Significance of Funeral Attendance and Sorry Business for Aboriginal and Torres Strait Islander Peoples

The purpose of this document is to collate research findings in relation to the significance of funeral attendance for Aboriginal and Torres Strait Islander peoples. It may be relevant in the context of applications by individuals who are incarcerated and seeking compassionate leave to attend funerals, or who are subject to conditions of bail or other orders restricting their ability to fulfil cultural obligations in relation to Sorry Business. It may also be relevant on sentence for individuals who have been prevented from attending funerals or participating in Sorry Business while on remand.

Note: This document is intended to be a short, accessible resource for legal practitioners and decision-makers. It does not purport to comprehensively collate research findings and literature in relation to Sorry Business or grief and loss as experienced by Aboriginal and Torres Strait Islander peoples. It is acknowledged that, while many cultural beliefs and practices are shared by Aboriginal and Torres Strait Islander communities, communities remain individual and diverse in their perspectives and cultures. This document is to be read in the context of that diversity.

Introduction

1 The Royal Commission into Aboriginal Deaths in Custody (1991) recognised that 'attendance at funerals is an important aspect of Aboriginal culture. Failure to attend the funeral of a relative may cause great distress and possibly lead to consequences for the [incarcerated person] and/or [their] family'.[1]

2 One of the formal recommendations of the Royal Commission was:

> That Corrective Services give recognition to the special kinship and family obligations of Aboriginal [incarcerated people] which extend beyond the immediate family and give favourable consideration to requests for permission to attend funeral services and burials and other occasions of very special family significance.[2]

3 The Western Australian Law Reform Commission (2005) also recognised:

> While attendance at funerals is obviously important in all cultures, kinship and cultural obligations under customary law may require Aboriginal people to attend funerals even where

[1] Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia* (1991) vol 2, 214. See also Queensland Corrective Services, *Custodial Operations Practice Directive*, '5.3 Escorts – Leave of Absence' (version 5.4) 8 [8.2].

[2] Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, 313 (Recommendation 171). A 2018 review found that all Australian jurisdictions had implemented Recommendation 171, with the exception of the Northern Territory which had 'mostly implemented' the recommendation: Department of the Prime Minister and Cabinet, *Review of the Implementation of the Royal Commission into Aboriginal Deaths in Custody* (Report, 2018) 337–8.

> it is necessary to travel long distances and the deceased person would be considered a distant relative in a Western context.[3]

4 The importance of recognising the special kinship and family obligations of Aboriginal and Torres Strait Islander people experiencing incarceration is reflected in operational policies and procedures of corrective services in multiple jurisdictions. For example, the Queensland Corrective Services *Custodial Operations Practice Directive* provides:

> In some instances, the deceased person may have had a closer relationship with the [incarcerated person] than is immediately apparent. Kinship within Aboriginal and Torres Strait Islander cultures often extends close relationship ties where a grandparent or aunt/uncle may assume a parent role, or a cousin a brother/sister relationship. For example, where an aunt has raised a child, she may assume a mother figure while her offspring are regarded as brothers and sisters.[4]

5 In relation to applications for compassionate leave to attend funerals for adults in prison, the Corrective Services NSW *Custodial Operations Policy and Procedures* make clear that '[t]he definition and role of extended family is based on kinship for Aboriginal inmates. For the purposes of this policy, extended family must be considered the same as immediate family for Aboriginal inmates'.[5]

Terminology

6 This document uses the words death, dying, grief, loss and bereavement. However, it is acknowledged that different communities use different terms and that there are different customary practices associated with death and dying.

7 Sorry Business is a term commonly used within Aboriginal and Torres Strait Islander communities to refer to the grieving process and cultural protocols associated with the death of a community member. Some Aboriginal communities use the term Sorry Time, or simply Sorry, and some Torres Strait Islander communities use the term Sad News.[6] This document uses the term Sorry Business to refer to these practices collectively.

8 Sorry Business is 'a very important part of Aboriginal culture' and funerals can involve entire communities.[7] It is 'an important time of mourning, and it involves responsibilities and obligations to participate in cultural practices, protocols, ceremonies and rituals associated with bereavement and funerals for a deceased person'.[8] The '"sorry time" of the funeral and mourning takes precedence over all other matters'.[9] There is no set time period for Sorry Business:[10]

> Ceremonies and mourning periods can vary depending on community customs. Some periods of mourning could be for weeks after the funeral and some may continue long after the death of a person – perhaps even for months. The time period for Sorry Business depends on the

[3] Western Australian Law Reform Commission, *Aboriginal Customary Laws* (Discussion Paper, December 2005) 197–8.

[4] Queensland Corrective Services, *Custodial Operations Practice Directive*, '5.3 Escorts – Leave of Absence' (version 5.4) 8 [8.3].

[5] Corrective Services NSW, *Custodial Operations Policy and Procedures*, '9.3 Application for Compassionate Leave' (version 1.0) 5 [1.2].

[6] Queensland Government, *Sad News, Sorry Business: Guideline for Caring for Aboriginal and Torres Strait Islander People through Death and Dying* (Practice Guide, December 2015) 15.

[7] Pat Dudgeon, Helen Milroy and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2nd ed, Commonwealth of Australia, 2014) 549.

[8] Queensland Government, 'Respect for Cultural Protocols and Practices' (Web Page, 7 October 2022).

[9] Australian Institute of Judicial Administration, *Aboriginal Bench Book for Western Australian Courts* (2nd ed, 2017) 2:24.

[10] See, eg, Government of South Australia, *Working with Aboriginal Families: A Practice Resource* (Report, Women's and Children's Health Network, 2019) 32.

> status of the person being mourned as well as the nature of the relationship between the person taking part in Sorry Business and the person who died.[11]

Impacts of Inability to Attend Funerals and Participate in Sorry Business

Impacts on social and emotional wellbeing

9 The nationally adopted Corrective Services Administrators Council *Indigenous Strategic Framework* (2016) recognises that 'Sorry Business and the inability to attend the burial ceremony can cause great stress on Indigenous prisoners and offenders. Every opportunity to attend or secure some form of closure should be facilitated when deemed appropriate'.[12]

10 A 2013 report of the Office of the Inspector of Custodial Services (WA) recognised that '[f]or many Aboriginal people, failing to attend a funeral can be damaging to mental wellbeing. It may also be seen as a sign of disrespect for which there may be cultural consequences':[13]

> The health of Aboriginal people is often tied to their cultural and social wellbeing. For most Aboriginal people it is extremely important to attend funerals and take part in the mourning process with their community. It is essential to show respect to the family, say goodbye and participate in 'Sorry' business. If unable to grieve appropriately, Aboriginal people can become physically ill. In addition to allowing the opportunity to grieve, Aboriginal people have significant cultural obligations to attend funerals. If a person does not attend a funeral and spend time with the family, it may be seen as not valuing family.[14]

11 The Western Australian Law Reform Commission *Inquiry into Aboriginal Customary Laws* (2006) made the following observations in relation to funeral attendance by people in custody:

> If attendance is required at a funeral because of the prisoner's relationship to the deceased, failure to attend will cause distress and shame. In this regard it is important to understand that responsibility under Aboriginal customary law is often strict. The fact that a prisoner does not attend a funeral through no fault of their own (because they are in prison and have not been granted permission to attend) does not necessarily relieve them from the obligation to attend and the consequences that follow.[15]

12 These policies and findings reflect well-established research concerning the impacts of bereavement, grief and loss within Aboriginal and Torres Strait Islander communities. Wynne-Jones et al (2016) found:

> It is known that the experience of bereavement itself means a higher risk for a range of negative physical, mental and social outcomes. Complicated grief or unresolved grief … further heightens this risk, with links to increased rates of cancer, heart disease, high blood pressure and suicidal thoughts … Hillin et al. point out that mainstream research and health services have largely failed to understand and address the complexities of grief and loss for Aboriginal people, and its connection with health and well-being.[16]

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[11] Queensland Government, 'Respect for Cultural Protocols and Practices' (Web Page, 7 October 2022).

[12] Corrective Services Administrators Council Indigenous Issues Working Group, *Indigenous Strategic Framework* (2016) 27.

[13] Inspector of Custodial Services (WA), *Funeral Attendances by Incarcerated People in Western Australia* (Report, September 2013) i.

[14] Ibid 2 [1.4]–[1.5].

[15] Western Australian Law Reform Commission, Inquiry into Aboriginal Customary Laws, *Aboriginal Customary Laws* (Discussion Paper, 2005) 256. See also Western Australian Law Reform Commission, Inquiry into Aboriginal Customary Laws, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* (Final Report, September 2006) 215–6.

[16] Megan Wynne-Jones et al, 'Aboriginal Grief and Loss: A Review of the Literature' (2016) *Australian Indigenous Health Bulletin* 16(3) 2.

13 In 2020, the Australian Human Rights Commission's Aboriginal and Torres Strait Islander Social Justice Commissioner received evidence that missing Sorry Business is one aspect of disconnection from culture for Aboriginal and Torres Strait Islander women who are incarcerated,[17] and may have a negative impact on reintegration following release:

> Aboriginal and Torres Strait Islander perspectives on which relationships are important and central to our lives is poorly understood and the importance of Sorry Business is easily dismissed. This includes a lack of acknowledgement that there can be ramifications for missing Sorry Business that will make reintegration into the community unnecessarily more difficult.[18]

Impacts associated with suicide

14 Wynne-Jones et al (2016) found:

> Grief associated with suicide adds to the complexity of Aboriginal grief and loss because of the traumatic nature of suicide and its relative frequency as a cause of death in Aboriginal communities. Kristjanson et al. argue that people experiencing complicated grief have a substantially heightened risk of suicidality. Suicide 'clusters' in communities sometimes develop as a result of this experience, particularly amongst young men:
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> > Ripples of loss, grief and mourning after suicide can spread outwards through the community and to other communities, particularly where families are highly interconnected and there are strong cultural obligations with regard to funerals and observance of sorry business. … This 'bereavement stress' has overtaken the community's usual resources for coping with and containing suicidal behaviour, leading to clusters of 'copy-cat' suicides.[19]

15 Silburn et al (2014) observed:

> Suicide is a profoundly distressing event which has highly disruptive effects on the families, friends and communities who are bereaved. While it is well recognised that Aboriginal Australians experience high levels of bereavement stress due to the higher overall rates of premature death, it has been less well recognised that family and community recovery from bereavement through suicide is complicated by its traumatic nature, issues of stigma and the frequency of suicide as a cause of death for Aboriginal people.[20]

16 The authors also considered the cumulative impacts of multiple experiences of loss:

> Where there is little time to recover from one loss before another has occurred, whole families and communities can be left in a constant state of mourning, grief and bereavement. For some individuals, this can be accompanied by extended grief reactions such as shock, numbness and disbelief. Bereaved family, friends and other community members often see their own distress reflected in the predicament and actions of the deceased person. For more vulnerable individuals, this can trigger their own suicidal thoughts and actions.[21]

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[17] See also ***Bugmy* Bar Book chapter 'Cultural Dispossession Experienced by Aboriginal and Torres Strait Islander Peoples'**; Vanessa Edwige and Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Report, August 2021).

[18] Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices) – Securing Our Rights, Securing Our Future Report* (September 2020) 188–9.

[19] Megan Wynne-Jones et al, 'Aboriginal Grief and Loss: A Review of the Literature' (2016) *Australian Indigenous Health Bulletin* 16(3) 3. See also Sven Silburn et al, 'Preventing Suicide Among Aboriginal Australians' in Pat Dudgeon, Helen Milroy and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2nd ed, Commonwealth of Australia, 2014) 147–64.

[20] Sven Silburn et al, 'Preventing Suicide Among Aboriginal Australians' in Pat Dudgeon, Helen Milroy and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2nd ed, Commonwealth of Australia, 2014) 147.

[21] Ibid 157.

Bail conditions restricting funeral attendance

17 In the context of bail, the Australian Law Reform Commission (2017) heard evidence that '[c]urfews, exclusion zones and non-association orders can "restrict contact with family networks and prevent Aboriginal people from maintaining relationships, performing responsibilities such as taking care of elderly relatives or attending funerals".'[22] The Inquiry acknowledged submissions that such conditions 'rarely address a risk and can be "especially problematic" for Aboriginal people'.[23]

18 The NSW Judicial Commission's *Equality before the Law Bench Book* (2022) provides guidance for courts in relation to practical considerations which may be relevant in the context of determining appropriate bail conditions for First Nations defendants, observing:

> Reporting and residential conditions need to be realistic and not unduly oppressive – for example, a condition banning residence in a particular town, or requiring court permission to change, may be ruled as unduly oppressive if there is a death in the defendant's family requiring their immediate attendance in that town.[24]

Attendance at funerals by audio-visual link

19 The Western Australian Inspector of Custodial Services (2013) acknowledges that '[v]irtual attendance should be a supplement to, not a replacement for personal attendance'.[25]

20 The desirability of in-person attendance at funerals, where appropriate, has also been recognised by courts, with a recent bail decision of the NSW Supreme Court finding that the 'alternative of attending by way of an audio visual link is a very poor substitute'.[26]

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[22] Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, December 2017) 157 [5.41]. See also NSW Law Reform Commission, *Bail* (Report No 133, 2012) 182 [11.54].

[23] Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, December 2017) 159 [5.49].

[24] Judicial Commission of NSW, *Equality before the Law Bench Book* (May 2022) 2131 [2.3.2].

[25] Inspector of Custodial Services (WA), *Funeral Attendances by Incarcerated People in Western Australia* (Report, September 2013) 39 [4.31].

[26] *Director of Public Prosecutions (NSW) v PH* [2022] NSWSC 1245, [48] (Button J). **For further examples of judicial consideration of the significance of funeral attendance, refer to the Case Summary on the chapter webpage.**