North Australian Aboriginal Justice Agency

Submissions on the Draft Aboriginal Justice Agreement

Department of the Attorney-General and Justice – Aboriginal Justice Unit

April 2020

About NAAJA

NAAJA provides high quality, culturally appropriate legal aid and justice services to Aboriginal people throughout 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). From 1 January 2018, NAAJA has been providing legal services for the southern region of the Northern Territory, formerly provided by CAALAS (Central Australian Aboriginal Legal Aid Service). NAAJA and its earlier bodies have been fighting for the rights of Aboriginal people since 1974.

NAAJA has over 40 years of experience in providing justice for Aboriginal people. Our Agency represents and assists Aboriginal adults and children throughout the continuum of the Justice system.

NAAJA's key vision is to achieve True Justice, dignity and respect for Aboriginal people. NAAJA has established key features of Aboriginal Justice in establishing and partnering with Law and Justice Groups and Aboriginal mediators, creating a nationally renowned Aboriginal Throughcare service for prisoners and their rehabilitation into the community, forming specialist youth justice and child protection teams and establishing a Custody Notification Service for the safety and wellbeing of Aboriginal people in police custody.

NAAJA serves a positive role contributing to policy and law reform in areas affecting Aboriginal peoples' legal rights and access to justice. NAAJA travels to remote communities across the Northern Territory to provide legal advice and consult with relevant groups to inform submissions. We have had extensive input into the Draft Aboriginal Justice Agreement through consultation with our Aboriginal Board of Directors, staff of NAAJA, Aboriginal communities and organisations and Law and Justice Groups.

Priscilla Atkins

Chief Executive Officer, NAAJA

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Background to NAAJA's Submission

The North Australian Aboriginal Justice Agency (NAAJA) welcomes the commitment to the creation and implementation of the *Northern Territory Aboriginal Justice Agreement 2019-2025* (AJA).

The *Pathways to the Northern Territory Aboriginal Justice Agreement* has exposed the systemic failures of Police, Courts, Laws, Prisons and Government bodies when it comes to Aboriginal people's access, participation, resolution and rehabilitation through the Justice System.

It is necessary to recognise that successive Governments have failed to adequately resource the Northern Territory Justice System. Governments of both political persuasions have continued to invest in prisons rather than people.

The perpetuation of 'law and order' approaches[1] to justice in the Northern Territory have led to a Royal Commission[2] on the scandalous treatment[3] of children in youth detention and failings of a child protection system.

Aboriginal people will encounter the legal system from a great variety of entry points from child protection, criminal justice, mental health, civil law through to adult guardianship.

Oppressive laws and practices[4] have seen the over representation and criminalisation of Aboriginal people through police failure to exercise 'arrest as a last resort' and discretions for diversion or to charge, restrictive bail laws and options, 'mandatory sentencing'[5] that ties the hands of our Courts and the failure to provide sentencing alternatives that are rehabilitative or therapeutic.

The *Northern Territory Aboriginal Justice Agreement 2019-2025* must genuinely value and integrate the needs and views of Aboriginal people[6]. The AJA's implementation must be resourced by successive Northern Territory Governments to ensure successful reform of the Justice system to lower Aboriginal imprisonment and recidivism.

[1] 'Reforming the Discussion on Crime' in NAAJA Pre and Post Detention Submission to the RCCPDNT.
[2] Royal Commission into Child Protection and Detention Systems of the Northern Territory and Northern Territory Board of Inquiry.
[3] 'Shocking Failure': NT Royal Commission calls for closure of Don Dale. Guardian 16 November 2017
[4] Pathways to the Northern Territory Aboriginal Justice Agreement 2019; Pathways to Justice – Inquiry into the Incarceration of Aboriginal and Torres Strait Islanders 2017 (ALRC Report 133); and Royal Commission into Aboriginal Deaths in Custody
[5] Chapter 8 on Mandatory Sentencing in Pathways to Justice Inquiry 2017.
[6] 'Empowering Aboriginal Communities' in NAAJA Pre and Post Detention Submission to the RCCPDNT.

Principles

The aims of the Aboriginal Justice Agreement are to:

- Reduce reoffending and imprisonment rates of Aboriginal Territorians
- Engage and support Aboriginal leadership
- Improve justice responses to Aboriginal Territorians.

To achieve these aims, the AJA must be delivered in line with the following Principles:

Aboriginal people need to be front and centre of our systems to support justice, and in formal roles as agents of change.

1. Aboriginal people are diverse in language, culture and history and move between the complexities of two worlds. Over time, their cultural authority in formal roles and in administering justice has been reduced and minimised. At the forefront of our colonial narrative are the systems to support justice and we need change to support both human rights and Aboriginal self-determination.

To work towards justice, we first need recognition by our systems to support justice of not only past injustices but the ongoing, colonial nature and narrative of our present design. Our systems to support justice must be trauma-informed.

2. As a whole, the systems to support justice are not culturally appropriate, safe, secure or competent. From an Aboriginal justice perspective, this hampers the very work of justice – rehabilitation, reintegration, punishment and deterrence. From an Aboriginal health perspective, this compounds trauma and reflects systemic and institutionalised discrimination which are social determinants of health. Our Courts and police need properly resourced options that are based on health and cultural responses. Our remote communities need equity in terms of access to services and responses. We need cultural frameworks across the justice system to assess cultural appropriateness, safety, security and competency.

Our systems to support justice require accountability to Aboriginal-led notions of policy and legislative design.

3. Over decades we have seen many inquiries, reports, Royal Commissions, reviews, audits and strategies and consultations at all levels of government. All of these point to the need for Aboriginal-led solutions. The nature and scale of our crisis means we cannot accept incremental change and low investment.

NAAJA Submissions on Draft Strategies

NAAJA has provided comment on each AJA Strategy, noting Strategies and Actions that are not supported by NAAJA and opportunities for expansion of a Strategy to ensure it truly meets the aims of the AJA. NAAJA notes existing Government initiatives in this space and submits that programs developed as a consequence of the Aboriginal Justice Agreement should be new programs that are distinct from existing Government commitments, obligations and initiatives. NAAJA has also made recommendations as to when each Strategy (i.e. in Stage 1 2019-2021 or Stage 2 2022-2025) should be implemented by.

Strategy	**Position**	**NAAJA Submission**	**Responsibility**	**Stage**
1. Establish an alternative to custody model	Support	NAAJA recommends the establishment of alternative custodial services and facilities that are place-based within Aboriginal Communities. These alternative custodial facilities should be designed to operate an Open Prison model (see submissions against Strategy 9). The Northern Territory Government (NTG) must establish genuine partnerships with Aboriginal communities to empower Aboriginal people to design specific programs and services and to operate facilities.	NTG and Aboriginal Communities	Stage 2
2. Expand community – based, Aboriginal –led early intervention and youth diversion programs	Support – Expanded Strategy 2	NAAJA recommends that early intervention and culturally specific diversion programs be developed for Aboriginal adults and youth of the Northern Territory. NAAJA notes existing Government initiatives in this space and submits that programs developed as a consequence of this strategy should be new programs that are distinct from existing initiatives. Further to this, the *Sentencing Act* (NT) should be amended to include the option of diversion for infringements and certain offences for adults.	NTG and Aboriginal Communities and Law and Justice Groups	Stage 1

		Aboriginal Diversion programs should be developed, owned and led by Aboriginal organisations. Further discussion with elders and Law and Justice groups should explore the kind of ceremonies, cultural activities and family engagement that could be included in diversion frameworks and programs.		
3. Review and reform relevant provisions to the *Bail Act*	Support – Expanded Strategy 3	NAAJA submits that successful implementation of this Strategy requires review of the barriers that Aboriginal people face in granting of bail and remand. When bail is granted, a tailored approach to the needs of the person should be adopted to allow full and complete consideration of factors that may inhibit compliance, including housing/homelessness, disability and cognitive issues. The *Bail Act* (NT) should be amended similar to the *Bail Act 1977* (Vic) for a standalone provision that requires bail authorities to consider any 'Issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations.	NTG and Legal Stakeholders	Stage 1
	Not supported Draft Action 3.3	Draft Action 3.3 is unnecessary.		
	Not supported Draft Action 3.5	Draft Action 3.5 is not supported as imposition of bail considerations should be tailored to the needs of the person and their offending. NAAJA submits that Law and Justice Groups should have greater involvement in bail determinations by police to identify community attitudes at first instance.		

		Further, youth and adult bail residential programs that facilitate cultural activities and practices and off-site community work programs should be adopted. These residential programs should develop robust transition plans for their clients.		
4. Review and reform the relevant provisions in the *Sentencing Act*	Qualified support – Expanded recommendation Not supported Draft Action 4.5	NAAJA submits that an identified position of an Aboriginal Experience report writer is should be placed with NAAJA to provide individualised reports on the background, cultural information relevant to the circumstance of the offending, needs, strengths and sentencing options. Mandatory sentences and mandated fines should be repealed. The following provisions should be prioritised for immediate review and 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(2)(3) of the Misuse of Drugs Act. The Northern Territory Government should also repeal:	NTG, NAAJA and Legal Services	Stage 1 Stage 1

		• Provisions that remove the availability of suspended sentences (or other sentencing alternatives) for classes of offences or at all. • Provisions that remove the availability of home detention orders for offences that are not suspended wholly. • Mandated minimum fines for traffic offences. NAAJA notes that in its 2018 Pathways to Justice Report the Australian Law Reform Commission (ALRC) encouraged the Commonwealth Government to review the operation of ss 16A(2A) and 16AA of *Crimes Act 1914* (Cth) to ensure that they are operating as intended, and to consider repealing or narrowing the application of the provisions if necessary to the successful implementation of a statutory requirement to consider unique and systemic factors of Aboriginal and Torres Strait Islander offenders when sentencing in the NT. NAAJA recommends that the Northern Territory calls upon the Australian Government to amend the *Crimes Act 1914* (Cth) as it applies to prohibit consideration of any form of customary law or cultural practice in consideration of bail or sentencing.		
5. Review and reform relevant provisions in the *Parole Act*	Qualified support – Expanded Strategy	NAAJA supports the development of an overarching policy framework for a therapeutic and contemporary parole system. There must be an evidence based and tailored approach to the management of offenders that is not risk adverse. This could be supported by a system of Aboriginal mentorship for parolees and engagement with Aboriginal elders.	NTG, Parole Board, NAAJA Throughcare	Stage 2

	Supported Action 5.1	Through our Throughcare Teams, NAAJA has capacity to provide an integrated parole support service across the Northern Territory. It is NAAJA's experience that people in prison are sometimes transferred between the Alice Springs Correctional Centre (the ASCC) and the Darwin Correctional Centre (the DCC), particularly in circumstances where they are required to complete Treatment Programs. Having staff in both Alice Springs and in Darwin means NAAJA can commence pre-release work with people at, for example, the DCC and allocate them to an Alice Springs based Case Manager should they be returning to Central Australia post-release. The advantages of NAAJA's NT wide service provision extend beyond the provision of post-release support. With Case Managers in both Alice Springs and Darwin, NAAJA can work directly with family members and service providers in the location a client is returning to during the pre-release phase; thereby enhancing the quality and rigour or our planning process and our clients' prospects of success post-release. NAAJA supports an expanded recommendation for Court ordered parole for automatic release for sentences under 5 years. NAAJA submits that time spent on parole beginning on the date of release and ending on the date of the breach or revocation should count towards a person's head sentence		
6. Reintroduce community courts	Qualified support – Expanded Strategy	Central to this Strategy is the removal of the barrier of mandatory sentencing legislation. NAAJA recommends the introduction of Community Courts on a legislative basis and prioritisation in remote Aboriginal communities. Community Courts should not be implemented on a pilot project basis. Community	NTG, Law and Justice Groups	Stage 1

		Courts should achieve more sustainable and culturally informed sentencing outcomes, increase understanding of the court process and promote therapeutic outcomes for the offender, victim and community. NAAJA recommends partnering with Law and Justice Groups to establish a framework for Community Courts to: a. Assist in any establishment of Community Courts and provide a suitable panel from which Elders and Aboriginal Justice of the Peace (see Strategy 13) could be chosen to sit with the Court. b. Set community rules and community sanctions provided they are consistent with Northern Territory law c. Present information to courts for sentencing about an accused who is a member of their community and provide information or evidence about Aboriginal law and culture d. Be involved in community based programs and participate in the supervision of offenders e. Be involved in mediation, conciliation and other forms of dispute resolution f. Assist in the development of protocols between the community and Courts.		
7. Expand community – based sentencing options	Support – Expanded Strategy	See comments on Strategy 2 and 6. NAAJA notes the recommendations of the Australian Law Reform Commission's Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples to improve the availability and flexibility of	NTG, Law and Justice Groups	Stage 1

		community based sentencing options. NAAJA notes the lack of response to the Inquiry by the Northern Territory Government. NAAJA recommends the expansion of community based sentences to remote areas of the Northern Territory as a priority. The greatest flexibility must be given to sentencing options to allow conditions to reduce offending and encourage rehabilitation of the offender. NAAJA recommends the provision of community based sentencing options that are accessible to offenders with complex needs or disabilities. Courts and Corrections should work with Aboriginal organisations to provide the necessary programs and supports to facilitate the successful completion of community based sanctions. NAAJA notes Government initiatives in this area and submits that activity to support this AJA Strategy should build on this progress, but should also be commenced as new activities. 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.		

8. Expand non-financial options for the payment of fines	Support – Expanded Strategy	NAAJA recommends that the 'naming and shaming practice' of the Northern Territory Government and the media in relation to fine defaulters cease. Specifically, the "Name and Shame list" published at https://nt.gov.au/law/processes/fines-name-and-shame-list/list must be removed. NAAJA further recommends the cessation of warrants of imprisonment for fine defaulters to prisons on a non-voluntary basis. Further, NAAJA recommends a wider discretion to allow the operation of Section 26(2) of the *Sentencing* Act to past fines where a person is to be sentenced. NAAJA recommends further investigation of options for the discharge of persons from custody to enter into alternative community based programs. Aboriginal community based programs could include unpaid work, counselling, attendance with Law and Justice Groups, Aboriginal NGO's and Aboriginal Health clinics. NAAJA recommends the establishment of a Northern Territory Fines Court to deal with all forms of peoples debts including Justice, Housing and Centrelink. This Fines Court should be enabled to assess the discharge of fines debts where the person is experiencing financial hardship, family violence, homeless or housing uncertainty, intellectual disability, mental impairment.	NTG and Legal Stakeholders and Aboriginal Communities	Stage 1 Stage 2
9. Further develop correctional services	Support	NAAJA submits that the Northern Territory must transition from a 'closed' prison system to an 'open' prison system. A closed system reflects the current restrictive environment of prisons that should be reserved as a	NT Corrections and NAAJA Throughcare	Stage 2

therapeutic programs		last resort for inmates that pose serious risk that cannot be managed beyond being accommodated in cells with restrictions on their movement. NAAJA recommends the transition to an open prison system that is based on restorative rather than punitive justice, allowing for inmates to work in community. Scandinavian prisons and increasingly western prison systems (including the UK) are adopting principles of an open prison system which provides greater advantages in the rehabilitation and reintegration of an offender, reducing recidivism rates. Trauma-responsive and culturally competent therapeutic programs should be designed. These programs should also be able to accommodate all prisoners' needs including interpreters and consider disabilities such as hearing loss.		Stage 1
	Draft Action 9.1	NAAJA supports Action 9.1 and recommends that prison programs reflect best practice principles as set out by the ALRC that recommends: "programs for Aboriginal and Torres Strait Islander people need to be designed and delivered by Aboriginal and Torres Strait Islander organisations with relevant experience and expertise".		
	Further Action	In the context of the current concerns on the nation's prison system during the COVID-19 epidemic and moves to increase the rate of parole, funding of the NAAJA Throughcare Prison Parole Program should be restored immediately.		

10. Strengthen tailored and targeted case management for offenders	Support	It is important that Action 10.1 adopts recent developments in research around best practice case management. Concerning throughcare case management, NAAJA recommends the adoption of the principles set out in the "Adult Through Care Model for Aboriginal and Torres Strait Islander Peoples". The Model was developed for the National Indigenous Australian's Agency's enhanced Adult Throughcare Program, in consultation with State and Territory governments, Aboriginal Community Controlled organisations (including NAAJA), community groups, and 'end users' of throughcare services.	NT Corrections and NAAJA Throughcare	Stage 1
11. Expand prison and diversion programs for Aboriginal women	Support	NAAJA again recommends the removal of the barrier of mandatory sentencing legislation. Diversionary options in the Northern Territory should be prioritised for Aboriginal women. Successful implementation of this Strategy will require law reform and changes to legal frameworks to recognise the complex issues Aboriginal women face. NAAJA recommends adequate resourcing of family dispute mediation services, that can support Aboriginal women trapped in cycles of family violence through Aboriginal-led restorative justice practices. NAAJA recommends that the AJA continue the support for and funding of the Kunga Stopping Violence Program as a wrap-around service. There is scope to expand the current service so that future work with Aboriginal women in the justice space is complex trauma–informed, holistic, and tailored specifically for the needs of Aboriginal women, not just in justice agencies and diversionary programs, but in health, disability, education,	NT Corrections and NAAJA Kungas and Throughcare	Stage 1

		and housing. This is supported by recent recommendations of the Australian National Research Organisation for Women's Safety. NAAJA further supports amendments to offences for which Aboriginal women are most commonly imprisoned to better support referral to police diversion. Prison needs to be culturally appropriate for Aboriginal women. Discriminatory practices exist within prison and detention facilities in facility design, programs, education and healthcare (including antenatal care). Procedures for visitations require strip searches and do not acknowledge that women in prison are oftentimes survivors of sexual abuse and domestic violence. NAAJA notes the observations made in the 2016 Report of the Review of the Northern Territory Department of Correctional Services (the Hamburger Report), of difficulties with female prisoners accessing medical services at Darwin Correctional Precinct. Also noting the lack of meaningful work opportunities for women that will provide them with marketable job skills. There also did not appear to be any engagement of female prisoners in art and craft or cultural activities. In NAAJA's submission, these conditions have not improved.		
12. Establish and support Law and Justice Groups	Qualified support – Expanded Strategy	Over three decades NAAJA has worked to establish a model of partnership with Law and Justice groups, through building capacity and knowledge of elders and leaders in communities. The model of two way learning has	NAAJA and Law and Justice Groups	Stage 1 Priority

		provided knowledge of Aboriginal culture and perspectives concerning criminal and child protection proceedings, law reform and government policy, and community policing and safety.		
	Enhanced Action 12.1	NAAJA recommends that there is resourcing for continuous development and strengthening of existing and emerging Law and Justice Groups to ensure full involvement of all Aboriginal communities. NAAJA recommends coordination that will not duplicate Law and Justice structures in existing communities that potentially undermines existing systems and authorities.		
	Action 12.2	NAAJA recommends that the AJA establish genuine partnerships with Aboriginal Law and Justice Groups to design community based models. The AJA must have flexibility in its criteria to support the current model of Law and Justice groups working independent of Government with the support of NAAJA as the Northern Territory's Aboriginal Justice Agency.		
	Further Action	The guiding principles of partnership with existing and emerging Law and Justice Groups should accord with Article 5 of the *United Nations Declaration on the Rights of Indigenous People* "Indigenous people have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State". Identified positions of Aboriginal Experience report writers should be placed with NAAJA to work with Law and Justice Groups to provide		

		training and individualised reports that will consider a person's background and provide cultural information relevant to the circumstance of the offending, needs, strengths and sentencing options.		
13. Increase appointments of Aboriginal Justice of the Peace and Commissioners of Oaths	Support – Expanded Strategy	NAAJA supports an expanded Strategy that to increase the appointment of Aboriginal Justices of the Peace beyond a limited or symbolic function. NAAJA supports Aboriginal Justices of the Peace to be utilised and supported to sit in Bush Courts in Aboriginal communities. To this end, NAAJA recommends the development of training and strategies by the Chief Judge of the Local Court to provide support to Aboriginal Justices of the Peace to exercise duties under the *Local Court Act* 2016 and *Local Court Regulations* 2016.	NTG and Aboriginal Community	Stage 2 Priority
14. Support Aboriginal cultural authority and leadership	Support – Expanded Strategy	See comments against Strategy 12. Aboriginal people need to be resourced to be agents of change for themselves, their families and their communities. Cultural Authorities such as Law and Justice groups, need to be resourced appropriately and integrated across the justice system. NAAJA recommends that the AJA invest in the current models of Aboriginal Justice in order to enhance the current model and for Government to move away from the current practice of free consultation with Aboriginal people, groups and organisations. NAAJA is the Aboriginal Justice Agency, individual legal representation is but one component of our organisation. NAAJA provides a holistic service that also includes advocating and providing a representative voice for Aboriginal justice. This includes a representative Aboriginal Board with	NTG and Aboriginal Community	Stage 1 Priority

	Not supported Draft Action 14.3 and 14.4	members from across all regions of the Northern Territory, as well as supporting and amplifying the voice of Aboriginal leaders in communities across the Northern Territory. For the AJA to support NAAJA to continue its current mandate would be effectively supporting Aboriginal cultural leadership in the Northern Territory. NAAJA has been developed formal partnerships agreements with our Law and Justice Groups. NAAJA is building a Law and Justice Coalition with all of our Law and Justice partners that will meet a quarterly or biannually to collaborate and develop Aboriginal Justice strategies and provide a united position on justice policy and issues. NAAJA does not support Action 14.3 and 14.4. These recommendations do not accord with the AJA guiding principles of respectful and collaborative relationships with Aboriginal communities and individuals. These Actions as they are currently worded suggest mere symbolic acknowledgement of Aboriginal culture and leadership. There is the potential for Government to create conditional and prescriptive criteria for Aboriginal consultation and collaboration rather than allowing Aboriginal led determination and involvement Justice reform. NAAJA has had productive collaborative partnerships with Law and Justice Groups that set their own protocols regarding Aboriginal leadership and membership. NAAJA recommends that the AJA should be led by the Aboriginal Community as to their determination of leadership and decision making with standard eligibility criteria for community organisations applying, such as eligibility to obtain a Police Clearance and Working with Children/Ochre Card.		

15. Continue to implement a specialist court response to domestic and family violence	Qualified support – Expanded Strategy	NAAJA recommends a legislative and policy framework for specialist Domestic Violence Local Courts tailored to the needs of Aboriginal people and communities across the Northern Territory. NAAJA supports a non-exhaustive strategic response to address all forms of Domestic and Family Violence whether on the basis of gender, age, sexual orientation or disability with the provision of programs and supports. An example the Tiwi Islands Strong Men and Strong Women program which incorporates traditional ceremonies and activities that are centred around healing. Further examples of specialist programs include NAAJA's Kungas program that works with Aboriginal women both in and out of prison, providing a wrap-around service.	NTG and Aboriginal Community	Stage 1
	Expanded Action 15.2	A responsive and therapeutic domestic violence strategy will require long term commitment and investment in Aboriginal led culturally specific programs that focuses on breaking the cycle of domestic violence and creation of sustainable intervention processes. NAAJA recommends a commitment to develop a community driven strategy to ensure that Aboriginal people are properly resourced and supported to co-design community or regional specialist court processes as well as culturally responsive programs.	Law and Justice Groups	Stage 1
	Further Action	NAAJA recommends the development of culturally specific programs in the community and custodial settings and case management of Aboriginal prisoners who have been convicted of domestic violence. NAAJA's experience is that case management is best achieved with community engagement and the involvement of family and community members.	NAAJA Kungas Program and NAAJA Throughcare and Aboriginal Community	Stage 2

16. Redesign key service delivery models	Support – Expanded Action 16.2 Support – Expanded Action 16.3	NAAJA submits that this action cannot be achieved without adequate resourcing and funding for the Aboriginal Interpreter Service (AIS). Building on the Productivity Commission's draft recommendations for coordinated and targeted funding for services across the Northern Territory, NAAJA recommends that the Northern Territory Government map all Government contracts for services in the Justice System that affect Aboriginal people of the Northern Territory. NAAJA recommends that the awarding or renewing of contracts should be by open tender where appropriate. NAAJA recommends the transition of law and justice services to be delivered to Aboriginal people and communities to Aboriginal Community Controlled Organisations. Where an Aboriginal Community Controlled Organisation requires support to build their capacity, this should be supported and funded by Government. The contracting of services to Aboriginal Community Controlled Organisations must seek to improve cultural competency of program design and service delivery.	NTG and Australian Govt	Stage 2 Stage 1
17. Improve cultural competence in service delivery	Support Expanded Action 17.1	The development, attainment and provision of cultural competency of service delivery within the law and justice system, *must* be done in a genuine and authentic way with independent and robust means of accountability.	NTG and Aboriginal Community and NAAJA	Stage 1

		NAAJA recommends the development of independent and robust ways of integrating Aboriginal-led authority in terms of monitoring, measuring and evaluating service delivery. Government agencies involved in law and justice must empower Aboriginal-led authorities and decision-making. Agencies can do this by creating an Aboriginal and/or Torres Strait Islander identified position that is at the Deputy Chief Executive level (or immediately below) that provides oversight of the principal Aboriginal matters of the agency (amongst other priorities). This position must not be solely burdened with supporting the agency's cultural competency. Agencies must move beyond aspirational policies and actually embedding the consideration of Aboriginal perspectives in their practice. NAAJA provides in-principle support for embedding cultural competency into government contracts with service providers.		
18. Improve communication about the justice system	Support	Communication about the justice system must be culturally competent and allow Aboriginal Territorians to engage with and shape the justice system. Communications must recognise the specific and unique circumstances of remote and culturally diverse Aboriginal communities and empower those communities to participate in the justice system. It has been NAAJA's experience over many years that communication with Aboriginal communities about the justice system has been one way, with one-off or short term programs comprising of traditional strategies to disseminate legal information (e.g. posters, brochures, and advertising). Such strategies are aimed at a general audience and do not show respect	NTG and Law and Justice Groups	Stage 2

		for or incorporate the prior experiences and knowledge of Aboriginal people. It is NAAJA's view that communication about the justice system is best achieved through culturally competent community legal education. Our unique approach to legal education and community engagement works with Aboriginal communities to increase the ability and confidence of Aboriginal people to navigate and influence the mainstream legal system. Fundamental to NAAJA's approach is respect for traditional authority and knowledge, working closely with Law and Justice Groups, Elder groups or cultural authorities or groups with their own names. Communication by the Courts should be flexible, responsive and adapted as a standard part of the Court's service delivery. NAAJA submits that the Northern Territory Government must seek a continuing commitment to cultural competency from the Courts.		
19. Increase accessibility and uptake of complaint process	Support	NAAJA recommends significant overhaul of the operational and legislative framework that governs complaints about government services. A significant area of concern for NAAJA is Police complaints. A key component to achieving the AJA's stated goal of reducing incarceration rates is ensuring an effective and robust mechanism for Police accountability. The majority of Police complaints are investigated by Police and often Police members without any specific cultural competency training. The Ombudsman's investigation of Police complaints is the only truly	NTG	Stage 1

		independent process of investigating a Police Complaint. Even this process is hindered by close Police involvement. See NAAJA's further strategy recommendation on Police Accountability. The Northern Territory Anti-Discrimination Commission serves as a key complaint outlet for instances of discrimination in the Northern Territory. NAAJA notes limits to the Commission's remit, as complaints can only be received from a direct victim of alleged discrimination. This can result in delays in complaint processes, as demonstrated by the handling of allegations of racial profiling at the Ibis Styles Alice Springs Oasis. [7] As discussed throughout this submission, NAAJA notes that improved access to supports to navigate complaint processes will be aided by coordinated and targeted funding. NAAJA notes the expansive discussion on the benefits of coordinated funding of services in the Northern Territory, addressed most recently in the Productivity Commission's Draft Report on Expenditure on Children in the Northern Territory. Agencies like NAAJA are well positioned to continue to support Aboriginal Territorians to access complaint mechanisms and could be assisted to broaden their capacity to do so through adequate funding provision.		
20. Introduce Aboriginal Impact Statements for	Support	NAAJA recommends that the proposed Aboriginal Impact Statement be prepared by an independent Aboriginal Advisory Group (the Group) each time a Cabinet Submission is circulated to Northern Territory Government Agencies. The Statement should serve as a Cabinet comment, rather than	NTG	Stage 1

[7] Gordon, O., & Mitchell, S. (2019, March 9). A tale of two rooms: How racial segregation was exposed at an Australian hotel. Retrieved from https://www.abc.net.au/news/2019-03-10/how-racial-segregation-was-exposed-at-an-australian-hotel/10887128

Cabinet Submissions		an addendum to a Submission. The Group should be funded by Government and comprised of senior Aboriginal people from across the Northern Territory nominated by the Aboriginal Justice Sector. If the Group issues an Aboriginal Impact Statement that determines the proposals contained in a Cabinet Submission will have an adverse impact on Aboriginal Territorians, the Cabinet Office should refuse to process the draft Submission for consideration by Cabinet. If the Group forms a view that any agency has acted in contravention of their assessment in an Aboriginal Impact Statement, the Group should also be enabled to escalate this to the Aboriginal Affairs Sub-Committee of Cabinet. Should the Sub-Committee be dissolved, this should be communicated to the sector and the Sub-Committee's function should be assigned to an equivalent oversight body comprised of senior Aboriginal people with authority to hold Cabinet to account. All efforts must be taken to ensure that the proposed Aboriginal Impact Statement does not become a bureaucratic procedural requirement. The Statement should be distinct in form. Where a Statement asserts that a proposal to Cabinet may have an adverse impact on Aboriginal Territorians, this should not be negated by an assessment by an agency or Government that the adverse impact is necessary.		
21. Establish strong governance structures for the NT Aboriginal	Support	NAAJA recommends that a model Aboriginal representative body should provide independent oversight on the AJA as part of the governance structure, and will also provide the representative signatory to the Agreement.		Stage 2

Justice Agreement				
22. Collect and analyse data	Expanded Action 22.1	NAAJA submits that draft action 22.1 should be further amended to include the right to and protection of Indigenous Data Sovereignty consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*. Further, any data collection should be in line with Indigenous Data Governance mechanisms to protect the right of Indigenous Data Sovereignty. Government funded contracts for service providers should include data collection requirements that require service providers to monitor and evaluate their cultural competency and service provision.	NTG and Aboriginal Community	Stage 1
	Expanded Action 22.2	NAAJA recommends that a statistician is engaged to co-design a data monitoring and evaluation framework with Aboriginal groups that is not deficit focused and considers factors of cultural strength and historical legacies.		
	Expanded Action 22.3	Data should be shared with Aboriginal communities and organisations for the purposes of planning, monitoring and ensuring accountability for service delivery under the AJA.		
	Expanded governance role			

		Governance of Strategy 22 should include Aboriginal communities and organisations (who are adequately resourced), recognising the right of Indigenous Data Sovereignty.		
23. Strengthen partnerships		See comments against Strategy 14. Aboriginal Community Controlled Organisations and community groups should be supported to build upon and strengthen their own governance to enable their full and equitable participation in initiatives under the AJA, in its governance and more generally in law and justice in the Northern Territory. The Aboriginal Peak Organisations Northern Territory (APONT) Partnership Principles serve as a good foundation for strengthening partnerships. In NAAJA's submission, work under this Strategy that aligns with those principles could be strengthened by ensuring meaningful engagement and evaluation of their use.		Stage 2

NAAJA Further Recommendations – Additional Matters that need to be included in the Aboriginal Justice Agreement

1. There are a number of critical areas funding, policy and law reform that have not been addressed within the AJA. These are:

    a. Funding
    b. Racism
    c. Coronial Inquests
    d. Mental Impairment
    e. Housing;
    f. Poverty reduction
    g. Police Accountability

2. Without these areas being addressed, it will be impossible to realise the aims of the Aboriginal Justice Agreement to reduce reoffending and imprisonment rates, and particularly the reduction of reoffending and imprisonment rates of Aboriginal Territorians. [8]

Funding

3. Adequate funding could resource solutions to address the national crisis of the continued over-incarceration of Aboriginal people in the Northern Territory and meet the unmet legal needs of Aboriginal people within the wider Justice System.

4. The 2014 Productivity Commission's 'Access to Justice' Report found that the inevitable consequence of these unmet legal needs is a further cementing of the longstanding overrepresentation of Indigenous Australians in the criminal justice system.

5. By March 2020, the Productivity Commission[9] found that the expenditure of $538 million funds for children in the Northern Territory lead to 'funding decisions made in silos, by departments that are largely unaware of what others are funding or what services are being delivered on the ground.. leading to a fragmented system that is failing to best address the needs of children and families'. The findings of the Productivity Commission related to Youth Justice and Child Protection are directly apposite to the larger Justice System and its funding.

[8] Australian Government Productivity Commission (2014 September) Inquiry Report (Vol2) Access to Justice Arrangements
[9] Australian Government Productivity Commission (2020 March) Expenditure on Children in the Northern Territory

6. Justice funding does not align with placed based or public health approaches or principles of justice reinvestment. The Northern Territory Government's funding provision rarely, if at all, provides for consideration of cultural capabilities or culturally appropriate provision of services.

7. There is the need for a complete overhaul of funding within the Justice System at both the macro and micro levels. A fundamental rethink of the funding approach to Justice is required through a whole-of-system reform or justice reinvestment directing and re-investing money spent on prisons and policing to community based initiatives and early intervention programs that aims to address underlying causes of crime and pathways from prison.

8. We recommend that further consideration, consultation and design of robust funding models and procurement in partnership with NAAJA and Aboriginal Community Controlled organisation and the Aboriginal community.

Recommendation 1. That an Aboriginal Justice Funding Model be developed.

9. We set out below a set of values and principles which should inform the establishment of an Aboriginal Justice Funding model:

    - A focus on culturally based capabilities and cultural competency in service provision;
    - The recognition of wrap-around services to address the complexity of needs for Aboriginal people;
    - Funding allocations based on the legal need of Aboriginal people;
    - The recognition of strengths based approaches of Aboriginal Community Controlled Organisations;
    - Placed based approaches to funding through Law and Justice Groups and Aboriginal organisations;
    - Flexibility and integrated delivery of services based on local requirements; and
    - Long term funding provision contracts of 5 years or 10 years.

Recommendation 2. That the Northern Territory Government and Australian Government commit to extra funding for the Aboriginal Justice Agreement

10. It is necessary that the Northern Territory Government and Australian Government commit to increased funding for the NT Justice System, to address the issue of Aboriginal incarceration and to address the existing and unmet legal needs of Aboriginal People. The Draft AJA should not be in competition with existing Aboriginal funding.

11. New initiatives under the Draft AJA and provision of supports and programs for access Aboriginal people, Communities, Law and Justice groups should be funded by through community grants, such as with the example of the West Australian system of justice grants and LotteryWest. Equally there should be access to community grants from the gambling and liquor revenue to repair the social harm done.

Racism

12. Aboriginal people in the Northern Territory have expressed that they experience 'racism, discrimination and disrespect on a daily basis.'[10]. A 3-year study of 395 Aboriginal people from Darwin and 8 communities revealed that, a quarter of all participants directly experienced racism.

13. The Australian Human Rights Commission has recognised that Aboriginal and Torres Strait Islander peoples are more vulnerable to racism and discrimination. The consequences and effects of racism are often linked to poorer health, educational outcomes and psychological distress.

Recommendation 3: That the Northern Territory Government create a Northern Territory Anti-Racism Strategy

14. NAAJA recommends that there is a further Strategy in the Draft AJA that addresses the issue of racism through the process of a Northern Territory Anti-Racism Strategy that includes public education campaigns, policy statements, training for Government Agencies and the introduction of racial vilification legislation. The inclusion of this work within the AJA will provide significant symbolism as to te Northern Territory Government's commitment against racism and will recognise that racial vilification is a crime.

15. The Anti-Racism Strategy must address and respond to the growth in Australia of right-wing extremism and radicalisation that has led to the warning and raising of the threat level of right-wing extremism of the Director-General Mike Burgess of the Australian Security Intelligence Office.[11] In the context of the Northern Territory, the concern is the increasing right wing-extremism against the Aboriginal population.

Recommendation 4 That the Northern Territory Legislative Assembly enact legislation that criminalises and addresses racial vilification and racial harassment

[10] Telling it Like it Is: Aboriginal Perspectives on race and race relations. Allison, Schawartz and Cuneen, May 2016 Larrakia Nation Aboriginal Corporation, University of Tasmania, University of Sydney

[11] Far right wing extremism is growing in Australia. ASIO doesn't know why. Guardian 2 March 2020.

16. The law is an educative force for good. The Northern Territory Legislative Assembly has enacted laws for societal change, as seen through the passage of Bills concerning domestic violence, recognising that 'domestic violence is unacceptable behaviour that society does not condone';[12] and the expunging of historical homosexual offences.[13] The enactment of racial vilification legislation by the Northern Territory Legislative Assembly would provide a significant educative and symbolic function as realised through the Aboriginal Justice Agreement of the Northern Territory.

17. The law is most effective when it works hand in hand with education. NAAJA recommends that there is public education against racial vilification and the effects of racism on all peoples and particularly Aboriginal people. Racial vilification legislation also acts to send a clear message that the community disapproves of and will not tolerate, certain behaviours[14].

18. The education and training component must extend to all Government Agencies and services in the justice system and include Courts, Judicial Officers, NT Police and Emergency Services and Correctional Services.

19. The Northern Territory is one of only two Australian jurisdictions where there is no racial vilification laws. It is noted that the *Sentencing Act* 2016 (NT) does provide for sentencing consideration as an 'aggravating factor' under section 6A(e) that: 'the offence was motivated by hate against a group of people'.

20. There is the need for the introduction of effective racial vilification legislation within the *Criminal Code* Act (NT) and laws that protects individual persons or a group from racial harassment and prevents incitement against a group more generally.

21. NAAJA recommends the enactment of racial vilification laws that are similar to the West Australian *Criminal Code Compilation* Act 1913 (WA):

    - Section 77 conduct intended to incite racial animosity or racial harassment.
    - Section 79 possession of material with intent to publish and intent to incite racial animosity or racial harassment.
    - Section 80A Conduct intended to racially harass.
    - Section 80C Possession of material for display with intent to racially harass.

[12] Preamble to the *Domestic and Family Violence Act* 2015

[13] *Expungement of Historical Homosexual Offences Records Act* 2018.

[14] Submission to the 'Racial Villification Laws in New South Wales' NSW Standing Committee on Law and Justice

Strict liability offences

- Section 78 conduct likely to incite racial animosity or racial hatred.
- Section 80 possession of material that is likely to incite racial animosity or racial harassment and with intent to publish.

Coronial Inquests

22. Coronial Inquests are one the most important legal processes in addressing systemic failings for Aboriginal people, in health, police, custody and treatment. It is critical that Aboriginal people can participate and understand the reasons for the death of a loved one to provide healing and closure.

23. Aboriginal families including next of kin require assistance, support and legal representation following the death of a loved one and throughout the Coronial investigation, Inquest and findings.

24. Many Aboriginal families continuously raise their concerns at the lack of information and assistance that occurs immediately following a death in custody. NAAJA has experience in contacting, meeting and assisting families and the identified next of kin to discuss issues of autopsies and pathology procedures within a few hours in order to determine if there is any cultural objection to the autopsy and commencement of legal proceedings if necessary. In many instances, NAAJA will travel to remote communities to speak with families and obtain instructions.

25. Aboriginal people and communities in comparison to the western legal system respond to death in different ways. In communities, people will undergo immediate 'sorry business' that brings healing and closure to families. The Western legal system has a delayed response that can confuse people and reignite issues or conflicts over the death of the person. Where there is a vacuum of information or understanding of causes of death can lead to conflict and blame.

Recommendation 5
That the Coronial System is culturally appropriate, timely and achieves its purpose.
That within the Coroners Office an Aboriginal advocate who is able to support families in their loss and assist the Presiding Coroner on cultural issues and practice.
That families and next of kin receive culturally competent and culturally proficient legal representation at Coronial Inquests.

26. It is necessary that we have a Coronial System that meets the needs of Aboriginal people and families. This requires timely and adequate provision of support and

information for Aboriginal people and families and the provision of assistance of counselling services.

27. Culturally competent and culturally proficient support and legal representation is necessary to help families navigate the western legal system of police investigations, autopsy procedures and Inquest and findings.

Mental Impairment and Unfitness to Stand Trial

28. Part IIA of the *Criminal Code Act* (NT) (Part IIA) addresses 'Mental impairment and unfitness to be tried'. 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.

29. 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.[15]

30. Unfitness to stand trial is defined by reference to the ability of a person to understand the charges and proceedings, and to instruct their counsel.[16] The question of fitness is generally to be determined by an investigation conducted by a jury,[17] but can be dispensed with by the court if the parties to the prosecution agree that the accused person is unfit to stand trial.[18]

31. 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.[19] If there is such reasonable prospect, the matter is to be adjourned for up to 12 months.[20] Otherwise, the court is to hold a 'special hearing' within 3 months.[21]

32. 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

[15] Section 43I(2).
[16] Section 43J.
[17] See ss 43L, 43P.
[18] Section 43T(1).
[19] Section 43R(1).
[20] Section 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).
[21] Sections 43R(3), (9)(b)

hearing, the court must declare that they are liable to supervision under Division 5 or order that they be released unconditionally.[22]

33. Supervision orders may be custodial or non-custodial and subject to such conditions as the court considers appropriate.[23] 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.'[24]

34. Persons subject to a custodial order must be committed to custody in a prison or another 'appropriate place'.[25] 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.[26]

35. There is in practice for an Aboriginal person subject to a custodial supervision order no other place other than a prison. The lack of suitable alternatives to prison – for example, supported accommodation for people with high needs - leaves courts with little option. Aboriginal families and communities have very few other options that they can put forward as they may lack suitable housing due to overcrowding or live in a remote community with limited access to support services.

Recommendation 6 T The establishment of a Forensic Mental Health Facility for the treatment of persons subject to Supervision Orders other than at a prison.

36. Supervision orders are for an indefinite term,[27] but are subject to review,[28] reporting at least annually[29] and can be varied or revoked.[30] 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.[31]

37. 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

[22] Section 43X(2).
[23] Section 43ZA(1).
[24] Section 43ZM.
[25] Section 43ZA(1)(a).
[26] Section 43ZA(2).
[27] Section 43ZC.
[28] Section 43ZG provides for a major review and s 43ZH provides for periodic review.
[29] Section 43ZK.
[30] Section 43ZD deals with variation or revocation.
[31] Section 43ZG.

or the public will or is likely to be seriously at risk if the supervised person is released.'[32]

Recommendation 7 Introduction of legislation for 'limiting terms', in place of indefinite supervision orders that balances the need to protect the community against the principle that a person's liberty should be subject to the minimum restriction necessary.

38. In NAAJA's view, the priority for legislative reform should be the introduction of 'limiting terms', in place of indefinite supervision orders. The length of 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.

39. 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, resulting in the order simply continuing with the person detained.

Housing

40. Housing is a key social determinate for education, health, employment and prosperity and criminal offending. Research[33] shows that the common explanations of the correlation between housing and offending are:

    a. those without stable accommodation may have little choice but to engage in 'survival offending' such as shoplifting and squatting;
    b. substance abuse as a coping mechanism may lead to offending behavior in order to fund habits;
    c. Police may specifically target homeless populations because of perceived community safety issues, or because homeless populations are more visible to street policing operations[34]; and
    d. by virtue of living in a public place, people who are homeless are more susceptible to committing public order offences such as trespassing and public urination.

[32] Section 43ZG(6).
[33] Homelessness and housing stress among police detainees: Results from the DUMA program
[34] Kirkwood & Richley 2008

41. Unfortunately for Territorians, and particularly Aboriginal people, homelessness as a determinate of offending is ***firmly entrenched*** in the Northern Territory. According to the 2016 Census:

    a. the Northern Territory has a homelessness rate approximately 1,204% higher than the national average of homelessness;
    b. While Aboriginal people are 26% of the Territory's population, they have a homeless rate of 88%;
    c. Approximately **77% of homeless persons in the Northern Territory are in remote areas**; and
    d. When remote homelessness is considered exclusively, **the rate of homeless in remote areas in the Northern Territory is approximately 3,953% above the national average**.

42. While we appreciate that the Northern Territory and Commonwealth Governments has committed $1.1 billion dollars under the Remote Housing Investment Package, we are concerned that this will still not be enough to adequately address the homelessness rate, maintain the current premises to a sufficient standard and will keep track with population growth.

43. Given the correlation between offending and homelessness, all other attempts to reduce the offending rate will be virtually redundant unless the AJA contains a commitment to continue to reduce homelessness in the Northern Territory.

Recommendation 8: That the AJA include commitments expanding the efforts to reduce homelessness of Aboriginal people in the Northern Territory.

Poverty reduction

44. As found by the Senate Standing Committees on Legal and Constitutional Affairs, imprisonment rates are linked to the level of criminal activity, changes to justice policies and practices, and social and economic factors such as poverty[35]. The median income of Indigenous Australians in 2016 was estimated at 66% of that of non-Indigenous Australians[36] and, appallingly, 31% of Aboriginal and Torres Strait Islander people are living in poverty[37].

[35] Value of a justice reinvestment approach to criminal justice in Australia (2013), Chapter 2
[36] Markham F & Biddle N (2018): Income, poverty and inequality - Census Paper 2, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra at p 20.
[37] Davidson, P, Saunders, P, Bradbury, B & Wong, M (2018): *Poverty in Australia, 2018*, ACOSS/UNSW Poverty and Inequality Partnership Report No. 2, p 65

45. Particularly for Aboriginal people in remote communities in the Northern Territory:

    a. **Poverty rates rose in remote and very remote areas** (up 1.2% and 7.6%, respectively)[38];
    b. The median income of disposable equalised household income in all remote Aboriginal regions in the Northern Territory **is merely between 29% to 45% of non-Indigenous people**[39];
    c. **All of the remote Aboriginal regions in the Northern Territory have a poverty rate of 42% or greater**[40];
    d. **the rates of inequality and poverty are particularly acute in remote Aboriginal communities and are getting worse.**[41]

46. Unfortunately, currently many Aboriginal people who are reliant on social security find themselves living in poverty. According to 2019 Australian National University modelling, the average income for Centrelink recipients is $45.50 a day.[42]

47. It is clear that Newstart rates are inadequate to provide subsistence and that Newstart does not appropriately assist persons who are unemployed to meaningfully upskill so they are job-ready. Many individuals who should be on the Disability Support Pension payment are unable to become eligible due to onerous requirements. Centrelink debts that are raised because recipients did not understand their obligations are problematic and consign recipients to reduced payments on an already insufficient amount.

Recommendation 9 The AJA must conceive of the structural and systemic issues related to long-term welfare dependency and bring a nuanced understanding to the relevant nexus between poverty and offending.

Recommendation 10 In the meantime, the AJA should commit the Northern Territory Government to lobbying the Commonwealth Government to increase the rate of Newstart and Youth Allowance.

[38] Markham F & Biddle N (2018): *Income, poverty and inequality - Census Paper 2*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.
[39] Ibid
[40] Ibid
[41] Ibid
[42] https://www.smh.com.au/politics/federal/morrison-government-to-prioritise-pensioners-over-newstart-recipients-20190724-p52afs.html

Police Accountability

48. Conduct by Police officers can lead to unnecessary time in detention for Aboriginal people in circumstances where (but not limited to):

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

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

50. To improve police accountability, we make the following recommendations:

Recommendation 11 That section 162 of the *Police Administration Act 1979* should be repealed.

Recommendation 12 The *Ombudsman Act 2009* is amended to overcome the following structural deficits:

- 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;
- 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.

Section 162 of the *Police Administration Act 1979*

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

    a. An action (meaning civil action); and

b. Prosecution;

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

52. 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.

53. 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.

54. 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.

55. 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.

Oversight by the Ombudsman

Background to the inherent structural barriers to appropriate oversight

56. The Act provides the legislative framework for the way in which complaints against the Northern Territory Police Force (the Police) are to be handled. Section 150 of the *Ombudsman Act 2009* 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 1979*.

57. 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:

    a. The Police Complaints Resolution Process (CRP)[43];
    b. An investigation by the Police Standards Command (the PSC)[44]; and
    c. An investigation by the Ombudsman[45].

58. 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.

59. 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.

60. 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:

    a. Category 2 - which relates to "minor misconduct" but not sufficiently serious to be subject to category 1[46] and is carried out with limited oversight by the Ombudsman's office[47]; and

[43] Ombudsman Act (NT) s 78.
[44] Ibid, s 80.
[45] Ibid, s 86.
[46] See paragraph 12 of the Agreement.
[47] See paragraph 12 of the Agreement.

b. Category 1 – which relates to alleged serious misconduct or maladministration[48]. Paragraph 12.3 provides a list of alleged conduct that would justify a Category 2 processes.

61. Pursuant to section 86 of the Act, the Ombudsman will only directly investigate a police complaint where the complaint:
    a. 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;
    b. concerns conduct of a Police Standards Command member;
    c. is in substance about the practices, procedures or policies of the Police Force; or
    d. should for another reason be investigated by the Ombudsman.

Conflicts of interest

62. 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:

    a. 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[49] (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

    b. 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

63. 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.

[48] See paragraph 12.2 of the Agreement
[49] See paragraph 12.2 of the Agreement.

64. 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.

65. 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:

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

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

67. 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.

68. It is NAAJA's position that the Ombudsman should categorize 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

69. 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.

70. This can be particularly important in circumstances where police admit an incorrect process is followed and provide an apology however the person adversely affected is not able to have all of their questions answered appropriately. There is often no opportunity to assess how systems have changed to address these issues from a systemic perspective.

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

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

72. In our experience, 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 do 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 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.

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

74. 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.

75. 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 similar requirement in that Act to ensure that a complainant is given an opportunity for further comment before the finalisation.

76. 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.

Dealing directly with complainants who are known to be legally represented

77. 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.

78. 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.

79. It is NAAJA's experience that many of our clients will not wish to engage directly with the Police as regardless of the outcome of the complaint as they feel that have been subjected to unfair, harsh or unjust conduct from the Police and:

    a. This conduct has been particularly distressing;
    b. 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);
    c. They feel uncomfortable, distressed, overwhelmed or intimidated given the power imbalance between themselves and the Police officers;
    d. The power imbalance may lead to the complainant feeling unable to confidently and or completely put forward their complaint to the Police officer; and
    e. They have sought legal representation so that they do not have to directly engage with the Police without assistance or guidance.

80. 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.

Oversight of the Ombudsman

81. 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.

82. 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

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

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

85. Subsection 6(3) of the Act provides that the Ombudsman must not disclose the final outcome of 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.

86. 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

87. 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.

88. 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.

89. 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.

90. 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.

91. 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

92. 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.

93. 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.

94. 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

95. 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:

a. There were bi-monthly meetings between NAAJA civil solicitors and the Regional for Katherine and the Superintendent for Arnhem & Western.
b. 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.
c. In some cases, this managed to bring about preventative/proactive action to ensure that community relationships with police were not unnecessarily damaged.
d. 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.

96. 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.

Appendix A: Recommended Legislative Reform

NAAJA recommends that the Aboriginal Justice Agreement (AJA) accords with the United Nations Declaration on the Rights of Indigenous People.

NAAJA recommends the following legislative reform to support the implementation of the AJA:

- Amend the *Sentencing Act 1995* to include the option of diversion for infringements and certain offences for adults
- The repeal of mandatory sentencing laws
- Provision of community-based sentencing options
- Amendment of the *Police Administration Act 1979* and the *Ombudsman Act 2009* to support police accountability and improved complaint processes
- The introduction of 'limiting terms', in place of indefinite supervision orders, under Part IIA of the *Criminal Code Act*
- The introduction of racial vilification legislation in the Northern Territory.

NAAJA recommends that the Northern Territory calls upon the Australian Government to amend the *Crimes Act 1914* (Cth) as it applies to prohibit consideration of any form of customary law or cultural practice in consideration of bail or sentencing.

Signatories to NAAJA's Submission

NAAJA will provide a supplementary document containing endorsements of NAAJA's Submissions on the Draft Aboriginal Justice Agreement of the Northern Territory from Aboriginal Community Controlled Organisations and Aboriginal Peak Bodies.