

Is not us, then who?

Where do criminal defence firms stand on black deaths in custody?

By Jerome Doraisamy

There are numerous social issues, including deaths in custody, whereby lawyers in the criminal law space can and must lend their professional weight to drive change.

Since the 1991 Royal Commission into Aboriginal Deaths in Custody was held, over 430 Indigenous Australians have died in custody across the country, amounting to an average of 15 Indigenous Australia dying per annum, or more than one per month, in custody over the past 29 years.

YFS Legal solicitor Candice Hughes – who last year won the Indigenous Lawyer of the Year category at the Lawyers Weekly Women in Law Awards – said this issue makes it difficult to be an Indigenous woman, mother, and youth justice lawyer all at once.

“But it is in the culture, resilience, strength and pride of our people that drives me every day to be a better mother, community member, and lawyer. I am privileged to be a lawyer, and for me, this comes with a responsibility to advocate for human rights and fight against the injustices committed against all vulnerable people, but particularly our First Nations people,” she reflected.

“This is why I chose to work in a community legal centre and work directly with our young people. While this issue is personal for me, it is not just an issue for First Nations people. This is a national issue, a national shame.”

Indigenous lawyers Teela Reid and Matthew Karakoulakis last week told Lawyers Weekly that unless Australian legal professionals turn up for issues that matter, system change will never occur. Criminal defence lawyers (who are closer to such social issues than those in commercial practices) appear to take a similar approach, acknowledging their unique position to be more forceful in advocating for change.

The stance of lawyers on this issue

Karim + Nicol Lawyers was unequivocal in its proclamation that not enough has been done to address black deaths in custody, calling national statistics on this issue “shameful and inexcusable”.

“Being a firm made up mostly of women from minority groups, we see this as a serious issue entrenched in Australian history, and the undeniable incarceration rates of Indigenous people only serve to highlight that. In NSW, Indigenous people make up 2.8 per cent of the total population yet represent approximately 25 per cent of the prison population,” K+N solicitor director Carrie Nicol said.

Korn MacDougall partner Warwick Korn said that his firm is “strongly opposed” to deaths in custody, with the rates of Indigenous persons dying being of particular concern.

“We are trained around the premise that all members of the community are equal in the eyes of the law and that the community, at least in Australia, is a multicultural one. Therefore, to see any institutionalised examples of that equality not being applied is of the deepest concern,” he said.

Armstrong Legal senior associate Trudie Cameron said the rate of Indigenous deaths in custody is “appalling”: “Targeting of Indigenous persons by police, unlawful arrests and excessive use of force [are] an ongoing problem.”

What change must occur?

The best outcomes, Ms Nicol said, are achieved when First Nations people are given the power and responsibility to make decisions for their communities, “particularly in relation to recidivism and rehabilitation”.

“Programs such as Justice Reinvestment and the Youth Koori Court have been implemented with great success, however, our firm believes that more positive changes can be made to transform the criminal justice system,” she said.

“As an Aboriginal woman and criminal defence lawyer, I am particularly interested in advocating for the establishment of Walama Court, led by my colleague and friend Teela Reid. Prisons are not effective in providing the rehabilitation necessary to heal intergenerational trauma and the current system of incarceration is not working for our Aboriginal population.”

The Walama Court, Ms Nicol continued, has been designed to divert Aboriginal people away from the criminal justice process and reduce police contact by involving Aboriginal elders in the administration of justice.

“Unlike other programs, it would be enshrined in legislation, allowing Aboriginal lore and cultural knowledge into the courts. Funding needs to be diverted from the [police] and towards these community-based solutions,” she said.

Other reforms that are needed are “wide-ranging” and will require significant government funding for the training and education of police officers, Ms Cameron argued, as well as broader policy and legislative updates.

“In the short-term, requiring police [body-worn] footage to be permanently turned on, rather than turned on and off at the discretion of the officer is a start. Professional review and disciplinary action should be swift, rather than reviews that presently take months or even years,” she said.

Part of the problem on these broader issues, Mr Korn submitted, is that state powers – “particularly those given to law enforcement bodies” – have reached unprecedented levels, and vigilant protection of fundamental rights and liberties has never been more crucial.

“With respect to the [Indigenous] community and their over-representation in the correctional system, our firm believes that advocating for community-based sentences, with a focus on engaging the local community through means such as circle sentencing, would reduce the numbers of [Indigenous] people needlessly entering custody,” he said.

Echoing Ms Cameron’s thoughts, Criminal Defence Lawyers Australia principal Jimmy Singh remarked there also needs to be a greater sense of police and prison officials’ accountability by ensuring they have regard to recommendations of the 1991 royal commission.

“Courts must be pressed to improve that accountability through general deterrence by way of awarding damages against those authorities who breach. Independent bodies such as the [ombudsman] must have a greater role in enforcing and keeping a closer eye on the implementation of these recommendations across all levels,” he outlined.

“Threats of reducing Aboriginal Legal Services funding [are] also a major setback because the ALS are the main source with the incentive and resources to pursue legal proceedings against police and prison authorities.”

The role of these firms in advocating for change

K+N is acutely aware, Ms Nicol said of the greater systemic issues affecting its clients and thus see its role as a firm to support causes that work to address inequities.

“We demonstrate our support by engaging in the community, showing support through protest, and offering pro bono support and legal services to those assisting the cause. This year we have continued to work with Community Northern Beaches to represent and assist their homeless clients on a pro bono basis, we have participated in and assisted those participating in the Black Lives Matter protest, we have volunteered our legal representation for those facing charges for protesting against the coal mines; but overall we just try to show up for and across important issues,” she listed.

“Our firm takes the view that criminal defence firms should take a public stance on important social, political and cultural issues. We are often the only voice that will be heard for our clients – that is the privilege of working in this profession – however, equally we must recognise that privilege and use it to advance our clients’ position wherever we can.”

All criminal defence firms, Mr Singh espoused, have a duty to provide greater access to justice and increase community understanding of current legal, social, political and cultural issues.

“As criminal defence lawyers we regularly take a public stance in court, and we do this to ensure that our [client’s] rights are protected, and not abused – being the same essential legal rights we all have,” he proclaimed.

One of the key roles for criminal defence firms, Korn MacDougall partner Lauren MacDougall explained, is advocating for protection of an individual’s civil liberties and ensuring every citizen is provided due process.

“This often involves promoting the regulation of law enforcement bodies to act within the scope of their powers. When law enforcement bodies avoid strict compliance with legislative provisions of this type, lawyers and accused individuals are often confined to the courtroom for a remedy. This is due to the

low rate of investigations within the LECC who are tasked with disciplining police misconduct (only 2 per cent of complaints were investigated in 2019). Firms should absolutely take a stance on issues such as this because it is our responsibility to ensure that the civil liberties of individuals are protected,” she said.

A secondary role for defence firms, Ms MacDougall continued, is to share their experiences working within the courts and with the community.

“As criminal lawyers we are at the front lines to see the types of matters which repeatedly arise and form trends which we are then able to observe and comment on for the benefit of the wider community. Quite simply, once we are able to observe trends or issues, we are then able to put a spotlight on these for the community,” she said.

“The community cannot respond accordingly to issues if they are unaware of them. This concept can also be applied in the inverse when we see legislation enforcement which is inconsistent with the values of our community.”

How the broader legal profession can help

Pledging support is important, Ms Hughes mused, but it is “certainly not enough” and law firms need to be doing more, she said.

“Pro bono programs are vital, but those programs also need to specifically direct this support to First Nations issues and people. This support can also be demonstrated through support of Indigenous legal services and community legal centres – all of which struggle and are restricted by funding. The law firms (and legal profession as a whole) need to work in equal partnership and engage in meaningful collaboration with our First Nations people, because no decision about our people should be made without our people,” she detailed.

“We are in the best position to make decisions in this regard. While we are a strong people with a strong voice, we are only still 3 per cent of the population – it is important that law firms develop strong genuine allies to First Nations peoples and communities.

“I believe law firms have a social responsibility to advocate for change, including some of the changes noted below.”

There is so much that individual lawyers can do to raise awareness of important issues pertaining to Indigenous Australians, Ms Cameron argued, “whether it’s drafting submissions in relation to proposed reforms, sharing messages on social media platforms or stopping a friend, family member or colleague and pointing out that something they’ve said is not okay and is, either intentionally or unintentionally, degrading, disrespectful or racist towards Indigenous Australians”.

“Volunteering or working on a [pro bono] basis for non-for-profits, community legal centres and/or the Aboriginal Legal Service is an effective way to lend hands-on support. Membership of societies and associations responsible for advocating for change is also helpful,” she added.

The legal profession should be advocating for the embedding of Indigenous knowledge into the law school curriculum in a meaningful way, Ms Hughes added.

“There has for too long now also been a conversation about making cultural capability training a compulsory element of the CDP program. This has yet to happen. The legal profession should also advocate for reform in terms of police investigations and complaints – police should not be investigating police,” she posited.

“Further, to advocate for an independent investigative body to conduct investigations into Indigenous deaths in custody. The legal profession should also advocate for the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, the ALRC findings in 2018 and the Queensland Productivity Commission inquiry in 2019. Custody notifications should also be legislated with consequences for failing to comply, just as there are consequences for a First Nations person for failing to comply with a police direction.”

Ultimately, lawyers have a “heightened awareness of our obligations to uphold the law”, Ms Nicol submitted.

“This can be difficult at times when we can also see laws that are unjust, or that are used disproportionately towards particular groups of people. This is where we need to use our knowledge and voice to advocate for change,” she said.

“As defence lawyers we are our client’s voice, and often their only voice. We cannot underestimate or forget the privilege of that position, and with that privilege comes a huge responsibility.”

It is the obligation of all lawyers, Korn MacDougall associate Carly Hydes said in agreement, to work together cohesively to effect legislative change.

“This means that the profession must keep pace with community changes and expectations and use our understanding of Australia’s complex systems of law to prevent reactionary legislation which may have unintended and far-reaching consequences. When we overlook this responsibility is when injustice occurs. we have a position at the front lines to respond to these situations and to take things further where we have an issue,” she said.

“Quite simply if not us, then who?”

This article first appeared in the e-newsletter Lawyers Weekly on June 11, 2020