



Our ref: IIC/HRC:RMup10032026

10 March 2026

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Dear Dr Popple,

### **SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES – VISIT TO AUSTRALIA**

Thank you for the opportunity to contribute to the Law Council's submission to the Special Rapporteur on the Rights of Indigenous Peoples (**Special Rapporteur**) to inform his visit to Australia in November 2026. The Special Rapporteur's Call for Input provides a comprehensive list of issues that submissions can address. The following submission sets out a few key issues affecting Aboriginal and Torres Strait Islander people in NSW which the Law Society suggests should be put to the Special Rapporteur for consideration. The Law Society's Indigenous Issues and Human Rights Committees contributed to this submission.

#### **Closing the Gap**

In March 2019, the then Council of Australian Governments and the Coalition of Aboriginal and Torres Strait Islander Peak Organisations (**Coalition of Peaks**), a representative body of more than 80 Aboriginal and Torres Strait Islander community-controlled peak organisations and members, entered into a Partnership Agreement in a bid to address the determinants of the significant life expectancy gap between Aboriginal and Torres Strait Islander peoples, and other Australians. The Partnership Agreement committed all Australian governments and Aboriginal and Torres Strait Islander representatives to a fundamentally new way of developing and implementing policies and programs affecting Aboriginal and Torres Strait Islander people.<sup>1</sup>

In June 2020, a new National Agreement on Closing the Gap (**National Agreement**) was entered into which included Socio-Economic Outcomes and associated Targets to address, among other things, Aboriginal and Torres Strait Islander incarceration and overrepresentation in youth detention, child protection systems and domestic and family violence.<sup>2</sup> The National Agreement also introduced four national Priority Reforms intended to accelerate progress towards improving Aboriginal and Torres Strait Islander life expectancy outcomes, in recognition of the fact that structural transformation is required as a precondition to achieving the objectives of the Closing the Gap framework.

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<sup>1</sup> Partnership Agreement on Closing the Gap 2019 – 2029 (22 March 2019), <https://static1.squarespace.com/static/62ebb08a9ffa427423c18724/t/649250e9283f10393bf96840/1687310588476/Partnership-Agreement-on-Closing-the-Gap-Full-Documents.pdf>.

<sup>2</sup> See National Agreement on Closing the Gap (July 2020), <https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap>.

The Priority Reforms commit the parties to the National Agreement to establishing formal partnerships and sharing decision-making with Aboriginal and Torres Strait Islander people represented by their Aboriginal and Torres Strait Islander Community-Controlled Organisations (**ACCOs**); building the ACCO sector; transforming government organisations; and sharing access to data and information at a regional level.

In NSW, Closing the Gap is implemented under a formal jurisdictional partnership between the NSW Government, the NSW Coalition of Aboriginal Peak Organisations and NSW Local Government. In February 2024, a new NSW Closing the Gap Partnership Agreement (**NSW Partnership Agreement**) was entered into to reaffirm the parties' commitment to work together on Closing the Gap, where policy impacting the lives of Aboriginal and Torres Strait Islander people is done in full and genuine partnership. In addition to the four Priority Reforms identified in the National Agreement, the NSW Agreement includes a fifth Priority Reform focused on growing the Aboriginal business sector, including by expanding opportunities for Aboriginal businesses to deliver government contracts.

Several reviews of Closing the Gap have been completed since the Special Rapporteur's last visit to Australia. On the whole, while some pockets of positive progress have been noted, there remain barriers to achieving the aspirations and commitments made by the parties, and implementation has been significantly delayed.

We suggest that the Law Council raise with the Special Rapporteur the lack of progress and, in many cases, regression in Socio-Economic Outcomes under the National Agreement on Closing the Gap. The Productivity Commission was able to measure 15 of 19 of the Socio-Economic targets aimed at reducing disadvantage for Aboriginal and Torres Strait Islander people.<sup>3</sup> In NSW, statistics demonstrates that outcomes 'continue to worsen' in relation to Outcome 4 (increase the proportion of Aboriginal and Torres Strait Islander children assessed as developmentally on track in all five domains of the Australian Early Development Census to 55 per cent) and Outcome 10 (reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15 per cent).<sup>4</sup>

### **Deaths in custody and overrepresentation in the criminal justice system**

There have been two Aboriginal people who died in NSW in the first three weeks of this year alone.<sup>5</sup> In 2025, twelve Aboriginal people died in custody in NSW, the highest number on record.<sup>6</sup> The National Dashboard on Deaths in Custody indicates that the rate of Aboriginal and Torres Strait Islander deaths in custody is rising, unlike the rate of non-Indigenous deaths in custody.<sup>7</sup> The NSW State Coroner, Teresa O'Sullivan made an unprecedented statement on this "profoundly distressing milestone", noting the "entrenched over-representation of First Nations peoples in the criminal justice system – a systemic issue that compounds the risks and vulnerabilities contributing to the rising number of deaths in custody".<sup>8</sup> This is borne out in the statistics. In NSW, Aboriginal and Torres Strait Islander people are disproportionately represented in every stage of the criminal justice system. Aboriginal people make up just three per cent of the NSW adult population and eight per cent of

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<sup>3</sup> Productivity Commission, '[Closing the Gap: Annual Data Compilation Report](#)' (July 2025), pp. 32–34, 104– 106.

<sup>4</sup> Ibid pp.30, 108-110.

<sup>5</sup> Corrective Services NSW, 'Deaths in Custody Information' (21 January 2026)

<https://correctiveservices.dcj.nsw.gov.au/documents/research-and-statistics/deaths-in-custody/dic-external-21-1-26.pdf>.

<sup>6</sup> NSW State Coroner Teresa O'Sullivan made a public statement on the number of Aboriginal deaths in custody: Australian Broadcasting Corporation, 'Coroner makes rare public statement as NSW records most Indigenous deaths in custody in a year' (15 October 2025) < <https://www.abc.net.au/news/2025-10-15/nsw-coroner-confirms-12-first-nations-deaths-in-custody-2025/105890400>>.

<sup>7</sup> Australian Institute of Criminology, 'Deaths in Custody in Australia Real-Time Dashboard'

<https://www.aic.gov.au/statistics/deaths-custody-australia>.

<sup>8</sup> Australian Broadcasting Corporation, 'Coroner makes rare public statement as NSW records most Indigenous deaths in custody in a year' (15 October 2025) < <https://www.abc.net.au/news/2025-10-15/nsw-coroner-confirms-12-first-nations-deaths-in-custody-2025/105890400>>.

the NSW population aged 10-17 years, but comprise more than 30 per cent of the adult prison population and 50 per cent of the youth detention population.<sup>9</sup>

We note that the recommendations, including a number of key recommendations, of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) are yet to be fully implemented.<sup>10</sup> Central to the 339 recommendations were those seeking to address overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, and to use imprisonment only as a last resort. In 2018, the Commonwealth Government commissioned a report on the implementation of the recommendations in RCIADIC (**Deloitte report**). This report has been the subject of criticism, including for its methodology.<sup>11</sup> However, we note its finding that:

The lowest proportion of fully implemented recommendations relates to self-determination, non-custodial approaches, and cycle of offending.<sup>12</sup>

The RCIADIC and later reviews have found that the core issue is the significant overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system, and the systemic issues underlying incarceration.<sup>13</sup>

Crucially, the NSW Government has enacted a number of punitive laws, which disproportionately affect Aboriginal and Torres Strait Islander adults and children, such as s 22C, *Bail Act 2013* (NSW), which provides that bail cannot be granted to a young person if it is alleged that they committed the relevant offence while on bail for another offence, unless the bail authority has “a high degree of confidence the young person will not commit a serious indictable offence while on bail subject to any proposed conditions”.<sup>14</sup> As Aboriginal and Torres Strait Islander people are, as above, overrepresented at every stage of the criminal justice system laws, they are, in turn, disproportionately affected by these punitive approaches to criminal justice.

Failure to address overincarceration of Aboriginal and Torres Strait Islander people will continue to compound the life expectancy gap between Indigenous and non-Indigenous people. We note, for example, a relatively recent study which demonstrated substantial disparities within Aboriginal and Torres Strait Islander populations across a number of important health and socio-economic markers by incarceration status,<sup>15</sup> highlighting that incarceration itself is a risk factor affecting educational outcomes, labour force participation and drug and alcohol problems.

For these reasons, we suggest that the gross overrepresentation of Aboriginal and Torres Strait Islander adults and young people in the justice system, and the growing number of Indigenous deaths in custody, should be a key issue for consideration by the Special Rapporteur.

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<sup>9</sup> Bureau of Crime Statistics and Research, ‘Aboriginal over-representation in the NSW Criminal Justice System’ (18 September 2025) < <https://bocsar.nsw.gov.au/topic-areas/aboriginal-over-representation.html> >.

<sup>10</sup> See Royal Commission into Aboriginal Deaths in Custody, *National Report* (Report, 1991) (*‘RCIADIC Report’*).

<sup>11</sup> See Thalia Anthony et al, ‘30 Years On: Royal Commission Into Aboriginal Deaths In Custody Recommendations Remain Unimplemented’ (CAEPR Working Paper No. 140/2021, 2021).

<sup>12</sup> Deloitte Access Economics, Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in custody, Report to the Department of Prime Minister and Cabinet, 2018, xi (“Deloitte report”)

<sup>13</sup> See RCIADIC Report (n 8), recommendations 48–62, 214–245.

<sup>14</sup> See Law Society of NSW open letter to Members of the Legislative Council (20 March 2024), online:

<<https://www.lawsociety.com.au/sites/default/files/2024-03/Letter%20to%20Members%20of%20the%20Legislative%20Council%20-%20Bail%20and%20Crimes%20Amendment%20Bill%202024%20-%202024%20March%202024.pdf>>

<sup>15</sup> Shepherd, S.M., Spivak, B., Ashford, L.J. et al. Closing the (incarceration) gap: assessing the socio-economic and clinical indicators of indigenous males by lifetime incarceration status. *BMC Public Health* 20, 710 (2020). <https://doi.org/10.1186/s12889-020-08794-3>.

## Child welfare systems

We also suggest that the Law Council raise with the Special Rapporteur the significant overrepresentation of Aboriginal and Torres Strait Islander children in the child protection system. Aboriginal and Torres Strait Islander children are disproportionately represented at each stage of child protection systems in all Australian States and Territories.<sup>16</sup> In 2024, Aboriginal and Torres Strait Islander children were 11 times more likely to be in out-of-home care (**OOHC**).<sup>17</sup> In NSW, in 2024-2025, Aboriginal children made up 50.6 per cent of children in out-of-home care.<sup>18</sup>

Aboriginal and Torres Strait Islander children in OOHC are more likely to:<sup>19</sup>

- Be placed in a residential care service, which is the least preferred option in the Child Placement Principle hierarchy;<sup>20</sup>
- Be placed in an environment that lacks cultural safety or understanding;
- Spend longer in OOHC;
- Have a greater number of placements;
- Have lower rates of family reunification;
- Be reported missing from a placement;
- Leave school before completing secondary education;
- Become a parent whilst in OOHC or soon after leaving;
- Have contact with the justice system.

The removal of Aboriginal and Torres Strait Islander children from their families and culture is indicative of a failure to implement provisions of the UN Declaration on the Rights of Indigenous People (**UNDRIP**) related “to the right of Indigenous families and communities to retain the responsibility for upbringing, training, education and well-being of their children”.<sup>21</sup> Significantly, removal of Aboriginal and Torres Strait Islander children threatens their right to connection with family, community, culture and Country, and should therefore be considered by the Special Rapporteur.

## Cultural rights, native title and cultural heritage

### Cultural fishing rights

Cultural fishing is a culturally significant practice for many Aboriginal and Torres Strait Islander communities and is part of their cultural obligations and connection to Country.<sup>22</sup> This right is not explicitly enshrined in relevant

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<sup>16</sup> Australian Institute of Health and Welfare, ‘Child protection Australia 2023 – 2024’ (11 December 2025) < <https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2023-24/data>>.

<sup>17</sup> Ibid.

<sup>18</sup> See Department of Communities and Justice, ‘Annual Statistical Report 2024 – 25: Children and families are supported: Supporting children in out-of-home care’ < <https://dcj.nsw.gov.au/about-us/families-and-communities-statistics/annual-statistical-reports/asr-landing-page/asr-cft-oohc.html>

<sup>19</sup> Secretariat of National Aboriginal and Islander Child Care, *Family Matters Report 2025* <https://www.snaicc.org.au/wp-content/uploads/2025/12/Family-Matters-Report-2025.pdf> 52.

<sup>20</sup> *Child Protection (Care and Protection) Act 1998* (NSW) s 13.

<sup>21</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/296 (2 October 2007, adopted 13 September 2007) preamble.

<sup>22</sup> Legislative Council Portfolio Committee No.4, ‘Commencement of the Fisheries Management Amendment Act 2009’ (Report 55, November 2022) [1.34] (*Fisheries Management Report*), available online:

NSW legislation, and this has resulted in prosecution and compliance actions taken by the government against Aboriginal people exercising this right.

The *Fisheries Management Act 1994* (NSW) (**Fisheries Act**) governs management of fishery resources in NSW. Its stated objects are to 'conserve, develop and share the fishery resources of the State for the benefit of present and future generations.'<sup>23</sup> Prior to the *Fisheries Management Amendment Act 2009* (NSW) (**Amendment Act**), the Fisheries Act did not reference Aboriginal cultural fishing. The Amendment Act made the following changes to formally recognise Aboriginal cultural fishing:

- Inserted s 3(2)(h), which provided that one of the objects of the Fisheries Act is 'to recognise the spiritual, social and customary significance to Aboriginal persons of fisheries resources and to protect, and promote the continuation of, Aboriginal cultural fishing';
- Introduced a permit for taking and possessing fish or marine vegetation of any kind or of a specified kind for the purpose of Aboriginal cultural fishing, which functions as a defence to the s 35 offence.
- Introduced a definition of Aboriginal cultural fishing.

Additionally, s 21AA of the Amendment Act would recognise for Aboriginal fishers a state-based statutory right to 'cultural fishing'. However, despite the 17 years since the Amendment Act passed, s 21AA has not commenced. In 2021, the NSW Legislative Council conducted an inquiry on the failure to proclaim the commencement of s 21AA. The inquiry tabled a report in November 2022, which made the following findings:<sup>24</sup>

1. The NSW Government failed to effect the will of the Parliament by not commencing s 21AA of the Fisheries Management Amendment Act 2009.
2. The NSW Government's implementation of a local management approach to make provision for cultural fishing has been too slow and lacks the full support of stakeholders.
3. The regulatory and policy settings applied by the NSW Department of Primary Industries Fisheries mean it is unable to differentiate between trade and barter, as part of cultural fishing practice, and being in possession of fish for the purpose of a commercial activity without a licence.
4. The compliance activity and prosecutions against Aboriginal people for practising cultural fishing, particularly on the South Coast of NSW, are unacceptable and creating perverse outcomes inconsistent with the NSW Government's commitments to the Closing the Gap Agreement.

In NSW, a recent prosecution against seven Aboriginal men, including six native title claimants exercising their native title rights, highlighted the barriers to exercising cultural rights for Aboriginal people in NSW.<sup>25</sup> In that case, the men were charged with offences under the Fisheries Act for trafficking thousands of blacklip abalone, attracting a maximum penalty of ten years' imprisonment. NSW Police and the Department of Primary Industries and Regional Development conducted surveillance over the seven men for six months. However, prosecutors withdrew the charges eleven days into the Local Court hearing, on the basis that there was potentially exculpatory evidence that was part of confidential negotiations in a native title claim which could not be produced at trial. The defendants were made aware of this evidence weeks before the hearing was listed, despite

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<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2850/Report%20no.%2055%20-%20PC%204%20-%20Commencement%20of%20the%20Fisheries%20Management%20Amendment%20Act%202009.pdf>.

<sup>23</sup> *Fisheries Management Act 1994* (Act) s 3(1).

<sup>24</sup> Fisheries Management Report (n 17) xi.

<sup>25</sup> See Australian Broadcasting Corporation, 'Future of fishing prosecutions unclear after multi-million-dollar abalone trafficking case collapses' (16 February 2026) [Future of fishing prosecutions unclear after multi-million-dollar abalone trafficking case collapses - ABC News](#).

prosecutors being aware of this evidence for almost two years. NSW Police were ordered to pay \$1.89 million in costs to the defendants.

Data regarding fisheries prosecutions from 1996–2020 in NSW indicates that Aboriginal people make up 31% of persons proceeded against for fisheries offences, meaning that they are nine times overrepresented.<sup>26</sup> Concerningly, between 2009 and 2020, 80% of people who received a term of imprisonment for a fisheries offence were Aboriginal.<sup>27</sup> Additionally, in the 18 months to June 2021, 70 Aboriginal people were charged with fisheries offences that did not result in a court outcome, compared with 12 non-Indigenous people,<sup>28</sup> indicating that Aboriginal people may be more likely to be charged where the prospects of a guilty verdict are low. This prosecution of Aboriginal people for exercising their cultural rights is of significant concern.

### Land rights

In addition, there is a significant number of unresolved claims under the *Aboriginal Land Rights Act 1983* (NSW). At the end of 2019–20, approximately 60 per cent of claims had been awaiting determination for more than five years, and around 20 per cent for more than ten years.<sup>29</sup> As of December 2025, more than 44,000 Aboriginal land claims in NSW remained undetermined.<sup>30</sup> These significant delays for determination leave large numbers of claimants in a state of uncertainty, and unable to access the economic, social and cultural benefits which derive from the exercise of land rights.

### Cultural heritage

Further, there are no standalone national or NSW-based cultural heritage laws to protect Aboriginal and Torres Strait Islander heritage sites. NSW is one of only two Australian jurisdictions without standalone cultural heritage legislation, where, instead, the protection of Aboriginal cultural heritage (**ACH**) falls under the operation of the *National Parks and Wildlife Act 1974* (NSW).

In NSW, there are high rates of destruction of ACH.<sup>31</sup> In our view, standalone legislation in respect of ACH is required, and significant deficiencies with the current framework continues in respect of a number of issues including free prior and informed consent; a lack of genuine Aboriginal control; and significant exemptions, as major projects (State Significant Development) are generally excluded from ACH protection requirements.

In 2020, the Law Society made submissions to the Law Council in respect of the inquiry into the destruction of the caves at Juukan Gorge, setting out our longstanding view that the current NSW ACH “protection regime is anachronistic and contains serious deficiencies.”<sup>32</sup> The Law Society’s views expressed in that letter in respect of ACH protection in NSW continue to be current, and we suggest providing these views to the Special Rapporteur.

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<sup>26</sup> Oxfam Australia, Submission No 30 to NSW Legislative Council Portfolio Committee No 4, *Inquiry into the Commencement of the Fisheries Amendment Act 2009*, 28 February 2022, 4.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Audit Office of New South Wales, *Facilitating and administering Aboriginal land claim processes* (Performance Audit, 28 April 2022) 3.

<sup>30</sup> National Indigenous Times, ‘NSW Aboriginal Land Council Marks 60,000th Land Claim with Call for Urgent Reform’ (Online, 27 January 2026) <<https://nit.com.au/27-01-2026/22339/corrective-not-symbolic-nswalc-calls-for-urgent-improvement-to-system-on-submitting-60000th-land-claim>>.

<sup>31</sup> See Commonwealth of Australia, Joint Standing Committee on Northern Australia, *A Way Forward Final report into the destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, (Canberra), online: [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc\\_pdf/AWayForward.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc_pdf/AWayForward.pdf;fileType=application%2Fpdf) at [5.22]. See also Janet Hunt, *Cultural vandalism: Regulated destruction of Aboriginal cultural heritage in New South Wales* (CAEPR Topical Issue No. 3/2020) <https://doi.org/10.25911/5ef088fdc313f>.

<sup>32</sup> Law Society of NSW, Letter to the Law Council of Australia, ‘Inquiry into the destruction of caves at Juukan Gorge’ (28 July 2020), [www.lawsociety.com.au/sites/default/files/2020-12/Letter to LCA - Inquiry into the destruction of caves at Juukan Gorge - 28 July 2020.pdf](http://www.lawsociety.com.au/sites/default/files/2020-12/Letter%20to%20LCA%20-%20Inquiry%20into%20the%20destruction%20of%20caves%20at%20Juukan%20Gorge%20-%2028%20July%202020.pdf).

## Geographic discrimination

Geographic discrimination is an oft-overlooked, structural form of discrimination which significantly affects Aboriginal and Torres Strait Islander people. Such discrimination intersects, and compounds with other forms of inequity and disadvantage experienced by Indigenous people, which we suggest should be highlighted to the Special Rapporteur for consideration.

In 2021, around 15 per cent of Aboriginal and Torres Strait Islander people in Australia lived in remote and very remote locations,<sup>33</sup> and the proportion of the population who were Aboriginal and Torres Strait Islander increased with remoteness, from 2.2% in major cities, to 30% in remote and very remote locations.<sup>34</sup> Additionally, for many Aboriginal and Torres Strait Islander people, geographic location can be closely tied to cultural identity.

Simultaneously, regional, rural, remote and very remote (**4R**) communities suffer significant disadvantage and under-resourcing of essential services, including health, legal services, housing, disability and aged care services, education and information and communication technology. Additionally, socio-economic disadvantage generally increases with remoteness.<sup>35</sup> These factors compound and result in people in 4R areas having poorer health outcomes, being less likely to have completed Year 12 and attain a tertiary education, and being more likely to be unemployed and reliant upon unemployment payments or have a lower income if they are employed,<sup>36</sup> and being at higher risk of domestic and family violence.<sup>37</sup> This privileging of urban areas in terms of access to resources and infrastructure impinges on the human rights of those living in 4R areas.

Critically, this intersects with the specific systemic barriers and discrimination experienced by Aboriginal and Torres Strait Islander people, meaning that Aboriginal and Torres Strait Islander people who live in 4R locations fundamental to their cultural identity are further disadvantaged, and unable to access critical services and supports. This impinges on a number of rights set out in the UNDRIP and other human rights instruments.

Thank you for the opportunity to comment. Questions at first instance may be directed to Ursula Paetzholdt, Policy Lawyer, at (02) 9926 0130 or [Ursula.Paetzholdt@lawsociety.com.au](mailto:Ursula.Paetzholdt@lawsociety.com.au).

Yours sincerely,



**Ronan MacSweeney**  
President

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<sup>33</sup> Australian Institute of Health and Welfare, 'First Nations people Overview' (20 October 2025) <<https://www.aihw.gov.au/reports-data/population-groups/indigenous-australians/overview>>.

<sup>34</sup> Australian Institute of Health and Welfare, 'Profile of First Nations people' (16 October 2025) <<https://www.aihw.gov.au/reports/australias-welfare/profile-of-indigenous-australians>>.

<sup>35</sup> Australian Institute of Health and Welfare, 'Rural and remote health' (20 November 2025) <<https://www.aihw.gov.au/reports/rural-remote-australians/rural-and-remote-health>>.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.