



# **North Australian Aboriginal Justice Agency**

## **Submission to the Australian Productivity Commission Inquiry into Access to Justice Arrangements**

The North Australian Aboriginal Justice Agency (NAAJA) is pleased to make this submission to the Australian Productivity Commission's Inquiry into Access to Justice Arrangements.

This submission focuses on the legal needs of Aboriginal people in the Top End of the Northern Territory and draws on over 40 years of experience in providing Aboriginal legal aid services.

### **1. About NAAJA**

The North Australian Aboriginal Justice Agency was formed in 2006. It brought together three existing Aboriginal Legal Services: the North Australian Aboriginal Legal Aid Service, established in 1972; the Katherine Regional Aboriginal Legal Aid Service, established in 1985; and the Miwatj Aboriginal Legal Service, established in 1998.

NAAJA now has staff of over 100 across the Top End of the Northern Territory, with offices in Darwin, Katherine and Nhulunbuy.

In 2010 NAAJA won a Human Rights Award in the Law Category from the Australian Human Rights Commission for its work. It is recognized as a leading Australian legal service.

#### **a. NAAJA's funding**

NAAJA is funded by the Commonwealth Attorney-General's Department on a triennial basis to provide legal assistance to Aboriginal and Torres Strait Islander people in the Top End of the Northern Territory. In addition to our 'core' operational funding, we are also funded by the Commonwealth to provide services in the following program areas:

- Indigenous Prisoner Throughcare, providing post-release support to prisoners before and after their release to assist rehabilitation and reintegration and reduce recidivism;
- Additional legal services funded under 'Stronger Futures for the Northern Territory' (originally part of the Northern Territory Emergency Response), reflecting the significant increase in workload that has been generated by the Northern Territory 'Intervention' and 'Stronger Futures' policies;

- Welfare Rights Outreach Project, funded under ‘Stronger Futures for the Northern Territory’ (originally part of the Northern Territory Emergency Response), providing legal assistance in relation to social security and housing issues;
- Community Legal Education provided through Night Patrol groups operating in the Top End;
- Additional one-off funding from the Attorney-General’s Department granted in 2013 to provide additional services in family and civil law.

These ‘additional’ grants are now a significant part of NAAJA’s operations and make up approximately 32% of our funding.

Area	% of total budget
Operational contract	68
Indigenous Prisoner Throughcare	8
Stronger Futures	8
Welfare Rights	5
Night Patrol Community Legal Education	2.5
One off funding for family and civil law	8.5

#### b. NAAJA’s service area

NAAJA’s client base is spread over 700,000 km<sup>2</sup> and we service the following remote communities:

- Darwin Region – Borroloola, Milikapiti, Wurrumiyanga (Nguiu), Maningrida, Ramingining, Milingimbi, Gunbalanya (Oenpelli), Jabiru, Nauiyu (Daly River), Peppimenarti, Palumpa and Wadeye (Port Keats).
- Katherine Region – Barunga, Beswick, Bulman, Ngukurr, Urapunga, Timber Creek, Yarralin, Kalkarindji and Lajamanu.
- Nhulunbuy Region – Alyangula, Unbakumba, Angurugu, Numbulwar, Galiwin’ku and Gapuwiyak.

The distances we travel to some of these communities are given below. Those communities marked with an asterisk are those to which we travel by road.

Bush Court Location	NAAJA servicing office	Distance (in km) from servicing NAAJA office
Alyangula	Nhulunbuy	186
Borroloola	Darwin	1056
Barunga*	Katherine	90

Nauiyu (Daly River)*	Darwin	222
Galiwin'ku	Nhulunbuy	130
Jabiru*	Darwin	256
Kalkarindji*	Katherine	480
Lajamanu*	Katherine	560
Maningrida	Darwin	550
Milikapiti	Darwin	105
Warrumiyanga (Nguju)	Darwin	70
Ngukurr*	Katherine	331
Numbulwar	Nhulunbuy	250
Gunbalanya (Oenpelli)*	Darwin	303
Ramingining	Darwin	580
Timber Creek*	Katherine	285
Wadeye (Port Keats)*	Darwin	280 by air (wet season), 399 by road (dry season)
Yarralin*	Katherine	385

It costs over half a million dollars annually for NAAJA to service each of its communities by air and road. In addition to the ordinary expense of traveling to remote areas, NAAJA is regularly faced with the high costs of additional charter flights (including by helicopter) to deal with staff and vehicles stranded or requiring immediate evacuation due to flood and cyclone.

### c. Criminal law service

NAAJA's criminal practice employs 25 lawyers, making it one of the largest in the Northern Territory (second only to the Office of the Director of Public Prosecutions). NAAJA represents clients:

- On criminal charges in the Youth Justice Court, Magistrates Court and Supreme Court
- In all courts sittings in urban and remote regions
- In the Court of Criminal Appeal and in some circumstances the High Court of Australia.

We also provide:

- Legal advice over the phone or face to face about criminal charges or police investigations
- 24 hour legal advice when people are arrested or taken into police custody.

It is an exceptionally busy practice. The number of casework matters undertaken by NAAJA's criminal lawyers has increased over 50% in the last 5 years and the number of duty lawyer matters has increased 70% in that period.

The demands on the criminal law practice need to be understood in the context of the gross over-representation of Aboriginal people in the criminal justice system and the constant increase in criminal matters before the courts. The NT's rate of imprisonment is five times the national average. Our imprisonment rate has increased by 72% in the last 10 years and

our prison population is set to double in the next 4 years. Over 80% of the adult prison population is made up of Aboriginal people and 95% of young people locked up in our juvenile detention centres are Aboriginal.

These figures are expected to get worse in coming years with the current NT Government introducing a new regime of mandatory sentencing and punitive laws in relation to alcohol-related offending ('Alcohol Protection Orders') that are expected to significantly increase the number of Aboriginal people serving sentences of imprisonment.

#### **d. Civil law service**

NAAJA's civil law practice employs 20 solicitors and provides a comprehensive range of legal services across general civil, family and welfare rights law.

Our services include advice; minor assistance including referrals to, and linking with, other agencies; ongoing casework; and litigation, including strategic litigation to address systemic deficiencies. As the only legal service that provides that range of civil law assistance across the Top End we endeavour to be responsive to our client's demands.

Often the first step in providing 'access to justice' is providing access to legal advice and minor assistance. We therefore conduct regular advice clinics in Darwin's prison and all the major remote communities in the Top End. It is our experience that delivering access to justice in this way, by maintaining a regular physical presence, makes a significant impact upon the lives of Aboriginal people.

Areas of work in NAAJA's general civil law practice include:

- Complaints about government services and departments (eg, police, prison officers);
- Compensation claims against police and other government departments (eg, negligence, false imprisonment, assault);
- Coronial inquests, particularly Aboriginal deaths in custody;
- Forfeiture or seizure of property – where property was used to take liquor, kava or drugs into a restricted area or in the commission of a crime;
- Child protection matters (including a duty service);
- Adult guardianship and Mental Health matters;
- Urban tenancy where client is at risk of eviction;
- Statutory compensation (eg, Motor Accident and Victims of Crime Compensation);
- Consumer matters (eg, credit, debt, motor vehicle sales and repairs);
- Health care complaints; and
- Discrimination and human rights.

## ***Case Studies***

The following case studies give a snapshot of the diversity of the work done by NAAJA's Civil Law Section:

- A claim in the Supreme Court against NT police for false imprisonment and assault. Our client was awarded over \$100,000 in damages. This was the first case to run in the NT for over 15 years and is an important precedent. NAAJA regularly settles claims against the police and this result has significantly improved the potential outcomes for other clients.
- Supreme Court appeals against decisions in child protection matters in which parents were denied natural justice and errors of law were made in relation to the powers of the court to order children to be taken into care. In one appeal, the Magistrate made orders that our client's five children be taken into care until they are 18 years old. This was done without taking into account the children's wishes, the Aboriginality of the children or the fact that the Department of Children and Families and the parents had agreed to a short term order. In this matter the Supreme Court also made comments about the role of the child representative and as a result, a Bill clarifying that role has been introduced into Parliament.
- A complaint to the NT Ombudsman about the failure of the NT government to ensure appropriate morgue facilities in remote communities. Our client's son had committed suicide but his body was not able to be stored properly due to inadequate morgue facilities in the community. Our client was unable to view her son's body due to the extent of decomposition and this caused her significant additional distress. The NT Ombudsman prepared a detailed report on this issue made a number of recommendations about the allocation of responsibilities for morgues and in particular about the need for an apology to our client.
- Health care complaints against Royal Darwin Hospital. In one such case, the medical staff did not use an interpreter when arranging for our client to consent to an operation which involved an amputation. She did not understand the reasons for that operation nor the extent of the operation and was distressed about what had happened when she awoke from her anaesthetic.
- A successful Supreme Court review of a decision of the Northern Territory Coroner to conduct an autopsy on a baby who died – apparently of SIDS. The autopsy was unlikely to have resulted in a positive finding as to cause of death other than SIDS and there was no suggestion of abuse or neglect. The parents strongly objected to the autopsy on cultural and religious grounds and the Supreme Court found that in this case the interests of the family outweighed the public interest in determining the cause of death.
- NAAJA has assisted numerous families in remote areas to have their mobile phone debts waived on the grounds of unfairness. None of these clients had requested a new service, instead they were induced to agree to the contracts in exchange for a free mobile phone. The clients received the phones but they did not work because the

service provider did not provide mobile phone coverage in those communities.

**e. Family law**

NAAJA's three family lawyers provide the following services:

- Legal advice on family and child protection law
- Legal representation in parenting matters
- Referrals to Family Dispute Resolution
- Legal representation in child protection matters.

NAAJA's service in family law was recommenced in April 2013, having been suspended in May 2012. The decision to suspend the service was taken because our funding did not allow us to commit sufficient resources to provide an effective level of service in family law, given the pressing need for services in other areas of our civil practice, including child protection. The service had been run with 1.5 FTE lawyers and we were unable to fill the full-time vacancy that arose when our senior family lawyer resigned. We reviewed the practice and assessed that it required at least 3 FTE lawyers to be sustainable and to ensure that we were providing a competent level of service. It also became clear from feedback we received that the salary that was being offered was not competitive given the specialized nature of family law.

In early 2013, the Commonwealth Attorney-General's Department was able to provide additional funding to resume our family law services for an initial 12 months. NAAJA now has 3 family lawyers, two in Darwin, and one in our Katherine office. We hope to secure ongoing funding so that we can continue to provide legal assistance in this important area.

Because the funding for family law is not presently ongoing, NAAJA originally considered that the focus for the new service would be on early intervention in family disputes and resolution through negotiation and mediation and to limit litigation to urgent recovery action. However it very quickly became clear that our clients had complex and protracted family disputes which do not always lend themselves to early resolution or mediation (see more below). We have therefore decided to assist people to commence proceedings and represent people to interim hearings. The fact of court action encourages negotiation in some disputes and in others an interim finding of the court will at least provide a basis for the children of our clients to spend time with both parents and maintain some links to their Aboriginal culture if one of the parents is non-Indigenous.

***Family law case studies***

- Earlier this year we received a call from the Associate Justice Harland of the Federal Circuit Court specifically requesting our family lawyer to come to the Court to assist Ms G, who was at that time unrepresented. We met with Ms G and explained the court system to her. Ms G's 13 year old granddaughter was staying with her and did not want to return to her mother. However her mother had applied for an urgent

recovery order so that the Federal Police could collect her daughter. We were able to negotiate a resolution where the girl returned to her mother at the end of the week without police intervention. We then arranged a Family Dispute resolution conference through NT Legal Aid and were able to resolve the matter without further court action.

- NAAJA was able to obtain urgent recovery orders and have a 14 month old returned to her mother, within a week of obtaining instructions. The father had attempted to obtain a DVO against the mother to prevent her from keeping the child.
- Ms A saw us after recently separating. She had 2 young children with the father who was non-Indigenous. We assisted Ms A to draft a parenting plan for the children. Ms A was able to negotiate with the father for a parenting plan that allowed for both parents to spend time with and take responsibility for the children. The matter was resolved without commencing court proceedings. We are now helping Ms A to formalise the parenting plan by lodging consent orders in the Federal Circuit Court.

#### **f. Welfare Rights**

NAAJA's four Welfare Rights Outreach Project (**WROP**) solicitors provide legal advice and assistance in Centrelink matters, including:

- Seeking administrative review of Centrelink debts – obtaining the waiver of debts or reduction of debts;
- Drafting submissions to the Commonwealth Director of Public Prosecutions (CDPP) seeking withdrawal of criminal charges for Centrelink fraud;
- Advice in relation to decisions about payments – refusals to grant, non-payment periods and cancellation of payments;
- Family tax benefit issues; and
- Advice and assistance with income management including income management deductions, BasicsCards and seeking exemptions.

Our WROP solicitors also provide advice and assistance in remote tenancy matters, including:

- Terminations;
- Assisting clients to obtain repairs;
- Administrative review of debts imposed by Territory Housing;
- Priority housing applications;
- Obtaining rent refunds;
- Complaints to the Complaints and Appeals Unit of Territory Housing; and

- Advocating for disability modifications to be undertaken in remote public housing.

### ***WROP Case Studies***

- WROP assisted a Ms G, a Disability Support Pensioner from a remote community, with a \$30,000 Centrelink debt. She was being investigated by the Department of Human Services' Serious Non-Compliance branch with a view to a potential referral to the CDPP for prosecution. NAAJA's submissions focused on Ms G's personal circumstances including her significant health problems and very limited literacy. On the basis of those submissions, Centrelink decided against prosecution and the debt has been waived.
- The Commissioner of Tenancies awarded our client, a tenant of Kalano Community Association Inc, \$1000 in compensation for unlawful rent increases and \$1860 for the landlord's failure to do repairs. In his decision, the Delegate of the Commissioner, said that he found our client's claims to be

quite reasonable in the circumstances of the tenant's serious inconvenience because of the landlord's persistent failure to take any action to remedy insufferable living conditions yet accepting a rental some of which was obtained under duress.

The unlawful rent increases have affected a large number of tenants. NAAJA is negotiating with the Kalano Community Association to address these without the need for further litigation.

- WROP assisted a tenant, a single mother who faced homelessness, to appeal a decision of the Local Court to the Supreme Court. Territory Housing sought an order from the Local Court for possession of our client's home as they had issued her with an eviction notice after she had been given 'Three Strikes' for being a 'nuisance' to her neighbours. The Local Court found that once the nuisance had been proved, the legislation required the tenancy to be terminated. On appeal, the Supreme Court held that the Local Court had a discretion to consider other matters such as the 'psychological, social and legal consequences' of the eviction. When the matter was remitted to the Local Court NAAJA negotiated a resolution in which the tenant was transferred to another premises.

### **g. Law and Justice Projects**

NAAJA undertakes a range of innovative law and justice projects that seek to improve access to justice for Aboriginal people.

#### ***Community Legal Education***

NAAJA delivers legal education projects and training sessions at schools, prisons, men's and women's centres, rehabilitation centres and various community-based organisations.

NAAJA has developed a unique multi-disciplinary methodology that is tailored specifically for communities in which we work. In order to make legal education initiatives as successful

as possible, NAAJA's legal education team draws on principles of adult learning, bi-lingual education, traditional Aboriginal learning styles and community development.

NAAJA places an emphasis on working with elders and emerging leaders in remote Aboriginal communities to develop ways for Aboriginal people to have more influence on the (principally criminal) legal processes that affect their communities.

### ***Night Patrol Legal Education***

NAAJA also conducts a legal education program that is targeted specifically at Night Patrol Officers in remote communities in the Top End. The program aims to build local leadership in relation to community safety while providing specific training in relation to the legal context in which Night Patrols operate.

### ***Indigenous Throughcare Project***

NAAJA's Throughcare Project provides individual case management support to clients in the six months before release from prison or juvenile detention, and in the six months after release, to assist their rehabilitation and reintegration into the community. Our Throughcare Project includes four case workers and two prison-based staff at Darwin Correctional Centre who assist with parole issues, prisoners' rights issues and referrals for legal and non-legal assistance.

In 2012, NAAJA was awarded an Australian Crime & Violence Prevention Award for the success of our Throughcare program in reducing reoffending.

## **h. Government and stakeholder engagement**

NAAJA has a reputation for being an authoritative and credible voice in law and justice policy development, implementation and reform. NAAJA engages with all levels of Government and the courts on reforms to the legal system. Our input is regularly sought in relation to the development and implementation of legislation and policy and we are asked to participate in numerous high-level committees and advisory groups. NAAJA regards this work as being essential to improving access to justice for Aboriginal people.

NAAJA co-facilitates the Northern Territory Legal Assistance Forum, which brings together NT legal assistance providers. The forum works to ensure services are targeted and coordinated, and facilitates collaboration and skill-sharing between agencies.

NAAJA is also an active participant in the NT Jurisdictional Forum, under the National Partnership Agreement on Legal Assistance Services. This brings together legal assistance providers from across the NT with representatives of the Commonwealth and Northern Territory Attorney-General's Departments and other high-level stakeholders to promote the effective delivery of legal services.

NAAJA also plays a leadership role in bringing stakeholders together around issues such as youth justice, remote tenancy and housing, social security and welfare rights, and is active in

forums such as the Law Society of the Northern Territory, the National Congress Justice Working Group and the Making Justice Work campaign.

NAAJA is also actively involved in working with partner organisations and stakeholders including other Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) and the Aboriginal Peak Organisations of the NT (**APO (NT)**).

## **2. Barriers to justice for Aboriginal people in the Top End**

Aboriginal people in the Top End face a range of broad societal and systemic barriers that prevent them having access to justice. These include:

- Acute social disadvantage in the areas of education, housing, employment, income, health and disability. This disadvantage can give rise to greater legal need (for example in relation to welfare rights or housing and tenancy issues) as well as inevitably impacting upon people's ability to access justice, particularly without legal assistance.
- Language: in many parts of the country, Aboriginal people speak Aboriginal English (a distinct dialect) as their first language.<sup>1</sup> In the NT, many Aboriginal people speak English only as a second or third language and require interpreters. In a number of communities that are serviced by NAAJA (including communities like Wadeye, the NT's largest Aboriginal community), almost all people seeking legal assistance require an interpreter. Unfortunately, there is a shortage of appropriately trained and qualified interpreters in Aboriginal languages, including in some of the major language groups.
- Cross-cultural issues: for many of our clients, the mainstream legal system is foreign and they are unable to engage unassisted with common governmental/bureaucratic processes. The language of the law and government/bureaucracy and its concepts are difficult to effectively interpret into Aboriginal languages and are very poorly understood. This means that clients often have a poor understanding of court processes and proceedings as well as a very limited awareness of their rights and what legal remedies they may have available. There are a range of other common cross-cultural issues that arise for NAAJA's clients including those arising from kinship relationships, the practice of customary law and the prevalence of gratuitous concurrence (the tendency to agree with the questioner). These issues particularly arise in remote communities, although they are by no means confined to those communities. These issues mean that many Aboriginal are not able to self-represent in legal proceedings, even with the assistance of a qualified interpreter. They also make it vital for legal assistance services to be provided face-to-face for many clients.
- Remoteness: in the case of NAAJA's clients, many live in communities or outstations that are hundreds of kilometres by dirt road to the nearest regional centre and can be inaccessible by road for significant parts of the wet season (roughly December – April). Flooding, storms and cyclones are common challenges in servicing remote

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<sup>1</sup> See Department of Justice and Attorney General, *Aboriginal English in the Courts* (2000), available at [http://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/90715/m-aboriginal-english-handbook.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/90715/m-aboriginal-english-handbook.pdf).

communities. Remoteness makes regular face-to-face contact with legal assistance services difficult and often expensive, while also posing a formidable barrier to other services, courts and tribunals that may only be accessed in major centres.

- Lack of services: with geographical remoteness also comes a lack of basic services or unreliability in those services – such as electricity and telecommunications. The availability of technology such as audio-visual links and services such as Skype is limited, the quality of the connections available often poor and as is the quality of communication achieved. Most of our clients do not have landlines but will have mobile phones. However, this does not give them easy access to government and other agencies – the ‘free’ 1800 or 1300 numbers are not free for mobile phone users.

### **3. Understanding ‘legal need’ for Aboriginal people in the Top End**

The submission to this inquiry made by the National Aboriginal and Torres Strait Islander Legal Services refers to the research being conducted through the Indigenous Legal Needs Project (ILNP) and which documents the unmet need in civil and family law for Aboriginal people across Australia. NAAJA was a partner in the ILNP project in their research in the Top End, and as such we provided input based on our experience as well as support in linking the researchers with people, communities and agencies. In our view the NT report<sup>2</sup> is invaluable because it highlights the specific areas of unmet need. We will not reproduce their findings here.

The Legal Australia-Wide (LAW) research being conducted by the NSW Law and Justice Foundation is also a critical reference point when assessing legal need. Their research identifies ‘clusters’ of legal problems, refers to groups who have an increased vulnerability to legal problems (indigenous people, prisoners, people with disabilities), looks at whether people seek assistance for their legal problems and if so from whom, and recommends a ‘holistic approach to justice that provides integrated and multifaceted service delivery across both legal and non-legal services in all jurisdictions’<sup>3</sup>. That research describes the complexity of ‘legal need’ – unmet, unrecognized, and interrelated with social disadvantage.

In the NT ‘legal need’ cannot be separated from the particularity of Aboriginal people’s disadvantage – such as language, literacy and remoteness.

A significant proportion of the work of the civil law team is assisting clients to lodge applications for compensation under statutory schemes (motor accidents and victim of crime compensation). In general these claims do not require evidence-gathering or legal argument and are finalized at the end of an assessment process without a significant ‘dispute’. However the majority of our clients are unable, due to literacy and language issues and their unfamiliarity with government and bureaucratic processes, to complete the application form with sufficient detail and answer requisitions for further information. Living

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<sup>2</sup> [http://www.jcu.edu.au/ilnp/public/groups/everyone/documents/technical\\_report/jcu\\_113496.pdf](http://www.jcu.edu.au/ilnp/public/groups/everyone/documents/technical_report/jcu_113496.pdf)

<sup>3</sup> Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigang Wei, Reiny Iriana & Stephanie Ramsey Legal Australia-Wide Survey: Legal Need in Australia 2012  
<http://www.lawfoundation.net.au/ljf/app/&id=FC6F890AA7D0835ACA257A90008300DB>

remotely (with the added limitations on post, internet and phone access) and having a more mobile lifestyle results in further barriers to maintain ongoing communication with the assessors and their lawyers.

Overwhelmingly, our clients often do not have an appreciation of the differences between criminal and civil law nor do they experience their lives according to social or legal problems and how they can address them. They will know there is a problem with the police, 'Housing', 'Welfare' or 'money' but they will not necessarily know that there is a legal remedy. The appropriate remedies are often partly legal but also substantially achieved by assisting clients who lack bi-cultural competency to negotiate with service providers and bureaucracies to protect their basic rights and entitlements. In our experience, meaningful access to justice for our clients comes through understanding and responding to Aboriginal peoples disadvantage in a holistic and practical way.

Characteristics of Aboriginal people's disadvantage in the NT include the high levels of interaction with and dependence on state agencies. Legal need can then be described in broad terms as the ability to effectively engage with those agencies and the right to transparency and accountability in the decisions of those agencies. Our child protection, housing, Centrelink, adult guardianship and police accountability work can all be seen within this framework.

Aboriginal people have high levels of chronic health problems and disability. Their legal need in these interactions is not so explicit. However it is our experience that many of our clients are bewildered by their interactions with health professionals. This can be attributed to a number of factors but one of the main reasons is the low rate of interpreter use by health professionals. A lack of understanding of one's health problem will have obvious repercussions for compliance with treatment and with advice about necessary lifestyle changes. However the failure to communicate is also a legal issue when it comes to medical professionals failing to obtain properly informed consent.

In pursuing health complaints we have been able to collate the experience gained from the many individual disputes and act strategically to pursue their resolution. As mentioned above we have successfully resolved a number of our clients' complaints through the conciliation mechanism of Health and Community Services Complaints Commission. We have also commenced and resolved Local Court proceedings claiming trespass as a result of the hospital staff failing to obtain informed consent before performing major surgery. We have further raised the issue of poor interpreter use with the Board and senior staff of Royal Darwin hospital and this year conducted a 'grand rounds' training session in conjunction with staff from the Aboriginal Interpreter Service and Menzies School of Health.

## **4. Importance of an accessible civil justice system for Aboriginal people**

### **a. Confidence in the rule of law**

In considering the importance of access to justice, it is necessary to recognize the history of distrust of, and alienation from, government and the legal system felt by many Aboriginal people. State-sanctioned discrimination and policies that have had a disproportionate negative impact upon Aboriginal people are part of recent history and inform the understanding of many Aboriginal people and influence their attitude to mainstream Australian law. Such laws and policies include the operation of the Aboriginals Ordinance (remembered as the 'dog tag' days) and the role of the Chief Protector of Aborigines, policies of child removal, over-policing of Aboriginal people and deaths in custody.

Another important contextual factor is the gross overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system. Nationally, Indigenous people make up about 2% of the population, but 26% of the prison population.<sup>4</sup> In the NT, Aboriginal people make up about 30% of the population but over 80% of the prison population and over 90% of the young people locked up in juvenile detention.<sup>5</sup>

This is an important part of the context in which the role of Aboriginal and Torres Strait Islander Legal Services (ATSILS) should be understood. Beyond their vital role of providing culturally competent legal services, ATSILS also play an important role as a uniquely Indigenous legal service – run by Aboriginal people with a real stake in meeting the needs of their community; providing a voice for Aboriginal people on law and justice issues with the authority that comes from being 'on the ground' delivering services; bringing with them a history of defending the rights and interests of Aboriginal people; and fostering and promoting Aboriginal talent and leadership. These features are vital in establishing trust and credibility amongst Aboriginal people seeking access to justice.

### **b. Achieving outcomes**

The following examples of NAAJA's work highlight the impact that it has on protecting the basic rights of our clients. In each case the results simply could not have been achieved without access to a responsive legal service.

#### ***Preventing homelessness***

NAAJA has assisted four families at risk of homelessness in the Katherine region by appealing to the Territory Housing Appeals Board. In each, NAAJA successfully challenged the decision to evict them on the basis that Territory Housing had not complied with its operational policies, and in particular the rules of natural justice, when deciding to evict the tenants. Despite the Appeals Board upholding the appeals, Territory Housing proceeded to

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<sup>4</sup> Australian Bureau of Statistics, *4512.0 Corrective Services, Australia, December 2011*, available at: [www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4512.0Main%20Features2December%202011?opendocument&tabname=Summary&prodno=4512.0&issue=December%202011&num=&view=](http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4512.0Main%20Features2December%202011?opendocument&tabname=Summary&prodno=4512.0&issue=December%202011&num=&view=).

<sup>5</sup> See Northern Territory Department of Justice, *Northern Territory Quarterly Crime and Justice Statistics*, Issue 35, March Quarter 2011, 94-5, available at: [www.nt.gov.au/justice/policycoord/researchstats/index.shtml](http://www.nt.gov.au/justice/policycoord/researchstats/index.shtml).

evict the clients. NAAJA wrote to the Minister for Housing before commencing legal action in the Supreme Court. As a result, three of the four clients were offered fixed term tenancy agreements and Territory Housing changed its policy and improved the transparency of its decision making process for evictions.

### ***Maintaining children's links with their parents and culture***

Our client Ms R lives on an outstation more than 250 km from a major town centre. Her 10 year old son, J, had been removed by the Department of Children and Families (DCF). The focus of DCF's concern was J's older sibling, but DCF had decided to remove them both at the same time. J had come into Ms R's care as a baby of a few weeks of age through an informal adoption. Until recently J was not aware that he was 'adopted'.

NAAJA has assisted Ms R with that matter in the child protection proceedings and in the Federal Circuit Court. This matter raises complex issues about the interaction of child protection and family law proceedings as well as the proper recognition of our client's role as mother/primary carer. When DCF commenced protection proceedings her role was recognised but then disregarded when DCF withdrew proceedings and signed a Temporary Placement Agreement (TPA) with the biological mother. DCF refused to acknowledge Ms R's right to revoke the TPA and we were forced to commence proceedings in the Federal Circuit Court to have Ms R's voice heard and J's 'best interests' formally determined. The biological parents and DCF were joined the proceedings. When it looked like the Federal Circuit Court was considering returning J to Ms R, DCF recommenced protection proceedings.

Since he was taken into care over 6 months ago, J has been living in an institutional environment, with rostered carers and not with a foster family. Ms R and her partner have moved from their community to be in town close to J to have regular 'access visits' with him. As they are senior law people they have had to put significant community ceremonies on hold while this matter is determined. NAAJA has taken a proactive role in this matter, strongly advocating for Ms R (who requires an interpreter, has not had previous involvement with the Australian legal system and has lived her life according to traditional law) and the maintenance of her relationship with the child that she brought up. We have also been attempting to have the protection concerns for J reviewed by a court.

NAAJA has arranged for interpreters and provided relevant cultural information to the court regarding Ms R's role as senior law woman as well as contrasting the care and education she had provided to him with the institutional care provided by DCF. Ms R would not be able to represent herself in the Local Court Care Proceedings or the Federal Circuit Court Jurisdiction.

### ***Identifying 'legal' issues***

Ms M and Ms P live in a large community in West Arnhem Land. They sought NAAJA's assistance with their applications for remote public housing. They live in open sheds, which do not have a kitchen, bathroom or laundry. Both women are working, but illiterate. We use interpreters to communicate with the women in their language.

When we obtained a copy of their application for housing, which included their payslips, we noticed that deductions were being made for 'rent'. It turned out that their employer was paying money to Territory Housing even though Territory Housing does not own the sheds in which these women live. Ms M and Ms P did not know that they had no liability to pay rent and they were unaware that the money was being sent to Territory Housing.

NAAJA assisted the Ms M and Ms P to cancel the rent payments and sought a refund of \$6700 from Territory Housing. It took four months for Territory Housing to refund the clients their money.

### ***Enabling justice for victims of crime***

In many cases NAAJA's civil lawyers will be the first lawyer that a person has met and, as our reputation in the communities grows, people begin to trust us and disclose their personal information. In the cases of Ms B and Mr N, NAAJA was able to assist with making applications for victims of crime compensation out of time. Due to feelings of shame, neither had reported the assaults to the police nor had they sought medical attention at the time of the abuse.

Ms B had been in a violent domestic relationship. She originally told us that she wanted to claim for physical injuries that her former partner had inflicted upon her. These were documented in medical records. However over time we were able to encourage her to claim for the sexual assaults she had also been subjected to in that relationship. We assisted her to provide evidence in the form of a statutory declaration from a relative who had knowledge of the sexual assaults.

In Mr N's case, he had been sexually assaulted by a known sexual predator. He had told a psychologist about the assaults and there was evidence in an unrelated criminal matter that had referred to the assault on him. We assisted Mr N to gather that evidence and present it in support of his application.

Both Ms B and Mr N were assessed as being entitled to the maximum awards under the Victims of Crime scheme due to the extent of their psychological injuries.

### **c. Barriers and access to justice in child protection proceedings**

We provide the following detailed discussion of our role in child protection matters to illustrate the multiple barriers our clients face in interacting with the Department of Children and Families and the courts in these important matters.

Our clients will often tell us that having their children removed by the Department of Children and Families or 'welfare' feels just like the old days of the 'stolen generation'. The former NT Chief Magistrate, Hillary Hannam, was strong in her response such comments. Her argument, put simply, was that today's system is different because it is not arbitrary and because children are only being taken from their families if a court makes an order that they are 'in need of protection'. However for the system to work transparently,

to gain and maintain the trust and confidence of the Aboriginal community, Aboriginal parents and families need to have access to culturally competent legal advice and representation.

NAAJA plays a crucial role in giving parents an understanding of the system, a voice in the proceedings and assisting them to advocate for the least restrictive order consistent with the wellbeing of their child. We hope to be involved as early as possible to assist the Department of Children and Families (DCF) and the family to discuss protection concerns and identify steps to address them. We actively seek early referrals from caseworkers to avoid having matters proceed to court.

### ***Barriers in child protection matters***

There are numerous barriers to our clients accessing justice in the child protection system. The legislation allows for orders to be made without the parent's knowledge or input. This may happen because the parents do not actively engage with the court proceedings. For some this may be a conscious choice. But in NAAJA's experience, many parents in this position are overwhelmed, paralysed by shock and shame and many, because of their disadvantage, do not have the resources and support to remain actively involved in proceedings. Other parents do not engage simply because they are homeless and transient and therefore do not receive court papers.

Child protection matters in the Top End are only heard in Katherine and Darwin. If parents live remotely they will not have easy access to those proceedings. While there are buildings in many remote communities which are used for criminal court circuits, these court facilities are closed when court is not sitting on circuit. Further there are no video link facilities in remote communities. DCF will try to organise to bring some parents into Darwin to court as most parents are unable to fund their own travel. However this is not always successful – planes can be booked up well in advance and parents may be difficult to contact.

Protection issues, minor and serious, can be exacerbated by the language barrier. This can result in non-English speaking Aboriginal parents being seen as uncaring or incapable because they have failed to take steps to ensure the safety of their child that have been communicated to parents (by medical staff, educators or DCF workers) in English and without interpreters. NAAJA is often approached by DCF workers when these sorts of problems develop, and are able to explain to clients with the use of interpreters exactly what is expected of them and the consequences of failing to comply. This message (coming from a parent's own lawyer – who they see as being on their side despite the message being delivered) can be far less threatening and more persuasive than a message from a DCF worker or a worker whose notification triggered DCF's involvement with the family.

Our clients also often suffer as a result of the lack of services resulting from living in remote communities – this means not only are their children more likely to be in care in the first place, but that they are unable to show they are taking the steps that DCF/the court would expect to see in a committed parent (such as undertaking counseling, relationships training, healthy living training, moving to safer housing etc).

### ***Overcoming the communication barrier***

Overcoming the language barrier once court proceedings have commenced is far more complicated. It requires knowledgeable and skilled lawyers with training and experience communicating with Aboriginal people. It also requires interpreters who are skilled in English and well trained in interpreting. There is a shortage of well-trained interpreters in some Aboriginal languages and in some communities and it is sometimes the case that interpreters, although booked, do not turn up. These issues exacerbate the communication difficulties and hence a client's understanding and ability to partake in the process.

Having a competent interpreter is not, itself, sufficient to overcome the cultural gap faced by our clients. NAAJA civil and CLE solicitors have worked with the Aboriginal Interpreter Service to provide plain English explanations of the process and concepts in child protection matters – 'harm', parental responsibility vs daily care and control, 'neglect' - so that they can be more easily understood and interpreted. Without that work, the concepts are not readily (and accurately) translated and understood.

Language issues aside, the child protection process has many possible paths and explaining it to clients is extremely difficult and time consuming. Common issues causing confusion include

- what started the process – we need to explain notifications, who makes them and why and that DCF has an obligation to investigate them;
- what the law says - the abstract principles underlying the legislation (best interests of the child, role of the family, Aboriginal placement principles) and how they are court uses them to make decisions;
- the differences between 'parental responsibility' and 'daily care and control' of a child and who can be involved in those roles;
- what the court must decide – is the child 'in need of protection' (ie has the child suffered harm because of an act or omission of a parent) and if yes, then is the order is the 'best means of safeguarding the wellbeing of the child';
- how long the order might be – short term with a reunification plan, long term until the child is 18 – and why;
- what happens with access during the order and what might happen at the end of the order; and
- what the NAAJA lawyer does - many of our clients are women who have grown up in remote communities, have had no previous involvement in the legal system and do not have even a basic understanding of the lawyer/client relationship.

In our experience, explaining all this properly can take many hours, before we can even get into the details of the specific allegations of harm made in the case. Going through DCF

affidavits (which regularly run to 20 pages and contain specific allegations over a period of time) is painful and complicated. It normally takes a further three hours or more to explain these matters in detail. Cultural differences about the recording and importance of time make getting instructions about a particular incident difficult. For example, how does one get reliable instructions about an allegation in an affidavit – ‘teacher X said that on 3 June 2008 your child was at school with untreated school sores’ - when that person does not keep a diary, remember their own birthday or how many years ago it was when they were in a major car accident.

This is the work required to enable the parent to understand the application that the court is considering. If we are contesting the application we are then required to spend more time documenting our client’s response in affidavit form - a further long and often difficult process.

### ***Providing access to justice***

NAAJA provides access to justice in this area first by giving our client’s a basic (then a more and more detailed) understanding of the system which is so dramatically changing their lives.

Second, we provide legal advice in a way in which our clients can understand their options. Sometimes, given the facts of a case and our client’s instructions, our only advice can be that the order that DCF proposes is overwhelmingly likely to be made. Normally, there are at least some alternatives which clients need to be advised on. These include:

- Advocating for shared parental responsibility between our client and the CEO, with appropriate supervision directions to protect the child (these regularly include directions such as that the CEO will have the final say on the child’s medical treatment and place of residence). Such an order ensures that the parents of a child are kept in a crucial decision-making role and that the interference of the State only goes so far as is necessary to address the harm to the child.
- Advocating for a family member to be given parental responsibility or daily care and control of a child, rather than providing that control to DCF.
- Advocating for a shorter order than the CEO is seeking where appropriate, and advocating for services to be made available to address the issues of concern (this could be by asking the court to order counseling, mediation services, disputing debts with Territory Housing so that our client is again eligible for safe and hygienic public housing, etc).

Third, we assist by getting our client’s evidence and views before the court. We seek to do this by way of affidavit evidence. This allows us to spend time ensuring our clients understand precisely what is going in to evidence and that full consideration can be given by the court to all important issues. Relying on oral evidence in chief is not an effective way to do this for our clients. For example, asking a parent in open court ‘what aspects of your culture will your child miss out on if she is brought up in Darwin’ is likely to elicit a blank face

in response. Time, experience and an interpreter is required to elicit a proper response to that critical question and it is that information which we include in a detailed affidavit.

Finally, we act as a critical safeguard for any mistakes made by the Local Court making what are always difficult decisions. NAAJA has been involved in four successful Supreme Court appeals of Local Court decisions in the last two years.

### ***Child protection case study***

Ms M is a mother of twins who were born prematurely and then hospitalised for 'failure to thrive'. Before she had her twins she lived all her life in a remote community more than 500 km from Darwin. Since their birth Ms M has spent significant time in Darwin to be with her twins while they were in hospital. The protection issues focused around whether she could properly care for her twins in her community.

DCF commenced proceedings seeking a two year order transferring parental responsibility to the CEO. Our instructions were that our client, with the assistance and support of her extended family, could care for the twins in their community and that there was no need for DCF to be given any 'parental responsibility'.

With no mediation provisions in the child protection legislation in the NT, our role in this matter has been much more than simply attending hearings and preparing material for the court. For the last 12 months NAAJA has been intensively involved in this matter, appearing in court, calling meetings in Darwin and in Ms M's community with extended family, health care providers, DCF caseworkers and legal staff. Ms M instructed us to join two of her sisters to the proceedings to make sure that they were included in discussions about the twins. Explaining the orders sought and the reasons for them to family to get their response has been extremely time consuming and has required a delicate touch to recognise and respect the different roles of family members.

This matter has highlighted significant issues about the availability of health care for people with high needs in remote communities, the quality of interaction between health care providers in community and in Darwin and our clients who do not speak English and do not have more than a basic appreciation about the role of nutrition and early childhood development. With our knowledge of these issues we were able to take a proactive role and ensure that open discussions took place.

We established that hospital and clinic staff in community had not been using an interpreter to advise the mother about the health needs of the children and the complex care needed with children who require PEG feeding. Without that understanding it is easy to see how the twins' health would fail as it did. At the height of the miscommunications, shortly after the twins were discharged to their community, they were returned to Darwin and DCF amended their application to one for a 5 year order.

Finally after proposing solutions with DCF, the family and the health care providers we were able to agree on a one year order without the need to go to hearing. Connected with that order is a detailed care plan in which although the twins (now approx. 2 ½ years old) are in foster care, Ms M is able to stay in Darwin to ensure regular and consistent access with a clear plan to reunite the twins with family in community.

## 5. Early resolution of disputes: the role of Community Legal Education

The 'side effects' of unresolved legal disputes are well documented. The research being conducted by the NSW Law and Justice Foundation points out that one legal problem can cause a spiral into many as well as that there is an interaction between legal and health problems. It is clear therefore that early resolution of disputes will have a beneficial effect.

At NAAJA we aim to resolve matters 'early' but find that there are numerous barriers arising out of our clients' disadvantage that mean that even if we are approached about a 'legal problem' it may simply be too late to resolve (ie the limitation period has expired) or it is too entrenched for it to be resolved easily. The examples given elsewhere in this submission highlight these barriers our clients face in resolving their legal problems early and without assistance.

NAAJA's Community Legal Education work empowers Aboriginal people by enhancing knowledge of the mainstream legal system and legal concepts. Our work is an early intervention and prevention approach to justice, bridging the 'disconnect' many Aboriginal people feel with the mainstream justice system.

We address the linguistic and conceptual barriers faced by our clients. Many Aboriginal people approach the mainstream legal system from a different world view. Many Western legal concepts are foreign to our clients and can only be properly understood if first couched in analogous Aboriginal concepts that are part of a person's day-to-day reality.

Many of our clients lack a baseline legal knowledge to identify when a legal issue has arisen. Many Aboriginal people, especially in remote communities, perceive the mainstream legal system as something that happens *to* them, rather than something that happens *with* and *for* them. Unless people understand basic tenets of the justice system, it is unrealistic to expect them to identify and resolve legal disputes at an early stage.

Our legal education work allows Aboriginal communities to influence and participate in the legal processes that affect their lives. NAAJA's approach to community legal education is informed by traditional Aboriginal learning styles, bilingual education and effective intercultural communication. We partner with Elders and community leaders wherever possible. This acknowledges the important educative role that Elders have in their communities. We work with Elders to increase their knowledge of legal processes and to co-deliver legal education to the rest of the community.

In communities such as Maningrida, this has included co-delivering legal education sessions using mainstream and Aboriginal legal concepts. This assists Aboriginal young people to move conceptually from the known to the unknown.

In Wurrimiyanga (Nguiu), Tiwi Islands, NAAJA has worked closely with the Tiwi (Ponki) mediators and the Strong Woman's Group. We have supported the Community Justice Centre (NT) over the past three years to train the Ponki mediators who mediate a wide variety of disputes in a culturally relevant way. We have also supported Elders to participate in court proceedings by providing written sentencing recommendations, and hold regular meetings to address local community safety issues.

## **6. 'Joined up' services and meeting multiple legal needs**

### **a. Effective internal collaboration**

One of the ways that the civil team within NAAJA provides an effective and responsive service is to collaborate within the team and with other NAAJA sections to meet clients' multiple legal needs. Civil lawyers also take referrals from the criminal section in matters raising police accountability and assist our clients to make complaints about police practice or claims for compensation. The civil team relies on the criminal team's expertise and understanding of the criminal justice process and police powers in formulating these complaints.

The welfare rights and criminal teams work closely on Centrelink prosecutions. The welfare rights team has the expertise to provide advice on the client's prospects of administrative review of the debt which led to the prosecution; on the content and interpretation of the Centrelink file and brief; and an analysis of the possible contribution by Centrelink to the accrual of the debt. The teams work together to draft submissions to the Commonwealth Department of Public Prosecutions seeking the withdrawal of prosecutions in the public interest.

NAAJA's welfare rights team also have an increasing role in working with civil lawyers in child protection matters. Homelessness and housing issues are common reasons why children are considered to be 'in need of protection'. The welfare rights team assists clients to make applications for priority housing and transfers and to obtain support letters from other agencies to strengthen their applications for housing.

Housing, Centrelink, child protection, and debt problems if unresolved will present a barrier to prisoners in their successful reintegration into society. Recognising this, NAAJA's civil and welfare rights solicitors also work closely with the Throughcare team to address prisoner's legal needs. For example we have been very successful in obtaining the reinstatement of the cancellation of applications for priority housing. This often means that a person will be housed within a few months of their release, rather than waiting up to 3 years for housing.

### ***Case study***

Mrs R cares for her six grandchildren. The Department of Children and Families (DCF) removed the grandchildren from Ms R's care because the family was living in crowded and unsafe living conditions. NAAJA's civil team represented Mrs R in the child protection proceedings. NAAJA's welfare rights team assisted Mrs R with an application for priority housing which and Mrs R was offered a house through Territory Housing's supported accommodation program. The court recognised the efforts that Mrs R had made and the fact that she now had suitable accommodation was a significant factor in reducing the length of the protection order.

## **b. Working with other services**

NAAJA's civil law, welfare rights and family teams work also with other community services for holistic and effective outcomes.

### ***Case study: supporting a sustainable tenancy***

Territory Housing terminated Mr and Ms H's tenancy because they had failed to keep the premises in a reasonable condition. NAAJA identified that the family had a range of complex personal issues which were preventing the family from meeting their obligations as tenants. Mr and Mrs H had difficulty controlling intoxicated visitors and were under significant pressures caring for their 8 children. The Tenancy Sustainability Program offered by Territory Housing was not appropriate for assisting with these underlying issues.

NAAJA assisted the family to appeal the decision not to renew tenancy to the Territory Housing Appeals Board (THAB). The THAB recommended that a 6 month lease be granted and that the family work with an intensive family support service. Throughout the next 6 months NAAJA worked closely with the family support worker and the family monitoring progress and providing ongoing advice about tenant and landlord responsibilities. At the end of the 6 month period the family passed the final inspection and a further lease was granted.

### ***Case study: avoiding post-release homelessness***

A NAAJA criminal lawyer referred Mr W to the welfare rights team as Territory Housing had given him a termination notice while he was in prison. We assisted Mr W to appeal this decision to the THAB. Despite the THAB's recommendations that the decision to terminate Mr W's tenancy be overturned and his tenancy be extended for three months, Territory Housing decided to proceed with the eviction. It was only when NAAJA assisted Mr W before the Commissioner of Tenancies that Territory Housing agreed to extend Mr W's tenancy.

## **7. ADR and Aboriginal people in the Top End**

NAAJA's civil team regularly represents clients in a range of legal disputes in which mediation or conciliation is integral to the resolution process. Examples of this include discrimination complaints (both NT Anti-Discrimination Commission and the Australian Human Rights Commission), health care complaints (Health and Community Services Complaints Commission) and employment disputes (through Fair Work Commission). Even in our Supreme Court matters involving compensation claims, a court ordered mediation or 'settlement conference' is attempted before the matter is set down for hearing. As long as our clients are represented in that process, these forms of alternative dispute resolution are effective in resolving their disputes earlier and with less stress that would be achieved through litigation.

However, due to the level of disadvantage that the majority of our clients experience, the fact that many are unable to self-represent, they would find it almost impossible to attend and express themselves fully at an ADR without the benefit of legal representation.

For example in the context of family law disputes, we have found that the vast majority of our clients' disputes are not suitable to be resolved through the less formal family dispute resolution process in which lawyers are not present. Many of our clients have been involved in relationships characterized by domestic violence, others have been in relationship where there is an imbalance of power – for example where their former partner is non-Indigenous and more familiar and comfortable with the legal process. While we find that the family conferencing program through the NT Legal Aid Commission is more beneficial because lawyers are involved, this program is only available to our clients where the other party is represented by a lawyer funded by NTLAC.

Separate to the formal mediation and conciliation processes, NAAJA's civil and family law solicitors engage in ongoing negotiation with the other party or parties to a dispute and we see this as fundamental to our roles as advocates. We are proactive in suggesting solutions as a means to avoid lengthy and costly court proceedings. The role of lawyers in brokering resolutions in this way should not be underestimated

#### **a. Ombudsmen**

NAAJA solicitors regularly make complaints on behalf of our clients to the Commonwealth and NT Ombudsmen. There is no doubt that government Ombudsmen play an essential role in highlighting and addressing systemic access to justice issues in people's dealings with government. As such making complaint to through these agencies is an important aspect of providing a comprehensive legal service.

However, in our experience the effectiveness of these government Ombudsmen is not consistent across the range of complaint areas and depends on a variety of factors – not least the receptiveness of the agency the subject of the complaint as well as the resources available within those bodies to handle complaints in a thorough and timely way.

#### ***Commonwealth Ombudsman***

The Commonwealth Ombudsman's Indigenous Unit undertook significant efforts to improve its accessibility to Aboriginal people. It commissioned research titled *Improving the services of the Commonwealth Ombudsman to Australia's Indigenous peoples* in November 2010 to inform its Indigenous communication and engagement strategy. The research was aimed to gain a better understanding of attitudes, cultural influences, levels of awareness and the best way of engaging with Indigenous communities. Part of the Commonwealth Ombudsman's strategy was to undertake outreach visits to remote communities across the NT, to assist residents to complete complaint forms and to channel complaints through its Indigenous Unit. In our view this approach meant that the Ombudsman was particularly successful in obtaining complaints from Aboriginal communities.

NAAJA's welfare rights team has referred clients' matters to the Commonwealth Ombudsman including complaints regarding overcrowding in a remote community in East Arnhem Land and the payment of rent via a number of clients' Centrelink income management account to Territory Housing, where the clients had no liability to pay rent. The Commonwealth Ombudsman is currently investigating these complaints.

### ***Northern Territory Ombudsman***

The Northern Territory Ombudsman now has jurisdiction over complaints regarding remote housing. Through our casework, NAAJA Welfare rights solicitors identify systemic issues in the provision of remote housing services – delays in responses to repair and maintenance including emergency repairs, people paying double rent and the lack of transparency in decisions surrounding the allocation of houses. However we have been advised that the NT Ombudsman has very limited resources to take on complaints about remote housing services. This includes the number of staff available to investigate complaints and the ability to undertake outreach to remote communities.

We are concerned that this lack of resources also affects the robustness of NT Ombudsman investigations. We have observed that the NT Ombudsman's response to our complaints does not communicate the steps taken to investigate the matter or verify the information provided by Territory Housing. As a result it often appears that the NT Ombudsman accepts without question the explanation of events given by the responsible Department. We are further concerned that the NT Ombudsman will close complaints before our client is given an opportunity comment any further on the response by the Department of Housing (or relevant agency) or the Ombudsman's decision to take no further action. We are now attempting to resolve systemic remote housing issued through other means.

We regularly make complaints to the NT Ombudsman about police conduct. Unlike in other areas, the Ombudsman's role with police complaints is predominantly one of monitoring, rather than conducting, the investigation. A complaint once made is classified according to its seriousness and then referred either to the local command or to the Ethical Practice and Standards Command of the NT Police for investigation. We have found this process works best when there is independent evidence to support our client's complaint.

In the morgue case study referred to above, the NT Ombudsman conducted an investigation and prepared a comprehensive report with recommendations which was tabled in Parliament. However the government has failed to take any action in response to those recommendations. There is still no identified government agency with a responsibility for morgues in remote communities and we continue to receive complaint from our clients. This year we lodged another complaint to the NT Ombudsman. However the NT Ombudsman declined to consider the complaint. While this refusal was partly on a jurisdictional basis, the letter closing the complaint referred to the Ombudsman's previous report and the fact that it was still 'under consideration' by the NT government. It also said 'Any further inquiries by the Ombudsman will not achieve any useful purpose or the desired outcomes sought by your client'.

## ***Industry Ombudsmen***

NAAJA's experience with industry Ombudsman schemes (Financial Ombudsman Service, Credit Ombudsman Service Limited and the Telecommunications Industry Ombudsman) is that they can be very effective. These schemes are set up with inbuilt incentives which encourage settlement. Industry bodies are required to be a member of the dispute resolution schemes in order to get their licence, they pay a 'penalty' when each dispute is lodged and at each stage as it escalates through the resolution process without being finalized. These schemes can make decisions which bind the service provider. The industry Ombudsmen are able to report systemic abuses or breaches of the relevant code of conduct to the regulator with the possibility of additional penalties being imposed.

NAAJA solicitors regularly assist clients to make complaints to the Telecommunications Industry Ombudsman (TIO) particularly on issues arising from landline debts and unsolicited mobile phone contracts. The TIO ADR services are an example of good practice in managing complaints from Aboriginal people who in our experience are typically from remote communities and speak English as a third or fourth language. The TIO also accepts complaints over the phone - the requirement of a written complaint is a significant barrier to the accessibility of an ADR service.

The TIO have a specialist Indigenous Liaison Team. The TIO provides training for its staff covering cultural awareness and the issues which impact on remote service delivery to Aboriginal people - including the impact of remoteness, low financial literacy, variable English language skills and coverage issues. The ILT and the TIO are aware of the recurrent or systemic issues faced by our clients – the targeting of Aboriginal people by rogue traders offering mobile phone service in areas without mobile coverage and misleading conduct regarding the terms and conditions of contracts.

It is essential that Ombudsman bodies are flexible in their approach to complaints handling. Excessive and rigid bureaucracy can be a barrier to their accessibility and therefore their effectiveness.

## ***Case study***

Mr P approached NAAJA for help with a large debt. At the first interview with him we asked him to sign an authority so that NAAJA could act on his behalf. Mr P is from a community in East Arnhemland and requires an interpreter to communicate in English. He suffers from end stage renal failure and was receiving dialysis in Darwin three times a week. He did not have stable accommodation in Darwin and was therefore very difficult to contact.

When the debt recovery agency did not respond to our request for information about Mr P's debt, NAAJA lodged a complaint on his behalf with the Credit Ombudsman Service Limited (COSL). NAAJA attached the authority that Mr P had signed to act on his behalf. COSL advised NAAJA that they would not consider the complaint because Mr P had not signed the particular COSL authority found on their website.

In order to assist Mr P, NAAJA was required to call several renal centres in Darwin to find him and organise a meeting with an interpreter specifically for Mr P to sign the additional COSL authority form.<sup>6</sup>

## 8. Effective and responsive legal services

### a. Culturally competent service delivery

As the above examples have highlighted, culturally competent service delivery is essential to providing an effective legal service to Aboriginal people in the Top End. The National Pro Bono Resource Centre has found:

Indigenous legal services play a critical role in helping indigenous people access the legal system. Research indicates that Indigenous Australians rely on [Indigenous legal services] and are relatively less likely to seek help from mainstream providers to resolve their legal issues due to a distrust of the legal system, language barriers and a perceived lack of cultural awareness among mainstream legal service providers. As a result, Indigenous Australians are less likely to obtain legal assistance in areas that are not provided by [Indigenous legal services], such as civil law, despite being particularly vulnerable to credit and debt and employment problems.<sup>7</sup>

ATSILS lawyers, through induction and training as well as the accumulation of experience, develop both cultural competence as well as in-depth knowledge about legal issues commonly faced by our clients.

The ATSILS have developed a deep institutional knowledge around particular issues including, most notably, the exercise of police power (particularly in relation to summary and public order offences), the removal of Aboriginal and Torres Strait Islander children from their families and deaths in custody. This brings a depth to the work that we do as well as allowing sustained and strategic advocacy on important issues.

### ***Client Services Officers***

Client Service Officers (**CSOs**) are an integral part of NAAJA's service. CSOs are people with a deep understanding of Indigenous culture and community – generally Aboriginal themselves or with significant connections to Indigenous society. CSOs assist clients to access legal services and with issues related to their legal problems. For example:

- Providing legal information to clients before and after court and making referrals to other agencies;

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<sup>6</sup> In our experience many different agencies (including government – eg Territory Housing, Australian Taxation Office) require a particular authority form to be signed. This is overly burdensome and does not recognise the nature of the solicitor client relationship. Where our general authority is not accepted as sufficient, our remote clients may not be in a position to sign a new authority until our next trip to that community – sometime two or three months away.

<sup>7</sup> National Pro Bono Resource Centre, *Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Access to Justice* (2009), 15. Available at: [www.nationalprobono.org.au](http://www.nationalprobono.org.au).

- Assisting lawyers to understand cultural and communication issues that may arise with a particular client or in a particular community;
- Assisting clients to engage with other service providers, such as rehabilitation services, crisis accommodation or government agencies that can assist with fine payment options;
- Liaising with clients families and communities; and
- Assisting lawyers to contact clients and witnesses where remoteness and/or itinerancy may make this difficult.

The role CSOs play is an important qualitative difference in the service that NAAJA provides and are an important factor in the accessibility of legal services for Aboriginal people.

Ideally NAAJA would be able to employ CSOs in each community that it visits. As stated above we travel to over 20 communities in the Top End and there are linguistic and cultural differences in each community. Local field officers would provide additional assistance to our predominately non-Indigenous lawyers through their appreciation of local cultural mores, language, and familial connections. Community CSOs would be a NAAJA presence in the community between our trips. They could maintain contact with existing clients and help us to provide responses within tight time frames. They could also refer new clients and notify people in the community about upcoming trips. Finally they could take initial instructions before the trip allowing for better use of time by the visiting legal team – who due to costs and time constraints may only be in that community for less than a day.

### ***Working with interpreters***

The importance of language and cultural issues in providing access to justice for Aboriginal people in the Top End cannot be overstated. The vast majority of clients from remote communities in the Top End require an interpreter.

NAAJA works closely with, and strongly supports, the Aboriginal Interpreter Service (AIS), including through:

- Conducting joint training sessions on legal interpreting for AIS and NAAJA staff;
- Working with AIS to develop a Yolgnu Matha plain English dictionary;
- Working closely with the AIS to develop a protocol for court interpreters; and
- Seconding interpreters from the AIS into NAAJA to provide legal skills training and facilitate professional skills exchange.

### **b. Funding for Aboriginal Legal Services**

It is well-recognised that Aboriginal and Torres Strait Islander legal services are significantly and chronically underfunded. NAAJA encourages the Productivity Commission to engage directly with this issue and examine the adequacy of funding for Aboriginal Legal Services.

The Law Council of Australia has observed that

Notwithstanding the extraordinary levels of disadvantage suffered by Indigenous Australians, the ATSILS are the most underfunded sector of all legal aid service providers for the work required of them, that is to say, they still continue to be funded well below mainstream levels.<sup>8</sup>

The Senate Legal and Constitutional Affairs References Committee has twice – in 2004 and 2009 – called for the Australian Government to urgently increase the level of funding to ATSILS to overcome this significant under-funding and promote access to justice for Indigenous people.<sup>9</sup> This has not happened.

In addition to this problem of persistent structural underfunding, a major issue of concern for NAAJA is the failure of our funding to keep up with increases in our workload, including those increases that have directly resulted from developments in law and policy. This not only limits our ability to provide a full range of services (and without NAAJA providing these services there is generally no alternative service provider in remote communities) but also limits our ability to implement best-practice strategies, including early intervention and prevention initiatives.

Because we receive no funding from the NT Government, new policy and legislative initiatives introduced by the NT Government that impact upon our service are completely un-funded. Recent examples include the introduction of the Alcohol Mandatory Treatment Tribunal and the introduction of a regime of indefinite detention orders for serious sex offenders.

### **c. Workloads**

Differences in data collection practices make it hard to accurately compare workload between services. However, it is clear that there is a large disparity in workloads between lawyers at NAAJA and their counterparts at mainstream legal aid services.

Taking a simple comparison based on raw figures, on 2010/11 NAAJA had 32 lawyers working on a total of 1607 duty matters and 5502 casework matters. NAAJA lawyers therefore attended to an average of 222 matters in 2010/11.

In 2010/11 the Northern Territory Legal Aid Commission (NTLAC) had 27 lawyers working on a total of 2654 duty matters and 1450 casework matters. NTLAC lawyers therefore attended to an average of 152 matters each in 2010/11.

- On this count, average NAAJA caseload exceeds that of NTLAC by 71 clients per year.
- The average NAAJA caseload represented approximately 147% of the average NTLAC caseload.

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<sup>8</sup> Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Access to Justice* (2009), 24 available at: [www.apl.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/access\\_to\\_justice/submissions.htm](http://www.apl.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/access_to_justice/submissions.htm).

<sup>9</sup> Senate Legal and Constitutional References Committee, *Legal aid and access to justice* (June 2004); *Access to Justice* (December 2009).

In fact, the disparity is likely to be far greater than these figures suggest. Because of the different ways in which NAAJA and NTLAC count matters, the NTLAC figures for casework include matters that have already been counted as duty matters. At NAAJA, matters are counted as either duty matters or casework matters, but not both. If adjusted for this double-counting, NTLAC lawyers worked on less than 100 distinct matters in the year, significantly less than half the number of matters handled by NAAJA lawyers.

It is also vital to recognise the greater complexity in much of the work NAAJA does, relative to much of the work of mainstream legal aid providers:

- Because it is often necessary to use an interpreter, taking instructions and giving advice takes much more time;
- Cross-cultural issues may significantly add to the complexity of a matter. For example, as the examples above have highlighted, it may require basic legal concepts and court processes to be explained in detail, or for a lawyer to spend time understanding cultural issues relevant to the client and their legal problem;
- Taking instructions from clients or witnesses in remote areas raises logistical challenges and can be very time-consuming; and
- Remoteness also often requires more time and energy being put into aspects of legal representation, such as developing a bail plan to reside at a remote outstation.

It is important to emphasise that NAAJA regards this as an issue of *overwork* for our lawyers, not *underwork* by our colleagues at mainstream legal service providers.

#### **d. Facilities in remote areas**

NAAJA staff work in very difficult environments in remote communities. In addition to lengthy travel time and the demands of frequent travel, upon arrival in the communities there is often a basic lack of office space, difficulties in arranging transport in communities accessed by air and limited appropriate accommodation for staff if staying overnight.

This makes it very hard to provide a professional level of service and impacts on client confidentiality. It also creates a physically demanding environment for our staff in the often hot and humid climate of the Top End.

#### **e. Recruitment and retention challenges**

NAAJA faces a range of recruitment and retention challenges.

Low salaries and high workloads are central to the problem. Our salaries are uncompetitive, being 10-30% lower than salaries for equivalent positions in mainstream legal aid services and government legal organisations. This makes it difficult to attract and retain experienced staff with our service.

Uncertainty around funding also means that staff are often employed on short fixed-term contracts, the long-term uncertainty of which can make it difficult to attract and retain staff.

Other retention factors include:

- Complex and personally demanding work;
- The demands of remote travel and work;
- Cost of living pressures in the Northern Territory, especially high rent;
- Social and professional isolation, particularly in our regional offices;
- As many of our professional staff have moved from interstate to take up work with NAAJA, family often draws them 'home' after 1–2 years; and
- The disruption caused by high staff turnover itself adds to the pressure on teams.

Other recruitment factors include:

- Relocation – the small size of the local profession means that we still draw the bulk of our professional staff from interstate. Many people are simply not prepared to make such a significant move or bear the costs and logistical challenges that come with it; and
- Time taken to relocate – while we are generally given 4 weeks notice of a resignation, it is rare to be able to fill a position within 3 months.

Specific initiatives could be funded to target this problem, such as:

- Generous relocation packages;
- Remote allowances, including accommodation allowances or subsidised accommodation in remote areas;
- Loyalty bonuses for people staying more than 2 years; and
- Training support – eg, additional allowances for training and development.

Unfortunately NAAJA has a very limited ability to introduce these initiatives from within current funding – unless we are prepared to cut staff and increase workloads, defeating the purpose.

## **9. Conclusion**

NAAJA strives to provide a range of services that deliver genuine access to justice – engaging with the legal needs of Aboriginal people in the Top End through legal education to boost legal literacy and engagement; high-level constructive engagement with government and other stakeholders to bring about systemic change; effective and culturally competent legal services; and innovative programs such as Indigenous Throughcare that seek to break the cycle of re-offending.

While we are proud of the outcomes we achieve for our clients and their communities, the barriers to genuinely equal access to justice are often deeply entrenched and we are

inadequately resourced to deal with them. We hope that this submission assists the Commission to appreciate the legal needs of Aboriginal people in the Top End of the Northern Territory and the critical role that is played by Aboriginal Legal Services.