North Australian Aboriginal Justice Agency

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Australian Law Reform Commission inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples

North Australian Aboriginal Justice Agency submission

October 2017

"An overwhelming request from both men and women during community consultations was for Aboriginal law to be respected, recognised, and incorporated with the wider Australian law where possible."

> Rex Wild QC and Patricia Anderson, 'Little Children are Sacred', Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007, 54.

"Rrambaŋi limurr dhu djäma guŋga'yunmirr ga räl-manapanmirr."
"Equally we will all work cooperatively and combine our energy."

When Balanda law does not respect Yolŋu law, young people learn not to respect Yolŋu law and start to disrespect each other.

Any solution to a problem like this [violence] must involve Yolŋu and Balanda. We must work together. We must share authority and real decision-making power. We must be able to have both laws working together, which requires respect for and recognition of each other's law.

> Dhäwu Mala Galiwin'ku Community-wuŋ Nhaltjan Dhu Gulmaram Bunhaminyawuy Rom ~ A Galiwin'ku Community Statement to Prevent Family Violence (ARDS), May 2016, 9, 7

We want to be champions for our future generations and children so we can create a caring place for them to walk free, to create a country, a culture and a life that they want to live for our children, their children and their children's children. We have done enough searching and working - what more can we do to let the Napaki law see how we are trying to help our young people who are in trouble and are sick in body, for our young people who want to be well but they can't find the right path.

> Gayili Yunupingu Marika statement 1st September 2017.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. *This is the torment of our powerlessness.'*

> Uluru Statement from the Heart, 26th May 2017

In developing this submission a broad range of collaborators across several sections of NAAJA were involved. These are people with direct experience and expertise in their area, and include Aboriginal lawyers. In particular, we acknowledge the significant in-kind contribution of intern Shauna Stanley who was also able to reflect on, and share with us, the historic practices in Ireland to today's justice system and how a justice system which is responsive and adapted to local context is necessary for the exercise of justice itself.

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Executive Summary

- Due to the high number of Aboriginal people in contact with the criminal justice system (and amongst the highest rates of incarceration for any group in the world[1]), and the complex cultural and related aspects including significant diversity of languages, there is a need to consider the cultural appropriateness of the justice system itself.
- The Northern Territory justice system has gone backwards in being culturally appropriate due to several contributing factors: (1) de-funding of community courts and the de-valuing of cultural authority across the justice system; (2) expansion of mandatory sentencing across sentences; (3) legislative prohibitions on the judiciary considering aspects of customary law and related limitations on the judiciary; (4) following 10 years of the Northern Territory National Emergency Response (NTER, or 'the Intervention'), a substantial increase across all aspects of the justice system with minimal Aboriginal involvement across these areas; (5) the unaddressed access to justice issues including unmet legal need, the challenges of interpreting legal concepts in ways that are untranslatable, a busy and under-resourced court and legal services system and other access to justice issues. Addressing any single one of these factors will not be adequate in shifting towards a culturally appropriate justice system. A multifaceted approach encompassing all these issues must be adopted in realising a culturally appropriate justice system responsive and adapted to the NT.
- The strategic priorities across departments, agencies, organisations and institutions involved in the justice system need to move to a culturally appropriate position to make progress. The current system is very expensive. An Aboriginal Justice Agency Indicator (or similar measure) for agencies with significant budgets and a coordinated reform agenda will allow for this shift, and will reflect the principle of justice reinvestment.
- Bail laws require reform to reflect culturally appropriate factors and properly resourced and suitable accommodation/diversion options. Sentencing needs to take into account cultural factors and a process similar to Canada's 'Gladue Reports'. Mandatory sentencing requires wholesale repeal with a focus on prevention and alternatives to prison including community based sentences. Traffic offences such as fines and lack of driver's licences require wholesale reform and preventative programs to reduce offending rates. Alcohol policy requires a shift from a solely criminal justice response to one that also includes a culturally appropriate health based response. The Aboriginal Justice Agreement process will require meaningful and substantial support from government decision-makers. Police accountability needs to be considered in the context of cultural appropriateness. Offending stemming

[1] Thalia Anthony and Eileen Baldry, 'Are Indigenous Australians the most Over-Incarcerated Group on Earth?' *The Conversation* (online), 6 June 2017 <http://theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528>.

from mental health and disability requires a shift from a criminal justice response to a culturally appropriate health based response. The criminal justice system for females requires increased diversion and alternatives to prison including culturally appropriate community based options.

- Aboriginal people need to be resourced to be agents of change for themselves, their families and their communities. Cultural Authorities (or Law and Justice groups, Elder groups, or groups with their own names specific to communities) need to be resourced appropriately and integrated across the justice system. A network of outstations and place based alternatives to prison can link in relevant programs and Aboriginal people can resourced to provide a level of oversight and accountability in programs. Legislative reform to empower Aboriginal people across the justice system is required.
- Culturally appropriate legal education programs offer significant value to the justice system and are vital to increase agency of Aboriginal in the justice system. Programs which work to address cultural and language barriers and increase understanding of legal concepts are an important step to making the criminal justice system more meaningful for Aboriginal people involved in the justice system. Legal education programs need to be resourced and supported to work directly with people in community including the defendants and their families with the time, space and context required including on bush court circuits.

Background to the submission

NAAJA is aware of the substantial work of submissions provided by Aboriginal Legal Services and related bodies such as the peak body, National Aboriginal and Torres Strait Islander Legal Services (NATSILS). We support this work.

In providing this submission, our aim is to focus on a Northern Territory-specific context and to highlight issues and make recommendations based on our authority led by an Aboriginal board and are consistent with our serious commitment to cultural competency (as set out in the Cultural Competency Framework 2017 – 2020).

The justice system in the Northern Territory comprises the Courts, legal services, the Police, the Department of Correctional Services and its supporting policies, legislation and regulations. This system also serves in the context of a complex and specific set of cultural and community circumstances including significant diversity in languages across the population, different levels of understanding of the legal system and a characteristic of cultural authority where this authority has been reduced substantially over many decades. In our experience and working across communities we hear a consistent call from Aboriginal people for greater control and agency in how the legal and justice system responds to Aboriginal people.

With an Aboriginal prison population of 83% - 90% (and in youth detention up to 100% at times), and with significant contact by Aboriginal people across many different aspects of the legal system, it is essential that the justice system itself genuinely values and integrates the views and approaches as expressed by Aboriginal people and Aboriginal representative bodies. This is particularly important in a jurisdiction where Aboriginal people as a group are amongst the most over-imprisoned group in the world.

About NAAJA

NAAJA provides high quality, culturally appropriate legal aid services to Aboriginal people in the Top End of the Northern Territory. NAAJA was formed in February 2006, bringing together the Aboriginal Legal Services in Darwin (North Australian Aboriginal Legal Aid Service), Katherine (Katherine Regional Aboriginal Legal Aid Service) and Nhulunbuy (Miwatj Aboriginal Legal Service). NAAJA and its earlier bodies have been advocating for the rights of Aboriginal people in the Northern Territory since 1974.

NAAJA serves a positive role contributing to policy and law reform in areas impacting on Aboriginal peoples' legal rights and access to justice. NAAJA travels to remote communities across the Top End to provide legal advice and consult with relevant groups to inform submissions.

Cultural competency and the justice system

In 2017 NAAJA implemented a Cultural Competency Framework (Framework) to help explain our role as a culturally appropriate organisation. The Framework

includes a broad range of strategies and actions, with a view of continual improvement and regular reviews. A useful interpretation of cultural competency is to understand it as a continual process of having a meaningful commitment to developing cultural competency rather than an absolute position.

In developing the Framework, it became apparent that due to the high number of Aboriginal people in contact with the criminal justice system, with amongst the highest rates of imprisonment as a group in the world, and due the diversity of languages and other complex cultural and related matters specific to the population, there is a need to consider the cultural appropriateness of the justice system itself.

Whilst this can be done in many ways, it is apparent, as set out across this submission, that the Northern Territory has gone backwards in being culturally appropriate, and has not implemented measures required to make progress.

The NT has gone backwards because of several contributing factors:

- De-funding of community courts and the de-valuing of cultural authority across the justice system;
- Expansion of mandatory sentencing across sentences;
- Legislative prohibitions on the judiciary considering aspects of customary law and related limitations on the judiciary;
- Following 10 years of the Northern Territory National Emergency Response (NTER, or 'the Intervention'), a substantial increase across all aspects of the justice system with minimal Aboriginal involvement across these areas;
- The unaddressed access to justice issues including unmet legal need, the challenges of interpreting legal concepts in ways that are 'untranslatable'[2], a busy and under-resourced court and legal services system and other access to justice issues.

Addressing any single one of these factors will not be adequate in shifting towards a culturally appropriate system. The strategic priorities across departments, agencies, organisations and institutions involved in the justice system can consider how they are culturally appropriate and identify meaningful ways of reform to make progress.

The justice system is at the forefront of government responses and interventions which impact Aboriginal people significantly and where Aboriginal people are involved at a minimum. This imbalance requires carefully targeted immediate, medium, and long-term reform if we are to make progress.

An ethnocentric justice system and Aboriginal diversity

[2] The Law Council of Australia's Consultation Paper *Aboriginal and Torres Strait Islander People.* (The Justice Project, August 2017) refers to the 'untranslatable' nature of interpretation in the legal setting, and refers to the Productivity Commission, *Access to Justice Arrangements* Report (September 2014) at page 763: 'a very able court interpreter has given evidence on many occasions in South Australian courts that the words of the police caution are untranslatable into Pitjantjatjara containing as they do propositions put in the alternative and abstract concepts such as 'rights' which are divorced from immediate experience.' This matter is dealt with at page 67 this submission.

Consideration of the cultural appropriateness of the justice system requires an exploration of the different parts of the system and how these interface with Aboriginal engagement.

Reference to 'culture' in considering the cultural appropriateness of the justice system is of significant value, and is much more meaningful than what is often understood as the symbolic gestures of a different culture. All people value culture deeply (the broad and fundamental support of many well-known Australian events is testament to this value). A consistent message from Aboriginal people across the Northern Territory is they value culture deeply, and their views are as valid as any other. Consideration of 'culture' in this context also goes to the heart of identity and worldviews.

These worldviews are further informed by:

- A colonial experience of Aboriginal groups previously exercising their own ways of decision-making control and authority across a broad range of decisions and this exercise being disrupted with colonisation. It is important to consider that this time was not that long ago, and some senior people in the community came into contact with other Australians for the first time in their youth. A justice system that has gone backwards in its cultural appropriateness is a manifestation of colonialism rather than a justice system that accords with notions of justice and equality. The impact of losing decision-making control and authority, or agency, permeates and is far-reaching.
- Experiences and worldviews of fairness and justice that are very different across populations. All individuals have a strong interpretation and sense of fairness and justice. Due to different experiences and different worldviews Aboriginal people will have individual views of fairness and justice that may be very different to many other views which do not come from a similar experience or position. A justice system that is culturally appropriate must be responsive and adapted to this context.
- A lack of trust in the justice system. This is identified in the literature review of the Law Council of Australia's 'Justice Project':

> Aboriginal and Torres Strait Islander communities have experienced a history of social exclusion and marginalisation from the legal system and government.[3] This has led to police, government and the law being viewed as a tool of oppression by many.[4] Systemic discrimination, in addition to the law in Australia contributing to the criminalisation of Aboriginal and Torres Strait Islander communities, deaths in custody and the denial of political rights, have created a profound and ongoing

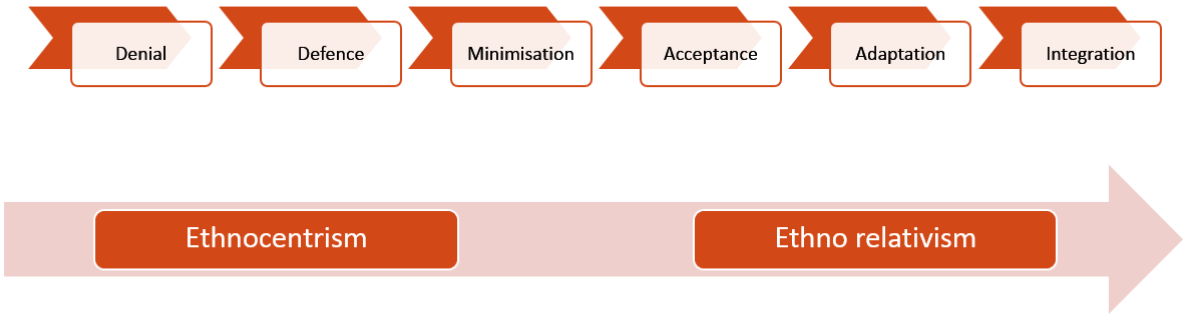
[3] Christine Coumarelos, Pascoe Pleasence, et al, *LAW Survey: Legal needs of Indigenous people in Australia*, *Updating Justice No 25* (Law and Justice Foundation of New South Wales, 2013), 31.
[4] Judicial Commission of New South Wales, *Equality before the Law Bench Book* (Emerald Press Pty Ltd, 2016) 2202, [2.2.2].

distrust in the Australian system.[5] Many Aboriginal and Torres Strait Islander people have experience of intergenerational trauma linked with the justice system, and many also have personal prior experience of it working 'against them' instead of 'for them.'[6] This distrust 'affects all aspects of the interaction between Indigenous Australians and access to justice'.[7]

- The health sector has led the development of trauma-informed practice and this practice has lessons for the justice system, including improving the work of rehabilitation and reintegration. There is significant trauma in communities as a result of many different experiences from unacceptable rates of family and domestic violence to the in inter-generational effects of past government policies. This is compounded by an experience where many aspects of Aboriginal culture, such as language, are going through significant, deep-seated changes (and due to a complex range of factors). This experience involves a sense of loss. A trauma-informed practice provides many lessons for the justice system and reveals the practices of the justice system that are not trauma-informed. A justice system that is culturally appropriate must take into account the views of Aboriginal people, representative organisations and the Aboriginal led health sector if it is to be trauma-informed.

In NAAJA's work with the Framework, we have identified some tools that are useful in the context of understanding the nature of cultural appropriateness in a system where there is significant diversity. An example of a useful tool is the Developmental Model of Intercultural Sensitivity (DMIS), developed by Dr Milton Bennett.

The DMIS proposes 6 stages of an individual's cultural competence:



The first three stages – 'denial', 'defence' and 'minimisation' – are 'ethnocentric'[8] as a person at any of these stages sees their own culture as the centre of reality and judges another by the values and standards of their own. The next three stages,

[5] Chris Cunneen, Fiona Allison and Melanie Schwartz, 'Access to justice for Aboriginal People in the Northern Territory' (2014) 49 *Australian Journal of Social Issues* 237.
[6] Pascoe Pleasance et al, *Reshaping legal assistance services: building on the evidence base*: *A discussion paper* (Law and Justice Foundation of New South Wales, 2014), 135.
[7] Productivity Commission, Access to Justice Arrangements, Inquiry Report No 72 (5 September 2014), volume 2, 763; ABS, Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016 cat no 2071.0 June 2017.
[8] For the Northern Territory's justice system this may also be characterised as Anglo-Australian or Eurocentric.

‘acceptance’, ‘adaptation’ and ‘integration’ are ‘ethnorelative’, as these are the opposite of ethnocentric and a person judges another culture relative to the context.

In the ‘denial’ and first stage, an individual will reflect on their own culture as the only ‘real’ one, and will generally be disinterested in another culture and tend to act aggressively to avoid or eliminate another cultural view. Cultural difference may not be seen at all, or may be considered only in broad categories such as referring only to ‘minority’ or ‘Aboriginal’.

In the ‘defence’ stage, individuals, through a process of othering, identify differences across cultures and consider their own as the best or most evolved. They often categorise people as ‘us’ and ‘them’ and blame social ills on characteristics of other cultures. They may feel threatened by cultural difference and so act defensively and are more likely to act aggressively to dismiss difference.

In the ‘minimisation’ stage, an individual will consider elements of their own culture as the same or universal across another culture. They will interpret values as transcending cultural boundaries and emphasise human experiences which are shared and common across all culture. They will likely overestimate their tolerance of another person’s views and underestimate the effect of their own culture on another. This stage is considered ethnocentric because it pre-supposes that fundamental patterns of behaviours and interactions are absolute.

In the ‘acceptance’ stage, an individual will see their own culture as one of many equally complex worldviews. Individuals at this stage have a frame for organising their observations of cultural difference and have a more developed understanding of how culture affects human experience. They tend to be more inquisitive and less prejudicial. They may not accept all aspects of another culture, but they will do so from a deeper grounding and more nuanced view than the previous stage.

In the ‘adaptation’ stage, an individual is able to draw on their own, expanded worldview to understand difference and has the ability to frame their approach and ways of interacting to properly understand, and be understood. An individual understands how to act properly in another culture and can demonstrate empathy and appropriate alternative behaviours in different contexts.

In the ‘integration’ stage, an individual will reflect on their own position as marginal and not central to any culture. They can move in and out smoothly between another culture and their own have a more comprehensive understanding of another person’s worldview. They are able to develop bridges across difference and more sophisticated means of interacting and connecting.

As organisations and systems are a collection of individuals, and as Aboriginal Territorians come from very diverse cultural backgrounds (including diversity amongst the broad term of ‘Aboriginal’ and also as a comparison to the dominant culture), there is a need to explore the justice system itself as it relates to cultural appropriateness.

Ethnocentricity of prison

Incarceration as a form of punishment is a relatively recent phenomenon - no more than 250 years old. Up until then, confinement had only been used in preparation for corporeal punishment, capital punishment, or penal transportation. Prisons were not established in non-European countries until the expansion of colonialism in the 19th century. In this sense, prison is inherently ethnocentric.

The modern prison is based on Jeremy Bentham's Panopticon.[9] Bentham's theory that imprisonment should be part of the punishment was revolutionary for the time, and heavily informed by Western Enlightenment thinking for methods of punishment more humane than corporeal harm. The primary aim of the Panopticon was deterrence. Bentham influenced the 'Less Eligibility' principle which requires that the conditions of imprisonment must not be superior to that provided to a member of the lowest significant social class in a free society for there to be a deterrent.

The history of penal policy in Australia is inextricably bound to its role as a penal colony for the British Empire. In many ways this narrative has shaped Australian penal policy to the present day, with Australian jurisdictions employing a harsh sentencing policy which employ "prison as a last resort", but prison as a priority.

The justice system and cultural appropriateness

When considering the justice system in the context of the DMIS tool (see page 10), in NAAJA's direct experience and in our many interactions and engagements with different aspects of the justice system individuals[10] more often than not sit between the 'denial', 'defence' and 'minimisation' stage. These stages are ethnocentric (or Anglo-Australian or Eurocentric) as people generally see their own culture as the centre of reality and judge Aboriginal culture based on the values and beliefs of their own.

Because the justice system comprises many laws and policies and directions which do not adequately value Aboriginal culture, individuals are often required act on behalf of, and implement, an ethnocentric framework. The standard program of regular cross-cultural training does not require people to demonstrate a shift through to the ethno-relative stages. Whilst at a surface level there are programs and policies that refer to Aboriginal aspects and these are taken into account, the core and systemic parts across the justice system are ethnocentric.

This situation is understood from the Aboriginal worldviews consistently expressed across many consultations.

The Uluru Statement from the Heart states:

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[9] Michael Foucault, *Discipline & Punish: The Birth of the Prison* (Random House, New York, 1977), 250.

[10] On rare occasions NAAJA comes across interactions where people from different aspects of the justice system sit within the 'acceptance', 'adaptation' and 'integration' stages of the DMIS tool. These individuals often do what they can within their roles and positions to exercise authority and power appropriately yet often come up with obstacles or directions which run counter to their work. In many cases these individuals exit their roles away from the justice system. This also includes Aboriginal staff who may otherwise serve senior roles or are on a pathway for promotion and who exit these roles (of concern, key agencies and different parts of the justice system with significant workforces and budgets don't have Aboriginal people in senior roles and certainly not as part of a critical mass reflective of the Northern Territory population).

> Proportionally, we are the most incarcerated people on the planet. We are not innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.
>
> These dimensions of our crisis tell plainly the structural nature of our problem. *This is the torment of our powerlessness*.'[11]

The Galiwin'ku Statement, edited by David Suttle and Yirriṉiṉba Dhurrkay (ARDS Aboriginal Corporation), was the result of 34 meetings between June 2015 and May 2016 with a total of 92 female and male leaders in Galiwin'ku community on Elcho Island, states:

> When Balanda law does not respect Yolŋu law, young people learn not to respect Yolŋu law and start to disrespect each other.

And further, and in the context of addressing family violence (of note, the current laws require mandatory sentencing and the in island of Galiwin'ku in North East Arnhem land this means people in protected custody must be escorted by plane and for prison sentences in Darwin at a very high cost):

> *"Gulyun limurr dhu galŋa ga ŋayaŋu-miḏikunhaminywuyŋur romŋur. Malŋmaram limurr dhu mägayamirr dhukarr."*
>
> "We will end this physically and emotionally hurtful way. We will find a path of peace."
>
> Family Violence is a difficult problem. There are many things that we need to think about.
>
> We have watched this problem get worse, especially over the last 10 years.
>
> We are worried, especially for our young people. Many are scared and angry and sometimes they go wild and hurt each other.
>
> This is not the right path. We must straighten this path.
>
> We cannot fix this only through Balanda (Western) law. We must return to the foundation of Yolŋu Rom (law), and this must be respected and taken seriously by Balanda authorities and by our young people.
>
> We are serious about this. Balanda talk about Family Violence all the time and we want to fix it. We have to listen to Balanda law, but Balanda need to listen to us too. With mutual respect for law, we can start to fix this together.[12]
>
> …
>
> We used to deal with all of these issues ourselves. We were the only authority, and Yolŋu Rom was the only law. Each clan owned its own law and

[11] Uluru Statement from the Heart, 26th May 2017.
[12] David Suttle and Yirriṉiṉba Dhurrkay (eds), *Dhäwu Mala Galiwin'ku Community-wuŋ Nhaltjan Dhu Gulmaram Bunhaminyawuy Rom ~ A Galiwin'ku Community Statement to Prevent Family Violence* (ARDS Aboriginal Corporation, May 2016), 4.

every clan was connected through kinship. When Balanda came, this didn't just stop. The law keeps going, we are all still tied by kinship and the authority of the old people is still real. Just because we buy food from the shop and live in the mission doesn't mean that we have lost our ancient and eternal law. But it is under threat. As our law and authority is undermined, we see these problems like family violence come out and get bigger.

We know that Balanda are now part of our society. We accept that we are now in a modern world. We are united in our belief that we can stop family violence – but only if Balanda are willing to cooperate with us to find a way to work together on this issue. Let's stop this Captain Cook business and find a way to work together, to live together. [13]

…

"Buthuru bitjurr marrkapmirr balanda. Napurr bukmak bäpurru Dhuwa ga Yirritja marŋgi nhaltjan limurr dhu rrambaŋi djäma ga guŋga'yun bala-räliyunmirr marr dhu yuṯay yolŋuy nhäma ga ŋäma dharaŋan marrma dhukarr ga rom bala malthun."

"Balanda – please listen. All of us from Dhuwa and Yirritja clans know how we can all work together in a mutually beneficial and helpful way so that our young people will recognise, understand and follow two laws."[14]

The situation of an ethnocentric justice system is also described by the following scenario:

In one large township, and to deal with increasing law and safety issues, several houses have recently been built to accommodate Police and to increase the Police response and interventions to local issues. The local Aboriginal population, for complex reasons, will likely not access this housing and will not serve Police Officer roles.

This township has a high number of people who enter the criminal justice system including serving short periods of time in prison. A significant proportion of the local population (and on par with the highest per capita for any prison system in the world) will be flown in and out of this town under escort. Flights are expensive. Interpreters will likely be used in court, but there will also likely be continual misunderstandings and confusion as to context as many of the concepts used in court will be very different to their own languages and worldviews. In some instances there may be pressure to proceed without interpreters.

Surrounding this town are many outstations and homelands with possible therapeutic and rehabilitive value. Many of these are vacant. These places will not be used. The views of Elders and Aboriginal people from this town as to each step of the Police, Courts, Prison process will not be used. The possibility of programs on country including violence programs and education

[13] Ibid, 6.
[14] Ibid, 17.

programs and cultural healing programs will not be used. Aboriginal people from this town will not be resourced to add value to this process, as the costs of an expensive system are all going elsewhere. A person from this town who will go to prison will likely see up to 20 people who work within the justice system, and not one person will be from their town. In large government departments, every line of authority from the person working at the front line to management to senior management to executive level to CEO (and any other areas in between), to the relevant Minister will not be Aboriginal, let alone an Aboriginal person from their town (or a person who speaks their language).

Prison several hundred kilometres away will be used.

They will enter the prison and see and reconnect with many other people of their language group and extended family. In English they will be asked to address their offending behaviour in a place where restorative justice principles are not used and later they will be released to the same environment and family and social dynamics which existed before they came in. They may put their family on the phone contact, but their family don't answer calls from 'private' numbers (like many people generally) and so they will likely not be included when they are contacted once by prison staff to verify if they want to receive calls. Family will struggle to visit them. Much of their extended family will be in the prison, and so they will update (and be updated) on social and family activities. They may see an Elder of their own who will visit from time to time, and will likely see them on television that night in the news broadcast as an example of how the justice system values Aboriginal input (these broadcasts are made regularly).

Several of this cohort will be normalised to prison and will come in and out, in and out. When they get out, young people in their family and extended family, even young sons and daughters and nieces and nephews, will see this as normal. Some young people will see this cohort before they went to prison as affected by substances and not looking healthy and not looking strong. These same young people will see their older family members return from prison healthy and strong, and with much talk in the community. Many young people will imagine prison as a place for respite from the accumulated trauma and challenges of conflict and home (which contradicts the 'less eligibility' principle of prisons influenced by Jeremy Bentham noted at page 12 – many people from this town will have conditions that are very challenging and whilst prison may not be the preference, it can be a place of respite from the daily pressures outside).

Prison then becomes normalised, and so too a justice system that is not responsive and adapted to the local context.

The justice system must move away from an ethnocentric position to an ethnorelative position, particularly in areas where reform is realistic and achievable. A strategic direction of different parts of the justice system needs to align with this goal, and with a pathway for resources and reform to support this new position over

time. The strategic direction and priorities of different parts of the justice system need to be held accountable to this proposed process.

Recommendation

That the justice system and its different parts are considered in the context of whether they are culturally appropriate and that reform directions are articulated with a need to explore and examine this concept from an overarching, strategic policy directive.

The case for an Aboriginal Justice Agency Indicator (AJAI)

NAAJA proposes the development of an Aboriginal Justice Agency Indicator (AJAI), or another similarly worded indicator, to reflect the allocation of resources within the justice system going directly to Aboriginal people in formal positions.

A key reason why our justice system is not culturally appropriate is because over many years new programs and new expenditure has been put in place with positions allocated and people selected on the basis of 'merit'. Aboriginal people are encouraged to apply for these positions but for many reasons do not apply or do not progress. The 'merit' of these positions and programs are based on an ethnocentric position. The positions and programs are not responsive and adapted to the circumstances of the NT, and so Aboriginal people are not resourced to have an adequate level of influence in the justice system. Many Aboriginal people can come into contact with the justice system and go through a process where they interact with 10 – 20 people and not one person is Aboriginal. In some areas of the justice system there can be a line of authority between a position at the front-line (and coalface) and from this position in a large government department there is not one Aboriginal person in a line of authority all the way to the relevant Minister.

Currently, when non-government justice agencies such as NAAJA seek funding for culturally appropriate programs such as alternatives to prison and resourcing and integrating Cultural Authorities, we are required to compete in a very small pool of funding specific to 'Aboriginal' programs. Some government agencies within the justice system also compete in this pool (and receive funding, for example, from Prime Minister and Cabinet). In many cases the response across governments is that there is no funding. In periods of austerity, programs and services are often cut (and in many instances this directly impacts Aboriginal employment).

The setting of an AJAI and an agreement or direction of various parts of the justice system to move to a specific level over a set period (say, 30% over 5 years), will deliver reform of the system so that it moves to a culturally appropriate, ethnorelative position and is responsive and adapted to the circumstances of the NT. It will ensure the 'merit' of the system reflects the specific needs of the population. Identifying this level will compel the type of coordinated reform across government required for the policy and legislative reform to support the many measures set out in this submission. The money saved on a very expensive justice system, where in some instances persons in custody are escorted and flown across vast distances to spend short periods in prison, will be diverted to more effective solutions.

The following graph reflects current expenditure on Aboriginal employment within the NT Police, Fire and Emergency Services (NTPFES) and the proposed AJAI for a scenario of 30% over 5 years:

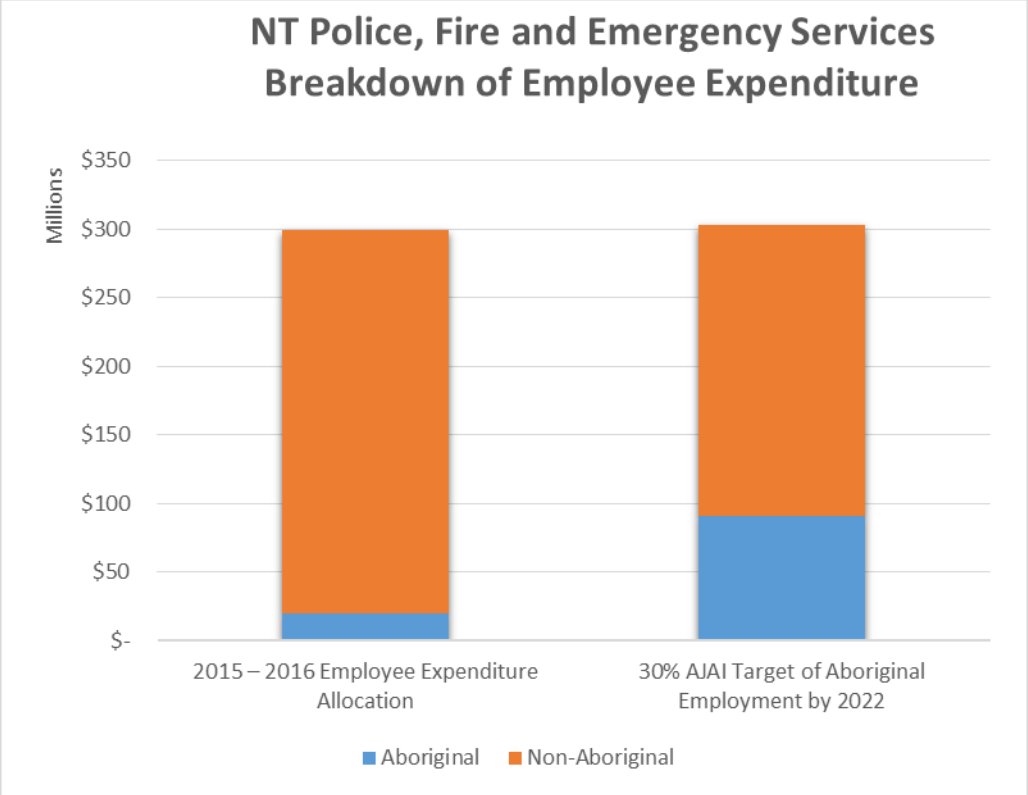

Figure 1 Estimated expenditure on Aboriginal employment based on 2015-16 annual report.[15] 30% aspirational figure based on 2017-18 Budget.[16]

Using the AJAI set out above, in 2022 the NTPFES would spend approx. $90.9m on Aboriginal employment rather than the $19m spent in 2015 – 2016 (this doesn't account for adjustments in overall expenditure). A nominal 30% figure is appropriate because Aboriginal people are in prison at levels of 83 – 90%, are in custody at similar levels and reflect 30% of the NT population.

The graph below indicates the significant disparity between current levels of involvement of Aboriginal people within the NTPFES and the levels that could be achieved with a goal of 30% in 5 years:

[15] Northern Territory Police, Fire & Emergency Services, *2015-16 Annual Report (*31 August 2016), 111. Figure taken from Operating Statement as at 30 June 2016.
[16] Northern Territory Government, *Agency Budget Statements 2017-18: Budget Paper No. 3* (December 2016), 52. Based on the Employee Expenses figure budgeted for 2017-18 of $303,056,000.

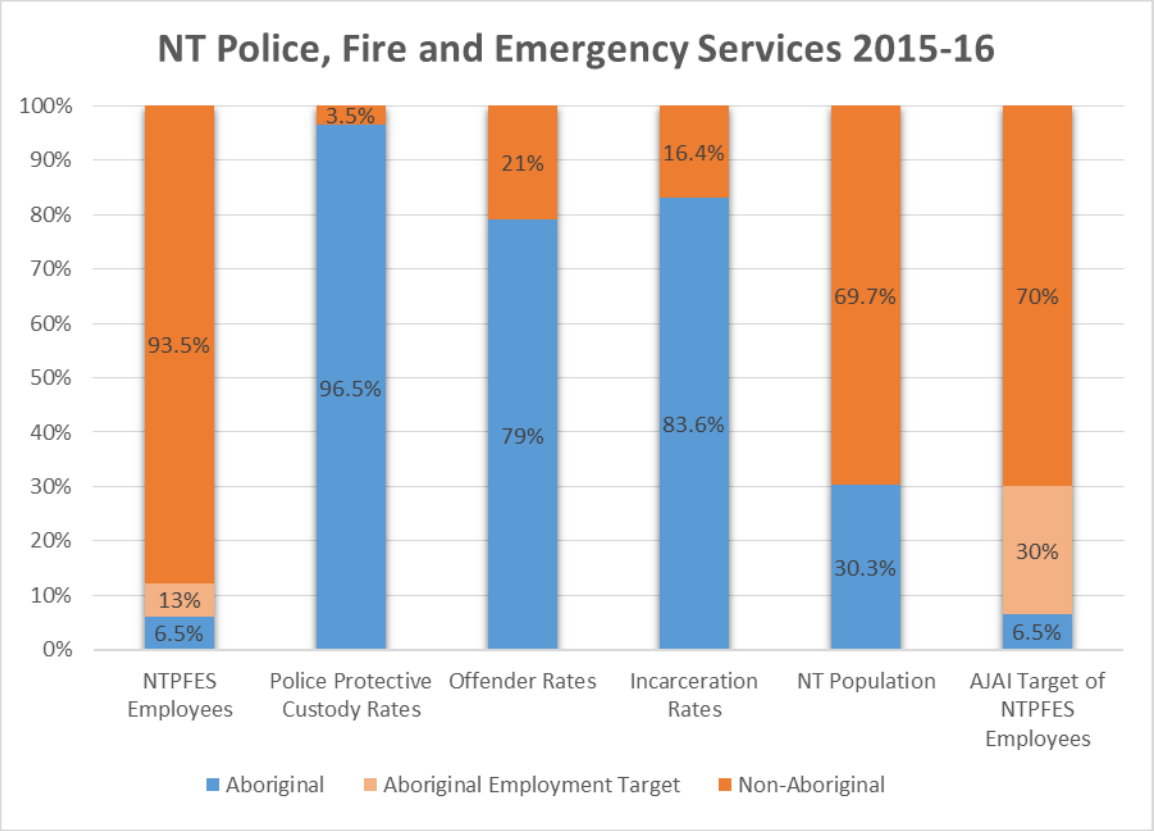

Figure 2 Recorded breakdown of employees in 2015-16,[17] with aspirational target of Aboriginal employees listed as 13%.[18] Offender rates for 2015-16.[19] Protective Custody Rates.[20] Incarceration Rates.[21] NT Population.[22]

In the above graph, the stark differences in Aboriginal involvement in a key part of the justice system from the perspective of employment, custody rates, offender rates, incarceration rates provides a clear picture in relation to the reasonable target of a 30% AJAI.

Similarly, the Department of Correctional Services could utilise the setting of an AJAI. The below graph indicates the level of current staffing in comparison to the demographics of the prison population. Putting in place the AJAI of 30% over 5 years, a target of $29m (using current figures) would be put to, for example, coordinating and administering culturally appropriate rehabilitative programs and other measures:

[17] Northern Territory Police, Fire & Emergency Services, above n 15, 87 – 88.
[18] Ibid, 90.
[19] Australian Bureau of Statistics 2016, 'Indigenous Status, selected states and territories (Tables 22 to 25)' *Recorded Crime - Offenders, 2015-16.* cat no. 4519.0, ABS, Canberra.
[20] Northern Territory Police, Fire & Emergency Services, above n 15, 171.
[21] Australian Bureau of Statistics, 'Prisoner characteristics, States and territories (Tables 13 to 34)' *Prisoners in Australia, 2016,* cat no. 4517.0, ABS, Canberra.
[22] Northern Institute, 'Territory Population Update: Aboriginal population statistics for June 2016.' (Charles Darwin University, June 2016), 2.

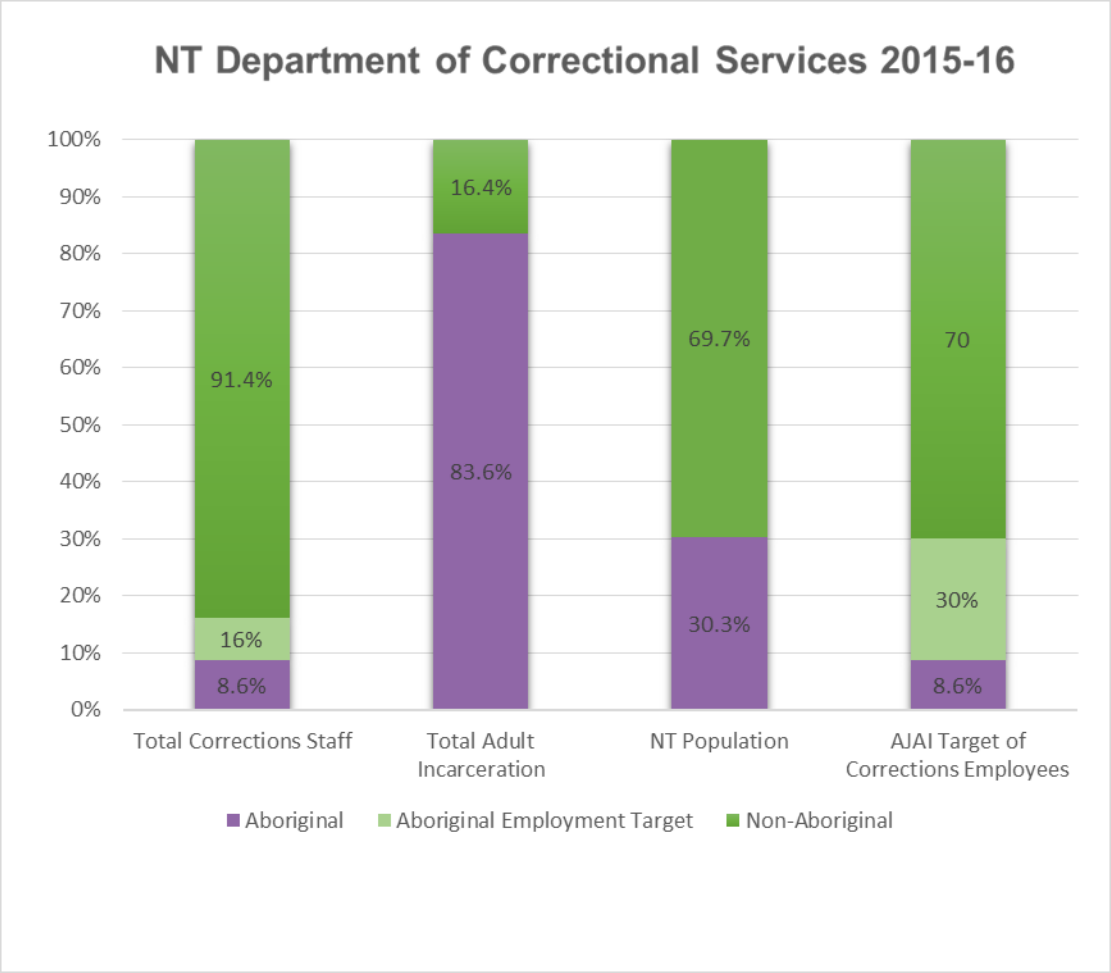

Figure 3 Shows NTDCS employment figures at 2015-16[23] and the aspirational Aboriginal employment target of 16%.[24]

[23] Northern Territory Department of Correctional Services *2015-16 Annual Report* (30 September 2016), 113.
[24] Ibid, 112.

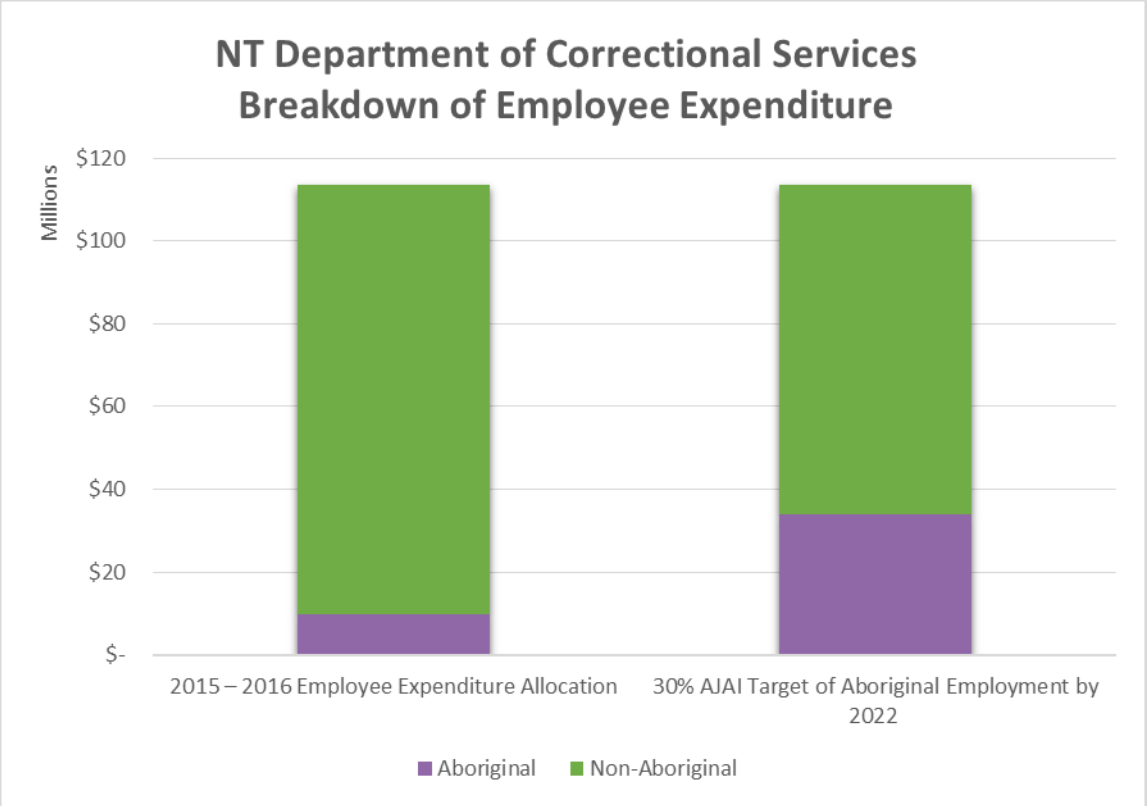

Figure 4 Estimated Aboriginal employee expenses based on 8.6% employment figure. 30% allocation target figure estimated from 2015-16 employee expenses, the most recent figures available.[25]

Concerns may be raised in relation to both proposals that there will be insufficient funds to support the required services in Police and Correctional services. This target, over time, will transition the justice system to a culturally appropriate position and will enable funds currently used for a very expensive prison system (including prisoners taken by escort over vast distances including flights) to a broad range of reform options which empowers and integrates Aboriginal people across the justice system. Aspirational targets alone in an ethnocentric system will not be sufficient. The setting of an AJAI and an agreement or direction on the part of various parts of the justice system will compel the type of reform required for meaningful reform to a culturally appropriate system.

Recommendation

That an Aboriginal Justice Agency Indicator, or similarly worded measure, is identified as a reform measure to assist in shifting the justice system to a culturally appropriate position.

Bail and remand population

Proposal 2–1

The Bail Act 1977 (Vic) has a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's

[25] Ibid, 193.

Aboriginality', including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements of the Bail Act. Other state and territory bail legislation should adopt similar provisions.

NAAJA endorses the proposal for Northern Territory to adopt at minimum the standard of provisions in Section 3A of the Bail Act 1977 (Vic) which require bail authorities to consider 'issues that arise due to the person's Aboriginality.'

We support the following broadly worded amendment as put forward by the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submission to this Inquiry:

> "take into account (in addition to any other requirements of the Act) any matter relating to the person's Aboriginal or Torres Strait Islander identity, culture or heritage, which may include:
>
> - Connections with and obligations to extended family;
> - Traditional ties to place;
> - Mobile and flexible living arrangements; and
> - Any other relevant cultural issue or obligation."

We endorse the above wording for insertion into Northern Territory Bail laws as it is prescriptive, refers specifically to a person's specific Aboriginal or Torres Strait Islander culture and background, the provision is not restrictive in considering "background" as a vulnerability or disadvantage, and it applies throughout the bail process.

The existing provisions in the Northern Territory which allow the court to consider "needs relating the person's cultural background" are simply too narrow or uncertain to be effective. While NAAJA supports the introduction of section 24(1)(B)(iiic) of the Bail Act 1982 (NT) in 2015)], courts should be required to consider a broad range of factors, including duties to family and extended family, traditional ties to place, outdoor and traditional living arrangements and homelessness and any other relevant cultural consideration.

Recommendation

That NATSILS proposed wording are considered for inclusion in relevant Bail laws.

Proposal 2–2

State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.

We agree with the submission of NATSILS that culturally appropriate bail support and diversion options are needed. We reiterate the points raised in this submission of the need to support community based options, alternatives to prison, the

resourcing and integrating of Cultural Authorities across the justice system, improved accommodation options and reform to bail laws which collectively can assist in culturally appropriate bail options.

In the Northern Territory there has not been any culturally appropriate bail support program available for people who require suitable accommodation to secure bail. This is an issue across the Northern Territory – from remote communities to the largest city and capital Darwin.

Recommendation

That culturally appropriate bail support and diversion options are made available where there are prisons and a network is established across the Northern Territory including community based options and resourcing and integrating Cultural Authorities to have input into bail decisions and bail support.

Sentencing and Aboriginality

Question 3-1

Noting the decision in* Bugmy v The Queen [2013] HCA 38*, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders? If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?

NAAJA supports creating a legislative requirement for courts to consider the systemic disadvantage caused by the impact of colonialism and intergenerational trauma, as well as cultural identity, ties to people and connection to country during the sentencing process.

Australian courts could develop a jurisprudence similar to the Gladue Principles developed in Canada and expanded upon in *R v Ipeelee* [2002] 1 SCR 433.

In Canada, during criminal sentencing the court is required to take into account circumstances particular to Aboriginal people. For minor offences, the court can consider Aboriginal-based sentencing principles such as restorative justice, which can consist of involving community members and the victim in the sentencing process, with the aim to “decrease the use of incarceration.” This was expanded upon in *R v Ipeelee*, whereby the Canadian Supreme Court held that in sentencing Aboriginal offenders "courts must take judicial notice of such matters as the history of colonialism, displacement and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide and, of course, higher levels of incarceration for Aboriginal Peoples.”[26]

[26] *R v Ipeelee* [2012] 1 SCR 433, per Justice Louis LeBel, 469.

Recommendation

That the Commonweal and Northern Territory government initiate a consultation process to institute a mechanism similar to the Gladue Principles in Canada to the jurisdiction of the Northern Territory and to resource Aboriginal people in this activity.

Question 3-2

Where not currently legislated, should state and territory governments provide for reparation or restoration as a sentencing principle? In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?

For over a century, Northern Territory jurisprudence has accommodated and recognised Aboriginal customary law in its sentencing practices, recognising its role in Aboriginal people's lives. The *Sentencing Act* NT provides in section 104A provisions for the reception of Aboriginal Customary law in sentencing.

The Supreme Court has recognised that Aboriginal persons can be subject to both laws of Aboriginal and non-Aboriginal as a sentencing consideration.[27] The Northern Territory Courts should be able to accommodate Aboriginal customary law when sentencing Aboriginal offenders as with all other Australian jurisdictions.

However following the Northern Territory Emergency response (The Intervention) the Commonwealth enacted section 16AA of the *Crimes* Act 1914 (Cth) that prohibits Northern Territory Courts from taking into account any form of customary law or cultural practice in sentencing determinations as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates.

The reduction of courts' ability to consider the importance of an Aboriginal culture diminishes the proceedings. All courts must be able to take into account Aboriginal customary law or cultural practice without restriction when sentencing.

The rationale underpinning sentencing in the Northern Territory is set out in Section 5(1) of the *Sentencing Act 1995*. The stated aims of sentencing are to punish, to rehabilitate and deter the offender, deter the wider community, denounce the offending, and protect the community. Notably, the purposes of sentencing in the Northern Territory are primarily punitive in nature.

Contrary to this, in many Aboriginal and Torres Strait Islander communities, restorative justice is one of the principal aims of sentencing, empowering the victim of the offence to play a central role in sentencing if desired.

To address the incongruous aims of these two systems is to provide for the principle of restorative justice on a legislative basis. It is significant that Australia's common law neighbours of both Canada and New Zealand, employ restorative justice mechanisms particularly when sentencing Indigenous defendants.

Recommendations

[27] Dean Mildren, *Big Boss Fella All Same Judge: A History of the Supreme Court of the Northern Territory.* Federation Press (2011).

That Section 16AA of the Crimes Act 1914 (NT) is repealed.

That restorative justice principles are featured more prominently across sentencing practices and criminal justice system practices generally.

Questions 3–3, 3–4 and 3–5: Sentencing reports

Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender's background, including cultural and historical factors that relate to the offender and their community?

In what ways might specialist sentencing reports assist in providing relevant information to the court that would otherwise be unlikely to be submitted?

How could the preparation of these reports be facilitated? For example, who should prepare them, and how should they be funded?

NAAJA calls for the use of a practice similar to the Canadian 'Gladue Reports' as highlighted above. This would involve pre-sentencing reports being written by an Aboriginal person, providing recommendations to the court about 'what an appropriate sentence might be, and include information about the Aboriginal persons' background such as educational history, child welfare removal, physical or sexual abuse, underlying developmental or health issues, such as FASD, anxiety, or substance use.'[28]

Sentencing reports should be prepared by leaders and Elders from the offender's community, as they would have the requisite knowledge about the offender and the cultural context of their background.

A similar but limited system to Gladue sentencing reports is the Law and Justice Group reference writing process which NAAJA's community legal education program is currently facilitating in target communities. See below case study

Kurdiji Law and Justice Group in Lajamanu

NAAJA's Community Legal Education team has been working with the Kurdiji Law and Justice group (a Warlpiri cultural authority)[29] since 2010 to facilitate pre-court meetings with members of the Kurdiji comprised of elders and community leaders in order to write pre-sentence recommendations (in the form of reference letters) to the presiding judge. These reference letters communicate important background information about the offender, including important cultural information and also provide community views on offending and where appropriate suggest alternative to jail options for sentencing. In 2017 the Kurdiji Law and Justice group extended this work to include sitting in court with the presiding judge and providing input to the court system where appropriate. Kurdiji members have reported an increase in community support since they began sitting in court with the Judge. Kurdiji members placed great emphasis on the importance and symbolic nature of Kurdiji being seen by defendants as sitting alongside the Judge (and as being respected by the Judge

[28] Native Women's Association of Canada, 'What is a Gladue Report?' <https://nwac.ca/wp-content/uploads/2015/05/What-Is-Gladue.pdf>.
[29] Central Land Council, *Lajamanu Kurdiji group* <https://www.clc.org.au/index.php?/articles/info/lajamanu-kurdiji-group1>.

as a source of authority) and have spoken very positively about the possibility of Kardia (Western mainstream legal system) and Yapa (Warlpiri) laws working together.

While this current work is an important step towards making the current system slightly more culturally accountable, there are a number of limitations to this work including elders having to volunteer their time and the process largely unsupported by key agencies in the criminal justice system. In order for pre-sentencing reports to be meaningful and have weight with the court, they ought to have legislative authority. These reports could be overseen by Aboriginal advocacy groups such as NAAJA. Funding for this process could be redirected from money spent on imprisonment through Justice Reinvestment – which will be highlighted below.

There is no comparable sentencing report available of similar quality in the Northern Territory. We propose Cultural Authorities are funded and supported to provide specialised information for pre-sentencing reports relating to Aboriginal young people and in circumstances where a prison sentence is determined, having regard to the key concepts underpinning Gladue Reports. This will enable important cultural and background information to be taken into account when sentencing.

Recommendation

That Aboriginal people involved in Cultural Authorities are resourced and serve a key role providing information to the courts as pre-sentence reports relating to Aboriginal people from the relevant community.

Sentencing options

Question 4-1: Mandatory sentences

Noting the incarceration rates of Aboriginal and Torres Strait Islander people:

Should Commonwealth, state and territory governments review provisions that impose mandatory or presumptive sentences; and

Which provisions should be prioritised for review?

Mandatory sentencing has for more than two decades, played a substantial part in increasing the Northern Territory's incarceration rates.

The Northern Territory has the highest incarceration rate in Australia, and the third highest worldwide. Aboriginal and Torres Strait Islander people in Australia are the most incarcerated group of people on earth.[30] Using other Australian jurisdictions as comparators, the only jurisdiction with a similar level of Aboriginal and Torres Strait Islander incarceration is Western Australia. A common denominator between the Northern Territory and Western Australia is 'tough on crime' rhetoric and the use of mandatory sentencing.

[30] Thalia Anthony and Eileen Baldry, above n 1.

NAAJA has opposed mandatory sentencing since the commencement of the first such law on 8th March 1997, when mandatory sentencing was introduced for property offences for adults and youths.[31] For 20 years Aboriginal voices such as NAAJA have decried these laws and its disproportionate impact on Aboriginal people.[32]In June 2000 NAAJA lodged a communication with the United Nations High Commissioner for Human Rights on behalf of an Aboriginal client, that the mandatory sentencing legislation of the Northern Territory contravened the International Covenant on Civil and Political Rights.[33]

Peak bodies such as the Law Council of Australia and NATSILS[34] hold that mandatory sentencing regimes are not effective and contribute to high rates of incarceration of Aboriginal and Torres Strait Islander people.

Sentencing principles in relation to criminal offending in all Australian jurisdictions are clearly articulated,[35] to include specific and general deterrence, rehabilitation of the offender, accountability for the offender, denunciation, and recognition of the harm done to the victim and the community. These principles of sentencing are founded upon the common law and jurisprudential reasoning. Its application permits Courts to utilise, in considering an appropriate sentence on the basis of proportionality, mitigating and aggravating factors, and allowance for judicial discretion in weighing competing purposes and considerations.[36]

Fundamentally, mandatory sentencing law contradicts these principles in focusing on punitive and retributive aspects of sentencing and the fallacy of crime prevention through deterrence. The efficacy of deterrence assumes the validity of rational choice theory – that potential offenders will assess the risks of crime and weigh them against the consequences. This fails to account for the social determinants of crime. If members of your community are being incarcerated at a steady rate, prison is normalised and individuals are socialised to experience prison as a normalised life experience. This is a significant problem.

Mandatory sentencing does not pay due regard to factors that may compel someone to commit crime such as socio-economic status, unemployment, and substance abuse. Further to this, mandatory sentencing fails to take into account the systemic oppression particular to Aboriginal people, such as the intergenerational trauma resulting from colonisation, dispossession and the Stolen Generations. Crime cannot be viewed in isolation from acknowledging these deeper social and economic issues. There is no single cause and no single solution. Therefore, one-dimensional

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[31] *Sentencing Act 1995 (NT)* s 78A (Now repealed).
[32] John Sheldon and Kirsty Gowans, 'Dollars without sense: a review of NT's mandatory sentencing laws' *North Australian Aboriginal Legal Aid Service* (1998).
[33] That mandatory sentencing laws infringed Articles 2(1) prohibition on racial discrimination; Article 7 cruel, inhuman or degrading treatment or punishment; Article 9(1) arbitrary detention; Article 14(1) right to a fair hearing; Article 26 non-discrimination and equality before the law.
[34] NATSILS comprises Aboriginal Legal Services in all States and Territories.
[35] *Crimes Act 1914* (Cth), *Crimes (Sentencing) Act 2005 (ACT)*, *Crimes (Sentencing Procedure) Act 1999 (NSW)*, *Sentencing Act 1995 (NT)*, *Penalties and Sentences Act 1992 (QLD)*, *Criminal Law (Sentencing Act) 1988 (SA)*, *Sentencing Act 1997 (TAS)*, *Sentencing Act 1991 (VIC)*, *Sentencing Act 1994 (WA)*.
[36] Elena Marchetti and Thalia Anthony, 'Sentencing Indigenous Offenders in Canada, Australia, and New Zealand' (2016) 27 *University of Technology Sydney Law Research Series* 27.

approaches to crime such as mandatory sentencing are unlikely to succeed in reducing crime.

Mandatory sentencing fails to take into consideration the individual circumstances of the offender. Whether the aim of punishment and sentencing is from the retributive, rehabilitative or restorative perspective, proportionality is a principle of punishment and sentencing which cannot be ignored.

Recommendation

That mandatory sentencing is repealed as it is ineffective, unnecessary, disproportionate and discriminatory, as it does not deal with the social determinants of crime, it does not deter crime effectively. We recommend that full judicial discretion is reintroduced in relation to sentencing laws.

Mandatory sentencing is morally wrong

Mandatory sentencing has been described as a 'cancer'[37] by an eminent Judge of the Supreme Court of the Northern Territory. The laws are unjust and have resulted in a pernicious effect in fettering the hands of the judiciary, debasing the role of advocacy on behalf of clients and reposing greater power to police and prosecutors. A fundamental fault of mandatory sentencing is that it generates an acceptance and tolerance in the wider community for the continued gross rates of imprisonment of Aboriginal people.

Ineffectiveness of mandatory sentencing

When mandatory sentencing laws are introduced, MLAs of governing political parties either advocate strongly in favour of these laws, or are sensitive to, the notion that they must be seen to be 'tough on crime' and 'in line with community expectations'. The reality is whilst this relates to a cohort of the community, in NAAJAs experience it is not the views of a broad cross-section of Aboriginal communities and as conveyed in our community engagement work. Mandatory sentencing introduces people to prison for minor offences which in other jurisdictions would have simply resulted in a fine. The most notorious example of the unjust sentencing occurred with the imprisonment of a 19 year old Aboriginal male for 12 months for stealing a packet of biscuits and cordial under the then (and now replaced) third strike mandatory sentencing property offence in 2000.[38] Two decades of mandatory sentencing has seen intergenerational impacts on Aboriginal people and primarily young Aboriginal men. As identified by the Discussion Paper, periods of incarceration diminish employment prospects and positive social links. It is no coincidence that we see corresponding issues for young Aboriginal men of high unemployment, low educational outcomes, high rates of suicide and substance abuse. The state of hopelessness and return to the same environmental factors will often see the perpetuation of further offending. For too many groups in the Territory, returning to prison means reconnecting with extended family members and common

[37] Andrew Thompson, 'Mandatory sentencing regime draws more flak', *ABC News* (online), 15 February 2013 <http://www.abc.net.au/news/2013-02-15/mandatory-sentencing-law-reaction/4521380>.
[38] 7.30 Report ABC, 'Mandatory sentencing controversy continues' 17 February 2000.

language groups. This in turn also contributes to the high rates of recidivism recorded in the Territory, and in turn inflates the rate of incarceration here. Aboriginal recidivism rates in the Northern Territory in 2015 – 2016 were at 60.4%.[39] High rates of recidivism signals the shortcomings of a punitive approach to sentencing which in turn contributes to the cycle of high incarceration rates. Moreover, there is no rehabilitative value associated with mandatory sentencing, which ultimately renders it ineffective as it fails to break the cycle of imprisonment, release and imprisonment.

Mandatory sentencing does not prevent crime

There is no evidence that mandatory sentencing works to reduce crime or make the community a safer place. Mandatory sentencing has not worked in the past. Using government figures of crime rates, when the Northern Territory introduced mandatory sentencing for property crime in 1997, property crime rates in the NT increased and then decreased after mandatory sentencing was repealed.[40] There has been little or no support for the proposition that harsher sentences reduce crime.[41]

Mandatory sentencing costs the community

The community pays for mandatory sentencing – and the system is very expensive. According to NT Correctional Services, it costs $177.76 per day to imprison a person in the NT.[42] The Productivity Commission calculated this cost at a higher rate of $198.86 per day.[43] That means that a mandatory sentence of three months imposed on an adult offender will cost the community between $16,000 – $18,000 (when the figure is multiplied on an individual basis using these figures).[44] A mandatory sentence of 12 months imprisonment imposed on an adult offender will cost the community between $65,000 – 73,000.

Further, it is likely the costs are significantly higher when the transport and Police escort costs for people charged with offences outside of Darwin and Alice Springs where there are no prisons is taken into account.

During periods where there is pressure on the Department of Correctional Services to reduce costs, the work of imprisoning people focuses on substantial periods of lock-downs for prisoners and reduced access to services (and added layers of supports) that may otherwise put downward pressure on high recidivism rates.

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[39] Northern Territory Department of Correctional Services, above n 23, 41.
[40] Office of Crime Prevention, Northern Territory Government, 'Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience' (August 2003) 10.
[41] Anthony N. Doob, Cheryl Marie Webster, Rosemary Gartner Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation Research Summaries Compiled from *Criminological Highlights* (14 February 2014), A-2.
[42] Northern Territory Department of Correctional Services, above n 23.
[43] Productivity Commission 'Report on Government Services 2016' Chapter 8. Figure accurate as at 30 June 2016.
[44] Note in relation to figures – although the cost scale of a prison means there is little difference between managing plus 1 offender in prison due to the structure of resources, mandatory sentencing leads to groups in prisons and therefore requires multiple costs across the system. Furthermore, whilst the operational costs of managing a cohort of prisoners can be provided, these costs often don't factor other costs such as programs and rehabilitation initiatives.

The financial resources would be better spent on crime prevention strategies and resourcing cultural authorities and services that build a better community with the aim of breaking the cycle and reducing recidivism rates.

Our Prisons are full

When the new Darwin Correctional Precinct was opened in 2016 with a much greater capacity to imprison people and to deal with the overcrowding issues of the previous Berrimah Correctional Centre, it was already overcrowded.[45]

The continued overcrowding of Northern Territory prisons has been a major issue despite the opening in 2014 of the $500m Darwin Correctional Precinct. The increasing rate of Aboriginal prisoners who are sentenced or on remand, particularly Aboriginal wome, has already put increasing pressures on a modernised and improved prison infrastructure.[46]

A major concern that follows with such an increased Aboriginal prison population is the limited opportunities to access prison based programs and therapeutic services. Increased waiting times to access programs or inability of access due to lack of Aboriginal language interpreters or disability with hearing loss or mental illness means that there is limited opportunities for rehabilitative support.

The effect of the commencement of mandatory sentencing in 1997 provisions is clear. Rates of imprisonment increased by 72% in 10 years from 2002 – 2012. In its most recent Annual Report the Department of Corrections highlights that the Northern Territory has reached a 15 year high in prison population.[47] The report specifically correlates the higher prison population with the higher population of Aboriginal people.[48]

The role of the judiciary in sentencing is to make the punishment commensurate with the offence and arriving at a just sentence after taking into account all of submissions and evidence. Mandatory sentencing means that courts must impose a 'one size fits all' sentence. Most of the time magistrates and judges get sentences right. When they get it wrong, the prosecutor or the defence can appeal the sentence and have it corrected. Stories in the media and the concerns of the public as a result of these stories often report on the original sentence and not the result of an appeal.

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[45]Georgia Hitch, 'Extraordinary overcrowding' at Alice Springs women's jail, investigation finds' *ABC News Online*, 24 August 2017, accessible at: http://www.abc.net.au/news/2017-08-24/extraordinary-overcrowding-at-alice-springs-womens-jail-report/8836916.

[46] Ibid.

[47] Avani Dias and Lucy Marks, 'NT Prison rate at a 15-year high, Corrections Department annual report shows' *ABC News* (online), 1 November 2016 < http://www.abc.net.au/news/2016-10-31/nt-prison-rate-reaches-15-year-high/7980464>.

[48] Northern Territory Department of Correctional Services, above n 23, 37. Note the following quote: "Aboriginal and Torres Strait Islander people are imprisoned nationally at 15.4 times the rate of non-Indigenous people (2,337.5 compared to 152.0). In the NT, Aboriginal and Torres Strait Islander people are imprisoned at 14.0 times the rate of non-Indigenous people (3,024.3 compared to 215.7). At 26.4%, the proportion of Aboriginal and Torres Strait Islander adults in the Northern Territory's adult population is 11 times the national figure of 2.4%. This disparity drives our high rate of imprisonment relative to the national rate. If the NT had the same demographic profile as the nation as a whole, our overall imprisonment rate would be approximately 39% greater, instead of 368% greater, than the national rate."

Mandatory sentencing results in unfair sentences

As stated, the role of the judiciary in sentencing is to make the punishment commensurate with the offence and arriving at a just sentence after taking into account all of submissions and evidence. As His Honour Justice Mildren said, 'prescribed minimum mandatory sentences are the very antithesis of just sentences'.[49]

Mandatory sentencing means that the Court must as a starting point impose the mandated term of imprisonment before taking into account all other relevant considerations.

Our prison populations are already overpopulated with people struggling with systemic socio-economic disadvantage such as mental health issues, intellectual disability, homelessness, and sexual and domestic abuse. Mandatory sentencing restricts the ability to consider a broad range of factors and pathways that may be required for a more rehabilitative, effective and fair outcome.

Mandatory sentencing in relation to violent offences provides a level of offences and resulting in different and harsher sentences for a 'first or subsequent offence'. After amendment[50] of section 78DA(1)(b) of the *Sentencing* Act a second or subsequent offence would occur where 'the offender has previously been convicted of a violent offence (whenever committed).'

This amendment has resulted in adverse circumstances where an offender who has a prior conviction for a violent offence of some considerable period, in one instance in excess of 20 years, is subject to a more draconian consequence.

Exceptional circumstances

NAAJA opposed in the initial draft legislation the inclusion of the test of 'exceptional circumstances' for mandatory sentencing of serious violent offences given the high threshold to meet in seeking exclusion from the mandatory sentence. It was NAAJA's view that a more appropriate test should have been one of 'particular circumstances' of the offender or offence akin to section 37(2) of the *Misuse of Drugs* Act.

It is clear that the interpretation of section 78DI(1)(b) of the *Sentencing* Act places an onerous evidential burden on the offender[51] 'as the word 'exceptional' describes a circumstance "which is such as to form an exception, which is out of ordinary course or unusual or special, or uncommon". To qualify as 'exceptional' a circumstance "need not be unique or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally exceptional".

Given the extreme disadvantages of Aboriginal persons and limited access to therapeutic programs and services in remote communities it is very difficult to meet this threshold.

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[49] *Trenerry v Bradley* (1997) 6 NTLR 175.
[50] Act 21 of 2013 commencing 12 July 2013.
[51] *Heath v Armstrong* (2017) NTSC 35 at [14].

Shifting the role of justice away from courts and to Police/Prosecution

With mandatory sentencing judicial officers are prevented from imposing a sentence that properly reflects the seriousness of the offences and is appropriate, having regard to all of the circumstances of the case. The appeal mechanisms provide a level of accountability in this system. This means that with mandatory sentencing the sentences may be inconsistent and therefore unjust and arbitrary.

Mandatory sentencing regimes not only take power from the courts, but give significant power to Police and Prosecutions.[52] It delivers judicial discretion further down the structure of the Administration of Justice and essentially places greater power in the hands of the Police.[53]

An example of a shifting power to Police is in relation to their discretion to charge and the determination of what charge is prosecuted. As the offence with which an accused is charged becomes a substantial determining factor as to the final sentencing outcome, the prosecutorial discretion to opt for an alternative offence carries greater weight.

Mandatory sentencing laws raise serious concern as to compliance with the separation of powers and international human rights law obligations such as the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), particularly due to their disproportionate impact on Aboriginal people and particularly on Aboriginal young people.[54]

Perceptions of discrimination

On the face of it, mandatory sentencing laws are not overtly discriminatory, however in practice it is clear that mandatory sentencing has a discriminatory effect on Aboriginal people. This is an important point in the context of moving towards a culturally appropriate justice system, as Aboriginal peoples' views are valid. The Australian Government's 'Aboriginal and Torres Strait Islander Health Performance Framework 2014 Report' explores the significant research and the link between racism and mental health including the adverse health consequences on Aboriginal people directly affected by racism. Perceptions of discrimination in the context of the imprisonment rates of Aboriginal people as a group and how the justice system adds to this result feeds into these experiences of racism.

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[52] Jonathon Hunyor, 'Imprison Me Nt: Paperless Arrests and the Rise of Executive Power in the Northern Tereritory' (2015) 8(21) *Indigenous Law Bulletin* 3, 8.
[53] Megan Davis, 'Mandatory sentencing and the myth of the fair-go.' Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Canberra 21-22 June 2001,4.
[54] See, generally: Sarah Pritchard, "International Perspectives on Mandatory Sentencing" (2001) 7(2) *Australian Journal of Human Rights* 51; Diana Henriss-Anderssen, "Mandatory Sentencing: The Failure of the Australian Legal System to Protect the Human Rights of Australians" (2000) 7 *James Cook University Law Review* 23; Tammy Solonec, '"Tough On Crime": Discrimination By Another Name The Legacy Of Mandatory Sentencing In Western Australia.' (2015) *Indigenous Law Bulletin* 24.

According to the Australian Bureau of Statistics, Aboriginal people accounted for 84% of the adult prison population in the Northern Territory in 2016.[55]

Under the initial mandatory sentencing scheme, Aboriginal people were 8.6 times more likely to be imprisoned under mandatory sentencing than non-Aboriginal people.[56] Aboriginal people are already vastly overrepresented in our prisons: they are about 30% of the general population but 84% of the prison population and over 90% of the young people in detention.

The Northern Territory government should abolish all mandatory sentencing provisions as it unreasonably and disproportionately criminalises Aboriginal people. NAAJA strongly recommends that the abolition of mandatory sentencing provisions in the Northern Territory are a priority due to the extremely high rates of Aboriginal and Torres Strait Islander being sent to prison.

The provisions which should be prioritised for review

NAAJA strongly recommends that mandatory sentencing in all circumstances should be abolished. The following provisions should be prioritised for immediate repeal, as they disproportionately affect Aboriginal people:

- Part 3 Division 6 of the Sentencing Act – Aggravated property offences;
- Part 3 Division 6A of the Sentencing Act – Mandatory Imprisonment for violent offences;
- Sections 120 & 121 of the Domestic and Family Violence Act;
- Part 3 Division 6B of the Sentencing Act – Imprisonment for sexual offences;
- Section 53A of the Sentencing Act – Mandatory non parole periods for offences of murder;
- Section 37(3) of the Misuse of Drugs Act.

The Northern Territory governments should also abolish:

- Provisions which remove the availability of suspended sentences (or other sentencing alternatives) for certain classes of offences or at all.
- Provisions which remove the availability of home detention orders for offences that are not suspended wholly.
- Mandatory minimum fines for traffic offences such as drive unregistered section 33 and drive uninsured section 34 of the Traffic Act.

[55] Australian Bureau of Statistics, 'Northern Territory snapshot at 30 June 2016' *Prisoners in Australia, 2016* cat no 4517.0, ABS, Canberra.
[56] Office of Crime Prevention, Northern Territory Government, *Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience* (August 2003), 3.

Availability of community-based sentencing options

State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are readily available, particularly in regional and remote areas.

With incarceration rates of Aboriginal people at its highest, it is crucial for Aboriginal people to be involved in developing a criminal justice system that is more judicious to the cultural and related characteristics of Aboriginal people and breaks the cycle of offending, imprisonment and reoffending. Community based sentencing is a prime opportunity to draw upon the expertise of Community Elders to understand more about why that particular offender offended, so that a tailored plan can be developed to prevent that person from offending again.

An example of a tailored plan comes from an initiative put forward by Gayili Yunupingu Marika of the Yolngu people in Galupa North East Arnhem Land with the aim "to allow for young people to come to Yudu Yudu (a Homeland located 2 hours' drive from Nhulunbuy) as part of their court punishment as a way of doing Yolngu rehabilitation and healing."[57]

Elders can also draw on their expertise of the justice framework employed in their Community to determine an apt penalty for the offender. Northern Territory remote communities have already initiated two types of mechanisms to reduce recidivism – the Community Courts and Law and Cultural Authorities. Unfortunately, the Anglo-Australian legal system has only served to undermine these mechanisms – for example, in 2011 the then Northern Territory Chief Magistrate declared the Community Courts invalid. Subsequently, the NT Attorney General, John Elferink, disbanded the program.

NAAJA supports the development of the Community Courts in a meaningful way, with adequate resourcing and integration across the justice system. The fact the Community Courts were a community-initiated attempt at trying to remedy the situation further emphasises the need for real reform in this area and for a more meaningful response to the present challenges.

Community Courts

NAAJA recommends that Community Courts are provided for on a legislative basis in remote NT communities.

Following the success of Koori Courts in Victoria, Nunga Courts in South Australia, Murri Courts in Queensland and Circle Sentencing in New South Wales, the Northern Territory established a pilot Community Court program in 2005. Community Courts aimed to achieve more sustainable and culturally informed sentencing outcomes, increase understanding of the court process and promote therapeutic outcomes for the offender, victim and community.

In 2007, the *Little Children are Sacred* report recommended the development of 'language-group specific Aboriginal Courts' and discussed the importance of

[57] Statement of Gayili Yunupingu Marika, 1st September 2017.

exploring 'alternative models of sentencing that incorporate Aboriginal notions of justice and rely less on custodial sentences and more on restoring the wellbeing of victims, offenders, families and communities.'[58]

Between 2004 and 2012 Community Courts were convened in 18 communities. At that time, Elders' recommendations were almost always adopted by the magistrate,[59] yet the Community Courts operated through informal guidelines only.

Justice Hillary Hannam told the Royal Commission into Child Protection and Detention in 2017 that Community Courts were intended to be expanded across the Territory in 2008 as part of the government's *Closing the Gap of Indigenous Disadvantage: A Generational Plan of Action*, but funding and resourcing of Community Courts was woefully inadequate:

> There was to be one coordinator still based in Darwin, which was strange because he was meant to service the whole of the Territory and then there were to be four part-time people in communities. They were never recruited and I don't know that there was ever enough money for them anyway and the budget really only covered the magistrate. It didn't ever cover the training of people in communities. It didn't cover the Legal Aid side, the police side, the DPP side or any of that sort of thing. Basically there wasn't enough money.[60]

The initiative was eventually defunded in 2012, despite an evaluation finding that the program allowed communities to 'join forces and partner with the Magistracy of the Northern Territory to deliver and enforce effective sentencing solutions.'[61] Community Courts had the most success hearing youth matters.[62]

Justice Hannam told the Royal Commission that Community Courts had assisted:

> In breaking down the barriers of mistrust between the formal justice system and … Indigenous people, and to actually feel that they were being heard in part of the process of what issues were important for the community and to have that, to – I mean the actual power of sitting side-by-side the magistrate around a table and to be seen in the community as doing that, I think they did have – they did have great potential.[63]

Until they were defunded, Community Courts comprised Elders, offenders, victims (in some cases), the offender's family, the magistrate, prosecutor, Community Court Coordinator and defence lawyer. Elders actively engaged in discussion with the defendant and assisted the magistrate to arrive at the appropriate sentence.

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[58] Exhibit 018.001, Annexure 1 to the Statement of Patricia Anderson, Little Children are Sacred Report, 30 April 2007, recommendations 39 and 74.
[59] Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality' (2013/2014) 17(2) AILR.
[60] Oral evidence of Justice Hilary Hannam, 8 May 2017, 3444:10–16.
[61] Exhibit 337.051, 'Joining Forces: A partnership approach to effective justice –community-driven social controls working side by side with the Magistracy of the Northern Territory', August 2012, 28.
[62] Justice Hilary Hannam, above n 60, 3445:47.
[63] Justice Hilary Hannam, above n 60, 3444:25–30.

Community Courts utilised Aboriginal concepts of justice and dispute resolution by providing Elders with a central role in the sentencing process.[64] They empowered Aboriginal Community Elders by facilitating their input to sentencing through pre-sentencing in the Community Courts. As they were conducted in local language, Community Courts also encouraged a better understanding of the impact of offending by the offenders. It also included a role for the victim in the sentencing process – which stresses the restorative justice element inherent in many Aboriginal legal systems.

Community Court was particularly successful in North Eastern Arnhem Land, where it was developed in partnership with the Yolŋu people to meet the specific needs of their community.

The then Chief Magistrate Jenny Blokland described the process:

> Community courts commenced in Nhulunbuy (North East Arnhem Land) in about 2003/2004 after the respected Yolngu educator, linguist and community worker Raymattja Marika visited the Nhulunbuy Court's Chambers stating that 'down South' there are Koori Courts, Nunga Courts, circle sentencing and that the Yolŋu wanted a 'Yolŋu Court'. Being a new Magistrate at the time, I wasn't sure if I could, with any authenticity, preside in a court called a 'Yolŋu Court'. With other developments occurring in Darwin (our then Chief Magistrate Mr Hugh Bradley came to an agreement with Yilli Rreung Council to trial 'circle sentencing' in Darwin, Nhulunbuy and the Tiwi Islands and make some funds available for the process), we settled on 'Community Court' to describe an informal participatory process. Subsequently there were general public meetings and education sessions involving Dr Kate Auty (formerly a Victorian Magistrate and now in Western Australia) and a number of restorative justice practitioners and educators in allied professional groups. The Community Court possesses some principles referrable to restorative justice but whether the goals of restorative justice are met, depends greatly on the level and extent of participation, the type of case and the level of engagement of all relevant parties.[65]

A challenge facing the Community Courts was the lack of a legislative framework or practice guideline.[66]

NAAJA recommends re-establishing Community Courts as an important way of fostering meaningful justice outcomes for Aboriginal people and communities. Community Courts should be implemented as an alternative justice model (such as diversion and Justice Conferencing) that can be discretionally employed on a case-by-case basis.

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[64] Thalia Anthony and Will Crawford, above n 59, 80.
[65] Jenny Blokland, 'The Northern Territory Experience', (Paper presented at the Australian Institute of Judicial Administration Indigenous Courts Conference, Mildura, 4–7 September 2007), 7.
[66] Justice Hilary Hannam, above n 60, 3445:8–10.

Community Courts must also be linked to effective community-based rehabilitation programs to support Aboriginal people to address the underlying causes of offending.

It is critical that Community Courts are community driven and community owned. In NAAJA's experience, that where Community Courts have been successful, it was almost entirely due to the relationship between the Elders and the particular defendant. This is in contrast to having a set panel of Elders, who may not be appropriate for every referred case where there is no connection with the young person. Cultural Authorities for each community would be able to provide a panel of Elders appropriate to hear particular cases.

Rules that govern Community Court's should consider using Aboriginal language as the main language in the Community Court setting. This enables a dialogue and better engagement between the Elders, other community members, the judiciary and the defendant. Conducting proceedings in English undermines the success of the Community Court. The process to develop Community Courts should be done in consultation with bodies such as NAAJA and the Courts so that past practices[67] and lessons learned can be integrated into the design.

Recommendation

That governments initiate a consultation process with relevant bodies with the view of resourcing and developing a Community Courts like structure.

Resourcing and Integrating Cultural Authorities across the justice system

In preparing this submission, the topic of Cultural Authorities (or Law and Justice groups or Community Justice groups or Elder groups or groups with their own names specific to a region), fits across many of the subject matters raised in the ALRC discussion paper.

The topic of Cultural Authorities relates to:

- 'Bail and remand' as the suggestions put forward by these groups relate to whether a person should be remanded and can provide alternatives to remand.
- 'Sentencing and Aboriginality' as the suggestions go to the core of sentencing principles and the purpose of sentencing.
- 'Programs, community-based orders and alternatives to prison' as the suggestions go to the heart as to why concepts of 'place' and 'culture' can serve an important part in these contexts. That is, individuals either involved in or outside of Cultural Authorities (and at the suggestion of Cultural

[67] For example, in NAAJA's submission to the Youth Justice Review Panel, July 2011 at page 56 to the Review of the Youth Justice System, a NAAJA lawyer observed: at a very base level the youth needs to be engaged in the process, and with his counsel, otherwise very little will be gained. I have sat in Community Courts where a Magistrate gives their opinion and then asks if the panel members agree with their view (which of course they do!). Then the youth is lectured by the Magistrate. There is very little interaction with the youth or the family. Nothing is resolved or proposed as a solution and this approach is largely ineffective.

Authorities) can serve potentially valuable roles in the individuals rehabilitation.

- 'Police accountability' because Police serve an integral role of the justice system and ought to support and value the input of Cultural Authorities across their decisions.[68]
- 'Access to justice' because justice serves a small role if it is to devalue or diminish the potential of Cultural Authorities and the restoration of authority for Elders. Drawing upon Cultural Authorities to assist with legal education also enables key legal concepts to be explained to Aboriginal people in a culturally appropriate and effective way.
- 'Justice reinvestment' because the justice system is very expensive, the outcomes are questionable and restoring and integrating cultural authority across the justice system in many cases can improve the rehabilitative and reintegrative prospects of offenders and particularly for low-level offending.

There is therefore a need to resource Cultural Authorities appropriately and integrate them across aspects of the justice system. This is necessary for the justice system to move away from an ethnocentric foundation to an ethno-relative frame and with an appropriate balance of sharing Aboriginal authority with the authority of key parts of the justice system.

This general direction has been supported by a range of reports and inquiries, including the final Report of the Royal Commission into Aboriginal Deaths in Custody:

> If there is one lesson we can learn from history, it is that solutions imposed from the outside will only create their own problems. The issue of giving back to Aboriginal people the power to control their own lives is therefore central to any strategies which are designed to address these underlying issues.[69]

And further:

> That in the case of discrete or remote communities sentencing authorities consult with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should in appropriate circumstances relate to sentences in individual cases.[70]

The 'Little Children are Sacred' report in 2006 also made comprehensive recommendations as to the urgent need for Cultural Authorities (referred to in the

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[68] For example, see Galiwin'ku Statement and suggestions that Cultural Authorities are consulted in relation to which Police Officers are selected for their island and are resourced and consulted on cross-cultural training for Police Officers responsible for their region.
[69] Commonwealth, *Royal Commission into Aboriginal Deaths in Custody, National Report,* Volume 4, (1991), 8.
[70] Commonwealth, *Royal Commission into Aboriginal Deaths in Custody, National Report,* Volume 5, (1991), Recommendation 104.

report as Community Justice Groups) to be established. It identified the following key roles and features of Community Justice Groups:

> 73. That the government commit to the establishment and ongoing support of Community Justice Groups in all those Aboriginal communities which wish to participate, such groups to be developed following consultation with communities and to have the following role and features:
>
> Role of Community Justice Groups:
>
> a. Set community rules and community sanctions provided they are consistent with Northern Territory law (including rules as to appropriate sexual behaviour by both children and adults)
> b. Present information to courts for sentencing and bail purposes about an accused who is a member of their community and provide information or evidence about Aboriginal law and culture
> c. Be involved in diversionary programs and participate in the supervision of offenders
> d. Assist in any establishment of Aboriginal courts and provide a suitable panel from which Elders could be chosen to sit with the magistrate
> e. Be involved in mediation, conciliation and other forms of dispute resolution
> f. Assist in the development of protocols between the community and Government departments, agencies and NGOs
> g. Act as a conduit for relevant information and programs coming into the community
> h. Assist government departments, agencies and NGOs in developing and administering culturally appropriate local programs and infrastructure for dealing with social and justice issues, particularly child sexual abuse
> i. Any other role that the group deems necessary to deal with social and justice issues affecting the community providing that role is consistent with Northern Territory law.[71]

This recommendation provides sufficient detail and clarity around the proposed role and purpose of Cultural Authorities and serves as an example of recommended reform which has not been progressed.

Recommendation

That governments initiate a consultation process with relevant bodies with the view of resourcing and integrating Cultural Authorities across the justice system. This consultation process must identify and secure the resources going forward in a 5

[71] Northern Territory Government, *Little Children are Sacred - Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse.* (30 April 2007), 30.

year period to appropriately support Cultural Authorities. The consultation process will therefore be a co-design process with the different parts of the justice system, Aboriginal people and the community sector including NAAJA.

Current practice of supporting Cultural Authorities in the Top End of the NT

With limited resources and no dedicated program funding, NAAJA has continued to work with a small number of Cultural Authorities (or Law and Justice groups or Elder groups or groups with their own names specific to a region), to support their aspirations and with community reference letters submitted to the Court for people on the publicly available court list. Our Community Legal Education team has worked with the Makarr Dhuni in Galiwinku, Burnawarra in Maningrida, Ponki Mediators in Wurrumiyanga and Binipilingmirring Djakakining Mala Cultural Authority in Ramingining.

This work is performed by Community Legal Educators who work over and above their standard role and in recognition of the value and importance of this work to the justice system. It is also done in recognition that the senior people involved in the Cultural Authorities often have many other commitments in community and family and volunteer their time for their voices to be heard in the justice system. This is voluntary work and on behalf of the community and behalf of family members.

"It is time for Napaki law and for the Judge to recognise all the people who are working on the ground, working really hard, volunteering our time for free without funding to help our young people and to try and heal them."[72]

It is work done in the context where senior people involved recall a time when they were young and when their own senior members of the community exercised greater agency in the decisions that affected their community. There is a common observation made across communities that during this time there was greater harmony in the system and senior people were able to draw on their intimate knowledge of relationships and processes to ensure greater stability.

In many cases and in discussions about people before the court the Cultural Authorities will have suggestions for how a person before court should be dealt with.

These suggestions range include:

- Alternatives to prison.
- Banishment to outstations and to engage in cultural healing programs.
- Participation in certain ceremonies to learn respect.
- Suggestions of who ought to be involved in working with them.
- Specific activities or referrals for issues relating to their offending behaviour.
- Family or community mediation.
- Prison time.

[72] Gayili Yunupingu Marika, above n 57.

The justice system often does not suit or enable these suggestions. Because of this, engagement often confines itself to character reference letter writing and views of the Cultural Authority in relation to the defendant that may assist a court process. This involves a Community Legal Educator reading out the offender's charges, depending on the circumstances the facts of the case, and details of any previous offending. The group then decides the cases for which they are prepared to write a letter. The references outline the group's knowledge of the offender's background, behaviour in community, views about the offending, the offender's character, and ideas for the offender's rehabilitation and punishment. The letters are provided to the offender's lawyer and then submitted to the court. The referees then make themselves available for cross-examination.

In the Northern Territory, these Cultural Authorities are not funded and have very limited, formal support. Some of these authorities are supported in certain locations (such as the Kurdiji in Lajamanu who are supported from funding generated from royalties and under the auspices of the Central Land Council). NAAJA has also served an important role in this space with limited resources and in limited areas in recognition of the value of their work (and potential value for an expanded and integrated service).

The Galiwin'ku Statement and a proposal for a Cultural Authority

Various publications[73] over time also recognise the potential value of these groups.

The Galiwin'ku Statement[74] is a good example of this. It was the result of 34 meetings between June 2015 and May 2016 with a total of 92 female and male leaders in Galiwin'ku community on Elcho Island. Given the importance of what is conveyed, we have included a significant excerpt below:

> *A Yolŋu Community Authority*
>
> *"Buku-luŋmaranhamirr ga l̲iya-ŋamaŋamayunmirr bukmak yolŋu mala ga dhukarr buma yalalaŋumirriw limurruŋgalaŋaw djamarrkul̲iw. Limurr dhu roŋanmaram limurruŋguwuy ganydjarr marr ga limurr dhu märrmirriyirr."*
>
> "All Yolŋu groups will gather together and determine a way to forge a path for the future of all of our children. We must reclaim our authority so we are genuinely empowered."
>
> The Community of Galiwin'ku propose that a Yolŋu Community Authority be established with female and male representatives of all clans. Addressing family violence requires a genuine sharing of authority, where all family groups on Galiwin'ku are empowered to deal with difficult issues like family violence.

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[73] For example, see Priscilla Collins and Ruth Barson, 'A 'New Era in Corrections' For the Northern Territory?' (2011) 7 *Indigenous Law Bulletin* 22.

[74] In the context of addressing family violence (and as an issue attracting mandatory sentencing and significant costs to the justice system across the NT under the current regime), the Galiwin'ku Statement referenced at above n 11 suggests the resourcing and integrating of a Yolŋu Community Authority as a reform measure.

This group would need to be treated with dignity and respect by Balanda and resourced properly. It is crucial that Yolŋu have the capacity to have real decision-making power over issues affecting our community, including family violence, through such an Authority.

This group would act like the old Village Councils of the past. Every clan would be involved in the Authority so that all family groups are empowered and can have their say. The Yolŋu Community Authority would discuss any issues that arise between people in the community, so that we can talk to the right kin and arrange for education, mediation, de-escalation, discipline or the involvement of other stakeholders such as police.

This group would work closely with the Balanda authorities like police, the school, the clinic etc.

If police have an issue, they can come to the Yolŋu Community Authority in the first instance, and find out who is the right kin to be involved in the issue. Then we can solve the problem together.

Many see the Makarr Dhuni or Makarr Garma group (an independently formed inter-clan Yolŋu governance group) as being the basis for this idea. Some want to start something new. Either way, we all agree that there needs to be a group where Yolŋu leaders have a paid role to do the important work of keeping the community running smoothly in regards to these issues.

This authority would, for example, have an important role in establishing restorative practices within the justice system.

Jail does not teach people how to be a proper Yolŋu. It does not teach us how to act towards our kin and the roles and responsibilities that we must carry to ensure peaceful co-existence. In many instances, jail makes the problems worse, and young people come out and return to causing problems like break-ins, sniffing, getting into fights etc.

The Yolŋu Community Authority could, where possible, oversee alternative punishments for Yolŋu offenders that bring them back to their foundations and remind them that we must all live together. There is big ceremonial business that works to teach young people how to speak and how to act towards each other in a lawful way. Yolŋu return to this ceremony throughout their life. If young people are straying off-track, they need to be pulled back in and supported. Then they will be confident that they can fulfil their role and feel proud to be who they are.

When a man is released from prison, the Yolŋu Community Authority should decide what and from whom he needs to learn. They could, for example, decide to send him to Gunabibi (a very important men's ceremony) so he can learn how to take responsibility for his actions and how to play a mature role in the community through Yolŋu Rom (law).

For this to work, we need Balanda law to take real steps towards formal recognition that Yolŋu have authority and jurisdiction over our land and

people. This cannot be ignored. For too long, Balanda have been pretending that our authority doesn't exist, and this is causing social breakdown.

When Balanda law does not respect Yolŋu law, young people learn not to respect Yolŋu law and start to disrespect each other.

Addressing these problems requires a genuine sharing of authority, where all family groups on Galiwin'ku are empowered to deal with difficult issues like family violence.

Yolŋu leaders are currently doing their best to intervene as per Yolŋu Rom, but this takes a lot of energy and is not sustainable, because many older people are getting tired and sick. Without funding, Yolŋu interventions will be hard to maintain. We fear that if this happens, it will lead to significantly more family violence.

The Galiwin'ku Statement was released in May 2016. We understand there has not been a formal response to the reform measures suggested in the statement. Whilst the understanding is that such suggestions should be channelled through an Aboriginal Justice Agreement, the broad range of recommendations as outlined in the Galiwin'ku Statement could have been implemented by relevant government agencies since its release.

Recommendation

That the content and recommendations of the Galiwin'ku statement, being a result of 34 meetings between June 2015 and May 2016 with a total of 92 female and male leaders in Galiwin'ku community on Elcho Island and as part a culturally appropriate consultation process, are included and considered in the Final Report.

The need for Community Based Sentencing

Section 5(d) of the Sentencing Act states an objective of sentencing is 'to make clear that the community, acting through the court, does not approve of the sort of conduct in which the offender was involved.' When considering the aims of sentencing, community-based sentencing fits the mould in many respects. This objective of the Sentencing Act also lends weight to the notion that the justice system itself must be culturally appropriate and the different parts of the justice system ought to consider cultural competency for this objective to be more meaningful.

By resourcing Cultural Authorities (see page 36), community members become change agents themselves and in the context of representing community views[75] in relation to conduct of the offender.

Community Courts, operated in language, can "convey the wrongfulness of the offence under both Anglo-Australian law (such as aggravated assault as a serious offence) and Aboriginal law (such as the need to honour one's partner and skin group through respectful behaviours)."[76] Even where crimes arguably do not have an

[75] Thalia Anthony and Will Crawford, above n 59.
[76] Ibid, 88.

equivalent to pre-colonial activities as understood by Aboriginal law, such as driving offences, offenders have been held to account from the perspective that they have committed a broad harm to the community and are able to exercise a level of cultural authority in the justice system to represent community views. Mechanisms such as this have greater effect in bringing shame to the offender. This possible practice reflects the aims of sentencing – denunciation, general and specific deterrence and community protection.[77]

For example, an Aboriginal form of a punishment which promotes deterrence is Girri Girri:

> "This ceremony is a discipline and healing ceremony. It is our hot stone ceremony and uses stones that have been heated throughout the day. We go to the ceremony place and see the young boys go through the healing. The hot rock ceremony stops them from doing the wrong things and breaking Yolngu rom and Napaki rom. This ceremony will help in their rehabilitation. This is a traditional ceremony that we have always done to teach young people right from wrong…If the young man breaks this law – there are Yolngu consequences – we call him back to Girri Girri. We call him back again again until he learns... It is a consequence, a way of doing Raypirri. It is like recognising the law."[78]

Gayili Yunupingu Marika states further:

> The program will have both traditional Yolngu and Napaki workshops to guide young people. There will be 5 days of workshops and then when the workshops are finished the young people can sit down on country and live like Yolngu for the rest of the time. It would be like a rolling workshop program that would come to Yudu Yudu every month. We want to try and see our young men walk the country and live a healthy life and learn what it means to be Yolngu.
>
> The main people supervising the program will be my family living at Yudu Yudu and we will invite key stakeholders visiting during the program each day to help in Napaki way, like mental health support, drug and alcohol counselling like Miwatj and Raypirri Rom. These stakeholders will be welcome to come here and run their programs at the Yudu Yudu Healing camp.
>
> During the program, I will be the main contact and will camp for the program at Yudu Yudu during the 5 days but living here will be my husband Bundawa, a senior Marika. Ian and David my children will also live here. My sister and I have strong boys in our family who will be going through the program to with the family. They will be mentoring the other young people coming through the program.

[77] Ibid, 89.
[78] Gayili Yunupingu Marika, above n 57.

> There will also be Yolngu healing and participants who come to Yudu Yudu Healing Camp will go through ceremonies to heal them. There is a special ceremonial ground at Yudu Yudu that has been set up for this.
>
> The Yudu Yudu Healing Camp includes both Napaki and Yolngu learning. It is important that the young people learn about Napaki law and about keeping away from trouble in town. To learn to have respect and to be more careful and understand the consequences when they break Napaki law.[79]

The concept as proposed by Gayili Marika in her statement represents an alternative to prison and as a community based model of sentencing that is not resourced and not supported appropriately. Senior persons such as Ms Marika and across communities have consistently called for community based sentencing options which have not been adequately supported and integrated across the justice system. A pathway to supporting and integrating these options does present itself with challenges and obstacles, however these are not insurmountable and a level of tolerance and continual reflection and improvement is required to move towards such options. A justice system committed to moving away from an ethnocentric position to an ethno-relative position is required for meaningful change in this context.

Community-Based Sentencing Parallels with Western Law: The Open Prison in Ireland

Alternatives to prison are increasingly used in Western legal systems. Parallels can be made with the proposed Yudu Yudu healing camp, and the 'Open Prison' in Ireland. The Nordic countries (generally considered as Denmark, Finland, Iceland, Norway and Sweden) are renowned for their emphasis on open prison facilities, but Ireland is an example of a common law system which is moving towards the Open Prison. Out of the 14 prison facilities in Ireland, two are open prisons and one is classed as 'semi-open'. Moreover the Irish Department of Justice has recommended an increase in the use of open prisons[80] due to the 'particular advantage in the rehabilitation and reintegration of an offender'[81] recognised in the current open prisons compared with closed prisons.

A key distinguishing feature of an open prison compared to a closed prison is in the underpinning philosophy of restorative justice rather than punitive justice. Open prisons encourage inmate development. There are minimal security measures - such as no bars or windows, and prisoners are often given keys to their rooms which gives them increased dignity and a sense of responsibility.[82] Open prisons are noted for contributing to reduced recidivism rates,[83] and they also cost much less to run than a closed prison.[84]

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[79] Ibid.
[80] Department of Justice and Equality, *Strategic Review of Penal Policy: Final Report.* (Dublin, July 2014), 60.
[81] Ibid, 57.
[82] Irish Penal Reform Trust, *Open Prisons in Ireland* (5 April 2017) <http://www.iprt.ie/contents/3093>
[83] For example – in Norway, where open prisons house 38% of all prisoners, there is only a 20% recidivism rate.
[84] Kevin Warner, 'Regimes in Irish Prisons: 'Inhumane' and 'Degrading': An Analysis and the Outline of a Solution,' (2014) 14 *Irish Journal of Applied Social Studies* 1, 13.

During a recent inspection of one of the Irish open prisons, Loughan House, it was characterised as 'a prime example of restorative justice at work in a practical way. The prison authorities and the prisoners are justly proud of their achievements.'[85]

The report continued:

> Loughan House Open Centre has a pivotal place in the Irish Prison System. It is clear from this Report that the ethos is one of openness, of addressing challenges that prisoners will face when they leave prison, of challenging the attitudes of prisoners by education, work training, physical wellbeing and with a strong emphasis on the prisoners becoming involved in external works and initiatives.[86]

This work includes projects for overseas charities and local community development. There are also culturally appropriate drug counselling programs provided.[87]

There is scope for culturally appropriate options which integrate Aboriginal involvement and cultural authority meaningfully and link back to local context and relationships. The proposed Yudu Yudu healing camp is an example of such an initiative. Outstations and homelands across the Northern Territory supported by relevant custodians and senior persons provide similar examples.

And whilst the current mechanisms instil a sense of dignity and mutual trust which contributes to lower recidivism rates, more culturally appropriate options have the capacity to enhance these objectives and more closely align with models across Western legal systems which value local input.

Opportunities such as supporting the Yudu Yudu healing camp serve as workable solutions for reducing recidivism and encouraging rehabilitation by fostering dignity and respect among participants and facilitators due to its open nature on Yolngu land. Open prisons also "allow prisoners to make gradual steps into society and reduce the likelihood of institutionalisation by providing an environment somewhat similar to that on the outside."[88] This can be applied to Yudu Yudu – reengaging offenders with what their culture is like outside of prison, will increase the likelihood of their engagement with culture when they leave prison.

Short sentences

Question 4–2 Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result? Question 4–3 If short sentences were to be abolished, what should be the threshold (eg, three months; six months)? Question 4–4 Should there be any pre-conditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including in regional and remote areas?

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[85] Michael Reilly, "A Report on an Inspection of Loughan House Open Centre by the Inspector of Prisons' *Office of Inspector of Prisons* (3 July 2014), 5.
[86] Ibid, 23.
[87] Ibid, 23.
[88] Irish Penal Reform Trust, above n 82.

NAAJA supports a review of the current sentencing and bail laws that have led to unjust outcomes for Aboriginal people. A significant number of Aboriginal persons in custody are either on remand pending the final outcome of their case or serving short sentences that are not mandatory sentencing related. In the Northern Territory, the median length of prison sentences are much shorter for Aboriginal people than non-Aboriginal people.[89]

A major issue with such sentencing is that it is an all too ready consequence for Aboriginal people for minor summary offences or public offences of disorderly behaviour, objectionable words or public drunkenness. The repetition of such charging and appearances results in increased criminal priors and imprisonment as the default option. The immediate consequences of such sentencing are;

- Disruption of life – being sentenced to a short term of imprisonment interrupts employment, family commitments, and causes people to miss important cultural events like funerals and ceremonies.
- Economic costs, particularly with regard to remote communities – short sentences put undue strain on the criminal justice system, the cost of flying offenders from remote communities out to prison to serve sentences that can be as short as a day.
- The inability to access prison based programs and the increased risk of re-offending and recidivism.

Minimum period of Imprisonment

NAAJA supports a minimum period of imprisonment in the Northern Territory in accordance with the sentencing laws of Western Australia where actual imprisonment commences at sentences of 6 months and 1 day.[90]

With the introduction of such legislation of fixing a stated sentence period of 6 months and 1 day there must also be a substantial increase in the use of community based options and therapeutic courts to deal with issues of substance abuse of alcohol and drugs, disability and mental illness. The focus needs to shift to breaking the cycle and addressing the systemic disadvantage causing crime and incarceration.

A major risk with the imposition of fixed imprisonment and what occurred in Western Australia was the factor of 'sentence creep' where sentences which ordinarily would be in the terms of days, weeks and months increased to sentences of 6 months and 1 day imprisonment. In order to protect against such incursions of inflated sentences there must be clear provisions for alternatives to prison to be resourced and supported appropriately and clear provisions for imprisonment as a last result.

[89] Northern Territory Department of Correctional Services, above n 23.
[90] *Sentencing Act 1994 (WA)* s 86.

Recommendation

That a minimum period of imprisonment of 6 months and 1 day is implemented with clear provisions for alternatives to prison to be resourced and supported appropriately and clear provisions for imprisonment as a last result

Fines and driver licences

Many of NAAJA's clients have accumulated significant debts, including additional enforcement fees, and now find themselves the subject of enforcement action. NAAJA is concerned that the current approach entrenches disadvantage, does not achieve any positive outcome for the community or victims and creates a significant obstacle for Aboriginal people seeking to get their lives back on track.

NAAJA has raised in its 2010 Issues Paper '*Reducing the Unintended Impact of Fines on Aboriginal People in the Northern Territory'* the great difficulty of Aboriginal people in knowing how to deal with fines with the need for interpreters at Court and in navigating with the Fines Recovery and Penalty Unit in making payment instalments.

Another obstacle which relates to paying back fines are the penalties imposed in relation the Community Development Program and the widespread incidences of people with no access to any form of cash income. This is set out in NAAJA's June 2017 submission to the Senate Finance and Public Administration Committees in relation to 'the appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)'.

The link between fines and incarceration is referred to in NAAJA's 2017 submission to the 'Expert Panel, Alcohol Policies and Legislation Review'[91]:

> The legislative and policy framework regulating driving and discouraging drink driving includes a range of mandatory penalties such as disqualification of licences, fines, alcohol ignition locks and the sanction of imprisonment. Collectively, these penalties are aimed at putting in place a range of disincentives proportionate to the circumstances to discourage people from drink-driving and ensuring a safe community and reduction of vehicle related deaths and major trauma.
>
> Those these policy objectives reflect the entire communities wishes Aboriginal and non-Aboriginal that there is the need for greater consideration by policy makers for those persons who are more disadvantaged by reason of geographical distances, isolation, poverty and the lack of services, programs and public transport. Our desire is to see a disincentive structure that suits all persons in being adaptive and responsive to local circumstances. .
>
> *Case study*

[91] NAAJA, submission to the Expert Panel, Alcohol Policies and Legislation Review, *Northern Territory Alcohol Policies and Legislation Review* (July 20127), 21.

In one community and as part of a criminal court matter NAAJA's legal team became aware of the process concerning Drink Driving Education (DDE) and the steps required to address these matters. In one community, DDE is available at a cost of $600 which must be paid in order for an individual to access this education in the community. The certificate attained from the course is required to access a Driver's licence. The cost for the same course in Darwin is $300. To participate in the DDE a person must have paid a minimum in relation to outstanding fines, and measures in relation to fines that are connected to suspended licences may also need to be resolved before obtaining a licence again. Full payment is required before the course is available. Supported loans are often not accessible. There can be a lot of confusion in the community about who is required to participate in the DDE, and information is not easily accessible. There is an alternative to paying fines and individuals can be considered for community work. However, if the person does not perform this work the next step is prison. The system of bush courts and associated, limited resources means it is very difficult to assist people to navigate this process and to ensure people are properly informed of the requirements and engage in a pathway to completing DDE and obtaining a licence.

Many people in this community are on low income and some people have no income at all. In June 2017 NAAJA made a submission to the Senate Finance and Public Administration Committees in relation to the Community Development Programme (CDP), noting the extensive feedback from communities of more people disengaging from CDP (and any form of receiving a cash payment) and the hurdles and obstacles relating to maintaining CDP. This means many people simply have no income and if they have fines or are required to participate in a DDE course they have no ability to pay these fines or access these courses. It's likely a broad range of people simply give up.

Recommendation

That the arrangements for accessing driver licences are reviewed with the view of ensuring accessibility issues are prioritised and are responsive and adapted to the circumstances of people in regional and remote areas.

Mandated fines

The Sentencing Act under Part 3 Division reposes the Court with the power to fine a person and is to ascertain if the person has means to pay the fine.[92] Notwithstanding that it has been a long established principle that a person should not be fined where

[92] *Sentencing Act 1995 (NT)* s 17.

there is no capacity to do so,[93] however in the Northern Territory there are still fines imposed when it is a mandated penalty.[94]

Consequences for non-payment

The *Fines and Penalty (Recovery) Act* provides a whole range of consequences for the non-payment of fines, including suspension of drivers licence, seizure of motor vehicles, increased default penalties, garnishing of wages, community work orders and imprisonment for the non-completion of community work orders. The Northern Territory Government also provides a 'naming and shaming' list of fine defaulters whose debt is in excess of $10,000.

Recommendation

That the naming and shaming practice in relation to fines is repealed.

Fines and the justice system

The Sentencing Act provides under section 26(2) a power whereby a fine at the time of sentencing may be served as a term of imprisonment in default after a period of 28 days.

The benefits of such a provision is that an offender after serving that sentence may not have any ensuing debt arising from that sentence. The shortfall is that the court can only deal with the fines associated with offences at the time of offending and not address an offender total outstanding fines that may amount in the thousands or tens of thousands of dollar as it is *functus officio* in respect of those previous criminal matters.

Where an Aboriginal person is in prison with a substantial debt this can be a major obstacle to their reintegration in the community and rehabilitation with the inability to have a driver's licence, leading to restriction of work opportunities, social contact and compliance with supervisory orders of the Court with respect to reporting.

Section 61 of the *Victims of Crime Assistance Act (NT)* imposes $150 on a person who has been found guilty of an offence. By contrast to the position in relation to fines. A levy is mandatory and must be imposed separately for each offence. There is no consideration to waive a levy or consider the financial circumstances of a person.

Accumulated debt reinforces levels of poverty and inequality which is in itself associated in general terms with increased likelihood of contact with the criminal justice system.[95]

It is also of significant concern to NAAJA of the overuse of infringement notices against Aboriginal people in respect of Traffic Infringements and Summary Infringements.

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[93] *R v Rahme* (1989) 43 A Crim R 81.
[94] See sections 33 and 34 of the *Traffic Act (NT)* and also imposition of victims' levies.
[95] Melanie Schwartz, Chris Cunneen, 'From Crisis to Crime: The escalation of Civil and Family Law Issues to Criminal Matters in Aboriginal Communities in NSW' (2009) *Indigenous Law Bulletin* 18.

Recommendation

That the courts are provided with full discretion in relation to offender's dealing with unpaid fines and that alternatives to prison where an offender must also give back to the community are prioritised.

Justice Procedure Offences – Breach of Community Based Offences

Attaching criminal sanctions to breach of bail is inappropriate, and disproportionately affects Aboriginal people. The relevant criteria for consideration of bail fails to consider Aboriginal family and living systems of care by multiple relations, highly mobile families and where homes can be in multiple communities.

In May 2011, an offence of breach of bail was introduced in the Northern Territory, which has led to increased criminalisation without improving compliance with bail.

Mobility and remoteness have a greater impact on Aboriginal people, particularly considering the context of remote living. Many important cultural obligations such as ceremony, 'sorry business' and law seasons will see travel and attendance for prolonged durations.

There is greater risk for Aboriginal people who are homeless in either obtaining bail or at risk of breaching bail. The negative consequences that flow from that can impact how their criminal matter progresses. Clients who have multiple breach of bail convictions can be adversely affected with greater likelihood of remaining on remand and consequential lack of therapeutic and rehabilitative options.

Provision of culturally appropriate alternative accommodation would go a long way to improving bail outcomes where homelessness, mobility and remoteness are an issue. However, there is no bail accommodation in the Northern Territory. The recent NT Government initiatives to establish supported bail accommodation options are an example of initial steps in the right direction.

Recommendation

That culturally appropriate accommodation options are made available for bail purposes and as an alternative to prison.

Alcohol

The approach to alcohol policy and legislation in the Northern Territory has had a significant impact on Aboriginal Territorians. Over many years the gradual response has been a law and order response with an increase in the harshness of penalties and greater reach and impact on Aboriginal people. Whilst this reflects the crisis of alcohol abuse and associated harm, there is a widespread perception that the impact has been to Aboriginal people as distinct to other parts of a broader system connected to alcohol abuse.

We need to be up-front and recognise the scale of our problem and the need for a substantive response, including reform that limits the influence of the alcohol industry

and holds the alcohol industry to account *as much as it does* for Aboriginal people. It will require empowering Aboriginal people across the legislative and policy response in a meaningful way and ensuring culturally competent therapeutic and health based responses where there are interventions related to alcohol abuse, including interventions in the criminal justice system. With pathways tailored to individual circumstances and need, we can work towards a response more suited and adapted to the regional and local context.

We recommend that government develops a dedicated program of supporting community-led and driven initiatives that relate to healing by investing in and resourcing cultural authority and local initiatives. We recommend that these initiatives are linked by way of referral pathways by courts and other services and mechanisms so that interventions into alcohol abuse are provided with options as an alternative to more prisons and protective custody.

Question 8–2: In what ways do banned drinkers registers or alcohol mandatory treatment programs affect alcohol-related offending within Aboriginal and Torres Strait Islander communities? What negative impacts, if any, flow from such programs?

We reiterate the recommendations of our previous submission to the Expert Panel, Alcohol Polices and Legislation Review dated July 2017, as follows:

- We recommend a formal, independent evaluation is put in place as part of the Banned Drinker's Register (BDR) so that it can be assessed as part of an evidence-based approach.
- We recommend the BDR along with other intervention measures are linked to properly resourced and culturally responsive pathways of therapeutic support.
- We recommend government initiate a consultation process to recommend the removal of individual permits for 'general and restricted areas' under the Liquor Act.
- We recommend Alcohol Protection Orders in its present form are abolished.
- We note since our July 2017 submission that the AMT Act has been abolished. We recommend that should any future civil commitment scheme is introduced that it is in line with international best practice, which means that any mandatory interventions are short term and are only enacted in emergency situations where there is an imminent risk of harm to the person.

Banned Drinkers Registers

We support, from a general and principled perspective, the recent reintroduction of the Banned Drinkers Register (BDR). We acknowledge the pathways to be placed on the BDR are significantly different to the previous scheme in the Northern Territory and we are observing the consequences (including any unintended consequences) of these arrangements.

Particularly, we note there is a level of political resistance to the idea of every person furnishing identification to be scanned for the purpose of implementing the BDR and we acknowledge and respect the view that the crisis of alcohol abuse necessitates

such a response. We note there are opportunities to strengthen the model and make it more effective based on a review of previous practices.

We make the following observations:

- The need for an independent and comprehensive evaluation – we understand that there was no independent and formal evaluation of the BDR's efficacy prior to its abolishment in 2012. We acknowledge there were positive indications of its success in reducing alcohol related harm in Central Australia and Alice Springs.[96] We are concerned that with the reintroduction of the BDR there are matters such as obtaining accurate, benchmark data that may be critical to an effective evaluation, and that the opportunity for such an evaluation is passing.

Recommendation

We recommend a formal, independent evaluation is put in place as part of the BDR so that it can be assessed as part of an evidence-based approach.

- Uniform implementation of the BDR – the Northern Territory is culturally, geographically and linguistically diverse. Policy solutions that are successful in one region may not work in another, or may require an adjustment to other policy areas to ensure they can work effectively and can complement existing practices seen by a broad consensus of a community to be working. It is important that the reintroduction of the BDR does not dismantle successful interventions already in place. As policy interventions are most successful when they are designed in genuine consultation with local communities,[97] reforms need to be implemented keeping in mind the need to work alongside Aboriginal communities.
- Offence provisions relating to supply of alcohol to persons on the BDR – we understand the reinstated BDR will make it a criminal offence to knowingly supply alcohol to a person already on the BDR. This shift is related to the government's efforts to 'address weaknesses in the old version by better addressing the problem of secondary supply and cutting red tape'.[98] NAAJA is concerned that these offence provisions will disproportionately impact Aboriginal people who may face difficulties in relation to their cultural obligations to family members, and who have less understanding of their legal rights or consequences for breaching the law in this way. The current offence provisions will increase Aboriginal peoples' interaction with the criminal justice system, and will circumvent the therapeutic purpose of the BDR.

Recommendation

[96] National Drug Research Institute, *Alcohol Control Measures: Central Australia and Alice Springs* (Curtin University, 2013), 11.
[97] Mandy Wilson, Anna Stearne, Dennis Gray and Sherry Saggers, 'The Harmful use of alcohol amongst Indigenous Australians' (2010) *Australian Indigenous Health Reviews* 4, 9.
[98] Michael Gunner, 'A Better BDR – Tackling Secondary Supply and Cutting Red Tape' *Northern Territory Government Newsroom* (online), 11 April 2017 < http://newsroom.nt.gov.au/mediaRelease/23052>.

We recommend alternative measures to a criminal offence provision are considered for actions where a person knowingly supplies alcohol to a person already on the BDR and in circumstances where the person providing the alcohol is not doing so to make a profit.

We support the importance of ensuring therapeutic pathways are available and integrated into any justice model. When the BDR was introduced in 2011, it aimed to reduce the supply of and demand for alcohol. Demand reduction measures included the establishment of the Alcohol and Other Drugs Tribunal, which referred banned drinkers to alcohol treatment options. The Substance Misuse Assessment and Referral for Treatment (SMART) Court, which diverted offenders from the criminal justice system and into treatment, was also introduced. Banning Alcohol and Drugs Treatment Order aimed to increase peoples' access to counselling or interventions for misuse of a substance. We are concerned the Alcohol Harm Reduction Bill 2017 does not provide the same referral pathways for alcohol misusers. A person in receipt of a Banned Drinker Order issued by a police officer does not have to be referred or assessed for any treatment options. NAAJA strongly believes that the BDR should focus not only on reducing the supply of alcohol, but supporting people to access treatment options including expanding and tailoring treatment options to demand and local and regional circumstances.

Recommendation

We recommend the BDR along with other intervention measures are linked to properly resourced and culturally responsive pathways of therapeutic support.

Female Offenders

Question 9–1 What reforms to laws and legal frameworks are required to strengthen diversionary options and improve criminal justice processes for Aboriginal and Torres Strait Islander female defendants and offenders?

NAAJA welcomes the consideration given to female offenders in the Discussion Paper. The criminal justice system ought to take into consideration the particular intersection of being both female and Aboriginal, and the disadvantages associated with both of these positions.

We endorse the following recommendations submitted by NATSILS:

- At every stage of the criminal justice process, from interactions with police to courtroom sentencing, diversionary options in the Northern Territory should be prioritised for Aboriginal and Torres Strait Islander women.
- Reform laws and legal frameworks to recognise the complex issues specific to Aboriginal and Torres Strat Islander women.
- Community based prevention and intervention support programs should be widely available and culturally appropriate.
- Amend bail laws that disproportionately affect Aboriginal and Torres Strait Islander women.

- Establish family violence courts. Despite a large number of family law matters in the Northern Territory, there is no dedicated court for hearing these matters only.
- Family dispute mediation services, through Aboriginal-led restorative justice practices.
- Increase investment in prison programs like Throughcare.
- Establish a mandatory custody notification service.

As identified in the Discussion Paper, the complex needs of Aboriginal and Torres Strait Islander women are, but not limited to:

- Parenting responsibilities and intergenerational trauma;
- Family violence and sexual abuse;
- Mental illness, disability and substance abuse;
- Poverty;
- Homelessness and lack of stable accommodation.

A combination of these characteristics as well as being an Aboriginal woman increases the likelihood of incarceration.

Diversionary options

In the Northern Territory, female prison facilities are grossly overcrowded. A recent report found that the new Darwin Correctional Precinct, only open in 2016, was already at 3 times the appropriate capacity for women.[99] This needs to be addressed immediately.

There are a number of steps that could be taken to address this:

- Police diversions – we advocate for amendments to offences for which Aboriginal women are most commonly imprisoned such that a lower, non-imprisonment penalty is introduced. For example, we advocate for the removal of imprisonment as a result of fine default as it disproportionately affects Aboriginal women. Fine default should not result in imprisonment as it criminalises low socio-economic status and disrupts employment opportunities. Incarceration for minor offences may also result in the removal of children. Children of prisoners face a high chance of ending up in foster care, with many later end up in custody themselves. Incarceration of Aboriginal women leading to separation from their children is a manifestation of past government policies which have served to marginalise Aboriginal women and control every aspect of their lives.
- Better targeted Throughcare programs and culturally appropriate accommodation options – current Throughcare programs are limited due to

[99] Felicity James, 'Separate NT women's prisons needed to address 'appalling' conditions: lawyer,' *ABC News* (online), 11 March 2017 < http://www.abc.net.au/news/2017-03-10/separate-nt-womens-prisons-needed-to-address-overcrowding/8344672>.

the perceived small population of female Aboriginal offenders, however if we reframe this and consider the fact that it is a large percentage of Aboriginal women who are incarcerated instead of being with their children and in community, this highlights the gravity and need for funding for programs to help them transition back into community. In 2011, 67% of Aboriginal and Torres Strait Islander women in prison had been incarcerated previously, while almost half this number of non-Aboriginal women had a history of incarceration.[100] Given the high rates of recidivism of Aboriginal and Torres Strait Islander women it is clear that the rehabilitation programs available are currently inadequate for their particular needs.

- Police diversion – we support increased police diversions for Aboriginal women, aimed at diverting them from formalised contact with the courts and addressing the underlying factors of their offending. Numerous studies have found a disparity in the use of diversionary options for young Aboriginal offenders which is resulting in lower rates of police initiated diversion for this population.[101]

Over-policing has also led to increased rates of Aboriginal women in prison. In 2011, the Australian Bureau of Statistics recorded that Aboriginal women were imprisoned at 5.4 times the rate of non-Aboriginal women.[102] Sisters Inside note the following ramifications of over-policing:

> The effects of over policing does not reduce crime in these communities or make them safer to live in, rather it creates a net-widening effect. There are many low level crimes that are often undetected and untargeted in white communities, however net-widening often results in these crimes being detected and charged within Aboriginal and Torres Strait Islander communities. In addition, increased interaction with the Police increases the risk that charges will become escalated with an individual also being charged with resisting arrest and assaulting Police.[103]

- Prison facilities – as well as overcrowding, facilities need to be culturally appropriate. For example, current procedures for visitations require strip searches, which does not acknowledge that Aboriginal and Torres Strait Islander women in prison are oftentimes survivors of sexual abuse and domestic violence and there is the potential for strip searches to re-traumatise survivors of such violence. This can sometimes cause Aboriginal and Torres

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[100] Australian Bureau of Statistics 2011, 'Prisoner Characteristics: States and Territories' *Prisoners in Australia, 2011*, cat no. 4517.0, ABS, Canberra.
[101] See for example: Allard et al, 'Police diversion of young offenders and Indigenous over-representation' *AIC Trends and issues in crime and Criminal Justice* (Australian Institute of Criminology, 2010), and Cunneen & Luke, 'Discretionary decisions in Juvenile Justice and the criminalisation of Indigenous young people. (1995) 14 *Youth Studies Australia* 4, 28 – 46.
[102] Lorana Bartels, 'Painting the Picture of Indigenous Women in Custody in Australia.' (2012) 12 *QUT Law & Justice Journal* 2, 6.
[103] Debbie Kilroy, 'The over-representation of Aboriginal and Torres Strait Islander women in prison' *The Stringer* (online), April 2013, 3 <http://www.sistersinside.com.au/media/Papers/The%20Stringer%20April%202013%20Over%20Representation%20of%20Aboriginal%20Women%20in%20Prison.pdf>.

Strait Islander women to withdraw from outside contact, which in turn causes them to disconnect with culture and can contribute to negative mental health issues.[104] Furthermore, the inflexible leave policies in Northern Territory prisons mean that many Aboriginal women miss important cultural events such as extended family funerals, which can risk compounding existing trauma.

- Family courts and mediation – in the Northern Territory, there are no court services specific for hearing family law matters. Noting that Aboriginal women are frequently the victims of family violence and may be stuck in a cycle between victimisation and offending[105] we propose this is an opportunity to employ Aboriginal-based restorative justice models focused on healing, reconnection with culture and behaviour changing. Family mediation in New Zealand has found to be successful, yet there appears to be a lack of consideration of the importance of similar models in the Northern Territory.

Unfortunately, as identified in the Discussion Paper, statistics particular to Aboriginal and Torres Strait Islander women are difficult to source. For example, the Australian Bureau of Statistics does not provide data on the most common offence of Female Aboriginal offenders,[106] subsuming Aboriginal women into the Aboriginal offender category or the Female offender category without recording the intersection. The steady increase in the rate of Female Aboriginal incarceration emphasises this is no longer a population which can be ignored or subsumed under either "Aboriginal offender" policy or "Female offender" policy. NAAJA supports Sisters Inside's proposition that the unique needs of Aboriginal women who are involved in the criminal justice system must be provided for in a culturally appropriate and gender specific way.[107]

Aboriginal Justice Agreements

We agree with the former Attorney-General of the Victorian Government Mr Rob Hulls (who has regularly visited the Northern Territory and has provided valuable advice), that the Aboriginal Justice Agreements process in the Northern Territory presents as an 'opportunity to lead the nation.'[108] Mr Hulls states that 'once it's born out of the Aboriginal community in real consultation with the government, real and long lasting changes can be made.'[109]

In acknowledging a theme also underpinning this submission, Mr Hull said that 'no governments can sit back and allow Aboriginal Australians to be incarcerated at the rates they are without actually realising that the justice system needs to change and

[104] Elizabeth Grant and Sarah Paddick, 'Aboriginal Women in the Australian Prison System' *Right Now* (online), September 2014 <http://rightnow.org.au/opinion-3/aboriginal-women-in-the-australian-prison-system/>.
[105] Debbie Kilroy, above n 103, 4.
[106] Australian Bureau of Statistics, 'Prisoner characteristics, States and territories (Tables 13 to 34)' *Prisoners in Australia, 2016* cat no 4517.0, ABS, Canberra. Noted upon review of raw excel data.
[107] Debbie Kilroy, above n 103, 10.
[108] Georgia Hitch, 'The Northern Territory has the opportunity to "lead the nation" with its new Aboriginal Justice Unit, a former Victorian attorney-general has said' *ABC News* (online), 5 July 2017 <http://www.abc.net.au/news/2017-07-05/new-aboriginal-justice-unit-in-nt/8682322>.
[109] Ibid.

needs to be more culturally sensitive.'[110] This statement goes to the core of this submission.

A key risk of any Aboriginal Justice Agreement (AJA) is that the term 'agreement' is interpreted broadly and does not sufficiently connect with the common aspirations and views of Aboriginal peoples. The proposed agreement in the Northern Territory is for the Territory as its own jurisdiction, however there is significant diversity amongst Aboriginal groups, and there is a need for comprehensive and systemic change. Whilst this factor is considered with a broad consultation process, there will be challenges if the outcomes of the agreement do not properly filter down to the ground level and empower Aboriginal Territorians in their common views. There is also a risk of new consultations for an AJA as an added layer to many previous consultations, and a long standing period of significant reform across government policy impacting Aboriginal Territorians (this results in a view of consultation fatigue, or of policy not being responsive to the regular views put forward by Aboriginal Territorians).

Notwithstanding these risks, NAAJA has observed closely the process to develop an AJA in the Territory and provides significant support to the process. The work of realising an agreement which substantially connects and meaningfully aligns with Aboriginal peoples' views deserves (and requires) broad support.

Our observations of long-held AJAs in other jurisdictions, and the concurrent increase in Aboriginal and Torres Strait Islander imprisonment rates (particularly with the Aboriginal and Torres Strait Islander female population) in those jurisdictions, tells us that even with agreements purported to tackle the achievable targets of lowering incarceration rates by resourcing culturally appropriate alternatives to prison, are failing. This is a cause of concern, and even more so in the Northern Territory with the fragile nature of our political and policy-setting context which can result in rapid and significant shifts in policy direction and within a short time period, and particularly with cuts in funding to important programs and where cuts can have medium to long-term effects.

NAAJA supports the ALRC discussion paper proposal to support AJAs. In particular, we note and appreciate the description of AJAs in each jurisdiction and a summary of key components, as the governance and accountability mechanisms differ across each State and Territory.

Question 10–1 Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?

NAAJA supports the development of justice targets at a Commonwealth Government level. By enabling mechanisms for Commonwealth and Northern Territory government relationships to report on, and be accountable to, a set of data will ensure a more transparent and informed public policy design response to what is a crisis in Aboriginal affairs. This data, and associated targets, can form part of a genuine, evidence-based approach to policy. It can also be potentially necessary in

[110] Ibid.

ensuring any level of funding provided by either the Commonwealth or the Northern Territory government (and from the Commonwealth to the Northern Territory government) is accountable.

Clear and reportable targets, and the collection and the public dissemination of data, can be significantly important to the work of making progress in the complex areas of Aboriginal incarceration.

For the process to be meaningful, there must be genuine engagement by the Commonwealth Government with Aboriginal people and in consultation with experts in justice services and public policy design generally. A specialised workshop or forum in consultation with groups such as NATSILS and relevant research bodies will enable the development of appropriate data sets and justice targets. This data will likely align with the social determinants of incarceration. The data will likely also relate to how the various parts of the justice system – the legal and court parts, the Police, Correctional Services, Throughcare and community services – are responsive to the specific and unique needs to Aboriginal peoples. The group will also be in a position to identify gaps in data and suggest ways to improve data collection. This mechanism may also consider the proposals set out in this submission and in relation to cultural competency and assessing a culturally appropriate justice system.

Whilst there is a focus on formal evaluation mechanisms for community funded programs, there is no similar requirement on State and Territory bodies with funding and oversight for the different parts of the justice system.

Recommendation

That the Commonwealth Government commit to justice targets as part of the review of the Closing the Gap policy and set in process a consultation mechanism to develop a relevant data set for the development and review of evidence-based approaches to justice.

Access to Justice Issues

Legal education

We support the issues raised in the Discussion Paper in relation to interpreter issues and the need to expand interpreter services in areas where they are required. The importance of people understanding what is happening in the court setting and in the justice system generally cannot be overstated. An adequate level of understanding of the justice system can be a challenge for many people who speak only English. For Aboriginal people where English is a second, third or fourth language, and given the stark differences between the structure and content of English language to Aboriginal languages, the challenges are multiplied and require a responsive and adapted system of response.

NAAJA considers the importance of access to justice and in the context of understanding from two perspectives:

- Linking Aboriginal interpreters into the justice system; and
- The provision of Legal Education.

Linking Aboriginal interpreters into the justice system

In our submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Standing Committee of Attorneys General (SCAG) dated 27 October 2011 NAAJA submitted:

> It is our experience that many Aboriginal people do not understand the legal system, or the specific legal orders they are subjected to. This is because English is used as the primary language and interpreters are either unavailable, or underutilised. The consequences of this failure to include Aboriginal language considerations into the legal system are adverse and far reaching.
>
> NAAJA strongly supports more funding for the Aboriginal Interpreter Service, and better use of Aboriginal language interpreters. We consider it essential that service providers receive cross-cultural training in how to best work with Aboriginal interpreters.
>
> …
>
> Aboriginal people are better able to participate in, understand, and comply with, court processes and outcomes when they understand the proceedings. Aboriginal people in the NT are largely alienated by court processes when they occur in English, without any interpretation.
>
> Good court systems should promote understanding of both process and outcome. It is our submission that this level of proficient understand can only occur if courts are either conducted as Community Courts in local Aboriginal languages, or Aboriginal interpreters are appropriately used.
>
> NAAJA submits that there is significant benefit to be gleaned from giving attention and recognition to Indigenous languages in the context of the criminal justice system. Those benefits include:
>
> - Better compliance with court orders
> - Increased participation in court processes
> - Increased community and cultural empowerment; and
> - Better understanding of, and respect for, court reasoning and outcomes.
>
> NAAJA also submits that these benefits could lead to the realisation of broader objectives such as safer communities and a reduction in recidivism.

> For justice to be effective, it must engage rather than alienate Aboriginal people.[111]

These points remain relevant today.

In recent years, in our general experience, whilst there have been some improvements to the use and provision of interpreters this has been gradual and ad-hoc. We have not seen the seismic shift required in the proper resourcing and integration of interpreters across the legal system and government service-delivery that we view as necessary and overdue.

Value of interpreters

As part of the application for legal aid process NAAJA assesses whether a client requires an interpreter. This assessment is done based on asking the client using plain English. Cross-cultural communication training is compulsory for all NAAJA employees. Training is also provided by the Aboriginal Interpreter Service (AIS). The content of training provides advice about assessing whether a client requires an interpreter including advice in the context when a question is asked using plain English.

In our experience interpreters engaged through the AIS have been instrumental in effective communications with relevant clients. Put simply, our work cannot take place without the use of interpreters.

Interpreters often have an established rapport with the client as they come from the same language group and this helps the lawyer to develop trust and a sense of openness and assuredness with the client. (In many cases the interpreter is also related to the client and this presents with its own issues.) The client can feel that their voice is being heard by the lawyer. In meetings between the lawyer and the client an interpreter is able to explore and understand the intent of a question in circumstances where the plain interpretation of a question can potentially lead to a deficient response. An interpreter is also better able to understand the context and realities in the complex intercultural space at play (and in a space made more complex by the technicalities of the legal system). Where NAAJA has worked with interpreters the quality of their work as interpreters is obvious and apparent and goes to the heart of providing an effective service. Interpreters are invaluable to the process.

In the context of Aboriginal people accessing government services and across the range of government agencies, there is a power dynamic where a government authority has significant power and authority in relation to decisions affecting the client (or customer). The potential for miscommunication and other adverse outcomes as a result of not having an interpreter can be significant. The underlying assumptions in terms of understanding information, rights, responsibilities, appeal rights, access to services, expectations and certain outcomes is not the same for the

[111] NAAJA, submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Standing Committee of Attorneys General *Inquiry into Language Learning in Indigenous Communities* (27 October 2011).

context where an interpreter is identified and relevant to the circumstances (and is often not used). In these circumstances the value of an interpreter is just as important as other relationships where the power dynamic is not as pertinent.

For interpreters there are also the challenges of the back-lash from the community as a direct result of perceptions of their complicity in court work. We are aware of information second-hand that an interpreter had their car damaged by an individual connected to a court proceeding where the interpreter was involved in a work role. We understand back-lash from family is an issue for interpreters and, whilst interpreters have scope to choose work they are involved in, this can clash with the demands placed on the need for the AIS to provide a quality service. A justice system that is not culturally appropriate and is not responsive and adapted to the local context is a contributing factor to the pressures placed on interpreters.

When AMT was in force, there was irregular use of interpreters used by the providers of alcohol mandatory treatment. Any sessions regarding alcohol rehabilitation and therapeutic treatment stemming from the Banned Drinkers Register must utilise interpreters in order to be successful. It is unclear how an affected person can meaningfully participate in and benefit from therapeutic treatment if they do not understand, partially or completely, the language that it is being delivered in.

NAAJA understands that interpreters are sometimes obtained in order to respond to medical issues.

NT Police

NAAJA is concerned that there is no interpreter involvement across areas the justice system including in police diversion, service of Domestic Violence Orders, treatment programs and at the time of granting Police bail and in the explanation of conditions.

In a staff survey, an employee observed that 'very, very rarely (no sighted cases) has an interpreter been used by the court staff in explaining bonds/warrants of imprisonment to persons in custody in Katherine'.

Department of Correctional Services

In our direct observations and experiences there are significant gaps between the need and the use of interpreters in the Department of Correctional Services setting. This is for both custodial and community correction's contexts.

In the custodial environment, treatment programs are conducted in group and individual settings. We understand treatment programs are designed to enable prisoners to address their offending behaviour through a tailored program suited to their offence and history. Treatment programs include programs for violent and sex offenders and varying types of programs (intensive and moderate). There are also a range of non-treatment programs including the Safe, Sober, Strong program.

Most programs are delivered in the group setting. We understand group settings are arranged for prisoners who speak multiple languages by placing prisoners into

smaller clusters or alongside each other in circumstances where they can assist in language and interpretation. Prisoners assist each other in participating in the program. Interpreters are not used. Our concerns are that there is a need to use interpreters across the range of treatment and other programs particularly given the well-known rates of cognitive and mental health challenges presented in the prison population.

In a staff survey, an employee observed:

> 'None of the prisoners have reports with the use of interpreters in relation to programs. This has caused real issues for some of my clients like [name redacted] and [name redacted] who do the sex offender program but then get released and reoffend. When I asked those clients if they understood any of it, they both said no. Both clients relied heavily on an interpreter throughout my dealings with them'.

The Correctional Services section of the Department of Attorney General and Justice website states 'The Indigenous Consultative Committee has been formed with Correctional Services staff and community members to oversee the cultural appropriateness and responsiveness of these programs to ensure that they meet the specific needs of Indigenous participants'.[112] The absence of interpreters in delivering programs means the programs are not culturally appropriate.

Further, given the high rates of prison population including Aboriginal people from regional and remote areas there is a strong case that interpreters ought to be based permanently at the Darwin Correctional Precinct and the Alice Springs Correctional Precinct (and available as required in youth detention). Prisoners require access to a range of information about prison processes and in the absence of interpreters, and in circumstances where the booking and involvement of interpreters can be a challenge, there is a need for a permanent presence. This is particularly so for major languages where there is a relatively large prison population. This direction also reflects the need to broaden the training and employment of interpreters across the board so as to not impact on the core business of the Aboriginal Interpreter Service and their reliance on a limited supply of interpreters.

In a staff survey an employee observed:

> [Another] issue relates to the use of interpreters by corrections when assessing a client for suitability for supervision or preparing PSRs. It is readily apparent from the incomprehensible direct quotes that are often included in these reports and attributed to our clients that the clients have no idea what the corrections officer is saying to them. This will often count against them in terms of their suitability for supervision or in the PSR when an assessment is made of their remorse or lack thereof. In my experience of seeing corrections officers going into the cells to interview clients, never once have I seen them utilise an interpreter. I would expect if they did, they would note this in their report. This is despite the fact that we have used interpreters for the exact

[112] Department of Attorney General and Justice, Correctional Services, *Rehabilitation and Indigenous initiatives* <https://justice.nt.gov.au/correctional-services/programs/rehabilitation-and-indigenous-initiatives>.

> same clients that corrections are speaking with. It becomes a significant issue also when the client is released and is expected to comply with conditions that they do not understand, which have not been explained to them in language.

Opportunities to enhance and improve the provision and accessibility of interpreters

Data and computer systems

We are of the view that for government agencies involving Aboriginal people who may require the use of an interpreter it is important that there are mechanisms in place to monitor, test and evaluate data and outcomes in relation to the use of interpreters.

Agencies that have contact with the criminal justice system have sophisticated data and computer systems to manage services and obligations. For example, the Department of Correctional Services has the IOMS system and the NT Police have the PROMIS system. Similarly, other government agencies including Centrelink, Territory Housing, Health and Department of Children and Families make decisions significantly impacting on Aboriginal Territorians and use sophisticated data and computer systems.

These systems are custom built to suit the role and purpose of each government function. They are highly customized to the individual in society. Questions ought to be raised about how these systems identify, monitor and collect information in relation to interpreter use or the need to use an interpreter. How do these systems know if a person requires an interpreter? How do these systems know if a person will likely understand what they are being? These are some of the questions that are relevant to understanding how the government agencies respond (or don't respond) to the language needs of Aboriginal Territorians.

Further, through government reports and agency annual reports there are opportunities to share aggregate data and information around the use of interpreters or the language needs of Aboriginal Territorians.

Recommendation

That agencies involved in the justice system provide data in relation to interactions where the use of an interpreter is required and when the use of an interpreter is used.

Training of interpreters

We understand there have been improvements in the training made available with the aim of more interpreters. Significant resources and a level of remuneration reflecting the value, resource and capability of interpreters is important.

In a staff survey an employee observed:

> The quantum of interpreters needs to be increased for a more complete coverage in the legal system. There may be a person in the cells who speaks a language of which AIS has one interpreter, if that person is unavailable then

the whole process comes to a standstill. Often when out on community we will come across in excess of 5-10 people who already have the language skills to fluently interpret across two languages. Efforts to recruit and train them need to be doubled.

…

[another employee] Accessibility: - Katherine town: even with notice sometimes it has not been possible to book a Kriol interpreter, which is the most common language. There is even less chance of booking an interpreter for a language like Warlpiri - Communities that Katherine region serves: we book an interpreter for each bush trip, however, I have never had an interpreter on a trip. The only time is when the court interpreter assisted us to announce civil clinic on a loudspeaker - It is not possible to book an interpreter at the last minute. [An identified area of need is] funding for interpreters other than for criminal court i.e. appointments, telephone calls.

Appropriate level of remuneration of interpreters

We are of the view that interpreters provide significant value to services and the community. The following factors are relevant to their value:

- Many Western developed knowledge systems including attendance at university and the accumulation of knowledge and capabilities lead to different professions e.g. medical, legal, psychology, social work, etc. Interpreters have capabilities because they have developed knowledge and practice skills across two very different and complex set of cultures, practices and languages. It is difficult to navigate between these systems and it can be an exhausting exercise for interpreters to perform the mental work required for effective interpreting. Although a formal university degree is not a qualification the level of expertise and capability ought to be at the least remunerated in line with professional streams.

- Without the use of interpreters services in some circumstances services can fail to fulfil their core purpose. Significant resources can be used in this process.

- The lack of focus on using interpreters can permeate amongst the workplace culture of services and this perceived reduced value can have a negative effect.

Recommendation

That interpreters are remunerated at a Professional level stream.

That interpreters are provided with the option to be employed on a permanent basis.

Legal Education

NAAJA provides a Community Legal Education (CLE) service with the primary focus of Night Patrol and also to a broad range of groups in communities and urban areas across the Top End. Our experience over many years has confirmed that one-off or short-term CLE programs will not be effective for Aboriginal people with limited English, literacy and numeracy skills, who are often unfamiliar with Western legal concepts and terminology, and have markedly different world views.

NAAJA has a unique approach to CLE in that we employ a Participatory Action Research approach to all of our CLE work in remote communities. Urban and remote legal education sessions are informed by principles of adult and Aboriginal learning styles and two-way learning exchanges.

CLE in Remote Communities

The vast majority of our clients live in regional and remote parts of the Top End. For most, English is their third or fourth language. Our approach in remote communities entails working collaboratively with community members in identifying local needs, delivering CLE tailored to these needs and designing and delivering CLE with the purpose of building capacity. This approach promotes high participation rates, enhances community safety outcomes by taking a community development approach to legal education and training that empowers the communities with which we work. This enables community members to become agents of change in their local community and active participants in the justice system.

CLE team members who work at the frontline and coal face of legal education have particular insight into the complexities and challenges of how a justice system interfaces with Aboriginal people where there are significant differences in languages and foundational knowledge to inform understanding. A justice system that is not culturally appropriate does not take into account these differences in an adequate way, and with the resources and supports required for meaningful engagement.

A combination of low levels of literacy, different clan and language groupings, (for the vast majority of our clients outside of Darwin and Katherine, English is not spoken as a first language), lack of familiarity with Western legal concepts and terminology and the markedly different world views of many of remote community residents, requires an intensive approach to education that involves the building of foundational knowledge of the mainstream western legal system before meaningfully and collaboratively developing site-specific, Aboriginal-led and solutions-based projects.

The challenges of legal education are set out in a number of reports and inquiries, including as a guiding principle in the 'Little Children are Sacred' report:

> Principle Two: Take language and cultural "world view" seriously
>
> > English is a very tricky language for us.
> >
> > Anindilyakwa Elder
>
> The Inquiry has formed the view that much of the failure to successfully address the dysfunction in Aboriginal communities has its roots in the

“language barrier” and the “cultural gap”. The Inquiry was told that the “language barrier” is the initial barrier to genuine communication. It reduces the ability to both express ideas and to understand the ideas of others. Many Aboriginal people only speak limited English as a second, third or fourth language.

> The difficulty is that because of the language and cultural barriers many people never get an opportunity to express their knowledge or their ideas. The impression is given to them that they are idiots and that people outside of their community are more qualified to deal with their problems. As a result of this general attitude people become apathetic and take no interest in dealing with the problems.
>
> Alyawerre Elder

The Inquiry was told that the “cultural gap” exists independently of the ability to speak the English language and exists due to a failure to understand the “world view” or concepts of the other culture. Further, that it takes language experts a lot of time and hard work to translate concepts but that the level of understanding gained is worth the effort.

It was a common theme in consultations that many Aboriginal people did not understand the mainstream law and many mainstream concepts. It appeared to the Inquiry in its consultations that some Aboriginal communities were unclear on what child sexual abuse was. However, the following comment was also noted that:

> by discussing child sexual abuse in English you take it out of the hands of the people and into the white forum. By doing this the people will respond to what the white person wants rather than speaking truthfully. These types of issues need to be dealt with a bit more innovatively and intelligently utilising language. People need to feel like they own the story and then they will speak truthfully about it.
>
> Alyawerre Elder

The Inquiry was also told that many youth today have an erroneous belief that the wider Australian society is lawless. They believe that:

> it is acting within “white fella” law when being abusive. A thinking that began with the systemic undermining of our own law with the colonization of Australia and the atrocities that followed. It is now reinforced by TV, movies, pornography and drugs brought into our community from wider Australia.
>
> Rev. Djiniyini Gondarra press release, 19 May 2006

It became clear to the Inquiry during its consultations that in many of the communities visited, the “language barrier” and the “cultural gap” was greater in the younger generation. The Inquiry was told that this problem is increasing, when intuitively it might have been assumed the gap was decreasing.

As well as many Aboriginal people not understanding the "mainstream" world view, it was a common theme of the Inquiry's consultations that many Aboriginal people thought that the "mainstream" world failed to understand their "world view". One old man told the Inquiry that the government:

> sees Aboriginal people from the front but fails to see the full background of law behind them.

This failure to understand the Aboriginal "world view" resulted in many culturally inappropriate practices and programs that failed to achieve the desired outcomes.

The endemic confusion and lack of understanding about the mainstream world was reported to be preventing many Aboriginal people from being able to effectively contribute to solving problems such as child sexual abuse. The "catch-22" is that genuine solutions must be community driven.

One of the first steps in genuine reform, therefore, is empowering Aboriginal people with conceptual knowledge.

> People need to be empowered with knowledge and once that knowledge reaches critical mass, then they will be in a position to themselves create the structures that are needed to service their communities.
>
> Language expert

It is vital that the government adopt this principle of reform and ensure ongoing strategies for dealing with both the "language barrier" and "cultural gap". This is a crucial step towards seriously tackling issues such as the sexual abuse of children.[113]

The significant changes in laws and policies over the last decade in the Northern Territory including the Intervention and its various manifestations has created a greater need for more effective legal education. For example, research in 2008 found that over 95% of 200 Yolngu surveyed were 'unable to correctly identify the meaning of the 30 commonly used English legal terms which are commonly used in the legal context in the NT'.[114]

Many of the challenges exist also because English words and concepts used across the justice system don't have an immediate and equivalent interpretation in an Aboriginal language. The effect of this cannot be understated.

The Law Council of Australia's Consultation Paper 'Aboriginal and Torres Strait Islander People' August 2017 refers to the 'untranslatable' nature of interpretation in the legal setting, and refers to the Productivity Commission, Access to Justice Arrangements report at page 763:

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[113] Northern Territory Government, above n 71, 50 – 51.
[114] Aboriginal Resources and Development Services (Inc), *An Absence of Mutual Respect* (2008), <http://www.ards.com.au/print/Absence_of_Mutual_Respect-FINAL.pdf>.

> A very able court interpreter has given evidence on many occasions in South Australian courts that the words of the police caution are untranslatable into Pitjantjatjara containing as they do propositions put in the alternative and abstract concepts such as 'rights' which are divorced from immediate experience.[115]

Even with the use of a suitable interpreter, there needs to be the time, space and context for a meaningful dialogue and exchange to develop an adequate level of understanding. The constraints of a busy and under-resourced court and supporting services often cannot provide for the time, space and context required.

This situation is described in the Galiwin'ku Statement

> *"Balanda romdja dhuwal mulkuru, Bäyŋu yolŋu djalkiri romŋur. Yolŋu djäl napurr dhu marŋgithirr gandaw ga gakalgu romgu balandaw ga nhaltjan djulam balandawal djalkiri romŋur ga ŋorra."*
>
> "Balanda law is foreign and strange. It doesn't exist in a Yolŋu foundation. We need to learn what it is, how it works and how it fits in a Balanda foundation."
>
> Balanda law is so different from how we do things and it is really hard to understand. It doesn't fit with the way we know the world to work. Everyone is very confused.
>
> For example, court is an incredibly difficult process for Yolŋu. We don't understand the roles of all the Balanda law people, because our law people are organised very differently. To us, it feels like we have no say. It seems like a dictatorship type of law that we can't influence. The confusion is increased because the process is rushed. Rather than explaining what's happening throughout the whole process, interpreters only have time to translate the sentence.
>
> We want to continue working with Balanda so we can understand the way they do justice. We need to be able to sit with people in the days before and after court and talk in Yolŋu Matha (Yolŋu language) about what will happen and what we can expect. We need people to explain what is happening during the court process. We need to understand the deeper story of why Balanda do it the way they do, so it becomes meaningful for us. If this foreign law is going to claim jurisdiction in our community, we need to know at the very least how it works. [116]

Case study "Community Legal Education in Ramangi̱ni̱ŋ: *Ŋamakuli'ŋu Dhärukku ga Romgu Malaŋuw Bulu Marŋgithirr* Learning about the Law and Legal Language*"* Project:

Recently NAAJA's community legal education team worked together with ARDS on a NT Public Purpose Trust funded pilot project based around targeted legal education at bush court in Ramingining titled "Community Legal Education in Ramangi̱ni̱ŋ: *Ŋamakuli'ŋu Dhärukku ga Romgu Malaŋuw Bulu Marŋgithirr* Learning about the Law

[115] Law Council of Australia, above n 2.
[116] David Suttle and Yirri̱ni̱ba Dhurrkay (eds), above n 12, 16.

and Legal Language*"*. The project model involved intensive engagement before, during and after court using Yolŋu Matha language speakers and plain English to facilitate workshops to explain key legal concepts underpinning the criminal justice system. To our knowledge, this type of targeted cross-cultural communication in the law and justice space has not happened in this way before in East Arnhem Land.

The intended purpose of this project was threefold: to improve court attendance and compliance with court orders; to decrease contact between Yolŋu and the criminal justice system and ultimately to reduce the rate of Aboriginal incarceration.

Our findings as a result of this project demonstrated a wide gap in understanding of the court process and discovered a significant depth of confusion, anxiety and concern with the criminal justice system amongst participants, defendants, their families and community elders.

Key observations of participants included:

> "*I am feeling this in my heart for those young men (who have court) I feel very emotional. What if people are illiterate, what if people can't speak English? People don't understand this process*
>
> Senior Elder's observation during Field Trip 2 Pre-Court Workshop
>
> Another participant observed:
>
> *"the Balanda court process is an invisible path that people are meant to know but don't".*
>
> *"You see this piece of paper (the court list)? It is like a spear, when we showed him the court list it was like we were showing him the spear that was going to kill him. We weren't going to kill him, but that court list is like the spear that was going to get him".*
>
> Senior Yolngu elder's observation during pre-court engagement with community.

Whilst legal education programs are currently funded to some extent there is a significant need to increase funding and support for these programs within the justice system to meet the huge need for legal education and community development programs across the Northern Territory. In addition, there is a need for a specific program accompanying the bush circuit to communities to work directly with defendants and their families similar to the model used in the recent NAAJA and ARDS project "Community Legal Education in Ramangiṉiŋ: *Ŋamakuli'ŋu Dhärukku ga Romgu Malaŋuw Bulu Marŋgithirr* Learning about the Law and Legal Language*"*.

Recommendation

That the bush court circuit provide for a culturally appropriate Community Legal Education program providing intensive and targeted legal education to persons on

the court list and their families. A culturally appropriate program will enable Legal Educators working alongside Cultural Brokers to facilitate education.

Mental Health and Disability

Indefinite Detention

Part IIA of the *Criminal Code Act (NT)* (Part IIA) provides for 'Mental impairment and unfitness to be tried'. The provisions apply to proceedings before the Supreme Court[117] as well as committal proceedings.[118]

Division 2 deals with mental impairment.[119] Section 43C codifies the defence of mental impairment, along established lines: the defence is made out if, as a consequence of a mental impairment, the accused did not know the nature and quality of their conduct, did not know the conduct was wrong or was not able to control their actions. A finding of not guilty because of mental impairment can be agreed by the parties to the prosecution,[120] although not in situations where a person is unfit to stand trial (such circumstances requiring that a special hearing be conducted).

Where a person is found not guilty because of mental impairment, the court must declare that they are liable to supervision under Division 5 or order that they be released unconditionally.[121]

Division 3 provides for unfitness to stand trial. Unfitness is defined by reference to the ability of a person to understand the charges and proceedings, and to instruct their counsel.[122] Division 3 provides for the procedures by which the question of whether a person is fit to stand trial is to be resolved. The question of fitness is generally to be determined by an investigation conducted by a jury,[123] but can be dispensed with by the court if the parties to the prosecution agree that the accused person is unfit to stand trial.[124]

If a person is found to be unfit to stand trial, the Judge must determine whether there is a reasonable prospect that the person might, within 12 months, regain the necessary capacity to stand trial.[125] If there is such reasonable prospect, the matter

[117] 'Court' is defined as the Supreme Court as per *Criminal Code Act (NT)* s 43A. Note that the Northern Territory does not have an intermediate District or County Court.
[118] Committals are dealt with by *Criminal Code Act (NT)* s 43M. In summary matters, issues of mental illness or mental disturbance are dealt with under the *Mental Health and Related Services Act* (NT). Where a person is unfit for trial in relation to summary matters, the common law applies and a stay can be sought: see *Pioch v Lauder* (1976) 27 FLR 79.
[119] 'Mental impairment' is defined in the *Criminal Code Act* (NT) as including 'senility, intellectual disability, mental illness, brain damage and involuntary intoxication': s 43A.
[120] *Criminal Code Act (NT)* s 43H.
[121] Ibid, s 43I(2).
[122] Ibid, s 43J.
[123] Ibid, ss 43L, 43P.
[124] Ibid, s 43T(1).
[125] Ibid, s 43R(1).

is to be adjourned for up to 12 months.[126] Otherwise, the court is to hold a 'special hearing' within 3 months.[127]

Special hearings

Division 4 provides for special hearings for accused persons found not fit to stand trial. At a special hearing, a jury determines (through a process that is conducted as nearly as possible as if it were a criminal trial)[128] whether an accused person:

(a) is not guilty of the offence he or she is charged with;

(b) is not guilty of the offence he or she is charged with because of his or her mental impairment; or

(c) committed the offence he or she is charged with or an offence available as an alternative to the offence charged.[129]

As with persons found not guilty because of mental impairment under Division 2, where a person is found not guilty because of mental impairment at a special hearing, the court must declare that they are liable to supervision under Division 5 or order that they be released unconditionally.[130]

Similarly, if the jury finds that the accused person committed the offence charged (or an available alternative), the court must declare that they are liable to supervision under Division 5 or order that they be released unconditionally.[131]

Supervision orders

Division 5 deals with supervision orders. Supervision orders may be custodial or non-custodial and subject to such conditions as the court considers appropriate.[132]

An overriding principle in determining whether to make a supervision order is that 'restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community.'[133]

The court is required to have regard to the following matters:

(a) whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;

(b) the need to protect people from danger;

(c) the nature of the mental impairment, condition or disability;

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[126] Ibid, s 43R(4). Further adjournments are possible up to a total of 12 months (s 43R(12)) if there remains a real and substantial question as to the accused person's fitness to stand trial: s 43R(9)(b).
[127] Ibid, ss 43R(3), (9)(b)
[128] Ibid, s 43W(1).
[129] Ibid, s 43V.
[130] Ibid, s 43X(2).
[131] Ibid, s 43X(3).
[132] Ibid, s 43ZA(1).
[133] Ibid, s 43ZM.

(d) the relationship between the mental impairment, condition or disability and the offending conduct;

(e) whether there are adequate resources available for the treatment and support of the supervised person in the community;

(f) whether the accused person or supervised person is complying or is likely to comply with the conditions of the supervision order;

(g) any other matters the court considers relevant.

Persons subject to a custodial order must be committed to custody in a prison or another 'appropriate place'.[134]

A court must not commit a person to prison under a supervision order unless it is satisfied that there is no practicable alternative given the circumstances of the person.[135] However, a court cannot commit a person to an 'appropriate place' other than a prison (or provide for a person to receive treatment or services in an 'appropriate place') unless the court has received a certificate from the CEO (Department of Health) stating that facilities or services are available in that place for the custody, care or treatment of the person.[136]

Supervision orders are for an indefinite term,[137] but are subject to review,[138] reporting at least annually[139] and can be varied or revoked.[140] When a supervision order is made, a 'term' is set at the end of which a major review is conducted. This nominal term is equivalent to the sentence of imprisonment that would have been appropriate if the person was found guilty.[141]

There is a presumption in favour of release at the end of the nominal term. On completing a major review, the court must release a supervised person unconditionally 'unless the court considers that the safety of the supervised person or the public will or is likely to be seriously at risk if the supervised person is released.'[142]

However, the court must not make an order releasing a supervised person from custody or significantly reducing the supervision to which they are subject unless the court has considered a range of reports, including 2 reports from a psychiatrist or other expert and reports on the views of the victim or next of kin.[143] The Court must also be satisfied that the victim (or next of kin), the supervised person's next of kin and, if the person is a member of an Aboriginal community, that community has been given reasonable notice of the proceedings.[144]

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[134] Ibid, s 43ZA(1)(a).
[135] Ibid, s 43ZA(2).
[136] Ibid, s 43ZA(3).
[137] Ibid, s 43ZC.
[138] Ibid, s 43ZG provides for a major review and s 43ZH provides for periodic review.
[139] Ibid, s 43ZK.
[140] Ibid, s 43ZD deals with variation or revocation.
[141] Ibid, s 43ZG.
[142] Ibid, s 43ZG(6).
[143] Ibid, s 43ZN(2)(a).
[144] Ibid, s 43ZN(2)(b).

Early intervention/diagnosis

In early 2016, the Darwin Local Court introduced a mental health list, currently presided over by the Chief Judge. The initiative has no formal legislative basis. All cases in which issues of mental impairment or fitness for trial are raised are being referred to the list so that they can be given special consideration and oversight.

An important part of the initiative is the creation of a court-based mental health clinician who can provide initial screening and assessment. This has already proven to be helpful for practitioners and their clients, by providing an early indication of possible mental health or cognitive impairment issues and allowing for cases to be more efficiently progressed (for example, by providing a preliminary view that a person may or may not have a defence of mental impairment available).

NAAJA would like to see this initiative expanded and properly resourced. While NAAJA strongly supports the initiative, we are not able to dedicate any additional resources to it – for example to employ or train specialist lawyers who can oversee these matters. Our funding is not only inadequate to allow us to do this, but is failing to keep up with demand for our services and increased costs.

Supported decision-making

NAAJA is pleased to be partnering with Melbourne University in the 'Unfitness to Plead Project', designed to explore the role that might be played by a support worker who can assist a person with a cognitive impairment to engage with their lawyer and the legal system, with a view to avoiding a finding of unfitness to be tried.

NAAJA provides lawyers to assist people with criminal matters and has a number of lawyers with significant expertise in dealing with clients who have mental impairments/ cognitive disabilities. But it is not the role of the lawyer to provide social advocacy support and the lack of this advocacy often leaves the lawyer with very few options for how to progress the case.

It is NAAJA's recommendation that legal services are funded with support workers to meet the needs of Aboriginal people with mental disabilities and impairments.

'Custody' means 'jail'

Although the Part IIA of the Criminal Code allows for a person to be subject to custodial supervision order in a place other than a prison, there is, in practice, no other option. The Northern Territory lacks a forensic mental health facility.

When the new Darwin Correctional Precinct was designed and construction commenced, it was to include a Mental Health Behavioural Management Facility specifically intended to accommodate people on custodial supervision orders.

Custody by default

Part IIA of the *Criminal Code* makes it clear that incarceration must be a last resort: a court must not commit a person to prison under a supervision order unless it is

satisfied that there is no practicable alternative given the circumstances of the person.[145]

However, it is NAAJA's experience that a lack of suitable alternatives to prison – for example, supported accommodation for people with high needs – leaves courts with little option but to remand a person in custody, or commit them to prison under a supervision order.

It is also often the case that a person and their family have very few other options that they can put forward. They may already lack suitable housing (overcrowding in remote communities is the rule rather than the exception) and live in a remote community with limited access to support services. Providing a realistic and safe alternative to prison can be impossible. Much therefore falls to agencies within the Department of Health to develop and implement an effective plan.

Delays and lengthy remands

In NAAJA's experience, people who are unfit to be tried or likely to be found not guilty by reason of mental impairment, can spend excessive periods detained in prison on remand for lack of an appropriate alternative.

In part this reflects a general lack of support for people with disability and their families: as noted above, a person's contact with the criminal justice system often comes after a period of time in which a person or their family have struggled with the challenges of the person's cognitive impairment or mental illness. When the person finally engages in conduct that requires police action, they may face detention on remand for lack of a safe alternative that can provide adequate support for a person's high needs.

In addition, when a person is on remand, having yet to be found 'liable to supervision' by a Court, it can be very difficult to engage resources that would allow for the person's release on bail. There are a number of reasons for this.

One is the lack of resources available generally, particularly in remote communities. This starts with overcrowded housing which can make it unsafe for a person to return to the house in which they have been living because of the presence of many young children. It extends to the lack of support services that would assist a person's family to care for them, make sure they take medication if required, and provide supports such as activities and respite that can be critical.

Another issue is the absence of pro-active guardians who could seek to mobilise whatever resources might be available. For Aboriginal people with family members as guardians, those family members are likely to have limited experience engaging pro-actively with service providers and may be ill-equipped to co-ordinate the services that a person may require. For Aboriginal people who come under the guardianship of the Office of the Public Guardian, it is NAAJA's experience that guardians simply lack the capacity to play this role.

[145] Ibid, s 43ZA(2).

It is also important to note where responsibility lies within government agencies. While a person is remanded in custody or imprisoned, they are the primary responsibility of the Department of Justice. Once a person is on a non-custodial supervision order, they are the primary responsibility of the Department of Health. For a person to have a realistic chance to get bail or move from custodial to non-custodial supervision order, it can often fall largely to the Department of Health to develop and implement an appropriate plan. However, should such plans not be developed or implemented in a timely way, the person remains the responsibility of the Department of Justice.

Co-ordination of services

In NAAJA's experience, effective service provision in the Northern Territory for people with cognitive impairment and mental illness is sometimes impeded by disagreement between the relevant Department of Health agencies – the Office of Disability and Top End Mental Health Services – as to which agency should take responsibility for a client.

Where a client has multiple diagnoses (for example, a brain injury as well as a mental illness), disputes over which is the predominant disability and therefore which agency should take the primary role in the person's care can be frustrating for those trying to get access to a proper level of care for a person. Such disputes also undermine effective and pro-active case management.

For example, in one of NAAJA's cases, a client with severe cognitive impairments who was already subject to an adult guardianship order, was referred to the Disability Co-ordination Team in the Office of Disability for assessment. That assessment concluded that his 'cognitive deficits were unable to be attributed to a disability or other factors' and the client was referred back to Top End Mental Health Services. He was subsequently found unfit to be tried by reason of his cognitive impairment. The charge against him was ultimately withdrawn, by which time he had spent many months in prison on remand.

Lack of culturally appropriate responses

NAAJA has been very concerned about the lack of culturally appropriate responses to Aboriginal people with cognitive or psychiatric impairment.

NAAJA is not aware of any significant resources having been developed to assist mental health practitioners in the Northern Territory to engage with Aboriginal people, particularly those from remote communities. This is an area in which the Northern Territory could and should be taking a lead – for example, by developing Northern Territory Aboriginal-specific cognitive tests; or culturally relevant materials for psycho-education. It is also important for such materials to be developed given the very high staff turnover experienced by many professions in the Northern Territory, including health.

NAAJA has long struggled to have interpreters used when providing disability and mental health services to Aboriginal clients for whom English is not a first language. We are pleased that there appears to have been an increased recognition, at least amongst some practitioners, that use of an interpreter should not only be considered

a basic right of clients, but is also critical in ensuring effective communication, overcoming cultural barriers and building trust.

Scope for legislative change to reduce indefinite detention

In NAAJA's view, the priority for any legislative change should be the introduction of 'limiting terms', in place of indefinite supervision orders. The length any term should be dictated by the need to protect the community, balanced against the principle that a person's liberty should be subject to the minimum restriction necessary. The system should more clearly place an onus on government to justify continuing any restriction on a person's liberty.

NAAJA suggests that a practical effect of such a change may be to place greater pressure on government departments to make suitable arrangements to support a person in the community by or before the end of any order. In many cases, NAAJA has been concerned about a lack of timely case planning and management. One consequence of a failure to plan for a person's release is that there may be no safe option for a person's release for a court to consider an order, resulting in the order simply continuing with the person detained.

Police Accountability

Police accountability is an integral part of reflecting on whether the justice system is culturally appropriate and is responsive and adapted to the local context.

Police accountability can be considered in the legal and policy context and in considering the relationships and structure of oversight bodies. In understanding and assessing cultural appropriateness, the views of Aboriginal people who come into contact with Police are essential. From an evidence-based perspective, seeking to understand these views in a comprehensive way is difficult where there are no formal mechanisms of consultation and evaluation.

Our direct legal experience on behalf of clients and in the work of police accountability is categorised into the following:

1. Two month period to file a statement of claim against the Police;
2. Decriminalisation of infringement debts and Paperless arrest;
3. Decriminalisation of Public Drunkenness;
4. Efficacy of the Body Warn Camera scheme and other footage of Police conduct;
5. Ombudsman Complaints process.

These categories are dealt with separately below.

Two month period to file a statement of claim against the Police

Subsection 162(1) of the Police Administration Act provides that both:

1. An action (meaning civil action); and

2. Prosecution;

must be commenced within 2 months of the act or omission complained of.

The effect of this provision is that the amount of potential claims and prosecutions against Police are limited. Regardless of intent, this affords additional protections against the Police that would not otherwise be provided to other citizens. We are not aware of a legitimate policy reason why civil action is limited in such a way, but it is particularly concerning that Police who commit criminal offences are provided such protections.

In practice, 2 months is an incredibly short period of time for vulnerable persons (such as our clients) to come forward, provide their complaint to the Ombudsman and/or the Police, evidence to be gathered and then criminal proceedings commenced. From NAAJA's perspective, it would be difficult to provide a decent Ombudsman complaint (one that is complete enough to be fully considered) within a two month period. Further, many of the persons who might have had criminal acts perpetrated against them would be incarcerated, adding further barriers to having a criminal act of a police officer prosecuted.

This is particularly exacerbated for persons who come from remote Aboriginal communities where issues such as travel times to community, weather restrictions on roads, language barriers, lack of reception, lack of phones and obtaining litigation guardians act as barriers for commencing prosecutions or civil actions.

These issues are demonstrated by the following case studies:

> The civil section of NAAJA received a referral from the criminal section of NAAJA regarding a client who was a minor that had allegedly been assaulted while in police custody. The civil solicitors were only able to obtain detailed instructions from the client when we attended his community 9 days later and only one day prior to the expiration of the 2 month time limit to file a statement of claim (SOC). The SOC was filed 6 days out of time as the civil section had to draft the SOC, obtain approval, obtain a litigation guardian and file the SOC as soon as we returned from bush trip. The remote location of the client caused significant difficulty in communicating the assault to lawyers and lawyers being able to file the SOC within two months.
>
> Another recent client was an elderly gentleman from a community an hour out of Katherine who was referred to NAAJA in relation to a complaint regarding excessive use of force. He has limited English skills, is transient between a few communities, and extremely difficult to speak with on the telephone. NAAJA's only way of proceeding in this matter was to make multiple lengthy trips to his community within a short space of time in order to comply with the 2 month time limit, which deviated our resources from other important case work.

Additionally, the 2 month time limit in commencing proceedings often requires legal representatives to file SOC's without having the opportunity to have obtained the full range of supporting evidence, such as Police records. This can lead to

circumstances where some proceedings would not have been commenced if there was sufficient time to obtain all of the relevant evidence.

Further, with a civil claim, not only are there two months to file a statement, but the Local Court (Civil Procedure) Rules have been recently amend to require plaintiffs to serve the statement of claims (and therefore begin the proceedings in earnest) within 6 months (until recently it was 12 months). This by itself is not unreasonable as it applies to all statements of claim (regardless of whether they are against the Police) and is reasonably consistent with the requirements to serve in other jurisdictions. It is the combination of the requirement to file within 2 months and serve within 6 that means there is a very truncated opportunity for Plaintiffs to gather all the necessary evidence, receive advice and enter into reasonable settlement negations of the matter. Not only does this place the Plaintiff at a disadvantage in preparing their case, but it also means that both parties begin to incur costs at the point of service, six months before they usually would.

Recommendation

That section 162 (1) of the Police Administration Act is repealed or amended in consultation with Aboriginal organisations.

Decriminalisation of infringement debts and Paperless arrest

Under the *Fines and Penalties (Recovery) Act* it is possible for a person to be incarcerated up to three months due to defaulting on an infringement notice.

Recently Territory Housing and the Police in Katherine have made a conscious effort to ensure that the Police issue infringement notices for offences that occur on public housing premises (in their role as a Police officer) and for failing to comply with a direction (in their role as a Public Housing Safety Officer).

Further, under the Police Administration Act a person who is believed to have committed an infringement notice offence could be held in detention under a paperless arrest for a period of 4 hours (we refer to the *Report of the Special Rapporteur on the rights of Indigenous Peoples* which specifically recommends the Northern Territory abolish of the paperless arrest scheme as well as mandatory sentencing).

In NAAJA's experience, the introduction of paperless arrests has really confused the situation between protective custody and "catch and release" style paperless arrests. People who have been arrested have no real appreciation of the difference between the two, and therefore have an extremely limited ability to understand their rights.

Recommendation

That infringement debt and the paperless arrest arrangements are repealed.

Decriminalisation of Public Drunkenness

Given that public drunkenness could either lead to a being held in custody for an offence, an infringement notice or a paperless arrest, then to avoid unnecessary incarceration, public drunkenness should be decriminalised.

These powers also perpetuate the existing problems in relation to discriminatory policing and unconscious bias. On one occasion, a client of NAAJA's was fined with "permitting drunkenness" in her house. There are any number of disruptive private parties held in the Katherine region which have gone unpunished in this manner. The fine was issued in addition to fines for other summary offences and ultimately served no real purpose other than to place NAAJA's client in more debt to the Fines Recovery Unit. It did nothing to address the underlying causes of the behaviour at play.

Alcohol related issues are also addressed in page 50 of this submission.

Efficacy of the Body Warn Camera scheme and other footage of Police conduct

The Northern Territory Police Force have been slowly rolling out the use of body warn camera since 2014. Part of the reasons put forward by the Northern Territory Government for rolling out this scheme was because:

> The use of BWV in other countries has been shown to moderate the behaviour of people present at incidents, resulting in less use of force by officers and reduced complaints against police. It is hoped this will help to ensure public confidence in police actions. [146]

There have, however, been some issues with using this scheme to ensure police accountability.

Often there is reluctance on behalf of Police to allow access to this footage on the basis that civil lawyers will misconstrue footage and / or use it to support a claim. In our view, there should be no objection to the latter. If the video displays actionable conduct, then it should be taken in order to enhance accountability. The former misunderstands our role as legal aid advocates. All lawyers have a duty to conduct a "merits test" on all of our client's matters. Where we believe that there is little or no merit to a client's case, we are not permitted to take the case on.

It is common for legal aid providers to encounter clients who are objecting to police conduct that amounts to a standard applied to all people. The typical example is a client who will seek assistance in their complaint that the police were too rough by, for example, pushing their arms up roughly behind their back. This description could very well be a standard police escort hold. In such circumstances, agitating a police complaint on the client's behalf does little except to tie up Government complaint mechanisms when there was a quick and easy alternative. This alternative would be a simple mechanism for lawyers to access police BWV and CCTV footage, so that we could very quickly and easily eliminate matters which we can see to be unobjectionable. In circumstances where lawyers are able to view footage this may result in the lawyer advising that there is no merit in making a complaint.

The challenges NAAJA often have in terms of accessing footage are:

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[146] Northern Territory Police, *Body Worn Video Trial* <http://www.pfes.nt.gov.au/Police/Community-safety/Body-worn-video-trial.aspx>.

- Insufficient time available to do an FOI request between receiving instructions and needing to lodge a complaint / tort action (due to the 2 month time limit).
- If there is an Ombudsman complaint on foot, the FOI Act excludes release of the information.
- General confusion between the police and the Ombudsman's office regarding who "owns" and has the rights to release video footage. In theory, there should be no reason why, if there is footage relevant to an Ombudsman complaint – that footage cannot be released to the legal representatives as part of the response to the complaint. Statutory amendment should be undertaken to ensure this can take place.

In one example, NAAJA did have the cooperation of the Local Police Superintendent to access footage and instead of bringing on proceedings, and it entirely resolved them. A client had alleged that she had been improperly searched at the watch house in circumstances that would have amounted to sexual assault. We contacted the Superintendent because the allegation was serious and we sought an opportunity to view the footage to see whether the client's story was plausible or potentially mistaken. The video footage clearly showed that what the client had alleged was impossible. We advised the client accordingly that her claim would not likely be proved in Court, and declined to act on her instructions. This avoided a lot of unnecessary work at a number of levels (Ombudsman, Court, legal representatives) as well as ongoing stress on the particular officer involved.

Recommendation

That formal mechanisms are made available for footage to be viewed by legal practitioners.

Police Accountability and the Ombudsman

Conduct by Police officers can lead to unnecessary time in detention for Aboriginal people, such as (but not limited to):

- Misconduct of a Police officer has unnecessarily escalated a situation (such as "the notorious trifecta legislation of offensive language, resist arrest and assault police");
- The conduct of a Police officer has led to a false imprisonment;
- The evidence for which a charge has been laid was obtained improperly or unlawfully;
- The Police have failed to reasonably proceed by way of summons.

Police misconduct might also indirectly lead to unnecessary incarceration of persons as when an officer is not held accountable for their misconduct, the injustice of this could lead to a corrosion of the rule of law. This may be particularly the case for Aboriginal people due to long standing power imbalances between the Police and Aboriginal people causing them to become disempowered in redressing the injustice of police misconduct.

Further, prisoners are often encouraged to critically consider their own actions with respect to their offending as a way to ensure meaningful rehabilitation. Where the investigation of the offending involved misconduct from the Police, the offender may otherwise focus on the Police's conduct leading to their incarceration rather than solely engaging with their own conduct. This is also relevant where there are significant differences in cultural circumstances and worldviews, and where a justice system that is not culturally appropriate is accepted as the norm.

It is therefore NAAJA's position that a key component of reducing incarceration rates is ensuring that there is an effective mechanism for police accountability.

In the Northern Territory, the main formal mechanism to ensure police accountability is an investigation through the *Ombudsman Act (NT)* (the Act). The following paragraphs provides submissions on NAAJA's concerns with respect to the flaws in the current police complaint investigation process and structure.

These concerns include:

- The conflicts of interests, or the lack effective safeguards, in Police officers undertaking investigations into misconduct;
- The limited oversight by the Ombudsman with respect to the investigation of some categories of Police Complaints;
- The miscategorisation of serious police complaints;
- Police complaints being resolved at the "preliminary enquires" stage of the complaint process;
- The lack of expertise of some Police officers investigating Police complaints;
- The inability of the complainant to provide submissions on the evidence and Police position prior to the finalisation of a complaint;
- The mandated findings available the Ombudsman;
- Police officers investigating complaints directly contacting complainants when they are legally represented;
- The unnecessary time limitations placed on commencing disciplinary proceedings;
- The inability of the Ombudsman to disclose of disciplinary action taken;
- The inadmissibility of evidence obtained in some police complaint investigations; and
- The independence of the Ombudsman.

Brief outline of the structure of the handling of Police Complaints in the Northern Territory

The Act provides the legislative framework for the way in which complaints against the Norther Territory Police Force (the Police) are to be handled. Section 150 provides for the creation of the Police Complaints Agreement (the Agreement) which is an agreement between the Ombudsman and the Police which outlines some of the specific details of the way in which Police complaints are to be dealt with. The Agreement appears to be a statutory instrument for the purposes of the *Interpretation Act*

The Act and the Agreement set out a tiered process for the way in which a Police complaint is to be handled. These processes provide who should investigate a complaint and the processes and level of formality which is to be applied to the investigation. These processes are

- The Police Complaints Resolution Process (CRP)[147];
- An investigation by the Police Standards Command[148] (the PSC); and
- An investigation by the Ombudsman.[149]

The Act provides that the Ombudsman is to determine which complaint handling process should be used in each case, where the Agreement provides that this will be based on the information provide to the Ombudsman after receiving the complaint and the PSC conduct preliminary enquiries.

The CRP is the most informal complaint process whereby the complaint is typically investigated by a senior officer at the Police station of the officer that is the subject of the complaint. This raises a concern of whether or not the investigating officer will have the appropriate "arm's length" to conduct an investigation. In any event, it appears to be the intent of the Agreement that the least serious allegations are dealt with through this process. The kinds of complaints that are dealt with under this complaint process is outlined in paragraph 11.2 of the Agreement.

The second tier of complaint handling is carried out by the PSC. This is a division of the Police whose function under section 34H of the *Police Administration Act* is to ensure the highest ethical and professional standards are maintained by the Police Force. The PSC further triages complaints according to the seriousness of the allegations into:

[147] *Ombudsman Act (NT*) s 78.
[148] Ibid, s 80.
[149] Ibid, s 86.

a. Category 2 - which relates to “minor misconduct” but not sufficiently serious to be subject to category 1[150] and is carried out with limited oversight by the Ombudsman’s office[151]; and

b. Category 1 – which relates to alleged serious misconduct or maladministration[152]. Paragraph 12.3 provides a list of alleged conduct that would justify a Category 2 processes.

Pursuant to section 86 of the Act, the Ombudsman will ***only*** directly investigate a police complaint where the complaint:

c. concerns the conduct of a police officer holding a rank equal or senior to the rank held by the officer in charge of the Police Standards Command;
d. concerns conduct of a Police Standards Command member;
e. is in substance about the practices, procedures or policies of the Police Force; or
f. should for another reason be investigated by the Ombudsman.

Conflicts of interest

The Ombudsman’s investigation, is therefore the only truly independent process of investigating a police complaint and only occurs in limited circumstances. As the majority of Police complaints will be effectively be investigated by the Police, it is very concerning that;

- According to the Agreement, a Commander assigning a category 2 PSC complaint to an investigating officer only has to consider whether there is an ***obvious*** conflict of interest and the Agreement specifically states that being a supervisor or manager of the subject member alone does not constitute a conflict of interest[153] (whereas an investigating officer in charge of a category 1 PSC complaint must immediately declare any conflict of interest when a conflict, or perceived conflict, arises); and
- The Agreement does not prohibit or require any consideration of a conflict of interest of an officer investigating a CRP complaint.

Determining the handling of the complaint and prejudging the outcome of the investigation

Given that:

a. the vast majority of complaints will not be investigated by the Ombudsman (and therefore will not be independent of the Police);

[150] See paragraph 12 of the Agreement.
[151] See paragraph 12.2 of the Agreement.
[152] See paragraph 12 of the Agreement.
[153] See paragraph 12.2 of the Agreement.

b. the category 2 complaint process and will have minimal oversight by the Ombudsman;

c. the CRP complaints process are not conducted at arm's length; and

d. the above mentioned concerns regarding the potential for conflicts of interests:

It is our position that to ensure proper process and independence, the majority of matters should be investigated (in the least) by the Category 1 complaint process or, if not, the Ombudsman. It is vital that serious complaints go through the process that will afford the greatest amount of scrutiny.

While section 66 of the Act provides that the Ombudsman determines how the complaint is handled, the Agreement outlines the matters that should be handled by the CRP, Category 2 and Category 1.

NAAJA is concerned that many of the serious complaints that we lodge on behalf of our clients are not investigated by the appropriate complaints handling mechanism.

By way of example, the following is a list of complaints that were made by one solicitor in NAAJA's Darwin office that were either dealt with as a preliminary enquiry, as a category 2 complaint or were unspecified in the way that the complaint was handled (where we make the assumption based on the brief nature of the responses and absence any other indication that these complaints were handled as category 2 complaints). Those complaints alleged:

- That the client's arm was broken in the process of arrest (where medical records were provided to this effect);
- multiple youths were battered by Police;
- multiple youths were battered by the Police and high powered weapons were pointed at those youths;
- that a client who was suffering from a mental health episode was struck repeatedly with batons by multiple officers;
- a client was battered and hit by a police vehicle in the process of an arrest; and
- a client was tasered multiple times while being restrained by multiple officers.

It is NAAJA's view that each one of these complaints meets the criteria for being handled as a Category 1 complaint.

Additionally, it is concerning that a number of complaints are being dealt with at the preliminary investigation stage. It is NAAJA's position that preliminary enquiries should be used for the purpose of determining which complaint handling process should be used so that the most appropriate process is applied to scrutinising any information or evidence that may be at hand.

The following is a case study:

> Recently NAAJA was advised that a complaint was decided to be dealt with through the CRP process because after initial enquiries were made the PSC had advised that complainant's instructions with respect to an incident were entirely different to the Police Officer's version of events. In that particular case it did ultimately appear that the client's complaint could not be sustained, but it seems that the decision about the appropriate handling process was based on the anticipated outcome of the complaint, rather than considering the nature of the complaint and determining the most appropriate complaint process.

Given the importance of ensuring that serious matters are appropriately categorized, and that the categorization can (and has) be determined by the results of preliminary inquiries conducted by Police, it is NAAJA's position that the Ombudsman should categorize the complaints independently of the Police, and that the categorization should be based solely on the allegation, and not on a preliminary investigation.

Need for specialist expertise in investigating Police complaints

It is also important that the persons who conduct investigations and provide responses to complainants have the appropriate skill and expertise in conducting an investigations and are in a position to consider the issues raised from a broader, systemic point of view.

This can be particularly important in circumstances where police admit an incorrect process is followed and provides an apology however the person adversely affected is not able to have all of their questions answered appropriately and where there is no clear feedback for how systems are changed to address these issues from a systemic perspective.

Conduct of preliminary enquiries, and disclosure of information prior to finalisation

As noted above, NAAJA is concerned that a number of complaints have been decided after preliminary enquiries have been made.

In our experience, the responses to the complainant that dismiss allegations often provide a description of the extent of the enquiry and a list of documents or witnesses relied upon in the preliminary inquiry but does not provide the complainant with the opportunity to review this documentation. This often leaves the complainant unsatisfied with the response, as they cannot see for themselves the basis for which their compliant has been discontinued and assess the strength of the evidence that is contrary to the complaint. It is therefore NAAJA's position that complainants should be given the opportunity to review these documents. Not only could this better satisfy the complainant, but it could also resolve the issue sooner, rather than complainant commencing proceedings and compelling the Police or the Ombudsman to provide that documentation.

Additionally, it is noted that section 49C of the *Information Act* exempts the Northern Territory Government from releasing information that is obtained in an Ombudsman investigation.

This means that individuals cannot obtain the information that the Ombudsman might rely on in an investigation and therefore cannot critically assess the outcomes of an Ombudsman investigation until the complaint has been finalised.

Further, section 100 of the Act requires that a Police Officer who is proposed to be subject to an adverse comment in an Ombudsman's report is given a reasonable opportunity to make a submission about the report prior to its finalisation. There is no requirement in that Act to ensure that a complainant is given an opportunity for further comment before the finalisation.

The ability of the complainant to be able to comment on adverse findings is particularly important where the investigation leads to multiple reports on an incident relating to a complaint with particularly serious allegations.

Mandated complaint outcomes

Paragraph 13.2 of the Agreement mandates particular findings based on the types of available evidence. NAAJA is concerned that this unnecessarily and inappropriately restricts the ability of the Ombudsman and the PSC to make findings against Police officers. As an example subparagraph 13.2(a) provides that a matter will be unresolved if there are differing versions of an incident, where the Ombudsman and PSC are unable to come to any conclusion about the allegation. This subparagraph gives an example of an unresolved matter is where the only available evidence is the complainant's version against that of the members.

In our experience while the Agreement provides that this should be applied flexibly, it is NAAJA's experience that where it is the word of the complainant against the word of the Police Officer, these complaints are deemed to be unresolved. While we accept that on many occasions when it is word on word evidence this might be an appropriate outcome of an investigation, it is our position that:

- There should not be a need for both the PSC and the Ombudsman to come to a conclusion about the allegation (it should only be the Ombudsman who would need to come to a conclusion regarding the allegation); and
- The Ombudsman should be able to apply the Briginshaw test and determine whether they might still otherwise be persuaded of the complaint's allegation if the complainant's evidence would otherwise be considered to be persuasive.

Similarly, subparagraph 13.2(b) provides that there is no evidence to support the allegation where there is no additional supporting documentation and gives an example where this finding may apply to an allegation of minor assault (e.g. push/slap) and there is no medical evidence to support the allegation, there are no witnesses to the incident, there is no video evidence or other members present, to positively support the fact that it did or did not occur.

NAAJA's concern is that this finding automatically deems that a complaint's allegation to be insufficient to sustain the complaint without any further documents and does not allow the Ombudsman to otherwise apply the Briginshaw test.

Dealing directly with complainants who are known to be legally represented

Various paragraphs in the Agreement provide when a complainant to should be contacted by Police officers investigating a complaint. Nowhere in the Agreement, however, is there any requirement for the Police to direct their queries or correspondence to the legal representatives of the complainant.

In our experience, while investigating officers from the PSC and the Ombudsman's office will usually (if not always) contact the legal representative rather than engaging with the complainant directly, Police Officers investigating under the CRP will often directly engage with the complainant even when those officers know that the complainant is represented.

> NAAJA assisted a client in making a complaint of harassment against officers at a particular Police station, where the client was particularly distressed by the conduct of the officers of the Police station at that point and we highlighted the client's particular vulnerability to the Ombudsman on this point.
>
> The Ombudsman decided that the matter should be handled under a CRP. The officer in charge of that station contacted the client directly which the client was not expecting, and was distressed by the officer's contact. The client advised NAAJA of this and when NAAJA asked that the officer in charge not to directly engage with our client, the officer responded by saying that the Ombudsman asked the officer to investigate the matter and that the officer was not required to direct his requests to legal representatives.

It is our experience that many of our clients will not wish to engage directly with the Police as:

- Regardless of the outcome of the complaint – they feel that have been subjected to unfair, harsh or unjust conduct from the Police;
- This conduct has been particularly distressing;
- They do not wish to directly engage with other members of the entity that caused that distress (at least not without the support of a legal representative or other support person);
- They feel uncomfortable, distressed, overwhelmed or intimidated given the power imbalance between themselves and the Police officers;
- The power imbalance may lead to the complainant feeling unable to confidently and or completely put forward their complaint to the Police officer; and

- They have sought legal representation so that they do not have to directly engage with the Police without assistance or guidance.

In our view, and in these circumstances, Police Officers directly engaging represented complainants is entirely counterproductive to the purpose of the complaint being made in the first place.

The following is a case study:

> NAAJA assisted a client to make a complaint about the way in which Police officers investigated a particularly personal criminal offence where our client was the victim.
>
> The Ombudsman decided that the matter should be handled under a CRP. The Officer in charge tried to contact the client directly and then later told NAAJA that they had attempted to contact the client to find out if our client wished to participate in the process.
>
> It is our position that this was a highly sensitive matter, where serious concerns around actions and inactions of Police officers were raised. We do not consider a CRP to be the appropriate outcome of the complaint. Furthermore, as our client is legally represented, we consider it to have been inappropriate for the Police Officer to attempt to contact our client directly.

Oversight of the Ombudsman

For the purpose of balance, it is noted that both the Act and the Agreement provide that the Ombudsman does retain ultimate oversight of the CRP and Category 1 and 2 complaint processes. This might be rectified by the Ombudsman deciding to continue with the investigation itself.

It is NAAJA's view that this is not a wholly satisfactory safeguard as the Ombudsman will be attempting to rectify an initially flawed investigation. This opens up the possibility that the evidence will be contaminated by the errors in the investigation which the Ombudsman might not be able to rectify in their own investigation. An initially flawed investigation might have potentially fatal consequences for any criminal or civil proceedings. The likelihood of this occurring is increased by the inherent flaws outlined in the paragraphs above.

Time limitations and the effects it has on complaints

Section 162 of the Police Administration Act provides that criminal proceedings must commence within 2 months of the misconduct and disciplinary proceedings must commence within 6 months of the misconduct.

It is NAAJA's experience that this places too tight time frames on the complainants and the investigators in gathering the necessary evidence to commence these proceedings. Alternatively it can mean that even when the recommendations of the Ombudsman's office does recommend that the misconduct would have warranted disciplinary proceedings, it may be too late for those proceedings to be commenced.

Non-disclosure of disciplinary action taken

Subsection 6(3) of the Act provides that the Ombudsman must not disclose the final outcome of the disciplinary procedures to the complainant or anyone else without the consent of the Commissioner. No current staff of NAAJA can recall an instance where the Commissioner has given consent to the disclosure of disciplinary procedures.

This lack of information, in our experience, leaves the complainant wholly unsatisfied and leaves the complainant, and the greater community (including NAAJA), uncertain as to whether or not a Police Officer did receive the appropriate discipline which is commensurate to the misconduct that the officer undertook. There appears to be no legitimate policy reason as to why complainants could not be advised of disciplinary action taken against Police officers.

Inadmissibility of evidence obtained in the CRP

Section 114 of the Ombudsman's Act provides that evidence of anything said or admitted during the police complaints resolution process (CRP) and any document prepared for the CRP cannot be used in any later investigation of the complaint and is not admissible in disciplinary procedures or any proceeding in a court or tribunal.

Additionally, paragraph 11.7 of the Agreement is broader than section 114 as it provides the same protection, but with respect to all evidence, rather than just admissions and documents.

These provisions therefore provides further protection for Police Officers from prosecution or disciplinary action. It is NAAJA's position that there does not seem to be any legitimate policy basis for this provision.

It is further noted that while the matters that are investigated through the CRP pursuant to paragraph 11.2 of the Agreement are initially deemed unlikely to lead to prosecutions or disciplinary proceedings, it is possible (and is indeed contemplated in the Guidelines) that further information could be discovered through the CRP that could lead to prosecutions or disciplinary proceedings. A Police officer would then be protected by section 114 or paragraph 11.7 if an admission, document or other evidence suggesting misconduct was obtained during the CRP.

Paragraph 11.7 also provides that the outcome of a CRP will not be kept on the personnel file of a member despite the results of any CRP.

It is unclear from the Agreement if the records of the CRP is recorded on another file other than the member's personal file, but it is NAAJA's position that it is necessary to ensure accountability that CRPs that result in findings of misconduct should be recorded on a personal file.

NAAJA's position with respect to the independence of the Ombudsman

As noted above, while the Ombudsman can independently investigate a complaint in certain circumstances, outside of those circumstances, the Police are involved in all other complaints.

Currently much of the details of the way in which a Police complaint is handled is through the Agreement which, pursuant to section 150, is made through an agreement between the Ombudsman and the Police Commissioner. In order to protect the independence that involves the Police, it is NAAJA's position the Agreement should be replaced by a set of guidelines that Ombudsman creates that details the way in which a complaint is handled and the extent of the involvement of the Police.

It is also NAAJA's position that section 86 of the Act should be amended so that it unambiguously provides that the Ombudsman can at its sole discretion chose when to investigate a matter.

Effective alternatives to complaint handling

NAAJA and the Police have previously worked effectively to informally deal with systemic issues that our clients have raised. One particularly effective relationship was developed in the Katherine region between 2010 to 2012 whereby:

- There were bi-monthly meetings between NAAJA civil solicitors and the Regional for Katherine and the Superintendent for Arnhem & Western.
- At the meetings, they would discuss trends they were seeing, remote station issues, and particular police officers that NAAJA lawyers were repeatedly hearing but community members were declining to make formal complaints.
- In some cases, this managed to bring about preventative/proactive action to ensure that community relationships with police were not unnecessarily damaged.
- As part of this informal process, NAAJA lawyers could contact the Superintendent (either by telephone or in writing) and request to view the CCTV footage of a custody episode. An appointment would be arranged where the NAAJA lawyer would attend and review it together with the Superintendent. After the review, the lawyer could then decide whether a complaint was warranted. The Superintendent always advised that they would elevate to PSC or counsel their officers if they saw anything untoward anyway – even if a formal complaint was not forthcoming.

It is NAAJA's position that this was a particularly effective mechanism that dealt with concerns about the Police. NAAJA would like to re-establish this relationship and would suggest that this kind of relationship should be developed throughout all the regions of the Northern Territory with the local legal aid providers.

Question 12 – 1 How can police work with Aboriginal and Torres Strait Islander communities to reduce family violence?

Family violence is a complex policy area and sits within a broader context of an overall justice system that is ethnocentric and is not responsive and adapted to the circumstances of the NT. A key part of this is trust between Aboriginal people and this system, where victims often do not want to report family violence because they

don't trust the system to respond adequately, or are fearful of having their children removed from their family.

An example of a comprehensive and culturally appropriate consultation process with Aboriginal people in relation to family violence and how the justice system interfaces with this issue is the Galiwin'ku Statement, released May 2016.

The introductory remarks of the statement reflect a strong desire for the justice system to move to an ethnocentric position:

> *"Gulyun limurr dhu galŋa ga ŋayaŋu-miḏikunhaminywuyŋur romŋur.*
> *Malŋmaram limurr dhu mägayamirr dhukarr."*
> *"We will end this physically and emotionally hurtful way.*
> *We will find a path of peace."*
> Family Violence is a difficult problem. There are many things that we need to think about.
> We have watched this problem get worse, especially over the last 10 years.
> We are worried, especially for our young people. Many are scared and angry and sometimes they go wild and hurt each other.
> This is not the right path. We must straighten this path.
> We cannot fix this only through Balanda (Western) law. We must return to the foundation of Yolŋu Rom (law), and this must be respected and taken seriously by Balanda authorities and by our young people.
> We are serious about this. Balanda talk about Family Violence all the time and we want to fix it. We have to listen to Balanda law, but Balanda need to listen to us too. With mutual respect for law, we can start to fix this together.[154]

Clear recommendations are noted and with detail in the statement:

> The Galiwin'ku community proposes:
>
> **1.** A Yolŋu Community Authority that has genuine community jurisdiction
>
> **2.** Community-informed policing
>
> **3.** Cultural awareness training for all Balanda workers
>
> **4.** Meaningful opportunities in community for Yolŋu, especially young people
>
> **5.** Targeted education programs about the Balanda legal system.[155]

Galiwin'ku is an island in north east Arnhem Land more than 500km from Darwin. It is accessible by plane or boat. The population varies and at the 2016 census was counted as 2,206. Many outstations surround the main community. In the area of family violence, there is significant opportunity to use the recommendations of the statement and move from an ethnocentric position to an ethnorelative position responsive and adapted to the island.

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[154] David Suttle and Yirriṉiṉba Dhurrkay (eds), above n 12, 4.
[155] Ibid.

We are unaware there has been any formal response to the Galiwin'ku Statement. As the Statement was released in May 2016 and involved comprehensive consultations with Yolngu in a culturally appropriate way, the lack of any formal response to the recommendations of the statement is a concern.

In addition, we also understand the Family Violence program developed and implemented by the Department of Correctional Services has been postponed across several communities due to not being able to attract sufficient numbers. This program serves as a community based alternative that could be integrated more formally into the justice system to ensure participation.

Question 12 – 2 How can police officers entering into a particular Aboriginal or Torres Strait Islander community gain a full understanding of, and be better equipped to respond to, the needs of that community?

As an example of how this issue can be dealt with appropriately and in the context of the specific location of Galiwin'ku, page 11 – 13 of the Galiwin'ku Statement provides sound recommendations.[156]

It is NAAJA's observation that community agreements such as the EG Yugul Mangi agreement with police in Ngukurr can be an effective way of promoting cross-cultural awareness and otherwise ensuring that relations between the communities and the Police can be effective. These agreements should be independently reviewed including in consultation with community members and with the report made public to measure progress.

In our work with communities there is a consistent message of select Police Officers not treating community members with respect and issues relating to how charges are selected and enforced. That is, people raise concerns that they have made complaints or raised concerns about the law being broken and not being aware if an investigation occurred or why charges were not laid.

In a context where Aboriginal imprisonment rates are amongst the highest in the world for a group of people, the accountability mechanisms to keep Police accountable are very lenient. This includes the strict timelines under section 162 (1) of the Police Administration Act which states that both:

1. An action (meaning civil action); and
2. Prosecution;

must be commenced within 2 months of the act or omission complained of.[157]

The effect of this provision is that the amount of potential claims and prosecutions against Police are limited. Regardless of intent, this affords additional protections against the Police that would not otherwise be provided to other citizens. We are not aware of a legitimate policy reason why civil action is limited in such a way, but it is particularly concerning that Police who commit criminal offences are provided such protections.

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[156] Ibid.
[157] *Police Administration Act (NT)* s 162(1).

In practice, 2 months is an incredibly short period of time for vulnerable persons (such as our clients) to come forward, provide their complaint to the Ombudsman and/or the Police, evidence to be gathered and then criminal proceedings commenced. From NAAJA's perspective, it would be difficult to provide a decent Ombudsman complaint (one that is complete enough to be fully considered) within a two month period. Further, many of the persons who might have had criminal acts perpetrated against them would be incarcerated, adding further barriers to having a criminal act of a police officer prosecuted.

This is particularly exacerbated for persons who come from remote Aboriginal communities where issues such as travel times to community, weather restrictions on roads, language barriers, lack of reception, lack of phones and obtaining litigation guardians act as barriers for commencing prosecutions or civil actions.

There are related accountability issues such as the use of visual and audio recordings accessible by Police (and not available to legal representatives of a civil complaint) and the process of dealing with Police complaints and a perception across Aboriginal communities that there is not sufficient independence and robustness of these complaint-handling mechanisms.

Question 12-3 and Question 12-4: Is there value in police publicly reporting annually on their engagement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities that are designed to prevent offending behaviour? Should police that are undertaking programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities be required to: document programs; undertake systems and outcomes evaluations; and put succession planning in place to ensure continuity of the programs?

NAAJA notes that there is very little information publically available on police programs. This means it is difficult to track if they are culturally appropriate and therefore effective. The NTPFES Annual Report 2015-16 did not report on what, if any, programs were being run by police to reduce offending behaviours in Aboriginal and Torres Strait Islander communities.

For example, $23.46 million of the NTPFES 2017-18 Budget is for the third year of the National Partnership Agreement on Northern Territory and for Remote Aboriginal Investment.[158] Lack of effective reporting means it is not clear what this money is spent on. Transparency is crucial in fostering a sense of positive progress in relations between NT Police and Aboriginal communities.

One program which has been implemented across NT Police is the "Police Caution – Aboriginal Interpreter Service App", now available on each Police iPad. The stated aim of the app is "to translate the police caution into 18 Indigenous languages and improve delivery and understanding of a person's legal rights when being held and

[158] NT Police, Fire and Emergency Services, above n 15.

questioned in police custody."[159] We welcome this initiative, however it remains to be seen how widely used this app is, or whether the police are obligated to use this app,

This means it is difficult to measure how much this has been utilised and whether it effectively explains Balanda law in language. This is why effective reporting is essential for marking positive progress.

NAAJA recommends that such programs be run in consultation with Aboriginal communities and Aboriginal advocacy organisations such as NAAJA in order to facilitate better collaboration, respect and trust between police and community. These programs should then be evaluated to assess their effectiveness in reducing offending behaviours in community.

Question 12 – 5 Should police be encouraged to enter into Reconciliation Action Plans with Reconciliation Australia, where they have not already done so?

A key risk of public engagement strategies or publicly promoting Aboriginal specific initiatives is that efforts to relay the symbolism of Aboriginal culture can be superficial and done with the purpose of conveying a positive intent without addressing the fundamental issues of an ethnocentric justice system.

Systemic reform such as that outlined at *the case for an Aboriginal Justice Agency Indicator (AJAI)* on page 16 of this submission is required and whether this is communicated as part of a RAP or other process and if the justice system moves to an ethnorelative position then it will be culturally appropriate and responsive and adapted to the circumstances of the NT.

Question 12 – 6 Should police be required to resource and support Aboriginal and Torres Strait Islander employment strategies, where not already in place?

A key risk of aspirational employment strategies for police is that Aboriginal people don't want to engage in these programs for a broad range of complex factors, and primarily because the justice system reflects an ethnocentric position that is not culturally appropriate.

If Aboriginal people constitute between 83% - 90% of the prison population, are similarly reflected in custody demographics, are in high contact with the justice system and come from very different cultural backgrounds and specific cultural circumstances, then every aspect of the justice system should also reflect these numbers. Given these figures are clearly not achievable in the short to medium term, a nominal figure of 30% Aboriginal employment can be achieved with the implementation of an Aboriginal Justice Agency Indicator, and will ensure that the justice system moves to a culturally appropriate position.

Aboriginal Community Police Officers are Indigenous uniformed sworn police officers whose role is to provide communication and liaison with local indigenous communities. They enforce the laws of the Northern Territory and protect and serve

[159] NT Police, Fire and Emergency Services, above n 15.

the public. The Northern Territory Government's policy intent is that ACPOs act as role models and an advocate for cross cultural awareness and to improve community knowledge about policing services and law and order issues.

It is NAAJA's understanding that there are currently a shortage of ACPOs. We understand that Yarralin has not had an ACPO for a year or more, in circumstances where historically their ACPOs were very effective.

Similarly, we understand there does not appear to have been an ACPO in the Gunbalanya community since at least November 2013. Whilst aspirational targets to increase ACPOs reflects a positive intent, there are many challenges for Aboriginal people aspiring to be ACPOs in a justice system that is ethnocentric and these targets alone will not achieve the type of progress required.

Justice Reinvestment

There is significant opportunity in the NT for justice reinvestment and to redirect the significant funds which goes to the justice system in the NT for models of prevention.

The content and recommendation at page 7 – 15, *Cultural Competency and the Justice System,* explore how the Northern Territory justice system can move away from an ethnocentric position to an ethno-relative position which is culturally appropriate and more adapted to regional and local contexts. From a justice reinvestment perspective the recommendation to ensure, over time, a targeted allocation of budgets from relevant parts of the justice system to integrating genuine Aboriginal involvement will deliver more effective results in the context of the purpose and underlying premise of the justice system.

In response to specific areas of the justice system, the following are examples of justice reinvestment proposals for the Northern Territory:

- The recommendation of providing intensive and targeted legal education to persons on the court list and their families as part of the bush court circuit and with Legal Educators working alongside Cultural Brokers to ensure genuine understanding (see pages 65 – 70).
- A culturally relevant program to work with people before court (and particularly the circuit court) in relation to fines and driving offences (see page 46 – 49).

NAAJA's demonstrated experience delivering a range of justice programs and capacity under the Cultural Competency Framework 2017 – 2020 provides a possible mechanism to support justice reinvestment programs.

Conclusion

The key essence of the many reports and inquiries over many years all point to a key aspiration of Aboriginal people to have their voices heard adequately and for services, responses and resources to meet their specific needs.

This can be achieved by ensuring the justice system and its many parts are examined in the context of their cultural appropriateness and that relevant parts are

held accountable and shift from an ethnocentric position to an ethnorelative position that is responsive and adapted to the circumstances of the Northern Territory.