PATRICK DODSON:
25 YEARS ON FROM ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY RECOMMENDATIONS

Patrick Dodson
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I acknowledge the traditional owners of the land on which we meet and I pay my respects to the Elders both past and present and I acknowledge the Indigenous leaders that are here today as well. I acknowledge Bill Shorten, the Leader of the Australian Labor Party, Warren Snowdon and Shayne Neumann and any of the other dignitaries that are here from other political parties.

I also want to pay my respects to the families of those who have died in custody in the 25 years since the Royal Commission. I acknowledge your pain, your frustration and hurt with the criminal justice system and the loss of life of your loved ones.

I'm here today at the very kind invitation of the Press Club to offer some observations on the Royal Commission into Aboriginal Deaths in Custody, 25 years after we handed down our report and its 339 recommendations.

The Royal Commission was established by the Hawke Government in 1987 to examine the deaths of 99 Aboriginal persons who had died in police custody and prison custody between the period of January 1980 and May 1989.

The Commission's report was put together by the late Elliott Johnston and a team of Commissioners that included Hal Wootten, Lew Wyvill, the late Dan O'Dea and myself.

My task was to review the underlying issues giving rise to the deaths of Aboriginal people in custody in Western Australia. In this I was well served by a great team which included the late Rob Riley, Peter Yu, Paul Lane, Kate Auty, Jackie Oakley and Daryl Kickett. And our report highlighted the systemic disadvantage and institutional racism that contributed to the disproportionate rates of imprisonment and deaths in custody of Indigenous peoples.

Since the Royal Commission handed down its report, some 750 people have died in custody.[1] Indigenous people make up 20 per cent of these deaths (or about one in five of those deaths that have occurred).

Alarmingly, the rate at which Indigenous people are imprisoned has more than doubled over the past 25 years.

At the time of the Royal Commission some 14 per cent of those in custody were Indigenous. Today, it is around 27 per cent; this is in spite of the Commission's recommendation that prison be a measure of last resort.

This growth isn't tied to the crime rate—it well and truly exceeds it.[2]

We Aboriginal peoples, Indigenous peoples, are being imprisoned at a rate that is a staggering 13 times higher than that for non-Indigenous people. And unfortunately, that rate appears to be accelerating.[3]

In some states, like my own of Western Australia, these rates are even higher.

At June 2015, the ABS statistics showed we comprised 38 per cent, or some 2113 prisoners, of the adult prison population. And we get incarcerated at a rate that is 17 times higher than that for non-Indigenous people.[4]

There are some exceptions to this bleak picture, notably the reduction in hanging deaths due to the removal of fixture points in cells.

But by and large, the problem the Royal Commission was set up to examine and advise governments on has become worse.

This raises questions as to how effectively the Commission's recommendations have been implemented in the period since, and whether the issues identified by the Commission are understood or even considered important.

Certainly one has to wonder what happened to the principle of imprisonment as a last resort and the 29 recommendations relating to this issue.

In this regard, the role of criminal justice policies in driving the current upward trend in Indigenous custody rates cannot be overlooked.

Mandatory sentencing, imprisonment for fine defaults, paperless arrest laws, tough bail and parole conditions and punitive sentencing regimes certainly haven't helped.

Neither do funding cuts to frontline legal aid services and inadequate resources for much-needed diversionary programs and re-entry programs to break the cycle of recidivism.

'Paperless arrest' laws in the Northern Territory are particularly concerning. These laws provide a new set of powers for arrest and detention without a warrant and apply to trivial offences which do not even carry imprisonment as a penalty.

Effectively, they enable the police to arrest someone who they *believe or think* is going to commit a crime or an offence regardless of whether an offence has actually been committed.

Paperless arrests do not require police to bring the person before the court as soon as practicable, surely one of the most fundamental rights that we should have as a citizen, regardless of who we are, where we live or how we live.

Paperless law arrests, like mandatory sentencing, are typical of a 'law and order', 'tough-on-crime' mentality. It frames a great deal of the political conversation about Indigenous incarceration and injustice.

This rhetoric—and the political thinking behind it—has authored the criminalisation of many of our people as the Commission noted decades ago:

> In many cases, in fact a great majority of cases, Aboriginal people come into custody as a result of relatively trivial and often victimless offences, typically street offences related to alcohol and language. Many of these 'offences' would not occur or would not be noticed were it not for the adoption of particular policing policies which concentrate police numbers in certain areas, and police effort on the scrutiny of Aboriginal people.
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> Those arrested are criminalised in several ways. They acquire criminal records, they are defined as deviant not only in the eyes of the police, but by the broader society, they are introduced to custody and circumstances where they feel resentment rather than guilt, and hence arrest and custody ceases to be a matter of shame.[5]

It seems Indigenous people are still being taken into custody far too often.

This suggests that legislators in some jurisdictions have not learnt from the past and are still intent on arresting their way out of Indigenous disadvantage.

Mandatory sentencing, imprisonment for fine defaults, paperless arrest laws, tough bail and parole conditions and punitive sentencing regimes certainly haven't helped.

The passing of Warlpiri man Mr Kumanjayi Langdon in custody last year is a case in point, and encapsulates the sheer pointlessness or absurdity of it all.

Mr Langdon had been in Northern Territory police custody for around three hours following a so-called 'paperless arrest'.

Earlier that day the police had seen him drinking from a plastic bottle in a public park.

Mr Langdon died of a heart attack but the coroner later found that Mr Langdon:

> Had done nothing to bring himself to the attention of the police beyond being with other Aboriginal people in a public park in the Darwin CBD . . . [He] was not violent, he was not uttering threats, he was not swearing or being offensive in any way.[6]

Under the Liquor Act, Mr Langdon's offence carried a monetary penalty.

Following his arrest, he was issued with an infringement notice before he was taken to the watch house, leading the coroner to question why detention was necessary at all.

As he put it:

> Kumunjayi Langdon, 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.
>
> He died in his sleep with strangers in this cold and concrete cell.
>
> He died of natural causes and always likely was to die suddenly due to his chronic and serious heart disease. But he was entitled to die in peace, in the comfort of family and friends.
>
> In my view, he was entitled to die as a free man.

The case of Ms Dhu, a 22-year-old woman who died in the police lock-up in Port Hedland, where she was detained for a fine default, is yet another devastating story.

The coronial inquiry into her death is still taking place so I won't comment further, except to say that her story could be plucked at random from almost any modern story of Aboriginal injustice.

For our communities, the storyline is all too familiar:

- the minor offence;
- the innocuous behaviour;
- the unnecessary detention;
- the failure to uphold the duty of care;
- the lack of respect for human dignity;
- the lonely death;
- the grief and loss and pain of the family.

If the recommendations of the Royal Commission had been prioritised and resourced by governments at the federal, state and territory levels over the past decade, could we have prevented deaths of people like Ms Dhu and Mr Ward in Western Australia, and Mr Langdon in the Northern Territory and the many others?

I don't know for sure, but what I know is that a quarter of a century after we handed down our findings, the vicious cycle remains the same:

- Indigenous people are more likely to come to the attention of the police;
- Indigenous people who come to the attention of the police are more likely to be arrested and charged;
- Indigenous people who are charged are more likely to go to court;
- Indigenous people who appear in court are more likely to go to jail;
- if Indigenous people are being taken into custody at an increasing rate, then it stands to reason that our chances of dying in custody also increases.

The statistics speak for themselves, and the cold hard fact remains an indictment on all of us.

In the past decade alone, the incarceration rate for Indigenous men has more than doubled.

Indigenous youth now comprise over 50 per cent of juveniles in detention.

As our Indigenous Social Justice Commissioner, Mick Gooda, observes, Australia is better at sending young Indigenous men *back* to jail than we are keeping them in school.

For Indigenous women, the rate of imprisonment is increasing even faster—a 74 per cent increase in the past 15 years.[7]

One in every three women in Australian jails is Indigenous.[8]

As the Law Council notes, a range of factors contribute to offending by Indigenous women, but poverty, homelessness, and high rates of violence and sexual abuse against women, along with drugs and alcohol abuse linked to the trauma they experience, tend to bring Indigenous women into contact with the criminal justice system at an increasingly higher rate, and often lead to the trivial and minor offences.[9]

Sadly, what this suggests is that Indigenous women ending up in prison are more likely to have been victims themselves.

Mental illness is also a growing concern.[10] Research by Eileen Baldry and Ruth McCausland et al shows that Indigenous people with mental health and cognitive difficulties, including FASD (fetal alcohol spectrum disorder), are being imprisoned at higher rates in Australia.[11]

In the absence of appropriate community-based services and support, these people end up in the criminal justice system, where they are managed by default by police, the courts and the prisons.

The impact of all of this on Indigenous families and communities, particularly children, is overwhelming.

We get an insight into the ripple effect when we look at the number of Indigenous children in out-of-home care, which now numbers around 15,000 nationally.[12]

If we are to disrupt the trends, we must invest in re-building the capacity of families and communities to deal with the social problems that contribute to these appalling indicators.

We need to prioritise and ensure frontline services are not only resourced to respond to crisis, but can develop preventative programs that engage the community in winding back the ravages of drug and alcohol abuse, the scourge of family violence and welfare dependency.

For the vast bulk of our people the legal system is not a trusted instrument of justice—it is a feared and despised processing plant that propels the most vulnerable and disabled of our people towards a broken, bleak future.

Surely as a nation we are better than this.

We need a smarter form of justice that takes us beyond a narrow-eyed focus on punishment and penalties, to look more broadly at a vision of justice as coherent and integrated whole.

Not as a closed system, but as an integrated life process that allows some sense of healing and rehabilitation.

Such an approach should consider innovative approaches to justice that can offer effective solutions to offending behaviour.[13]

Justice Reinvestment is one such approach. Such approaches suggest that unproductive expenditure on prisons should instead be invested in programs at the front end that aim to reduce crime and prevent people entering the criminal justice system.

Building more jails and enabling laws that ensure the incarceration rates of Indigenous peoples is not the solution, and is certainly not a good use of the taxpayers' money.

As a recent Vulnerability Report from the Australian Red Cross suggests,[14] there is a potential saving of almost $2.3 billion over five years if resources were devoted to reducing the rate of incarceration by 2 per cent per annum.

Such savings could be invested in the social support and health services that would over time address the underlying causes of crime.

For the vast bulk of our people the legal system is not a trusted instrument of justice—it is a feared and despised processing plant that propels the most vulnerable and disabled of our people towards a broken, bleak future.

Addressing the issue of high incarceration rates is not the government's job alone. It requires a whole of community response and will only be achieved by us working together. This echoes a call from the Royal Commission all those years ago.

It is time for our own communities to drive the change on the ground that is necessary to build better futures for the next generation. This must include valuing education and creating opportunities for the next generation to flourish.

We will not be liberated from the tyranny of the criminal justice system unless we also acknowledge the problems in our own communities and take responsibility for the hurt we inflict and cause to each other.

Family violence, substance abuse, and neglect of children should not be tolerated as the norm. And those that perpetuate and benefit from the misery caused to our people need to be held accountable.

If we are serious about addressing these issues, we must work together and agree on a way forward.

But the process must engage Indigenous peoples in a genuine dialogue.

And that dialogue must translate into real partnerships that enable local communities to devise solutions to the problems that confront them.

Benchmarks and strategies to achieve them must be set with agreements of the communities, with sufficient flexibility to allow for regional variations. As we know, a one-size-fits-all approach simply has not been effective.

It also requires that investment in communities, not die-on-the-vine policies that lead to community closure by stealth, and place more of our people at risk of coming into contact with the criminal justice system.

The Australian Parliament needs to be more open to the idea of engaging in a formal way with Indigenous peoples on matters that affect our social, cultural, economic interest, as well as our political status within the nation state.

I hope that as a Senator for Western Australia, thanks to Bill Shorten and the Labor Party, I can stimulate and play a constructive role in this discussion.

What is clear to me, though, is that this discussion must be framed by a philosophy of empowerment—of self-determination.

As Commissioner Elliott Johnston said 25 years ago:

> The whole thrust of this report is directed towards empowerment of Aboriginal societies on the basis of their deeply held desire, their demonstrated capacity, their democratic right to exercise, according to circumstances, maximum control over their lives and that of their communities.

He went onto add:

> Such empowerment requires that the broader society, on the one hand, makes material assistance available to make good past deprivations, and on the other hand approach the relationship with the Aboriginal society on the basis of the principles of self-determination.[15]

If we are to be authors of our own destinies, then governments must stop treating us as passive clients, or as targets of policy for 'mainstreaming'.

It is imperative that the policy context changes, so Indigenous people are viewed as part of the solution—not just as problems to be solved.

For that to happen, we must recognise the common humanity we share, and we've got to ask ourselves why Indigenous people in this country are being disproportionately incarcerated even to this day?

On any measure the current incarceration rates of Indigenous people are a complete and utter disgrace.

Accepting the status quo permits the criminal justice system to continue to suck us up like a vacuum cleaner and deposit us like waste in custodial institutions.

I would hope that we are better than that.

We must be better than that.

There is no choice here.

This tragic outlook will only change if we work together, all of us.

I want to end by acknowledging the hard work of those at the front line, and those who have been advocating for reform in this area for many decades. I am committed to working with you and urge all who have capacity to do so to join with those who have been waging a campaign to 'change the record'.

Thank you and Galyia

1 Since the Royal Commission, there have been more than 750 deaths in police custody. To the year 2013, 20 per cent of these deaths were Indigenous: Australian Institute of Criminology.

2 Crime rates have generally decreased or remained steady over the last 20 years, but Indigenous imprisonment rates have continued to rise: Australian Red Cross, *Rethinking Justice: Vulnerability Report No 2*, (2016).

3 Change the Record 2015, taken from data from ABS Report, *Prisoners in Australia*, 2014 (no 4517.0).

4 3067 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population compared to 181 prisoners per 100,000 adult non-Indigenous population: ABS 2015.

5 Commonwealth, RCADIC, *National Report*, vol 2 at 13.2.20–21.

6 *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016. Cited in Australian Human Rights Commission, *Social Justice and Native Title Report 2015*.

7 Productivity Commission, Fact sheet 3: Aboriginal and Torres Strait Islander Men and Women, *Overcoming Indigenous Disadvantage*, 2014.

8 ABS Report, *Prisoners in Australia*, 2014.

9 Law Council of Australia, National Symposium 2015, 'Addressing Indigenous Imprisonment' p 15.

10 As was highlighted recently by the situation of Rosie Anne Fulton, a young Aboriginal woman with FASD who was declared unfit to stand trial but sent to jail because there was no alternative accommodation available in Western Australia.

11 R McCausland, E Baldry and E MacEntyre, 'Why Aboriginal People with Disabilities Crowd Australia's Prisons', *The Conversation* (online), Nov 2015.

12 At 30 June 2014, there were 14,991 Aboriginal and Torres Strait Islander children in out-of-home care in Australia: Australian Institute of Family Studies.

13 For instance, Indigenous sentencing courts and therapeutic jurisprudence.

14 Australian Red Cross, *Rethinking Justice: Vulnerability Report No 2*, (2016).

15 Commonwealth, RCADIC, *National Report*, vol 1, at 1.7.34.

Leonard Mickelo in 'lore', 2015
Jacob Nash
Bangarra Dance Theatre