody.

This article is the start of a continuing focus on all Aboriginal and Torres Strait Islander deaths in custody from 1991 to the present.

Aboriginal and Torres Strait Islander people are respectfully advised that this article contains references to people who have passed away.

For those accessing and using this article, the details contained therein are of a highly sensitive nature and we ask you to be respectful of the cultural sensitivities of the living relatives and friends of those whose deaths are recorded in this article.

If this article raises any concerns for you or someone you know, please contact your local doctors' health service; Lifeline on 13 11 14; or Beyond Blue on 1300 22 4636 (in Australia). If you are outside Australia, you may obtain help in your country by visiting Befrienders Worldwide at www.befrienders.org

Aboriginal and Torres Strait Islander deaths in custody

The landmark Royal Commission into Aboriginal Deaths in Custody (RCIADIC) released its findings on 15 April 1991. The Commission made 339 recommendations in 1991 (see next section). In the 30 years since, at least 474 Aboriginal and Torres Strait Islander people have died in custody (Guardian, AIC). *[Note: there are actually 475 deaths because the author knows of, and has reported, an additional Aboriginal death that had not been officially recorded].* In 2018, a Deloitte review of the implementation of the RCIADIC's recommendations found that 64% of these 339 recommendations had been fully

implemented, 14% had been mostly implemented, 16% had been partially implemented and 6% had not been implemented (Deloitte Access Economics 2018:xi). The fully implemented recommendations mostly related to the justice system, prison safety and reconciliation, land needs and international obligations. The lowest proportion of fully implemented recommendations related to self-determination, non-custodial approaches, and cycle of offending, which are crucial areas, particularly given the extremely high rates of incarceration and recidivism for indigenous people (refer to the last article in this issue on Indigenous incarceration). It was also found that all jurisdictions had lost momentum in reporting on the progress of implementation of RCIADIC's recommendations (RCIADIC 1991:xiii). The Deloitte report was, however, strongly criticized at the time by 33 academics and professional experts as being misleadingly positive and seriously flawed. They said the review was "of such poor quality as to render its findings largely worthless" (Jordan et al. 2018; The Guardian 2018).

Perhaps the greatest contribution of the Deloitte report was the useful summaries and classifications that were provided based on the RCIADIC's findings. Reflecting the RCIADIC's approach, Deloitte divided sets of recommendations into themes and identified which jurisdiction was responsible for each recommendation.

		Responsibility for recommendations			
Theme	**Recommend-ations**	**Joint Cth & State**	**Cth**	**State & Territory**	**Total**
Coronial matters	1-47	16	3	28	47
The justice system	48-62	10	3	2	15
Indigenous disadvantage	63-78	10	5	1	16
Non-custodial approaches	79-121	12	4	27	43
Prison safety	122-187	40	0	26	66
Self-determination	188-213	23	2	1	26
Cycle of offending	214-245	23	1	8	32
Health and education	246-299	33	2	19	54
Equal opportunity	300-327	19	8	1	28
Reconciliation, land needs and international obligations	328-339	8	1	3	12
Total		**194**	**29**	**116**	**339**

Source: Deloitte 2018:viii-ix

As mentioned earlier, Australian Prison Reform Journal will make a detailed study of Aboriginal and Torres Strait Islander deaths between 1991 and 2021 in the first article of 2022, and this article will be progressively expanded until April 2023.
Coronial reports shall be relied upon, but it is important to note that coronial reports in the different Australian jurisdictions vary considerably in scope and quality. An excellent report on this was provided by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner in 1996 (when there had been 96 Aboriginal deaths in custody in the seven years since the RCIADIC completed its investigations). It is well worth quoting the three most relevant chapters in the Report Summary because they reveal the major difficulties, shortcomings and inconsistencies of the coronial system in Australia, essential though it may be:

"Chapter 10 Post-Death Investigations

10.1 There has been resistance by some coroners and police services to classifying deaths occurring during police pursuit as deaths in custody. There is a strong argument for coronial inquests into deaths occurring in all institutions, especially mental institutions.

10.2 The Coronial framework in several jurisdictions limits the usefulness of inquests. For example, in Queensland and South Australia coroners have very narrow statutory 'terms of reference.' As a result the coroners often cannot make findings about the quality of care and supervision of the deceased before his death. In contrast, the corresponding Victorian legislation gives the coroner adequate scope to examine the workings of the criminal justice and correctional systems.

10.3 Coroners, and counsel assisting them, frequently omit to examine the circumstances of the arrests which lead to the incarceration of remand prisoners whose guilt has not yet been determined by a court.

10.4 Investigation by an independent body, the Queensland Criminal Justice Commission, has revealed significant shortcomings in police investigations of deaths in custody in that state. Amongst other problems, police officers have been able to frustrate investigations by

invoking their privilege against self-incrimination. This problem extends to other jurisdictions.

10.5 Queensland has still not reformed its forty year old coronial legislation. Western Australia passed reforming legislation in 1996.

10.6 There are problems in the provision of information by police to the legal representatives of the families of persons who have died in police custody.

Chapter 11 Accountability for Implementation – The Current Process

11.1 The reporting process was flawed from the outset, and has not resulted in accurate evaluations of progress in implementing recommendations at either Commonwealth or State or Territory level. This is a fundamental question of public accountability.

11.2 The recommendations are still largely current, although there are gaps (for example, no reference to the 'trifecta' in the Royal Commission reports) and structural changes have occurred in custodial arrangements (for example, speedier transfer to remand centres, which may, in part, account for the proportional shift in the location of death from police to prison custody). [Note: The 'trifecta' are the three offences of offensive language, resist arrest and assault occasioning no harm that commonly bring Aboriginal people into prison. Indigenous people are twice as likely as non-Indigenous people to be arrested in circumstances where assault occasioning no harm is the most serious offence. They are three times more likely to be imprisoned for such an offence – at 4.5]

11.3 Monitoring is not useful unless there is a considered plan for the implementation of Royal Commission recommendations by Commonwealth or State and Territory governments. Responsible departments are encouraged to draw up plans in a six stage process – by:

1. reviewing current activities;

2. developing policies and programs;

3. setting goals or targets;

4. allocating responsibility for implementation;

5. ensuring adequate communication and training supports the plans; and

6. establishing evaluation mechanisms.

By comparison, the implementation of Royal Commission recommendations currently starts and stops at step 1.

Chapter 12 Alternative Mechanisms to Promote Implementation

12.1 Recommendations which require legislation, such as those on the principle of custody as a last resort, public drunkenness, the sentencing powers of justices of the peace, prisoners rights and legally enforceable custodial health and safety rules, have not been implemented. This indicates that a co-ordinated program is required, necessarily involving the Commonwealth and State Law Reform Commissions.

12.2 The recommendations are not mere suggestions. They can have precise legal implications under the common law relating to negligence, misfeasance in a public office and, potentially, other actions. If a custodial authority breaches recommendations, and that contributes to a death in custody, the custodial authority may be liable in damages.

12.3 The need for accountability in custodial and police settings is greater than ever. Deaths in custody have not decreased, despite the resources that went into the Royal Commission. The Wood Royal Commission in New South Wales has amply illustrated the need for police to be more accountable. Private prisons are being introduced, which must be made accountable for the treatment of prisoners in their charge. The role of the courts in improving accountability must be pressed.

12.4 The first successful negligence actions by family of persons who died in custody, taken against police and medical authorities, were concluded in 1995 and 1996. A third case has recently settled in favour of the plaintiff in relation to profile 39NSW.

12.5 The threat of liability in damages, including exemplary and aggravated damages, is a potentially powerful means of ensuring that prison and police officials have adequate regard for the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

12.6 Various administrative remedies are available to prisoners who are treated in a manner inconsistent with the recommendations. Anti-Discrimination complaints are also possible.

12.7 The Ombudsman or equivalent must play a greater role in enforcing and monitoring implementation of Royal Commission recommendations in the Sates and Territories, as well as at Commonwealth level.

12.8 Threats to the funding for Aboriginal Legal Services could set back the process of implementation of Royal Commission recommendations significantly. The Legal Services are virtually the only group with the resources to afford to pursue the legal avenues outlined in this chapter.

12.9 The failure to implement certain recommendations could be taken into the international arena, particularly the Human Rights Committee." (Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner 1996).

All of these issues will need to be considered in the survey that will be undertaken from Jan 2022 to April 2023.

Many changes need to be made, but the following recommendations are some of the important initiatives currently being discussed by Aboriginal community groups and other reformers:

1. Fully implementing the 339 recommendations set out in the Royal Commission into Aboriginal Deaths in Custody (RCIADIC 1991; Deloitte Access Economics n.d.; Allam and Wahlquist 2018)
2. Changing the law in Queensland so that a person cannot be arrested for being drunk in public and changing the law in all States and Territories so that swearing is not an offence and alternatives to prison are found for minor offences and driving unregistered, unlicensed and uninsured in remote areas (where there is a lack of

trainers, facilities and testing centres, and the language used for tests is inappropriate)

3. Greater flexibility for people, especially in remote areas, who cannot attend court (e.g. due to funerals, health problems or transport difficulties)
4. Raising the age of criminal responsibility from age 10 to at least 14 in all Australian jurisdictions, as called for by the UN Committee on the Rights of the Child. There are around 600 children aged 10 to 13 locked up each year, which primarily impacts Indigenous peoples since 65% of the children (and 80% of the 10-year-olds) are Aboriginal (Korff 2021; HRLC n.d.)
5. Expanding alternative pathways to the criminal justice system such as traditional sentencing circles; elders reconnecting offenders with the community; Aboriginal-led mediation; drug and alcohol court; farms and work camps; healing programs including spiritual healing programs; community corrections orders; and Aboriginal-led 'Night Patrols' which offer transportation to a place of safety for those at risk. The criminal law must be the last resort, especially for children, in order to break the prison cycle, and then there should be Aboriginal support for the offender and the provision of personal and cultural information in court. Greater investment may also be needed to make these alternatives more available in remote communities
6. Aboriginal-led investment in education and opportunities for Indigenous children (including finding alternatives to suspension and expulsion from school); as well as investment in traditional culture, employment, housing, health, etc to reverse engrained disadvantage
7. Aboriginal-led programs in every prison, involving traditional art, music, dance, storytelling, bush tucker, sports and ceremonies (including the supervised use of fire) as well as modern Aboriginal media, IT and politics. Sometimes this may involve all prisoners as a reflection of all Australians needing to come together and understand and appreciate Aboriginal views and culture
8. The recruitment of more Aboriginal parole officers, correctional officers, police officers, liaison officers, mentors, program leaders, psychologists and counsellors, medical staff and support agency workers to help provide Indigenous prisoners and

ex-prisoners and their families with greater understanding, care, engagement, role models and dignity. Support is needed post-release, not only to reduce the high Indigenous recidivism rate, but to protect their lives. Aboriginal people are vulnerable to dying from alcohol-related harms, preventable health conditions and suicide

9. Dramatic improvement in prisoner health, particularly mental health through the employment of more medical staff in prisons. Australian prisons are legally required to provide prisoners with a similar level of healthcare to that provided for the general community (RACGP 2011:2; UNODC 2015:Rules 24,25,27; CSAC 2018:20; legislation in each State and Territory; Russell 2021:2-3). However, better healthcare is also a major way in which suffering, anger and assaults (and extended sentences) can be reduced and the prison spiral reversed. Good healthcare would also benefit indigenous people who have poorer health than their non-Indigenous peers (Simpson et al. 2021:773; Krieg 2006:534; Grace et al. 2013:18). It may also reduce Aboriginal deaths in custody since Guardian Australia's analysis of all coronial inquests for Aboriginal deaths in custody showed that 33% of men and 50% of women who died did not receive appropriate medical care (Wahlquist et al. 2018).
10. Of the Indigenous prisoners in June 2021, 27.1% were in NSW, 26.6% in Qld, 20.5% in WA and 11.8% in NT. The four highest imprisonment rates were in WA (3,832/100,000 adult Indigenous population), NT (2,863), SA (2,816), and Qld (2,361) (ABS 2021). The recommendation is that there be at least one Aboriginal-run prison in at least each of NSW, Qld, WA, SA and NT. There should also be culturally appropriate treatment in all prisons
11. Aboriginal self-determination, empowerment and sovereignty are probably the most critical criteria for redressing the power imbalance, entrenched disadvantage and high incarceration levels. This is reflected in Aboriginal aspirations such as "Voice, Treaty, Truth", "Always was, Always will be", and "Heal Country!" which are increasingly being heard. One strong example of advances in self-determination is the Victorian Aboriginal Justice Agreement, *Burra Lotjpa Dunguludja* ('Senior Leaders Talking Strong'), a partnership between the Aboriginal Justice Forum representing all

Aboriginal and Torres Strait Islander peoples living in Victoria and the Victorian Government. This was the first such agreement in Australia and it is now in its fourth phase. Many major justice reforms have been funded that address the overrepresentation of Indigenous people in the justice system, and the independent reviews of outcomes have been very positive (Allison and Cuneen 2010:668; Clear Horizon Consulting 2018; ALRC 2018:Rec.16-2). Victoria then Qld were commended most highly and NT the least. Interestingly, the NT was the only jurisdiction to not have an AJA at any time, noting 'consultation fatigue' (ALRC 2018:16.48). Victoria has also moved in the area of sovereignty with the establishment of the Victorian Treaty Advancement Commission to 'strengthen independence for Aboriginal Victorians on the pathway to treaty and ensure they remain at the heart of the process' (Victoria State Government 2018:17). Victoria also enacted Australia's first treaty legislation, the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* that requires government to work with the Aboriginal Representative Body towards future treaty negotiations. Such serious initiatives are necessary for reform of the criminal justice system as it affects First Nations peoples.

References

ABS (Australian Bureau of Statistics) (2021) 'Corrective Services: June Quarter 2021', accessed 08 April 2021.

Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic)

AJC (Aboriginal Justice Caucus), Koori Justice Unit, and other groups in the Aboriginal Justice Forum (n.d.) 'Burra Lotjpa Dunguludja', (The Victorian Aboriginal Justice Agreement, literally "Senior leaders talking strong", comprising 4 phases to date), accessed 11 April 2021.

—(2000) 'Victorian Aboriginal Justice Agreement (Phase 1 – 2000-2006)', accessed 11 April 2021.

—(2006) 'Victorian Aboriginal Justice Agreement (Phase 2 – 2006-2012)', accessed 11 April 2021.

—(2013) 'Victorian Aboriginal Justice Agreement (Phase 3 – 2013-2018)', accessed 11 April 2021.

—(2019) 'Victorian Aboriginal Justice Agreement (Phase 4 – 2018-2023)', accessed 11 April 2021.

Allam L and Wahlquist C (25 October 2018) 'Indigenous deaths in custody: key recommendations still not fully implemented,' *The Guardian*, accessed 03 April 2021.

Allam L, Wahlquist C and Evershed N (9 April 2021) 'The facts about Australia's rising toll of Indigenous deaths in custody', *The Guardian*, accessed 14 April 2021.

Allison F and Cuneen C (2010) 'The role of Indigenous justice agreements in improving legal and social outcomes for indigenous people', *Sydney Law Review* 32(4):645-669.

ALRC (Australian Law Reform Commission) (2018) 'Aboriginal Justice Agreements', ALRC.

Clear Horizon Consulting (2018) 'Evaluation of the partnership arrangements of the Aboriginal Justice Agreement Phase 3', Victoria State Government, Melbourne.

Deloitte Access Economics (2018) 'Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody: Department of the Prime Minister and Cabinet', Deloitte Touche Tohmatsu, accessed 15 March 2021.

From the Heart (2021) 'The Uluru Statement from the Heart', accessed 17 March 2021.

Gaes GG and McGuire WJ (1985) 'Prison Violence: The Contribution of Crowding Versus Other Determinants of Prison Assault Rates', *Journal of Research in Crime and Delinquency*, (22):41-65.

Gelb K (2011) 'Alternatives to imprisonment: Community views in Victoria', (Report), Sentencing Advisory Council (SAC), Melbourne.

Grace J, Krom I, Maling C, Butler T, Midford R and Simpson P (2013) 'Review of indigenous offender health', *Australian Indigenous HealthInfoNet* (12)

HRLC (Human Rights Law Centre) (n.d.) 'Raise the Age: About the campaign', (Petition), accessed 02 April 2021.

Jordan K, Anthony T, Walsh T and Markham F (2018) 'Joint response to the Deloitte Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody', Centre for Aboriginal Economic Policy Research, ANU, Issue 4, accessed 04 April 2021.

Korff J (2021) 'Juvenile detention', *Creative Spirits*, accessed 14 April 2021.

Krieg A (2006) 'Aboriginal incarceration: health and social impacts', *The Medical Journal of Australia*, 184(1):534-536.

NNC (National NAIDOC Committee) (2020) 'Always was, Always will be', NAIDOC, accessed 10 April 2021.

—(2021) 'Heal Country!', NAIDOC, accessed 15 April 2021.

RACGP 2011:2; UNODC 2015:Rules 24,25,27; CSAC 2018:20; legislation in each State and Territory; Russell 2021:2-3

RCIADIC (Royal Commission into Aboriginal Deaths in Custody) (1991), 'Report', accessed 01 April 2021.

Salleh A (31 May 2020) 'Indigenous people take the lead in healing the trauma of the Stolen Generations', *ABC Science,* accessed 04 April 2021.

Simpson PL, Guthrie J, Jones J and Butler T (2021) 'Identifying research priorities to improve the health of incarcerated populations: results of citizens' juries in Australian prisons', *Lancet Public Health* 7:e771-779. doi:10.1016/S2468-2667(21)00050-5

UNAA (United Nations Association of Australia-Victorian Division) (2021) 'Australia's first nations incarceration epidemic: Origins of overrepresentation and a path forward', accessed 13 April 2021.

Victoria State Government (2018) 'Victorian Aboriginal Affairs Framework 2018-2023', Department of Premier and Cabinet, Victorian Government, Melbourne.

Wahlquist C (20 December 2018) 'Indigenous deaths in custody report 'largely worthless', academics say', *The Guardian*, accessed 12 April 2021.

Wahlquist C, Evershed N and Allam L (10 September 2018) 'Half of Indigenous women who died in custody did not receive appropriate medical care', *The Guardian,* accessed 27 March 2021.