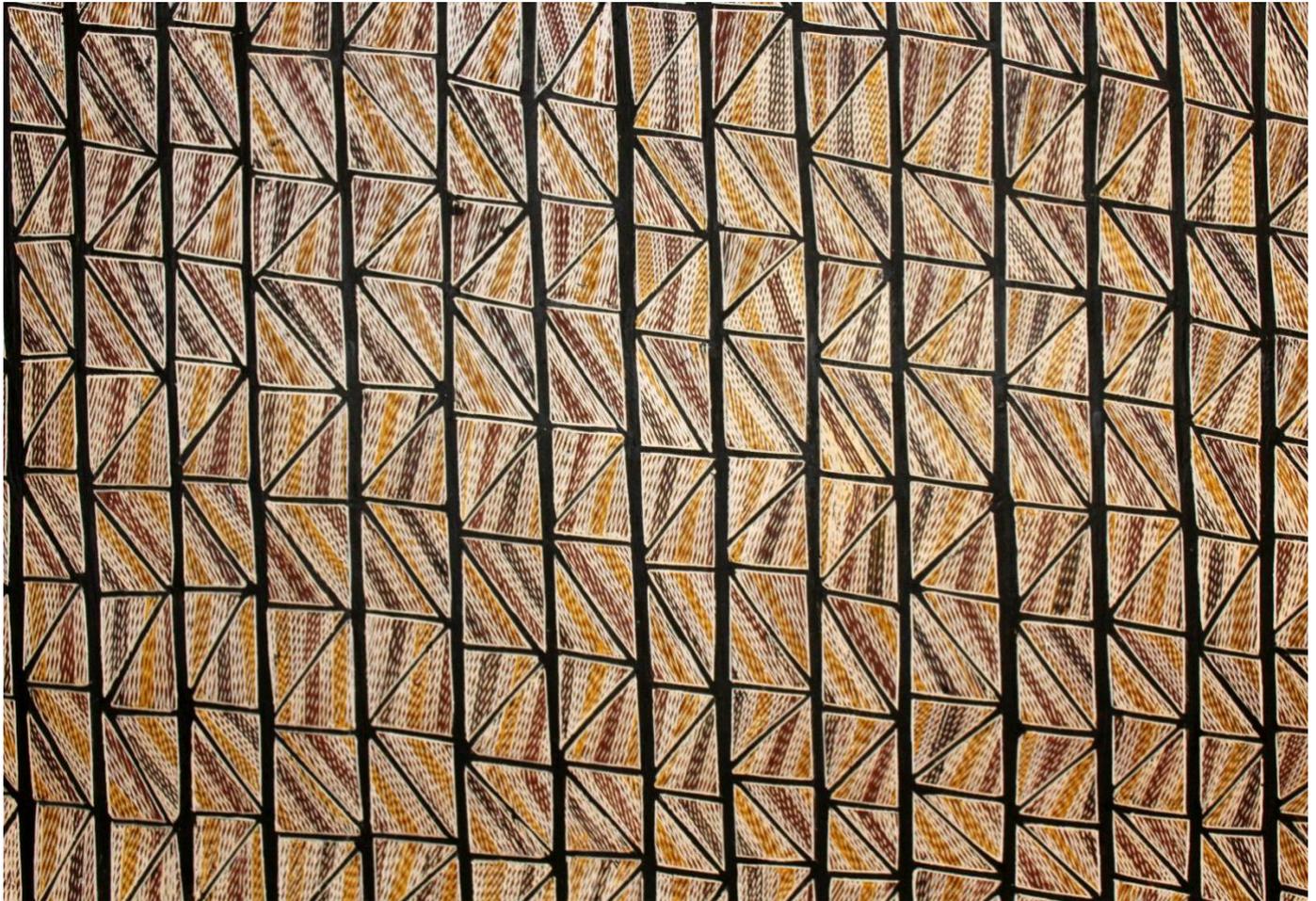




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30 YEARS ON: ROYAL COMMISSION INTO
ABORIGINAL DEATHS IN CUSTODY
RECOMMENDATIONS REMAIN
UNIMPLEMENTED

T. ANTHONY, K. JORDAN, T. WALSH, F. MARKHAM,
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Centre for
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30 years on: Royal Commission into Aboriginal Deaths in Custody recommendations remain unimplemented

T. Anthony, K. Jordan, T. Walsh, F. Markham, M. Williams

Abstract

This paper outlines concerns with the 2018 Deloitte Access Economics review of the implementation of the 339 recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). Here, we update a statement produced by Jordan et al. in December 2018, which argued that due to its scope and methodology, the Deloitte review had the potential to misrepresent the extent to which the RCIADIC recommendations had been implemented. Drawing on coronial inquest reports, we cite new evidence of the failure of governments to implement key RCIADIC recommendations and the fatal consequences for First Nations lives.

We argue that there is a risk that misinformation may influence policy and practice responses to First Nations deaths in custody, and opportunities to address the widespread problems in Indigenous public policy in Australia may be missed. In particular, current approaches too often ignore the principles of self-determination and the realities of laws and policies as experienced by First Nations peoples. We reiterate arguments for the development of national independent monitoring of Indigenous deaths in custody and further work towards the implementation of the recommendations of RCIADIC. We also call on the Australian Government to provide a response to the Australian Law Reform Commission's 2017 Inquiry on Indigenous Incarceration Rates.

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Acronyms

ABS	Australian Bureau of Statistics
ACCHO	Aboriginal and Torres Strait Islander Community-Controlled Health Organisations
ACT	Australian Capital Territory
AHNT	Aboriginal Housing NT
AMSANT	Aboriginal Medical Services Alliance of the NT
ANU	Australian National University
ATSIC	Aboriginal and Torres Strait Islander Commission
CAEPR	Centre for Aboriginal Economic Policy Research
CDC	Cashless Debit Card
CDEP	Community Development Employment Projects
CDP	Community Development Programme
IAS	Indigenous Advancement Strategy
NATSILS	National Aboriginal and Torres Strait Islander Legal Services
NACCHO	National Aboriginal Community Controlled Health Organisation
NT	Northern Territory
NTER	Northern Territory Emergency Response
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
SEAM	School Enrolment and Attendance through Welfare Reform Measure
UN	United Nations

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Introduction: Impetus for revised response

In December 2018, academics and professionals with expertise in the policy areas examined by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) prepared a statement (Jordan et al., 2018) to express serious concerns with the Deloitte Access Economics review of the implementation of the RCIADIC recommendations tabled in the Australian Senate on 24 October 2018 (Deloitte Access Economics, 2018). We raised concerns with the scope of the review, its methodology and substantive findings. This was published by CAEPR as a Topical Paper 4/2018. In March 2021, in the lead-up to the 30th anniversary of the RCIADIC Final Report on 15 April 2021, we were approached by the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) to update this statement in light of increasing First Nations¹ incarceration rates, the rising number of deaths in custody and mounting national concern about the inhumane ways in which First Nations people are treated in custodial environments. In preparing this new paper, the four original authors joined with one new author to review the Deloitte review in light of developments over the past three years and on the eve of the 30th anniversary of the RCIADIC Final Report. We have provided a more comprehensive response that sheds lights on recent First Nations deaths in custody, issues of systemic racism in the penal system and the failure of governments to adhere to a commitment to First Nations self-determination. We assert that First Nations deaths in custody could have been prevented had the Commonwealth, state and territory governments adhered to the implementation of RCIADIC recommendations.

Our original response to the Deloitte review was formulated because the review had the potential to misinform policy and practice responses to First Nations deaths in custody and other law and policy areas considered by the RCIADIC. Government reliance on the Deloitte review to inform policy decisions risks increasing First Nations deaths in custody because it misinterprets the extent to which the recommendations of RCIADIC have been implemented and misapprehends what is needed to reduce the incidence of First Nations deaths in custody. We maintain that the Deloitte review's finding that 78% of the 339 recommendations have been fully or mostly implemented is highly questionable, and that it obscures the issue of the effectiveness of any responses to the RCIADIC recommendations.

We estimate that as of April 9, 2021, there have been 474 deaths in custody since the RCIADIC. This number has been ascertained from the sum of Australian Institute of Criminology data between 1991 and 2019, news articles and corrective services notifications since mid-2019. This is a likely an under-estimate of the deaths in custody because corrective services often fail to provide contemporaneous public reports of deaths in custody at the time of their occurrence. This was recently brought to the attention of the public in New South Wales (NSW) parliamentary debates in March 2021.²

Our research at the time of our initial response to the Deloitte review, in December 2018, suggested that very few of the RCIADIC recommendations have been implemented and in fact many of the recommendations have been directly contravened by government laws and policies. We expressed concerns in relation to the methodology of the report and the sources that it relied on. In this revised response in April 2021 we reiterate these concerns and add new concerns that have arisen from governments' continued neglect of recommendations and from ongoing practices in custody that defy recommendations.

¹ The authors respectfully use First Nations as the collective name for Aboriginal and Torres Strait Islander peoples.

² See, e.g., NSW Police Commissioner's response to questioning on this topic: <https://www.abc.net.au/news/2021-03-09/two-indigenous-deaths-in-custody-in-sydney-last-week/13229962>. See also Walsh & Counter (2019).

Government's continued reliance on the Deloitte report

The Australian Government continues to rely on the Deloitte report to defend its implementation of the RCIADIC. On this basis, the Australian Government rules out further substantive action to implement the RCIADIC recommendations, prevent deaths in custody and dignify the lives of all First Nations people. For example in the midst of Black Lives Matter/Justice for First Nations Deaths in Custody rallies in mid-2020, the Minister for Indigenous Australians, the Hon. Ken Wyatt MP, tweeted (Wyatt, 2020):

It's important to note that an independent review of the RCIADIC recommendations (conducted in 2017) found that the Australian Government has fully or mostly implemented 91% of recommendations for which it has responsibility.

As recently as March 26, 2021, Senator Stoker, the Assistant Minister to the Attorney-General, repeated this claim during Senate Estimates, asserting that 'It's also true to say that of the recommendations in that report 91% have been fully or mostly implemented, 8% have been partially implemented and only one was not' (Senate Finance and Public Administration Legislation Committee, 2021, p. 22).

Reliance on the Deloitte report also emerged in the Australian Government's National Report to the United Nations (UN) Universal Periodic Review in December 2020. In its report, the Australian Government used the Deloitte report to defend its record on First Nations deaths in custody and, indeed, highlight its progress. The government professed to have addressed the main recommendations that remained unimplemented at the time of the Deloitte report and suggested that the only remaining shortcomings related to reporting. The Australian Government noted (Attorney-General's Department, 2020):

In October 2018, the Australian Government commissioned an independent review into the implementation status of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (1991). The review found 78% of 339 recommendations have been fully or mostly implemented, 16% partially implemented and 6% have not been implemented. Many aspects of the recommendations partially or not implemented have been superseded by subsequent government actions and policies. Areas where the recommendations have not been implemented in full relate to the intensity of reporting on progress of implementation and reporting on data on deaths in police custody.

We maintain that this is a misrepresentation of the facts of the Australian Government's response to the recommendations of the RCIADIC. Many key recommendations have not been implemented to this day. The Australian Government has failed to take the necessary leadership to coordinate implementation with states and territories, in consultation with First Nations representatives (see RCIADIC Recommendation 1), and implement recommendations relevant to its own jurisdiction such as in relation self-determination. This failure to implement the recommendations has contributed to increasing First Nations incarceration and is directly related to many First Nations deaths that have occurred in custody over the past three decades. We are concerned that the Australian Government's reliance on the Deloitte report to suggest otherwise and thereby evade an imperative to act is an inappropriate rewriting of history with serious consequences for First Nations lives.

Substantive outcomes: The rise in First Nations incarceration rates and deaths in custody

In focusing on counting actions (or 'outputs'), the Deloitte report fails to look at substantive outcomes from the RCIADIC. Many outcomes central to the concern of RCIADIC have continued to worsen. In particular, the commitments of RCIADIC to reduce the number of Aboriginal people in custody (Recommendation 148). Our concerns were encapsulated by Isabella Higgins and Loretta Florance (2020):

[T]he Deloitte review was limited to looking at whether actions had been taken on the recommendations, not what outcomes those actions achieved, and was criticised by many academics.

In January 2021, as part of the Universal Periodic Review Process, the Office of the UN High Commissioner for Human Rights compiled concerns by UN Committees and the Special Rapporteur on Indigenous Peoples and stakeholders regarding Australia's performance. These concerns were expressed as follows:

- 'deaths in custody of indigenous prisoners remained a problem' (p. 5)
- 'Indigenous peoples were drastically over-represented in the criminal justice system and that the extraordinarily high rate of incarceration among those peoples, including women and children, was a major concern' (p. 4)
- over-representation was a particular concern for 'indigenous children [who] were 21 times as likely as non-Indigenous young people to be in detention' (p. 5)
- 'racism towards indigenous people remained embedded' in the criminal justice system (p. 3).

Failures of governments to address the foregoing issues and implement the RCIADIC recommendations have culminated in an increase in the number of First Nations deaths in custody since RCIADIC. Current available figures, which are likely to be an under-estimate, demonstrate that there has been an average of 16 First Nations deaths in custody per year since RCIADIC, whereas the 10-year period over which the Royal Commission investigated deaths in custody saw an average of 10 deaths per year. The number represents a substantial and unacceptable increase per year in deaths in custody since the Royal Commission.

At the time of writing in March 2021, First Nations families of at least 20 men and women who died in custody are awaiting a coronial hearing in NSW, Western Australia (WA), Queensland, South Australia and Victoria. In addition to impending coronial hearings, there are two murder trials against police officers for shootings in the Northern Territory (NT) and WA. There is also one referral of NSW Corrective Services officers for manslaughter charges relating to a death in custody.

Hyper-incarceration

High rates of First Nations deaths in custody reflect the hyper-incarceration of First Nations peoples, who are the most incarcerated people in the world (Anthony, 2017). It is well documented that rates of First Nations people in prison have increased over the past three decades. In 1991, 1232 out of every 100 000 First Nations Australian was in prison (Anthony, 2016). But as Fig. 1 shows, by December 2020, 2333 out of every 100 000 First Nations Australians was in prison, with a total of 12 344 First Nations Australians in prison (Australian Bureau of Statistics (ABS), 2021). These are national averages, across all age groups. In WA, 3857 out of every 100 000 First Nations people were in prison.

Further, First Nations children are substantially over-represented in custody. First Nations children constitute 48% of the youth detention population and are 17 times more likely to be incarcerated than non-First Nations children (Australian Institute of Health and Welfare, 2021). In WA, of the First Nations young people aged 10–17, 40 per 100 000 were in detention in 2020. This is 34 times the equivalent non-Indigenous rate (Australian Institute of Health and Welfare, 2021). This defies RCIADIC Recommendation 62 to urgently reduce the rate of Aboriginal children in the criminal justice system. Deloitte finds that this recommendation has been fully or almost fully implemented. Governments, except the Australian Capital Territory (ACT), have failed to raise the

age of criminal responsibility or otherwise divert First Nations children to reduce the rates of First Nations children in detention.

Current imprisonment rates only focus on those held in custody at a point in time, but First Nations imprisonment is much more widespread. In 2014–15, the National Aboriginal and Torres Strait Islander Social Survey estimated that 9.5% of First Nations adults (38 100 persons) who were not currently incarcerated had been previously incarcerated at some stage of their life (authors' calculations from ABS, 2016). Among First Nations men aged 45–55 (i.e. those born in the 1970s) living unincarcerated in 2014–15, 25.4% had been incarcerated previously at some stage of their life.

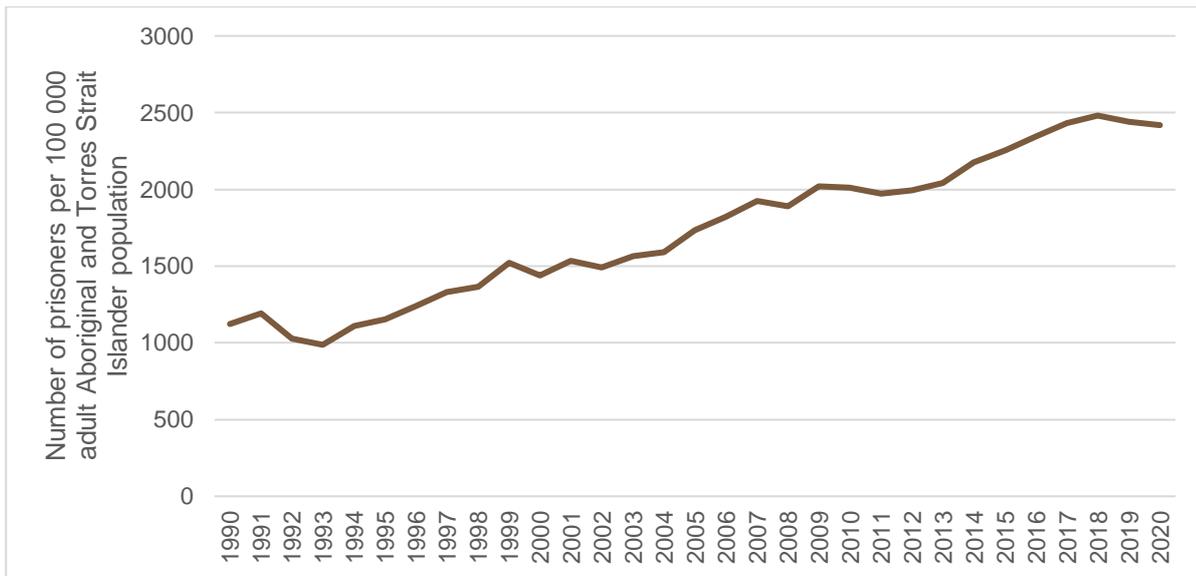
Disproportionality

First Nations people are not only being incarcerated at an accelerating rate, but are also comprising a growing proportion of the prison population (see Fig. 2). In 1991, 14% of the prison population were First Nations people. But by 2020, this proportion had increased to 29.5%. This increase in proportions in part reflects the increasing size of the First Nations population, which grew from 1.6% in 1991 to 3.3% in 2016 (Markham & Biddle, 2018). However, the disproportionality of First Nations incarceration also appears to be increasing. Whereas in 2000 First Nations people were 13.5 times more likely to be incarcerated than non-Indigenous Australians, by 2020 this ratio had increased 15.6 times (ABS, 2005, 2020).

Disproportional rates of incarceration are reflected in disproportional numbers of deaths in custody. A 2020 report by the Australian Institute of Criminology found that a First Nations person is about 10 times as likely to die in prison custody compared to a non-Indigenous person: 3.11 per 100 000 of the First Nations adult population compared to 0.38 non-Indigenous deaths in custody per 100 000 of the non-Indigenous population (Doherty & Bricknell, 2020).

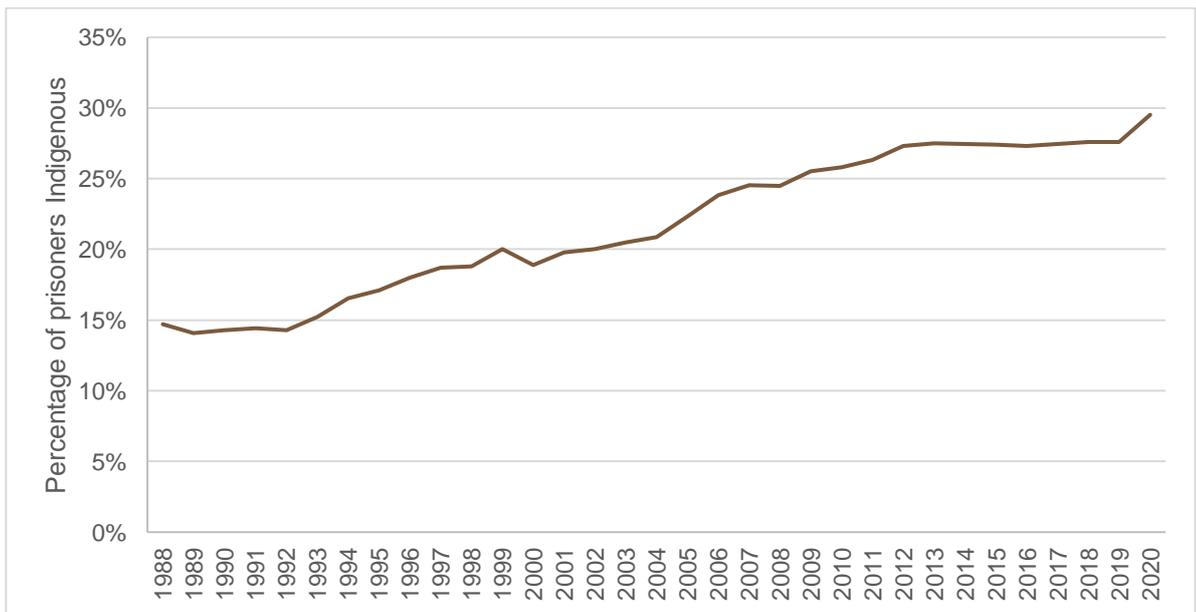
These statistics alone indicate that the recommendations of RCIADIC that focus on the need to reduce the number of Aboriginal people in custody, make custodial conditions safer, and enhance self-determination have not been realised. The Deloitte review does not account for these figures, and state, territory and federal governments have failed to rectify and prevent disproportionality and increasing incarceration rates.

Fig. 1 First Nations incarceration rate, 1990–2020



Sources: Leigh (2020) for years 1990–2018, updated from ABS (2020) using Leigh’s methodology for 2019–2020.

Fig. 2 Percentage of the total prison population who are First Nations people, 1988–2020



Sources: Authors’ calculations from ABS (2005, 2020), Carcach & Grant (1999), and Carcach et al. (1999).

Scope of the Deloitte review and methodological shortcomings

The Deloitte review overstates the progress that has been made towards implementing the RCIADIC recommendations. We believe that both the limited scope, and several methodological shortcomings, contributed to this. The scope of the review was limited to ‘assessing the actions taken to respond to each recommendation’ and excluded ‘commentary on whether the intended outcomes from each recommendation have been achieved’ (Deloitte Access Economics, 2018, p. 3). The report’s authors further limited the scope,

from 'assessing the actions taken' to 'whether actions had been taken to respond to each recommendation' (Deloitte Access Economics, 2018, p. 701, our emphasis).

Further, Deloitte's review methodology presents summaries of government actions from a desktop review of previous reports, some of which describe government actions taken towards meeting the RCIADIC recommendations that have since been reversed. It relies on information provided by government agencies – with little apparent analysis of the relevance of these government actions to the RCIADIC recommendations, the legitimacy of government claims to relevance, or whether the claims about meeting the recommendations are correct, or input from Aboriginal and Torres Strait Islander experts. In particular, the Deloitte review did not interrogate whether government actions have implemented RCIADIC recommendations consistent with three key features: reducing rates of Indigenous incarceration, increasing the safety of Indigenous people in custody, and advancing Indigenous self-determination (Recommendations 48–59, 188–204).

Overall, the scope and methodology of the review confuses an enumeration of policies and programs with actions which effectively address the RCIADIC recommendations. An analysis of outcomes shows a worsening situation, in the context of scant evaluations of those policies and programs for their effectiveness. The Deloitte review failed to identify real-world impacts of these policies or programs or governments' overall approach to Indigenous public policy and First Nations people in the criminal justice system.

Substantive findings of the review

Self-determination

Many of the RCIADIC recommendations identify the need to recognise the ongoing impacts of colonisation and initiate action towards self-determination. Recommendation 188 provides:

That governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.

The Deloitte review claims that Recommendation 188 is 'fully implemented' across all jurisdictions. This claim cannot be justified. The RCIADIC National Report defines self-determination to include 'Aboriginal [and Torres Strait Islander] control over the decision-making process as well as control over the ultimate decision about a wide range of matters including political status, and economic, social and cultural development' (E. Johnston, 1991b, Section 20.2.17). The evidence cited in the Deloitte review for the claim that Recommendation 188 is fully implemented is a fundamental misrepresentation of the nature of self-determination for Aboriginal and Torres Strait Islander peoples and of Indigenous public policy since the mid-1990s.

Despite signing the UN Declaration on the Rights of Indigenous Peoples in 2009, in recent decades Australian Governments have tended to reject the principle of self-determination in favour of centralised policy development and decision-making that substantively excludes First Nations peoples affected by the policy. Evidence produced by Aboriginal organisations and units, academic research, findings of the UN Committee on the Elimination of Racial Discrimination and reports by the UN Special Rapporteur on the Rights Indigenous Peoples all support this point. Indeed, in 2017, the UN Special Rapporteur described Australia's failure to respect the rights of Indigenous peoples to self-determination as 'alarming' (Special Rapporteur on the Rights of Indigenous Peoples, 2017).

Indeed, the election of the Howard Government in 1996 signalled the end of what many have termed the 'era of self-determination' in Indigenous public policy (e.g. Davis, 2015) and its replacement with an ideology that stressed 'practical reconciliation' or 'closing the gap', the economic sameness of First Nations and non-Indigenous Australians (Altman, 2016; Strakosch, 2015). It is salient to reiterate a few key moments in the dismantling of the institutions of self-determination in Indigenous public policy in Australia. In 2004–2005, the Australian Government abolished the national Indigenous representative body – the Aboriginal and Torres Strait Islander Commission (ATSIC) – whose functions included the local delivery of Indigenous-specific community services related to the justice system. RCIADIC underscored ATSIC's role in monitoring and reporting on the implementation of recommendations and providing input on the design of policies, alongside the formation of state and territory, regional, and local Aboriginal Justice Committees to provide advice on implementation (Recommendation 1). ATSIC was responsible for funding some of the newly-formed Aboriginal Justice Committees (see, e.g., ATSIC Yilli Rreung Regional Council, 2004, p. 5).

After the abolition of ATSIC, the Australian Government invoked a policy of mainstreaming the services for Aboriginal and Torres Strait Islander people, initially as part of a platform of 'practical reconciliation'. A further prominent legislative agenda of the Australian Government has been in relation to the control of Aboriginal communities in the NT, which was enacted through the *Northern Territory National Emergency Response Act* (2007) and the *Stronger Futures in the Northern Territory Act* (2012) with minimal input from the First Nations communities themselves.

Australian Government provisions to facilitate First Nations self-determination were further weakened in 2014 with the introduction of the Indigenous Advancement Strategy (IAS). The IAS amalgamated Australian Government funding for many Indigenous-specific services into the Department of the Prime Minister and Cabinet, and required all organisations in receipt of such funding to re-tender. At the same time, around half a billion dollars of funding for such services and programs was cut. The IAS's competitive framework has been criticised as benefiting large corporations (see Allam & Butler, 2021), for its lack of transparency and for the onerous conditions imposed on Aboriginal-owned organisations (Thorpe, 2018). The scheme has been marred by a litany of problems in implementation, documented in scathing detail in a 2017 'effectiveness' audit (Australian National Audit Office, 2017). These administration problems led one former senior bureaucrat to describe the IAS as 'a system which created the potential for substantial subversion of normal grant management principles and normal principles of governance, where the Minister could if he so wished, take funding decisions in accordance with whatever whim came to him, could reward favourites, punish enemies, without reasons being recorded, details kept, and all hidden from view and scrutiny' (Dillon, 2017). Ultimately, the IAS has made the financial sustainability of many First Nations organisations much more precarious (Page, 2018) and damaged the Indigenous sector, a crucial set of institutions through which First Nations self-determination is affected.

While First Nations peoples have made efforts to ensure that their views are considered in policymaking processes after the abolition of ATSIC, these efforts have rarely been supported by the Australian Government. In 2016, the Australian Government discontinued funding to the national Aboriginal and Torres Strait Islander-elected membership body, the National Congress of Australia's First Peoples, leading to the organisation becoming insolvent in 2019. In 2017, an unprecedented deliberative process convened 12 First Nations Regional Dialogues and a National Constitutional Convention, resulting in the production of the Uluru Statement from the Heart. The Uluru Statement from the Heart called for a constitutionally-enshrined First Nations' Voice to Parliament, as well as a Makarrata Commission to oversee treaty-making and truth telling (Referendum Council, 2017). Successive Australian Governments have failed to support this call for a constitutionally protected Voice, with only recent progress being made on the design of a legislated Voice to Government and Parliament (Langton et al., 2020).

These developments prompted approximately 50 First Nations community-controlled peak organisations to form the 'Coalition of Peaks' in 2019 to contribute to government policy. In 2020, the National Agreement on Closing the Gap came into effect to frame how governments and the Coalition of Peaks will work together (Coalition of Aboriginal and Torres Strait Islander Peak Organisations & Australian Governments, 2020). A new Closing the Gap justice target was set to reduce the rate of First Nations young people in detention by 30% and adults in prisons by 15% by 2031. This target was criticised by NATSILS, a member of the Coalition of Peaks, as well as by other advocacy groups (I. Johnston et al., 2019), as inadequate (Allam, 2020).

Since the RCIADIC reported in 1991, the Australian Government has generally failed to support representative national First Nations bodies and their substantive input into policy and legislation, and has failed to support self-determination in the community. In the realm of justice, state governments (except for Victoria) have disbanded their Aboriginal Justice Agreements that enabled Aboriginal organisations to have a stake in decisions on access to justice, justice services and criminal justice processes.³ The Australian Government has lacked commitment to a funding model that sustains Aboriginal-owned and place-based organisations that deliver frontline services. These developments demonstrate the Commonwealth Government's lack of adherence to the principle of First Nations self-determination which, according to RCIADIC, 'Aboriginal people should decide for themselves what they see as the scope of their demand' (E. Johnston, 1991b, Section 20.2.20).

Criminalisation

A key finding of RCIADIC was that Aboriginal people are more likely to be in custody than non-Aboriginal people, which contributes to their significant over-representation in deaths in custody as a proportion of the general First Nations population. RCIADIC concluded:

A major reason for Aboriginal deaths in custody remains: the grossly disproportionate rates at which Aboriginal people are taken into custody... Too many Aboriginal people are in custody too often (E. Johnston, 1991a, p. 6).

Many of RCIADIC's recommendations were therefore directed towards addressing the high rate of Aboriginal people in custody. The main recommendations relating to criminalisation include the following:

(a) Arrest as a last resort

RCIADIC Recommendation 87 referred to arrest as a sanction of last resort to avoid people being unnecessarily taken into police custody:

All Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders.

The Deloitte review suggests that Recommendation 87 is partially or fully implemented in most jurisdictions. However, First Nations people continue to be arrested at high and disproportionate rates. This leads to them dying in police custody at a rate above and beyond non-Indigenous people. A study of deaths in custody by Tamara Walsh and Angelene Counter, based on their public database (Walsh, 2016), found that 'Indigenous people are significantly more likely to die in police custody than non-Indigenous people' because they are significantly more likely to be in custody in the first place (Walsh & Counter, 2019, p. 143).

³ The NT Government Aboriginal Justice Unit in 2020 released a draft Aboriginal Justice Agreement, which it intends to finalise in 2021.

Furthermore, RCIADIC Recommendations 239–240 provided that police should proceed by way of caution rather than arrest for Aboriginal people, especially for young people. This should be monitored by governments (Recommendation 239). Excessive arrests are facilitated by summary offences legislation in all states and territories which still criminalise public drunkenness and offensive language. The issuing of infringement notices for public nuisance-type offences has resulted in substantial increases in charges, and ‘paperless arrests’ in the NT have made it even easier for police to arrest persons without a charge. The NT Aboriginal Justice Agency found that almost 90% of people who were arrested for street offences under the NT’s ‘paperless arrest’ were Aboriginal (Hunyor, 2015).

The arrest of Yorta Yorta woman Tanya Day for public drunkenness is an example of the inappropriate use of police powers to detain people in circumstances where they are not causing any social harm. Tanya Day was arrested after she fell asleep on a train – she was not causing a disturbance, nor did she pose a risk to herself or others. This arrest for public drunkenness led to Ms Day’s death in custody. The discriminatory decision to arrest Ms Day was highlighted by evidence that on the day of Ms Day’s arrest, the same arresting officers dealt with a heavily intoxicated non-Indigenous woman by taking her home without an arrest or issuing a penalty notice.

Moreover, arrests for the offence of public intoxication counter RCIADIC Recommendation 79 that this offence should be decriminalised. It has only been through the family of Ms Day campaigning that the Victorian parliament has passed legislation decriminalising the offence, although it will not commence until 2022.⁴ This highlights a major problem of governments failing to implement the RCIADIC recommendations – the burden shifts to grieving family members to push for the change needed to prevent more deaths in custody.

(b) Decriminalise offensive language

RCIADIC Recommendation 86 states that:

- a. *The use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest or charge; and*
- b. *Police Services should examine and monitor the use of offensive language charges.*

The Deloitte review considers Recommendation 86 to be partially or fully implemented in all jurisdictions. However, police practice and case law in relation to the application of offensive language crimes in some jurisdictions defy this recommendation. Offensive language remains an offence in all Australian states and territories. Aboriginal people, especially Aboriginal women, who are being imprisoned faster than any other demographic, remain disproportionately vulnerable to offensive language charges, primarily for offensive language against police officers. In Queensland, Aboriginal and Torres Strait people receive around one-third of all charges related to offensive language against police officers (Walsh, 2017), and in NSW it is 17% (Methven, 2017, p. 5). There has been an expansion of offensive language offences due to the roll out of criminal infringement notices for this offence in most jurisdictions. The issuing of such notices supplements the ongoing practice of charges being laid for offensive language. This leads to individuals being placed in police cells and some are ultimately sentenced to imprisonment.

⁴ Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020 cl 14.

(c) Amnesty on the execution of long outstanding warrants for unpaid fines

RCIADIC Recommendations 120–121 stated that governments consider introducing an ongoing amnesty on the execution of long outstanding warrants of commitment for unpaid fines, and that sentences of imprisonment not be automatically imposed for default of payment of a fine. Sentencers should also consider the defendant's capacity to pay in assessing appropriate penalties. The Deloitte review considers these recommendations to be partially or fully implemented in all jurisdictions (except Recommendation 120 in the ACT), yet in many states and territories, people can still be imprisoned for fine default.

In WA, fine default was used as grounds for detaining Yamatji woman Ms Dhu in Port Headland Police watchhouse in 2014, leading to her death in custody. In 2020, the WA Government passed the *Fines, Penalties and Infringement Notices Enforcement Act Amendment Act 2020 (WA)* in order for people who default on a fine to be diverted into community service. Nonetheless, imprisonment continues to be a sentencing option for failure to pay fines, which a magistrate can impose as a last resort.

(d) Uphold the right to bail

RCIADIC Recommendation 89 provides that governments should monitor legislation and criminal justice practice to ensure that defendants are entitled to bail. The Deloitte review considers this recommendation to be partially or fully implemented in all jurisdictions except Tasmania. However, the right to bail has been withered away by provisions that create presumptions against bail for a growing number of offences. Also, in some states and territories, magistrates are reluctant to grant bail in circumstances where the person does not have a fixed address, so people who are homeless may be ineligible for bail. Accordingly, remand rates have continued to grow, often outpacing the growth in sentenced offenders in prison. Many of those on remand will not be convicted or sentenced. Between 2008 and 2018, 56% of First Nations people who died in custody had not been convicted of an offence (Wahlquist et al., 2018). The UN Human Rights Council raised concerns earlier this year that over-imprisonment was attributable to remand rates and the government should redress this injustice by 'repealing punitive bail laws' (Human Rights Council Working Group on the Universal Periodic Review, 2020, Section 44).

The majority of First Nations children in custody are on remand (Australian Institute of Health and Welfare, 2021). In March 2021, the NT Government announced a tightening of the *Bail Act 1982 (NT)* for children, which will result in more Aboriginal children remanded for serious breaches, unlawful entry and unlawful use of a motor vehicle. At present, the NT penal system fills its detention centres with Aboriginal children (96%) and the great majority (77%) are on remand (Australian Institute of Health and Welfare, 2021).

Poor conditions on remand can contribute to deaths in custody, including a lack of access to services and programs. Poor remand conditions were recently raised in the coronial inquest of Gamilaraay, Gumbaynggirr and Wakka Wakka man Tane Chatfield in NSW (Grahame, 2020). The Coroner stated that over the course of two years in remand, Tane was 'unsettled' and 'did not receive sustained psychological care or support' or 'drug and alcohol treatment' despite his evident needs (Grahame, 2020, [25]).

(e) Imprisonment as a sanction of last resort

RCIADIC Recommendation 92 holds that community service work and a range of programs should be established as alternative sentences, including programs that provide skills, knowledge and work experience to reduce risk of reoffending. Recommendations 94, 109, and 111–13 noted that governments should review the range of non-custodial sentencing options, especially in remote and regional communities, with a view to ensuring that an appropriate range of options is available, and in doing so consult with Aboriginal communities and groups and ensure their involvement in community work and development orders.

However, there are few community-based sentencing orders that are run by First Nations organisations or cater to the specific needs of First Nations people. Aboriginal owned and run organisations, such as Sydney-based Deadly Connections Community and Justice Services Ltd, support people in the community on justice orders to strengthen individuals and their families. Yet courts and police are not reliably diverting Aboriginal people into such organisations and governments are not adequately funding the programs of Aboriginal organisations. The lack of diversion options and wrap-around community supports for First Nations people in the justice system is particularly stark in remote and regional areas. Courts need to engage with local First Nations organisations to receive input on appropriate community-based sentencing options. Information channels such as Indigenous Justice Reports, as recommended by Australian Law Reform Commission in its 2017 Inquiry into Indigenous Incarceration Rates, would support the implementation of RCIADIC Recommendation 94. Mainstream services often fall short of providing services for First Nations people that are relevant and free from racism (Finlay et al., 2017).

The Deloitte review considers these and related recommendations to divert First Nations people from custody to be at least partially implemented. Yet, it is well-established that First Nations people remain substantially over-represented in police and prison custody. Indeed, there has been a doubling of the proportion of Aboriginal people in custody (Fig. 2). Evidence of inadequate diversion from custody is that First Nations people now comprise 29.6% of the prison population (ABS, 2021), up from 14% in 1991. The greater imprisonment of First Nations people reflects the systemic racism experienced by First Nations people through the law enforcement system. At every stage First Nations people receive lesser access to non-penal and non-carceral options.

Health care in custody and systemic racism

RCIADIC Recommendations 127 and 150 point to the need for appropriate health care for Aboriginal persons in police custody and correctional institutions respectively. Further, medical services in police custody should be negotiated with Aboriginal Health Services and prison health care should be equivalent to the standard available to the general public. The Deloitte review reported that these recommendations have been either partly or fully implemented in prisons and partially or fully implemented in police custody.

However, First Nations people in prison are more likely to die from sudden, preventable causes than non-Indigenous people, and at younger ages (Doherty & Bricknell, 2020). Based on their Guardian Deaths Inside database (Evershed et al., 2021), Allam et al. (2018) found that Indigenous people are much less likely than non-Indigenous people to receive the care they need. Police, corrections and hospitals were less likely to follow their own procedures for Indigenous people (in 34% of cases) compared to non-Indigenous people (in 21% of cases). Indigenous people were three times less likely to receive required medical care, when compared with non-Indigenous people (Allam et al., 2021). Further, Indigenous women are less likely than Indigenous men to receive appropriate medical care. Compared with Indigenous males, Indigenous females who died in custody over the past decade were 'less likely to have received all the care they needed' but were twice as likely to have been injured in custody (Allam et al., 2018). Of all Indigenous women who died in custody, 54% did not receive all appropriate medical care, compared to 34% of Indigenous men (Allam et al., 2021). The Guardian's Deaths Inside database also showed that police or prisons had failed to follow all of their own procedures in 43.8% of cases involving the death of Indigenous women and girls, compared to 38.1% of cases involving males (Allam et al., 2018). The lesser care afforded to First Nations people paints a picture of systemic racism in custody. The lack of care available to Ms Dhu and Ms Day in police custody tells this story. The coronial findings in relation to their deaths point to the gross inadequacies in the available health care and checks that contributed to their deaths. In prisons, deficient healthcare contributed to the death of Dunghutti man David Dungay Jnr on December 29, 2015 while screaming 'I can't breathe'. The coroner in this matter concluded that Mr Dungay was administered inadequate and wrongful treatment before his death. Further, Anaiwan and Dunghutti man Nathan Reynolds was not given an asthma plan in prison and was then treated with reckless indifference and wrongly

administered anti-drug overdose medication, naloxone, when he was suffering an asthma attack that killed him on September 1, 2018, one week before he was due to be released.

The RCIADIC recommended that Aboriginal Health Services (now often referred to as 'Aboriginal and Torres Strait Islander Community-Controlled Health Organisations' (ACCHOs)) receive funding for national and local leadership roles (Recommendation 63), reviewing and providing prisoner health care (127, 152), file sharing (127, 130), risk assessments (127), training (133), and collaborating on coronial investigation protocols (39). However, there has been no coordinated funding scheme for ACCHOs to engage with these, or people in prison directly. ACCHOs frequently deliver holistic, comprehensive primary health care in the community via Medicare item rebates, relying on this form of fee for service rather than block funding by governments. Further, ACCHOs are primarily federally funded, representing a disconnect with prison health services which are state and territory-funded and are minimally funded for Aboriginal and Torres Strait Islander prisoner health programs. People in prison are not entitled to Medicare and thus Aboriginal and Torres Strait Islander people in prisons cannot access same standards of care that are available in the community (Pettit et al., 2019); the UN Nelson Mandela Rules assert that they have the right to equivalent care (UN General Assembly, 2015).

Further, for equivalent care, the complex health and social issues that people in prison experience mean highly skilled staff and management are required, with responsive community referral networks and accurate data to inform prison health planning. Prison health services are predominantly nurse-led, and health planning and criminal justice content in nursing curriculum is scant. Government organisations rarely meet Aboriginal and Torres Strait Islander staff targets, and have few Aboriginal and Torres Strait Islander health worker roles (Manton & Williams, 2021). Current estimates of mental health need highlight a long-term shortage of clinicians (Davidson et al., 2020) and almost entirely missing are palliative care specialists or nurses, staff skilled in engaging with Aboriginal and Torres Strait Islander people about cultural protocols for death and bereavement, or cultural safety frameworks (Williams, 2021). Thus, equivalent care in prisons to that available in the community is unable to be achieved well into the foreseeable future.

Hangings points

RCIADIC Recommendation 165 points to the need to screen for potential hanging points and eliminate risks in custody. The Deloitte review reported that this recommendation had been fully implemented. However, recently the NT Government identified hanging points following two deaths in custody (Damjanovic, 2021). The inquest into the death in custody of Tane Chatfield also found that hanging points were still a risk at Tamworth prison in NSW. The coroner noted that (Grahame, 2020, p. 6):

It is demonstrated that concerns raised during the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'), thirty years ago, in relation to the placement of vulnerable indigenous prisoners in cells with obvious hanging points remain unresolved today.

The Queensland Coroner also continues to note that hanging points remain in custodial environments in that state (e.g. Ryan, 2015).

Additional measures

RCIADIC recognised the significance of many policy areas within and beyond Indigenous Affairs portfolios as underlying issues in the disproportionately high rate of First Nations imprisonment. Whilst not all of these can be dealt with here, we focus on several areas to further illustrate the limitations of the Deloitte review. At the Commonwealth level, these include:

- reference to the Cashless Debit Card (CDC) trials (among other measures) as evidence that RCIADIC Recommendation 63 is ‘fully implemented’
- reference to the School Enrolment and Attendance through Welfare Reform Measure (SEAM) as part of the evidence that Recommendation 72 is ‘mostly complete’
- and reference to the Community Development Programme (CDP) and Stronger Futures as evidence that Recommendation 203 is ‘partially complete.’

(a) Recommendation 63 and the Cashless Debit Card

RCIADIC Recommendation 63 stated:

That having regard to the desirability of Aboriginal people deciding for themselves what courses of action should be pursued to advance their well-being, ATSIC consider...the establishment of a National Task Force to focus on:

a. The examination of the social and health problems which Aboriginal people experience as a consequence of alcohol use;

b. The assessment of the needs in this area and the means to fulfil these needs; and

c. The representation of Aboriginal Health Services and other medical resources in such a project.

The Deloitte review suggests that Recommendation 63 is ‘fully implemented,’ citing (among other measures) the CDC trials and the Australian Government ‘continuing to provide a national approach and funding to address alcohol abuse’ (Deloitte Access Economics, 2018, p. 131). The inclusion of the CDC trials as evidence that the Australian Government is meeting RCIADIC Recommendation 63 lacks logic and is a significant cause for concern.

First, the clear intent of this recommendation is that a response to problems associated with alcohol use should be guided by the principle of self-determination and informed by evidence including from Aboriginal Health Services. Research released in 2018 showed that the CDC trials were not community led, that the card made it harder for many respondents to manage money, and that it limited their ability to meet basic needs (Klein & Razi, 2018). Further, as the CDC is a blanket measure to all people in the trial sites on welfare payments (except veteran and aged pension payments), it does not distinguish between people with or without problems with alcohol use issues, and has been implemented without adequate therapeutic support.

It is not reasonable to suggest that the CDC trials have been informed by representation from Aboriginal Health Services. The National Aboriginal Community Controlled Health Organisation (NACCHO) – the peak body representing ACCHOs throughout Australia – has stated that it is strongly opposed to the trials on the basis that they are discriminatory, that ‘there are significantly better, more cost efficient, alternative approaches that support improvements in Aboriginal wellbeing and positive decision making’. NACCHO has also commented that ‘addressing the ill health of Aboriginal people, including the impacts of alcohol, drug and gambling related harm, can only be achieved by local Aboriginal people controlling health care delivery’ (NACCHO, 2018). Similarly, the Aboriginal Peak Organisations Northern Territory (APONT), representing the Central Land Council, Aboriginal Housing NT (AHNT) and the Aboriginal Medical Services Alliance of the NT (AMSANT), suggested in 2020 that the further introduction of the CDC would:

perpetuate the torment of our powerlessness. It denies our basic freedom to control our lives. It locks the many of us who live below the poverty line out of the cash economy... The millions of dollars supporting the transition of NT communities into a CDC 'trial site' would be better invested in holistic wrap around services helping our people to overcome drug and alcohol dependence and trauma. They and their families deserve support, not punishment. To the government this is just a law change, but to us it is about our everyday lives becoming even more of a struggle. We are sick of governments doing things to us, rather than with us (APONT, 2020).

Second, there is little evidence to suggest that the CDC trials have actually reduced alcohol-related harm. The Deloitte review references a claim from the Commonwealth Department of Social Security that 'many of the intended outcomes' of the CDC trials 'are on the way to being achieved' (Deloitte Access Economics 2018: 131). However, government-commissioned evaluations of the trials have been marred by flawed research methods (Hunt, 2017a, 2017b; The Auditor General, 2017). The most recent evaluation (Mavromaras et al., 2020) is no exception. It reported only perceived changes in alcohol use and misuse rather than objective measures of alcohol consumption and alcohol-related harm. Furthermore, it failed to include a control group, and was unable to attribute changes to perceived alcohol use to the CDC because other alcohol controls were introduced contemporaneously. An independent evaluation of the CDC trials in the East Kimberley found that the trials increased material hardship for many respondents and further disempowered those already marginalised by poverty (Klein & Razi 2018).

Third, the CDC is a time limited program, and is limited to several geographically constrained 'trial sites'. As such, even if it were a policy that reduced alcohol-related harm, its limited scope makes it difficult to argue that it could be considered an implementation of the recommendations of RCIADIC.

Accordingly, the CDC is an inadequate response to Recommendation 63 as it is neither guided by the principle of self-determination nor proven effective in actually reducing alcohol-related harm.

(b) Recommendation 72 and School Enrolment and Attendance Measure (SEAM)

RCIADIC Recommendation 72 identified the significance of diminished educational opportunity as a factor in the disproportionately high rate of Aboriginal imprisonment. It recommended an approach to schooling attendance and participation that recognised the failings of the schooling system and focused on the needs of the child:

That in responding to truancy the primary principle to be followed by government agencies be to provide support, in collaboration with appropriate Aboriginal individuals and organisations, to the juvenile and to those responsible for the care of the juvenile.

The Deloitte review should be clearer that SEAM (which operated 2009–2017) ran counter to Recommendation 72. It aimed to increase school enrolment and attendance by placing conditions on the parents' receipt of social security payments. Parents who did not comply with requirements under SEAM could have their payments suspended. Although families who had their social security payments suspended under SEAM could later receive backpay if they complied with the program requirements, suspension periods could result in serious economic hardship for families (Bielefeld, 2014). Reviews of SEAM found that it limited a range of rights (including to equality and non-discrimination; social security; an adequate standard of living; privacy; and culture) (Joint Committee on Human Rights, 2016, p. 66) and did not appear to be effective in addressing low school enrolment and attendance (Joint Committee on Human Rights, 2016, p. 75). In addition, it did not seem 'to have been established to provide support to Indigenous juveniles or their carers, or to address relevant cultural and social factors identified as being the cause of the truancy' (Amnesty International & Clayton Utz, 2015, p. 204). Instead, it relied on a punitive approach that was explicitly rejected by RCIADIC, which noted that

'to impose fines on the parents of Aboriginal children will only exacerbate their poverty and extent of social disadvantage' (E. Johnston, 1991b, Section 16.1.16).

Ultimately, SEAM was ineffective. In particular, a randomised controlled trial of SEAM found that while 5% of students in the SEAM trial had their payments suspended, there was no evidence that this had any impact on school attendance (Goldstein & Hiscox, 2018). Consequently, the Australian Government ceased the SEAM program in December 2017 (Department of Prime Minister and Cabinet, 2018, p. 90), with the then Indigenous Affairs Minister Nigel Scullion characterising the program as 'badly designed and woefully implemented' (Cunningham, 2017). It is unclear how such a program, ineffective when operating and long-since discontinued, could be said to be reducing rates of First Nations incarceration.

(c) Recommendation 203 and Social, economic and cultural development plans

RCIADIC Recommendation 203 stipulated:

That the highest priority be accorded to the facilitation of social, economic and cultural development plans by Aboriginal communities.

The Deloitte review determined that this recommendation was 'partially complete' at the Commonwealth level, citing both CDP and the Stronger Futures policy as evidence. Prior to the introduction of CDP, the Community Development Employment Projects (CDEP) scheme required providers of these schemes to develop Community Action Plans for the Aboriginal and Torres Strait Islander communities they serviced.

The CDEP's Community Action Plans were intended to give communities a central role in establishing a strategic vision for their social, economic and cultural development as facilitated by CDEP. Further, providers had significant flexibility to tailor the programs to local needs (Jordan, 2016). However, CDEP was gradually abolished between 2007 and 2015, and has ultimately been replaced by social security with mutual obligation requirements, in remote areas by the CDP and in urban and regional areas by mainstream employment services through the *jobactive* program. Under CDP, the Community Action Plans have been abandoned rather than reformed, flexibility has been limited, and centralised bureaucratic control has increased (Fowkes, 2018; Jordan et al., 2016). In urban and regional Australia, there is little to no accommodation for First Nations community development aspirations under *jobactive*. The gradual abolition of CDEP and its replacement with punitive workfare has impeded the abilities of First Nations communities to devise and implement social, economic and cultural development plans and to exercise their self-determination more generally (Jordan, 2016).

Stronger Futures was introduced to extend the substance of the Northern Territory Emergency Response (NTER) intervention from 2012 to 2022. The Deloitte review states that Stronger Futures 'included directives which were aimed at improving government engagement with Aboriginal and Torres Strait Islander communities and improving the coordination of funding and services for Aboriginal and Torres Strait Islander communities' (p. 407). However, Stronger Futures continued and expanded a number of the punitive elements of the NTER (Bielefeld, 2017). Although there was some consultation with Aboriginal and Torres Strait Islander peoples, a report into this consultation found that the process fell short 'of Australia's obligation to consult with Indigenous peoples in relation to initiatives that affect them' (Nicholson et al., 2012). In this context, including both CDP and Stronger Futures as evidence, with no assessment of their contribution in practice, significantly overstates and mischaracterises government progress towards meeting RCIADIC Recommendation 203.

In contrast, government actions since RCIADIC have actively impeded the facilitation of social, economic and cultural development plans by Aboriginal communities. For instance, the abolition of ATSIC resulted in the end of regional planning processes by ATSIC Regional Councils, through which First Nations' objectives and

priorities could be determined and worked towards. As discussed, the abolition of CDEP reduced community capacity to produce community plans and implement them. In the NT, the amalgamation of local councils in 2007 made local government in remote areas much less responsive to local needs, further impeding the ability to produce and implement plans (Sanders, 2012). Much of the infrastructure that existed for the facilitation of social, economic and cultural development plans by Aboriginal communities at the time of RCIADIC has since been dismantled. In some regions, First Nations organisations are undertaking such work themselves (Murdi Paaki Regional Assembly, 2016), although this is often with less support than existed 30 years ago.

Conclusion

Thirty years since the Royal Commission into Aboriginal Deaths in Custody, the over-incarceration of First Nations people in penal institutions and the numbers of First Nations deaths in penal custody are at unprecedented levels. First Nations deaths in custody continue to rise, including in circumstances of institutional disregard for their lives. However, the Australian Government has failed to take action to stop the over-incarceration of First Nations people and deaths in custody and enforce accountability. This is in part due to its reliance on consultancy reports, such as the Deloitte report, that fail to recognise the scope and nature of the problem and the need for substantial change that disrupts the carceral trajectory. The concluding remarks below point to the importance for First Nations leadership in the review of the penal system and deaths in custody and overseeing change.

By contrast, the scope and methodology of the Deloitte review misrepresents governments' responses to RCIADIC, and has the potential to misinform policy and practice responses to Aboriginal deaths in custody. It widens the gap between policy rhetoric and reality across many of the policy areas covered by RCIADIC, including policy areas not discussed in this response, and in doing so is evidence of a more widespread problem in Indigenous public policy in Australia. In particular, current approaches to policymaking, funding and reporting too often ignore the principles of self-determination and the realities of laws and policies as experienced by Aboriginal and Torres Strait Islander peoples. Our concern is that unless these approaches are highlighted, outcomes will continue to deteriorate and the policymaking process itself will continue to repeat the marginalisation and incarceration of First Nations people.

Instead, we support the development of national independent monitoring of the implementation of the recommendations of RCIADIC. A monitoring body should be led by First Nations people who are involved in devising strong terms of reference that draw on community concerns, and a rigorous methodology centred on input from Aboriginal and Torres Strait Islander peoples, organisations and peak bodies to establish whether governments are making real progress towards meeting the recommendations. Bond et al. (2019) offer useful principles for structuring independent evaluation and monitoring in Indigenous public policy.

Despite a commitment by the Commonwealth to increased use of evaluation in Indigenous affairs, the Deloitte review – according to records published by AusTender cost \$350 000 – is not alone in being of such poor quality as to render its findings largely worthless. Similar criticisms have been made by academics and the Australian National Audit Office of the evaluation of the CDC trial (Hunt, 2017a, 2017b; The Auditor General, 2017). A commitment to increased evaluation means little if such work is not undertaken independently, with transparency and with reference to Indigenous methodologies that engage First Nations standpoints and experiences and the substantive outcomes of policies. In the case of the RCIADIC recommendations, it is no exaggeration to suggest that this a matter of life and death.

We urge the Australian Government to fully embrace and enact the RCIADIC recommendations, including the need to support action towards self-determination. Finally, we urge the Australian Government to provide a response to the Australian Law Reform Commission's Inquiry on Indigenous Incarceration Rates (2017), which

emerged from the legal profession's sense of despair with the unprecedented rates of Indigenous incarceration in Australia. The instigation of this inquiry and the failure of the government to respond after four years demonstrate the lack of government action towards implementing the recommendations of the RCIADIC and is a sobering reminder of the tragic implications of this failure. Thirty years and almost 500 First Nations deaths in custody since the RCIADIC, there is an urgent need for substantive implementation of the 339 recommendations under the critical watch of a First Nations monitoring body.

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