North Australian Aboriginal Justice Agency

Submission to the NT Police Review

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DARWIN
61 Smith Street
DARWIN NT 0801
Tel: 08 8982 5100
Fax: 08 8982 5190

KATHERINE
10 Third Street
KATHERINE NT 0851
Tel: 08 8972 5000
Fax: 08 8972 5050

ALICE SPRINGS
55 Bath Street
ALICE SPRINGS NT 0870
Tel: 08 8950 9300
Fax: 08 8953 0784

TENNANT CREEK
61 Paterson Street
TENNANT CREEK
NT 0860
Tel: (08) 8962 1332

Acknowledgement of Country

The Northern Australian Aboriginal Justice Agency acknowledges and pay our respects to the traditional owners of the lands on which we live and work across the Northern Territory. We pay our respects to the Aboriginal and Torres Strait Islander Elders, leaders and respected persons, past, present and future and value the immense cultural knowledge of Aboriginal contributors to both the review and our submission.

About NAAJA

The North Australian Aboriginal Justice Agency (**NAAJA**) provides high quality, culturally appropriate legal aid services to Aboriginal people across the Northern Territory (**NT**). NAAJA was established in February 2006, which initially amalgamated the three top end legal services which are the North Australian Aboriginal Legal Aid Service (**NAALAS**), the Katherine Regional Aboriginal Legal Aid Service (**KRALAS**) and the Miwatj Aboriginal Legal Service (**MALS**). Until 2018, NAAJA only operated in the top end region until the Central Australian Aboriginal Legal Services (**CAALAS**) which covers the Barkly and Central Australian region of the NT then formed NAAJA.

NAAJA and its earlier bodies have been advocating for the rights of Aboriginal people in the Northern Territory since their establishment. 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 Territory to provide legal advice and consult with relevant groups to inform submissions.

a) Key recommendations

At the outset, NAAJA is requesting that the finalisation of the NT Police Review be deferred until completion of the Coroner's investigation into the death of Kumanjayi Walker, in particular through publication of the final report including findings and recommendations.

The following specific recommendations are directed at key reforms needed to improve the effectiveness and efficiency of the NT Police force in order to best serve and protect all communities in the Northern Territory.

1. The Northern Territory implement compulsory, structured community-specific cultural training to new police officers in each community which is delivered by local Aboriginal members of the community.
2. The Northern Territory government redirect funding to properly resource self-determined justice solutions including Law and Justice Groups and community-led alternatives to police.
3. To enhance accountability and transparency, and to improve integrity and trust, the Northern Territory government establish a new independent and robust police accountability mechanism that is complainant-centred, transparent, has adequate powers and resources to carry out independent investigations, and responds in a culturally appropriate way to the needs of Aboriginal people in the Northern Territory.
4. The Northern Territory government improve police accountability by repealing:
   (a) the 'acting in good faith' defence set out in section 148B of the *Police Administration Act 1978* (NT) (**Police Administration Act**);

(b) the 2-month time limit on taking legal action for police wrongs as set out in section 162(1) of the Police Administration Act;
(c) the provisions regarding liability for costs as set out in section 162(4) and (5) of the Police Administration Act;
(d) the 6-month time limit on commencing disciplinary action against police officers under section 162(6) of the Police Administration Act; and
(e) subsection 106(3) of the *Ombudsman Act 2009* (NT) (**Ombudsman Act**), so that complainants can be advised of the outcome of disciplinary action.

b) Introduction

The time for true accountability of police in the Northern Territory is long overdue. Over 30 years ago, the Royal Commission into Aboriginal Deaths in Custody recommended that complaints against police should be made to, be investigated by or on behalf of and adjudicated upon by a body independent of police.[1]

Numerous reports and inquiries since the Royal Commission have echoed this call for independent investigations of police, including the Australian Law Reform Commission's Pathways to Justice report, which recommended that, to provide Aboriginal people and communities with greater confidence in the integrity of police complaints handling processes, governments should review their police complaints handling mechanisms to ensure greater practical independence, accountability and transparency.[2]

The flaws of the NT's compromised police complaint system have been recently exposed again during the coronial inquest into the police-shooting death of Warlpiri and Luritja teen Kumanjayi Walker. NAAJA has intervened in that coronial inquest to highlight systemic injustices experienced by Aboriginal people in the Northern Territory.

As also noted in the recently released External Review: Complaints and Discipline System Northern Territory Police Force:

> *the current complaints and discipline system lacked the confidence of the community, is inefficient, plagued by time delays and has limited tools to deal with under performance or behavioural issues. Not one stakeholder advocated for its retention.*[3]

For as long as members of NT Police maintain authority and control of the investigation of actions by other police officers, the opportunity for members of NT Police to act with impunity and escape accountability will continue. This is for several reasons, including that the police adjudicating complaints often interpret their job as picking holes in a complainant's story rather than the police version of events and therefore tend to be uncritical of police accounts within a seemingly entrenched culture that tolerates or accepts police abuses and tends to downplay or minimise unlawful conduct. In addition to an independent police oversight mechanism, more must be done to reduce the burden on an already overwhelmed police service particularly through divestment of functions and deferral to more community-led solutions that work to improve community safety.

c) Community-led alternatives to policing

Aboriginal Elders, leaders and representatives of Aboriginal community organisations know what their communities need. Yet time and again government have failed to recognise their expertise and specialised insights on the very issues that affect them, in favour of top-down approaches. The same too often occurs in relation to key agencies operating within communities and across the Territory, by failing to engage with, honour and respect the cultural authority, knowledge and influence that these senior representatives and leaders have within their communities.

Aboriginal peoples and representatives of their communities must be at the heart of decision-making on matters that affect their lives. This requires their active involvement in determining appropriate responses, interventions and the nature, design and delivery of culturally relevant programs at key decision-making points of conflict or unrest within their communities. In relation to the NT police service, this requires police respecting the role of Elders and community in resolving conflicts, taking a step back to enable Elders and designated community members to peacefully resolve matters through a cultural strengthening and restorative process and only ever becoming involved at the direction of community where serious cases genuinely warrant their intervention.

In furtherance of the NT Government's commitment to Closing the Gap and enabling self-determination, Aboriginal Communities must be empowered in the design and delivery of community-led solutions to their own issues. The following case studies serve as examples of culturally strengthening responses, including alternatives that would obviate the need for police intervention and/or ways to enhance community policing services.

d) The Anindilyakwa Peacemaker Program on Groote Eylandt

The Anindilyakwa Peacemaker Program is one example of a community-led, culturally responsive program built on nationally recognised training frameworks and accreditation.[4] In their words: "We try and solve problems between different people and groups within the communities before they become big problems."

The program grew out of a series of conversations between Roderick Mamarika and Anindilyakwa Land Council anthropologist Hugh Bland, who, together with Elaine Mamarika, identified a lack of formal community involvement in dispute resolution and a lack of support for those community members who informally sought to resolve community disputes.

The key principle for the Peacemakers is always "staying in the middle". Their approach to mediating disputes combines the empowerment of counselling with the traditional role that many community members have always played in seeking to defuse tensions rather than exacerbate them.

The value of the Peacemaker Program cannot be understated; it forms part of a suite of programs on Groote Eylandt that have been supporting the community while rates of offending have been dropping. The Peacemakers informally estimate a significant decline in rates of arrest due to fighting from 80% to 90% down to 30% to 40%.

Importantly, “it is good for the community that the community is the ones solving the problems, and we don’t have other people or the Police doing this for us.”

The Anindilyakwa Land Council is seeking to ultimately establish Peacemaking groups on each of the three largest communities in the Groote Archipelago: Angurugu, Umbakumba and Milyakburra.

Instead of traditional police increasingly being deployed to manage issues that a very unequal system has produced, the Peacemaker Program aims for the communities of the Groote Archipelago to become accustomed to resolving their differences through negotiation alone.

In the short term, this approach helps equip communities with the skills they need to resolve conflict and reduce the need for contact with the police. This immediately helps remove the well-documented risks for community members associated with police contact, including discrimination, escalation, up-charging, assault and deaths in custody. Longer term, it is hoped that over time there is then less need for Peacemakers as the practice of dispute resolution through dialogue is more widely adopted.

To realise this vision, community responses need support and funding. While millions of dollars continue to be funnelled into policing, programs like the Peacemakers often operate without funding, and without Peacemakers being paid. Creating safer communities starts with significantly more resources being dedicated to supporting the ongoing rollout of the Anindilyakwa Peacemaker Program and other peacemaking and mediation programs across the NT.

e) Aboriginal led diversion

NAAJA acknowledges the Northern Territory Government’s commitment to youth diversion and increased funding for Back on Track and On The Right Track, including funding of 13 non-government organisations across the NT including Danil Dilba, Tiwi Islands Regional and Warlpiri Youth Development Aboriginal Corporation.[5] However, it is critical that Aboriginal people are given every opportunity to control, and participate in, the design and delivery of diversion initiatives that respond to the particular needs of their communities including their young people. We recommend that the NT government provide more and adequate funding and support for additional youth diversion programs in remote communities that are developed and run in partnership with or by Aboriginal communities, Elders and Law and Justice Groups. Alongside this, police should be brokering workable relationships with those communities and representatives to ensure appropriate referral pathways.

For example, the Groote Eylandt Community-Led Youth Initiatives through which traditional owners have overseen a range of community-led youth justice initiatives focused on diversion and early intervention to divert local children from the formal system and re-engage them with education or employment has seen a 95% reduction in youth crime on Groote Eylandt since its implementation.[6]

Whilst multiple youth diversionary options do exist NAAJA recommends early intervention and culturally specific diversion programs are developed for Aboriginal adults for multiple offence types including alcohol and drug related offending, family violence and property

related offending. Further to this, the *Sentencing Act 1995* (NT) should be amended to include the option of diversion for infringements and certain offences for adults.

Aboriginal diversion programs should be developed, owned and led by Aboriginal Elders and representatives of Aboriginal Community Controlled Organisations. Further discussion with Elders and Law and Justice groups should inform the nature and scope of the model, interventions and supports necessary including cultural ceremonies, cultural activities and how best to strengthen family and community connections as part of new diversion frameworks and programs.

f) Alcohol management plans

Measures to address alcohol misuse and alcohol-related harm must be tailored to suit the needs of specific communities and be non-discriminatory in their application and impact. They must involve the participation of and reflect the views of affected communities to ensure that they are culturally appropriate, address community needs and have the greatest chance of success.[7] In line with the calls of Aboriginal Peak Organisations Northern Territory (**APO NT**) for alcohol rules to be effective, Aboriginal leaders and communities must partner with health and care providers, police, law makers and businesses to design place-based systems and localised plans to address the complexity and depth of alcohol issues relevant to their collective need. [8]

NAAJA supports calls by APO NT for a whole-of-community approach to tackling alcohol abuse and related harm.[9] Alcohol Management Plans may be effective for individual communities so long as they are evidence-based and led and supported by Aboriginal and Torres Strait Islander communities.[10] As noted by APO NT, "Evidence shows that instead of putting a blanket ban on alcohol without community consultation, collaborative plans that incorporate supply, demand and harm reduction measures, that monitor the movement and sale of alcohol with the community, and that reflect the needs and wants of the whole community, will reduce the harm alcohol has on individuals, families and communities."[11]

In responding to alcohol induced harm and anti-social behaviour, NAAJA recommends the greater empowerment and utilisation of Aboriginal organisations as a primary response. Community Safety and Night Patrols, like the service operated by Larrakia Nation in the greater Darwin area should be a primary responder to alcohol related harm and where necessary operate in partnership with or in the alternative to police. Where NT Police are being funded to respond to alcohol-related harms, we recommend that police make decisions in partnership with Aboriginal organisations. This is in line with Priority Reforms 2 and 3 of Closing the Gap.

g) Cultural training by community members

Creating strong relationships between police officers and community members is at the heart of community policing. Strong relationships built on trust and respect allow police to walk together and to operate in tandem with the community.

Aboriginal Liaison Officers and Aboriginal Community Police Officers are an important part of 'bridging the gap' between the police and the community, however they are not the whole picture. Another important piece in building these relationships is providing structured,

meaningful, and community-specific cultural inductions, training and education to new police officers in community.

Cultural inductions, training and education must be more than just written documents or handouts. Rather, it must be a compulsory holistic process, in which local community members educate new officers about the local context, including history, cultural protocols, including the nature of the kinship system, family and community dynamics, local customs, beliefs and cultures, and also an introduction of officers to local Traditional Owners and Elders. It is not appropriate for members of one community to deliver cultural training about another community's culture. The community-members delivering the training must also be remunerated for their cultural expertise and transmission of knowledge.

Specific cultural awareness training for police was a recommendation of the Australian Law Reform Commission's Pathways to Justice Final Report (December 2017).[12] This recommendation also appears in the 2010 Independent Review of Policing in Remote Indigenous Communities in the Northern Territory.[13]

The benefits of community members providing cultural training to officers are numerous. First, it provides an opportunity for new officers in the community to meet Elders and community leaders. Having good relationships with community leaders will assist the NT police in the provision of localised policing services and will help build and maintain the trust of the community. Second, it ensures that new officers in community are aware of cultural protocols in community. The protocols that exist within one community will differ from those that operate within another community, regardless of distance, and socio-economic factors including language and religious context. Third, it empowers the local community by giving them an opportunity to welcome police into the community and share their knowledge, whilst in turn each new officer is prepared for a life within the community. This empowerment creates an 'even playing field' such that the officer will be better positioned to 'serve and protect' the local community.

h) Law and Justice Groups

Over three decades, NAAJA has worked to support and strengthen the operation and impact of Law and Justice groups, through building capacity and knowledge of Elders and leaders in communities. In addition to assisting with sentencing in community courts, the model of two-way learning has improved shared understanding of Aboriginal culture and perspectives concerning criminal and child protection proceedings, law reform and government policy, and community policing and safety.

As noted in the Pathways to the Northern Territory Aboriginal Justice Agreement, the Lajamanu Kurdiji Law and Justice Group is one of numerous groups operating across the Northern Territory.[14] The Kurdiji promote respect for law and justice within their community, provide cultural information and context to assist courts in determining an appropriate sentence, often through the provision of reference letters and/or advice directly to the judicial officer. In addition, the Kurdiji provide an alternative justice response to de-escalate or dispel conflict or tensions within the community including dealing with social welfare issues arising through violence and alcohol and drug misuse in the community.

> *We have been showing the way, showing that a strong Aboriginal group running things the way it wants for itself, can make a big difference in the community. We feel that supporting groups like ours will do a lot more to solve these problems…*[15]

Law and Justice Groups reflect the cultural authority of Elders and other respected people within a community, people who come together to promote community safety, to address law and justice related issues and to facilitate more effective and culturally relevant responses to local issues including offending. The Northern Territory Aboriginal Justice Agreement 2021–2027 lists the establishment of Law and Justice Groups as a key commitment.[16] The Agreement notes that Law and Justice Groups must be developed in cooperation with local Aboriginal leaders and respected persons and be co-designed with them.

NAAJA understands that a number of Law and Justice Groups will provide a formalised role in the Community Courts expected to start operating in 2024 in Groote Eylandt and, later, in Maningrida and Kintore. Whilst the work to re-establish Community Courts, including a legislative basis and mandate are a good start, NAAJA notes that this formalisation of existing roles linked to the Community Courts is just a portion of the more extensive and holistic work of the many existing groups operating across the Territory. NAAJA understands the need for the gradual and measured roll-out of the policy, but we are concerned that the Northern Territory Government is not prioritising the resourcing and incremental growth of Law and Justice Groups and will not be able to meet its commitments by the end of the Aboriginal Justice Agreement in 2027.

i) Need for independent police accountability

The current police complaints system

The Ombudsman Act provides the legislative framework for the way in which complaints against the NT Police are to be handled. Section 150 provides for the creation of the Police Complaints Agreement –an agreement between the NT Ombudsman and the NT Police which outlines some of the details about the way in which police complaints are to be dealt with. The Act and the Agreement set out the following tiered process for the way in which police complaints are handled:

1. The Police Complaints Resolution Process (**CRP**);
2. An investigation by the Police Standards Command; and
3. An investigation by the Ombudsman.

The CRP is an informal 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. A meeting between the complainant and the investigating officer is usually offered.

The second tier of investigation – carried out by the Police Standards Command – triages complaints according to the seriousness of the allegations into:

- Category 2 – which relates to ‘minor misconduct’ that is not sufficiently serious to be subject to category 1 and is investigated with limited oversight by the Ombudsman; and
- Category 1 – which relates to alleged serious misconduct or maladministration.

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

- 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;
- concerns conduct of a Police Standards Command member;
- is in substance about the practices, procedures or policies of the NT Police; or
- should for another reason be investigated by the NT Ombudsman.

In practice, the current police complaints system in the Northern Territory works in a way where the vast majority of complaints made against police are investigated by NT Police.

Best practice model of police accountability

For the purposes of giving evidence to the inquest into the death of Kumanjayi Walker, Tamar Hopkins prepared an expert report (the **Expert Report of Tamar Hopkins**, enclosed with this submission for convenience of reference). This report evaluates the current police accountability model. NAAJA endorses this report and seeks that consideration is given to this report for the purposes of this review. The report notes there is an inherent conflict of interest in police investigating complaints against police. An effective and best practice independent police complaints body is:

1. **Independent of the police**, institutionally, practically, culturally and politically.
2. **Able to conduct full and adequate investigations**, because it is adequately resourced and able to ascertain whether police have breached legal or disciplinary standards, and whether they have acted in compliance with their human rights obligations.
3. **Prompt in its investigations**, interviewing suspects and witnesses in a timely fashion, enforcing timelines for investigation and the prompt provision of documents by police.
4. **Transparent and open to public scrutiny**, regularly and publicly reporting police complaints, including outcomes, disciplinary action, civil litigation and prosecutions.
5. **Complainant centred**, enabling the complainant to fully participate in the investigation, including through access to information relevant to their complaint and a full explanation of the reasons for their complaint outcome, and affording protections from victimisation.

Extrapolated from international human rights standards and best practice,[17] together these five components constitute the core elements of an effective system for the investigation of police complaints. Yet most of these elements are lacking in the current system police complaints system in the Northern Territory.

Flaws with the current complaints system

While the NT Ombudsman is independent of NT Police, there are several critical ways in which the NT Ombudsman's independence and practical ability to investigate are undermined. The current system – as set out above – is designed in a way that the NT Ombudsman does not have primary responsibility for complaints. Rather, the NT Ombudsman and the NT Police must "agree to consult and jointly consider complaints", with the Professional Standards Command (**PSC**) positioned as the lead agency with respect to complaint investigation and with the Ombudsman relegated to a secondary, largely oversight

role. So, while the NT Ombudsman can independently investigate a complaint in certain circumstances, outside of those limited circumstances, the police are involved in all other complaints about police misconduct.

NAAJA lawyers assisting clients make complaints against members of NT Police have ongoing concerns about the operation of the current complaints system, with many of the serious complaints that are lodged on behalf of clients not investigated by the appropriate complaints handling mechanism.

In NAAJA's experience, most complaints are categorised as to be dealt with by the CRP. This is confirmed by the NT Ombudsman's annual report (2022/2023), which shows that a small number of complaints are investigated as category 1 complaints by the NT Ombudsman. Of 465 approaches relating to the conduct of police, less than 1% of complaints were investigated by the NT Ombudsman.

The table below sets out numbers of police conduct approaches received in the three most recent years and approaches categorised (not all approaches require categorisation).

Received	2020/21	2021/22	2022/23
Approaches	628	612	465
Complaint Resolution Process	172	186	161
Category 2	78	66	44
Category 1	4	1	3

Categorisation is undertaken by our Office based on the nature of the complaint. Categorisation does not mean that an allegation has been proven.

***Category 1** cases are the most serious level of complaints.*

***Category 2** cases are serious but not at the Category 1 level.*

*The **Complaint Resolution Process** (CRP) is an informal process undertaken by NT Police where early personal contact between police officers and complainants may lead to a quick and effective resolution.*

For more on complaint classification, see How Police conduct approaches are dealt with later in this Chapter - and the Police Complaints Agreement *at Appendix A, in particular, clauses 12.3, 12.2 and 11.2.*

Figure from the NT Ombudsman Annual Report for 2022/2023

For the purposes of giving evidence to the inquest into the death of Kumanjayi Walker, NAAJA conducted a review of all police complaints made on behalf of clients from 1 January 2020 to 31 December 2022, using data obtained from our internal client management system. The review revealed that:

- NAAJA made 190 complaints against the police from 1 January 2020 to 31 December 2022;
- The shortest response time to a complaint by the Ombudsman (i.e., after a preliminary investigation) was 5 days;
- The longest response time to a complaint by the Ombudsman (i.e., after a preliminary investigation) was 79 days;
- The mean response time to a complaint by the Ombudsman (i.e., after a preliminary investigation) was 33 days;
- The shortest response time to a complaint by the PSC (not including matters dealt with by way of CRP) was 37 days;

- The longest response time to a complaint by the PSC was 1,056 days (i.e., 2 years, 10 months, and 3 weeks);
- The mean response time to a complaint by PSC was in 338 days (i.e., 11 months and 3 days) - - which is completely unacceptable given that there is a 2 month time limitation to commence criminal or disciplinary proceedings;
- 32 complaints were dealt with by way of CRP;
- 130 complaints were dealt with by way of Category 2 investigation;
- Only 2 complaints were dealt with by way of Category 1 investigation; and
- None of the complaints were directly investigated by the Ombudsman.

In NAAJA's experience, only very rarely does the PSC or the Ombudsman find in favour of our client in the totality of their complaint. They might find in favour of our client on some smaller less controversial matters, such as rudeness or inappropriate comments, or where there is an issue peripheral to the main complaint, such as one member of the Police out of a number not having their body worn footage camera recording when exercising a police power. However, when it comes to the main thrust of the police complaint, in NAAJA's experience the PSC and the Ombudsman fail to find in favour of our clients.

This is confirmed by NAAJA's statistical analysis of the 190 complaints we made between 1 January 2020 to 31 December 2022, which showed:

- Of the 132 complaints that were in treated as category 1 or category 2, 93 of those complaints involved an allegation that the police used excessive force.
- Of those 93 complaints, only 9 of those complaints resulted in findings in favour of the complainants (i.e., 'allegation sustained')[18].
- Of those 93 complaints for excessive force, 67 of those complaints resulted in findings where the allegation was denied.
- Of those 93 complaints for excessive force, 17 of those complaints resulted in findings of 'unresolved' or 'insufficient evidence to support allegation'.
- Of the 17 complaints where a finding of excessive force was left 'unresolved' or a finding of 'insufficient evidence to support allegation' was made, 8 of those complaints resulted in a finding that body worn footage was not activated.

In NAAJA's extensive experience, the following issues are commonplace in the PSC's response to complaints:

1. Failing to appropriately weigh the contemporaneous evidence of complainants (e.g., when body worn footage captures commentary from complainants about police misconduct that is then complained about later);
2. Giving undue weight to justifications from members of the police in justifying misconduct (e.g., finding that the use of force was the product of 'reflex' or 'split-second' decision-making);
3. Failing to deal with all of the evidence (e.g., failing to factor in statutory declarations from complainants in making findings, or failing to deal with body worn footage which plainly depicts wrongdoing);
4. Failing to draw negative inferences from minor misconduct as supporting more serious misconduct (e.g., finding an excessive force allegation as 'unresolved' or 'insufficient evidence to sustain allegation' where body worn footage was not activated during the incident); and

5. Failing to take into account previous similar complaints, or untruthfulness from officers, to make credibility findings against those officers in support of the complaint.

These precise issues occurred in the investigation of the complaint of Cleveland Walker[19].

As it stands, the current police complaints system is not operating in a way where police complaints are being investigated independently of police, nor is it allowing for full and adequate investigations. As will be discussed below, in relation to the misconduct of former Constable Zachary Rolfe, the current system is not delivering full and adequate investigations. The below discussion is just in relation to failures of the current system in relation to one former police officer, with NAAJA lawyers reporting that the inadequate responses from the PSC and the NT Ombudsman in that case are emblematic of their day-to-day experiences helping clients make complaints about police misconduct.

NAAJA acknowledges that over the past year, the time for providing complaint outcomes by the PSC has improved. We understand this to be a product of improved systems at the PSC and also the significantly lower number of complaints submitted over the 2022/23 year. The Ombudsman's Annual Report (2022/23) was unable to identify an obvious cause for the decline in complaints. NAAJA considers that this decrease may be due to limitations in NAAJA's capacity to assist clients over that period, resulting in fewer complaints being submitted. From NAAJA's experience, we have not identified a decrease in the number of incidents being reported to us.

A further issue preventing the quick submission and resolution of complaints is the extremely slow response time from Police Information. Whilst the Police Information team is required to respond to requests for information within 30 days,[20] this rarely occurs. Applicants frequently wait around 6 months for the provision of footage and documents from Police Information. Complainants are therefore required to either submit a complaint a long time after the incident occurred or are unable to review the footage of their incident prior to submitting a complaint, resulting in a complaint that is inaccurate (thereby requiring further time-consuming investigation by the PSC). The lack of prompt investigation of complaints can be contrasted with the tight timeframes demanded of people taking action against the police (which is discussed in greater detail below).

The current system is also not transparent, nor complainant centred. In NAAJA's experience, responses to a 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.[21] Additionally, in the rare instance where disciplinary action is taken against an officer, subsection 106(3) prohibits the Ombudsman from disclosing the outcome of that action to the complainant or anyone else. This is shows a complete lack of transparency and is incredibly frustrating for the complainant.

A further issue with the complaints process, and the CRP in particular, is that the meetings with complainants and police officers are cursory, lack the assistance of an interpreter and are seen as a 'box-ticking' exercise by the officer responsible. We consider that NAAJA and the PSC agree that CRP meetings could constitute an important tool in resolving

complainant's grievances quickly and improving police-community relations. However, in NAAJA's experience, complainants rarely leave a CRP meeting feeling like their complaint has been meaningfully considered and responded to.

Further undermining the current system, section 100 of the Ombudsman Act requires that a police officer who is proposed to be subject to an adverse comment in an NT Ombudsman's report is given a reasonable opportunity to make a submission prior to finalisation. There is no similar requirement in that Act to ensure that a complainant is given an opportunity for further comment before the finalisation.

While NAAJA has previously advocated for reform of the current system and for the Ombudsman Act to be amended to overcome its structural deficits, the current system has failed to a point where NAAJA no longer believes that reform of current institutions is the answer. To achieve accountability and transparency, a new, dedicated, robust and truly independent mechanism empowered to investigate police misconduct – that is designed in collaboration with Aboriginal communities – is the best option.

Flaws in practice: misconduct of former Constable Zachary Rolfe

Flaws in the current complaints system were recently exposed during the coronial inquest into the police shooting death of Warlpiri and Luritja teen Kumanjayi Walker.

Twelve complaints were made against former Constable Zachary Rolfe, including a number by NAAJA. These included that he had been violent during the arrests of four Aboriginal men or boys who required medical treatment in a two-year period before fatally shooting Kumanjayi Walker. After three of the incidents he was also alleged to have falsified reports, and on one occasion he was accused of asking a fellow officer to scratch him to make it appear as if he had been harmed by an offender during an arrest. No disciplinary action has been taken against former Constable Rolfe in relation to any of the complaints.

In a particularly egregious case, body-worn footage of a 2018 arrest of a 14-year-old boy was played during the coronial inquest, in which former Constable Rolfe is seen throwing a bin to ground, to pull out the teenager who was hiding inside. In giving evidence to the coronial inquest, Superintendent Jody Nobbs said that the former Constable's actions were "violent" and "unnecessary,"[22] telling the Coroner he was "perplexed" as to how the use of force in that incident was deemed appropriate by the Professional Standards Command.[23] It is important to note that this body-worn footage. Along with preliminary inquiry material prepared by Professional Standards Command, the body-worn footage was also viewed, and the matter dismissed, by the NT Ombudsman.

In another particularly egregious case, former Constable Rolfe was alleged to have assaulted an Aboriginal man, Mr Ryder. Despite Mr Ryder sustaining significant head injuries, Officer Scott Manley initially found that there was no issue with the force used by the Police. When a complaint was subsequently made to the Ombudsman, the matter was categorised as a category two complaint – 'minor misconduct' – that was investigated by the PSC with limited oversight by the NT Ombudsman. The outcome of the category two investigation did not contain any adverse findings and merely notes the use of body-worn cameras should be reinforced.

When Mr Ryder was subsequently prosecuted in court for allegedly hindering former Constable Rolfe in executing his duties and unlawfully assaulting him after an incident at Mr Ryder's house, the Local Court Judge dismissed the charges against Mr Ryder and found his version of events – that Rolfe had punched him in the face and then slammed his head into the ground, leaving him unconscious and in a pool of blood during the arrest – was the "more likely" version of how the injuries occurred than the evidence provided by Rolfe.

Judge Borchers of the Local Court found that former Constable Rolfe's evidence in relation to Mr Ryder was "wrong and a pure fabrication". Judge Borchers found: "that Constable Rolfe's evidence lacks credibility. He lied. He has lied in a statutory declaration about what happened in the bedroom. Nobody can say how Malcolm Ryder was knocked out but him and he surmises that it may- that Ryder may have hit his head while he was being tackled on the ground." A recommendation was made to submit the file to the Director of Public Prosecutions (**DPP**). Detective Sergeant Sonia Kennon and Acting Sergeant Senior Sergeant Jakson Evans both made recommendations that a brief for perjury charges should be sent to the DPP but Superintendent Richard Bryson refused this recommendation, inexplicably citing that "undue reliance" was placed on Judge Borchers findings. A subsequent report from the PSC found that former Constable Rolfe's actions were 'reasonable'.

The difference in the findings of the internal police investigation into former Constable Rolfe, and the NT Ombudsman's acceptance of these findings, compared with the damning findings of Judge Borchers in the Local Court, calls into serious question the adequacy of the current police complaints system. It was entirely open to the PSC and the Ombudsman to do as Judge Borchers did and:

1. Not accept the police accounts at face value;
2. Compare and contrast the Police's version of events against the body-worn camera video footage and civilian evidence; and
3. Find Mr Ryder's evidence credible.

Similarly, after the death of Kumanjayi Walker, Senior Sergeant Andrew Barram conducted a review of former Constable Rolfe's use of force and found 5 times where he used excessive force. These findings were entirely open to the Police to make prior to Kumanjayi's death further illustrating the deficiencies in the current complaints and accountability model.

Finally, the incident relating to Albert Bailey which occurred on 12 October 2019 demonstrates the Police's complete inability to take proactive action in ensuring the safety of the public against excessive force from the Police. In this incident, former Constable Rolfe pushed Mr Bailey which resulted him hitting his head against a park bench causing him to bleed profusely. This incident took place slightly more than a month before the death of Kumunajayi Walker where, in our view, the level of excessive violence as captured on camera speaks for itself. If accountability was effectively working, former Constable Rolfe should have been reasonably suspended (albeit with pay) while an investigation occurred, which in retrospect may have meant he would not have been at Yuendumu on the night of the shooting.

Shielding police from accountability: repealing the 'good faith defence'

Section 148B of the Police Administration Act provides that "A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of a function under this Act." This shield allows for police officers to escape responsibility for their actions in incredibly broad circumstances when the police officer subjectively believes that they were acting in 'good faith' while exercising the powers or functions pursuant to the Police Administration Act. In order for police to be held accountable for their actions, this 'good faith' defence should be abolished.

Unfairness of short limitation periods: repealing the 2-month & 6 months time limits

If someone is unable to get the justice they seek through making a complaint to the NT Ombudsman (or, in reality, to the PSC), they are left to try their luck through the courts. Currently, there is an unreasonably short 2-month limitation period on taking legal action for police wrongs. There is no legitimate policy reason for such a fleeting time limit to be imposed on people. Time limits like this only serve to impede accountability and are against the public interest, particularly because of the barriers to justice they create for Aboriginal people – particularly those from remote communities – who are reliant on accessing legal services like NAAJA to initiate proceedings. Well-documented 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 civil actions.

Further, with a civil claim, not only are there 2 months to file a statement, but the *Local Court (Civil Procedure) Rules 1998* (NT) have been amended to require plaintiffs to serve the statement of claims (and therefore begin the proceedings in earnest) within 6 months (it was previously 12 months). The combination of the requirement to file within 2 months and serve within 6 means that there is a very truncated opportunity for people to gather all the necessary evidence, receive advice and enter reasonable settlement negations of the matter. Not only does this place a person 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. All other Australian jurisdictions have time limitations between 3 and 6 years to commence such actions.

The risk that a plaintiff faces in paying for legal costs in an unsuccessful civil claim presents another significant barrier to holding police accountable and improving the performance of police. If a plaintiff does not succeed in a civil claim against the police, they must pay for the full costs of the defence lawyers.[24] On the other hand, for a successful plaintiff to have the costs of their lawyers paid, a Supreme Court judge must make a special order certifying their "approbation" of the police's conduct.[25] There is no cogent policy justification for such disincentives to the commencement of legal proceedings for civil wrongs committed by the police, and the question of who bears the costs of police tort matters should be left to the discretion of the courts.

The current two-month limitation period must be repealed, and the limitation period for initiating legal proceedings against police must be increased to at least 6 years given the difficulties associated with remoteness and the limited options for legal service assistance in the Northern Territory

There also needs to be a repeal of the 6 month time limit at section 162(6) of the Police Administration Act on laying disciplinary charges against police officers. The NT Ombudsman has stated:

> *This time limit clearly presents substantial challenges for Ombudsman Act and disciplinary investigations. This is especially the case as there are frequently many steps involved in police investigation and Ombudsman Office consideration of complaints before laying a charge. It will often be necessary to undertake substantial investigation and consideration prior to that formal step, all within the 6 month limit.*[26]

Key components of an effective police complaints mechanism in the NT

Independent investigations of police misconduct are particularly important in relation to complaints about the mistreatment of Aboriginal people, given the realities of systemic racism and discriminatory policing which drive the over-imprisonment and deaths in custody of Aboriginal people. As identified by the Royal Commission into Aboriginal Deaths in Custody, "far too much police intervention in the lives of Aboriginal people throughout Australia has been arbitrary, discriminatory, racist and violent".[27]

NAAJA's experience is that serious complaints of police misconduct – involving racist language and/or excessive use of force – are often minimised and categorised as 'minor' complaints. A system that allows such complaints to be investigated by police, and then go unchecked, creates a permissive culture within policing where racist attitudes and stereotypes are pervasive. With no accountability, this contributes to the dehumanisation of Aboriginal people to a point where excessive (and sometimes lethal) use of force is deployed in a way that is rationalised by individual police officers and legitimised by the police force.

It is therefore imperative that police are not responsible for investigating and handling police complaints. All police complaints – other than those that can genuinely be described as the most minor, customer service matters – should be investigated and managed by a new independent police complaints body.

For any police investigation mechanism to have the impact of ending systemic issues in policing – especially systemic racism[28] – it must have scope to consider systemic issues. The scope of what the body can investigate must be broad enough to capture the myriad systemic issues within NT Police that stem from a culture that encourages a 'closed club' mentality, protecting its own and silencing complainants. The protective shield afforded by this culture lends impunity and emboldens individual misconduct. Without recognising the flaws within the institution's systems, individual misconduct cannot be stamped out.

Any new mechanism must be equipped with 'own motion' investigation powers, allowing them to start and conduct thematic investigations into systemic issues – like systemic racism – without needing to receive a complaint about an issue. There must also be broad standing to make complaints, so that organisations like NAAJA, who are well-placed to identify systemic issues through their work, are able to make complaints.

A new, independent police complaints body provides an opportunity to create a more culturally appropriate and complainant-centred process for the making and investigation of complaints about police.

In a new system, there must be opportunities for complainant participation, regular communication throughout the process, access to information (including access to all information relevant to a complaint, written reasons for any decisions made and access to their investigation file), culturally appropriate information and supports, protections for complainants against victimisation and review rights (so that decisions are administratively and judicially reviewable). People making complaints must also be afforded procedural fairness, including an opportunity to respond before a complaint is dismissed.

It is integral that a new mechanism is made up of people from the communities who are often the target of over-policing in the NT, most notably Aboriginal people. This should include involving Aboriginal staff in the classification process for complaints made by Aboriginal people, employing Aboriginal investigators and ensuring that Aboriginal people are employed in leadership positions. To ensure appropriate cultural competency, all non-Indigenous staff must also be required to undergo training in cultural awareness, systemic racism, anti-racism, unconscious bias and trauma-informed approaches.

The Police Ombudsman of Northern Ireland

An example of what a new, independent body could look like is the Police Ombudsman of Northern Ireland (**PONI**), which is widely regarded as the 'gold standard' of police-complaint investigation mechanisms.[29]

PONI is the civilian body, completely independent of Police, tasked with investigating various forms of police misconduct in Northern Ireland and has exclusive legal jurisdiction in Northern Ireland to investigate police complaints, potential criminal charges, and will provide briefs of evidence to the Coroner in deaths in custody matters. Once a PONI investigating officer completes an investigation, the officer submits a report to the Ombudsman. The Ombudsman then considers the report and determines whether a criminal offence has been committed and whether disciplinary proceedings should be brought against the police officer. If so, the Ombudsman forwards those recommendations – that can be mandatorily issued – to the DPP or the Chief Constable.

While PONI represents an example of a best practice police accountability mechanism, it is important to bear in mind that it would be inappropriate to directly transplant such a model into the Northern Territory. While Northern Ireland has navigated its own challenges, a new mechanism in the Northern territory must be equipped to pay particular regard to the intersection between policing and dispossession, the Frontier Wars, the Stolen Generations, the Intervention, insufficient housing in remote communities, lack of education and employment opportunities, as well as the historical and ongoing impacts of colonisation. For this reason, the final form of any new body must be designed in genuine consultation with Aboriginal people, communities and the community-controlled organisations that support them, like NAAJA.

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1 See Final Report of the Royal Commission into Aboriginal Deaths in Custody (1991, vol 2) recommendation 226:

That in all jurisdictions the processes for dealing with complaints against police need to be urgently reviewed. The Commission recommends that legislation should be based on the following principles:

a. That complaints against police should be made to, be investigated by or on behalf of and adjudicated upon by a body or bodies totally independent of Police Services;
b. That the name of a complainant should remain confidential (except where its disclosure is warranted in the interests of justice), and it should be a serious offence for a police officer to take any action against or detrimental to the interest of a person by reason of that person having made a complaint;
c. That where it is decided by the independent authority to hold a formal hearing of a complaint, that heating should be in public;
d. That the complaints body report annually to Parliament;
e. That in the adjudication of complaints made by or on behalf of Aboriginal persons one member of the review or adjudication panel should be an Aboriginal person nominated by an appropriate Aboriginal organisation(s) in the State or Territory in which the complaint arose. The panel should also contain a person nominated by the Police Union or similar body;
f. That there be no financial cost imposed upon a complainant in the making of a complaint or in the hearing of the complaint;
g. That Aboriginal Legal Services be funded to ensure that legal assistance, if required, is available to any Aboriginal complainant
h. That the complaints body take all reasonable steps to employ members of the Aboriginal community on the staff of the body;
i. That the investigation of complaints should be undertaken either by appropriately qualified staff employed by the authority itself, or by police officers who are, for the purpose of and for the duration of the investigation, under the direction of and answerable to, the head of the independent authority;
j. That in the course of investigations into complaints, police officers should be legislatively required to answer questions put to them by the head of the independent authority or any person acting on her/his behalf but subject to further legislative provisions that any statements. made by a police officer in such circumstances may not be used against him/her in other disciplinary proceedings;
k. That legislation ensure that the complaints body has access to such files, documents and information from the Police Services as is required for the purpose of investigating any complaint.

[2] Australian Law Reform Commission, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133) (28 March 2018), recommendation 14-2.

[3] External Review: Complaints and Discipline System Northern Territory Police Force (2022) 10.

[4] The information set out in this section is drawn from the affidavit of Naomi Wurramarra, Roderick Mamarika, Linda Mamarika and Elaine Mamarika (dated 2 September 2022) in the coronial inquest into the death of Kumanjayi Walker. A copy of the affidavit is enclosed with this submission for convenience of reference.

[5] NT Government, *Youth diversion program* (Web page, accessed 15 December 2023, <https://nt.gov.au/law/young-people/getting-arrested-and-pre-court-sentencing/youth-diversion-programs>).

[6] Smarter Justice, A better way of doing justice in the Northern Territory, The Insight Centre, report prepared for the Northern Territory Aboriginal Justice Agreement Governance Committee, 2023, 13. Further from the report: " The approach supports young people to take responsibility and to develop strategies to prevent reoffending and learn new skills. Programs include intensive mentoring for early intervention with at-risk young people; integration into training and work experience opportunities; community involvement in dispute resolution processes; and plans for a bush rehabilitation camp."

[7] Human Rights Law Centre and the National Aboriginal and Torres Strait Islander Legal Services, 'Submission to the Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities' (2014), 4.

[8] APO NT, Submission responding to the Northern Territory Government's Alcohol Action Plan (April 2023) 3.

[9] APO NT, Submission to the Northern Territory Government Review on Alcohol Polices and Legislation (2017) 38.

10 Ibid 38-39.
11 Ibid 40.
12 Australian Law Reform Commission, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133), tabled 28 March 2018, Recommendation 14-4. See pages 475 – 477 for a detailed discussion on cultural awareness training and the need for it to be community-specific.
13 The Allen Consulting Group, *Independent Review of Policing in Remote Indigenous Communities in the Northern Territory: Policing Further into Remote Communities* (2010) 78.
14 Department of the Attorney-General and Justice, NT Government, *Pathways to the Northern Territory Aboriginal Justice Agreement* (2019) 73.
15 Ibid.
16 Department of the Attorney-General and Justice, NT Government, *Northern Territory Aboriginal Justice Agreement 2021–2027,* 18.
17 Drawn from the European Court for Human Rights and consolidated in The Opinion of the Commissioner for Human Rights concerning independent and effective determination of complaints against the police (2009). The principles have been endorsed by the United Nations Office on Drugs and Crime, *Handbook on Police accountability, oversight and integrity* (2011) and have been applied by the UN Human Rights Committee in Corinna Horvath, *Individual communication to the United Nations Human Rights Committee in Horvath v Australia*, 19 August 2008; UN Human Rights Committee, *Views: Communication No. 1885/2009* (5 June 2014), 110th sess. See also Police Accountability Project, *Independent Investigation of Complaints against the Police: Policy Briefing Paper* (2017).
18 Please note, we submit that it is not reasonable to conclude that this is evidence of low levels of misconduct by the Police. It should be instead concluded that it is inherently implausible that so few complaints are substantiated, indicating a failure in the current model.
19 See Expert Report of Tamar Hopkins at page 16.
20 *Information Act 2002* (NT) s 19(1).
21 See further paragraphs 28 to 30 of the affidavit of Marcel Francis Delany (dated 28 February 2023) in the coronial inquest into the death of Kumanjayi Walker. A copy of the affidavit is enclosed with the submission for convenience of reference.
22 Page 2953 of the Transcript of the Inquest into the Death of Kumunjayi Walker.
23 Page 2954 of the Transcript of the Inquest into the Death of Kumunjayi Walker.
24 Police Administration Act s 162(4); *Northern Territory of Australia v Shannon* [2018] NTSC 88.
25 Police Administration Act s 162(5).
26 Ombudsman NT, *Annual Report 2022/23* (25 October 2023), 30. Available online <https://www.ombudsman.nt.gov.au/sites/default/files/downloads/2022-23_annual_report_omb_final.pdf>
27 Final Report of the Royal Commission into Aboriginal Deaths in Custody (1991, vol 2) 13.2.3.
28 Noting that the Coronial Memorandum by the Northern Territory Police made some findings of systemic racism with respect to the death of Kumunjayi Walker.
29 Sinéad O'Brien Butler, 'Policing the Police: Independent Investigations for Victoria' (2018) 41(3) *University of New South Wales Law Journal* 1, 30.