Criminal Lawyers Association of the Northern Territory (CLANT)
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SUBMISSION ON THE DRAFT ABORIGINAL JUSTICE AGREEMENT

We commend the Aboriginal Justice Agreement for its extensive consultation, evidence-based approach, and long term focus, all of which have been sorely lacking in the criminal justice policy and legislation over the past decade in the Northern Territory.

While we are agree with the aims and strategies within the draft agreement, we must observe that if mandatory sentencing remains, it will frustrate the desired outcomes of a number of these strategies. As Justice Mildren once observed, "mandatory sentencing is the very antithesis of just sentencing". Sentencing is the apex of the criminal justice system. Reform which aims to reduce re-offending and imprisonment and improve justice responses for Aboriginal Territorians must start with the abolition of mandatory sentencing.

We also sound a cautionary note that the focus of the Aboriginal Justice Agreement is on the factors which operate once a person has entered the criminal justice system. To effectively reduce offending and imprisonment rates a broader focus is needed, one capable of addressing criminogenic risk factors like economic disadvantage, unsafe and unsettled family environments, and a lack of appropriate housing, education and health care. The Maranguka initiative (an example of 'justice reinvestment') in Bourke has adopted this broader approach to great effect. We recommend the AJA consider justice reinvestment as a longer term strategy to effectively reducing offending and imprisonment of Aboriginal Territorians.

CLANT is well placed to comment on the AJA by virtue of its members working closely with Aboriginal people in the criminal justice system. On a daily basis our members see first-hand how legislative instruments and systemic barriers to justice fill our prisons with Aboriginal Territorians, young and old, male and female. We see at close quarters the way the justice system fails to respond to their needs.

The failure of the NT criminal justice system to appropriately respond to the circumstances of Aboriginal Territorians and the consequences of this are perhaps best illustrated by a hypothetical but all too common example.

A middle aged Aboriginal male and female are currently staying with family in Tennant Creek, having relocated from Ali Curung for ease of access to alcohol. Both are Alyawarr speakers. Neither is proficient in English. The two consume alcohol to excess together and engage in an argument in which threats are made, and blows are struck. Police are called to respond and arrest both parties who are taken to the Tennant Creek watch house. Due to an unwillingness of either party to provide a statement of complaint, the police issue reciprocal police domestic violence orders (pDVO) with the

relevant condition being that neither party is to have contact with the other when intoxicated. Both are released with copies of the pDVO. Neither party had the pDVO explained to them with the assistance of an interpreter. Neither party is referred to an alcohol rehabilitation service. Both are summonsed to court to show cause as to why the order shouldn't be finalised. Neither are able to obtain legal representation because both are respondents to the police domestic violence orders. Neither appear to show cause and the pDVO is confirmed for 12 months in their absence. A few days later police are again called to a domestic disturbance. Both the male and female are intoxicated. The female is bleeding from the head. The male is arrested for breaching his pDVO and is refused bail because of a prior conviction for breaching a DVO. When the male appears in custody in court, he speaks to a lawyer who does not have time to engage an interpreter. The male pleads guilty to the charge and by virtue of his prior conviction for breaching a DVO is sentenced to a mandatory 7 days imprisonment. No corrections assessment report is sought, no instructions are taken on rehabilitation or the male's deprived background, and even if they were, the Judge has no option but to impose a mandatory 7 day sentence of imprisonment. The male is released without having been provided with access to any rehabilitative programs and is reunited with his partner in Tennant Creek. They continue to drink together and the male is arrested again, being found in her company while intoxicated. He is again refused bail due to the operation of the presumption against bail. On this occasion he speaks to his lawyer with an interpreter and informs the lawyer that he has a drinking problem and is prepared to go to residential rehabilitation. The Judge on this occasion, imposes a sentence of 14 days, suspended after 7 days to attend residential rehabilitation. When the male is released he is reunited with his partner who is not required to attend residential rehabilitation. She persuades him to drink with her, and the two are again found in company, while intoxicated, and the male is arrested, refused bail and taken to court for sentencing. Having been extended his opportunity for rehabilitation on the last occasion, the Judge restores the sentence of imprisonment held in suspense, and imposes a one month sentence of imprisonment for the new breach, which is required by law to be cumulative to the restored sentence of imprisonment. The total effective sentence of imprisonment is one month and 7 days. While serving his sentence, the male has access to rehabilitation programs but they are not provided in language or with the assistance of an interpreter. When the male is released after serving his sentnce he is not provided with any supervision or assistance. And so the cycle continues.

This example highlights the injustice wrought by the intersection of mandatory sentencing, the current bail legislation, and the lack of access to culturally competent services within the justice system.

Discussion of the AJA strategies

We commend all of the strategies proposed in the draft AJA to reduce imprisonment and re-offending. The following strategies are deserving of particular comment;

Strategy 1 – While we agree with the alternative to custody model we note that the majority of sentences of imprisonment imposed by the courts are for offences the legislature has effectively precluded from consideration of alternatives to custody. This reform can only succeed if it is coupled with abolition of mandatory sentencing

Strategy 3 - We agree with all of the suggested actions to implement this strategy.

As the example referred to above illustrates, the feedback loop between mandatory sentencing and bail presumptions has a significant upward effect on the rates of imprisonment in the Northern Territory.

Noting that bail conditions imposed either by the police or the courts are at times unrealistic and/or not adequately explained to Aboriginal defendants, it is our experience that minor conditional breaches of bail offences are a considerable contributor to workload of police, the courts and because of the interplay of various provisions in the *Bail Act*, will usually result in bail being refused. In our experience refusal of bail and the lack of access to appropriate programs and services while on remand is a significant incentive for Aboriginal Territorians to plead guilty, often contrary to legal advice.

One particular provision that needs review is section 38 of the *Bail Act*. The interpretation of this anomalous provision (cf s16 of the Bail Act) by police is that where a person is arrested for breach of bail, not matter how trifling, even in circumstances where they hand themselves in to police or there is a compelling explanation for the breach, they must be refused police bail and put before a court, which can result in the person spending a number of days in custody. In addition, the more breaches of bail that are recorded on a person's prior convictions, however trifling or compelling the circumstances of that breach might be, the less likely they are to receive bail in the future. This interplay has been noted by the Royal Commission into Detention and Protection of Children in the Northern Territory and is reflected in a recent and welcome amendment to the *Bail Act* for youths.

Strategy 4 – We agree with all of the suggested actions to implement this strategy. It is our experience that practitioners and Corrections officers will often fail to provide the court with sufficient information on the defendant's background or assist the court in understanding the systemic considerations at play. This can be due to a number of reasons including workload and time pressures, communication barriers, ignorance and an unwillingness on the part of the defendant to disclose this often traumatic material. Even when the time is taken to put this material before the court, the courts are legislatively hobbled (by mandatory sentencing and s16AA of the *Crimes Act* (Cth)) or inconsistent in their receptivity and response to such material. To this end we recommend the Gladue reports used in Canada as a benchmark. We also commend the Public Defender NSW Bar Book Project https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book.aspx) as being an excellent resource that could be adopted and adapted to the Northern Territory.

Strategy 5 – We agree with the suggested actions to implement this strategy but would add the importance of using of interpreters and of having appropriate supports in place to assist Aboriginal Territorians on their release. To this end we commend the NAAJA Throughcare model.

Strategy 7 – We agree with the suggested actions to implement this strategy however, again, we reiterate our comments made regarding strategy 1 that the biggest barrier for 'community based sentencing options' is mandatory sentencing, closely followed by availability of these options in remote communities (eg home detention).

Strategy 9 – We agree with the suggested actions to develop correctional services therapeutic programs. We also recommend that these programs also be offered to those on remand, noting that it is not unusual for a defendant to be kept on remand for a period of months before their matters are ultimately resolved. It is also not unusual for defendants to be sentenced to a term of imprisonment equating to the time they have served on remand, which effectively precludes them from accessing rehabilitation services notwithstanding that they have received a sentence of sufficient duration to enable them to participate and complete such programs had they been available to them.

We note the interplay between this strategy and strategy 16 & 17 which we discuss below. It is frequently our experience that the prison rehabilitation programs are not offered in Aboriginal languages and prisoners are not given access to interpreters to assist them with these programs. In the case of sex offenders, a failure to offer the course in language or provide the assistance of an interpreter will impede successful completion of the program, which in turn will cruel their applications for parole.

Strategy 15 - We agree with the suggested actions to implement this strategy but would also highlight and commend the work of previous specialist courts, such as the Drug Court and Mental Health Court.

In relation to the specialist Domestic Violence Court, it must include funding for a legal service to provide assistance to respondents and not just applicants, noting that domestic violence orders are much more effective if they accurately reflect the status of the relationship between the protected person and the respondent and impose conditions that do not set the respondent or applicant up to fail. In this regard, reference is made to the example used in the introduction of our response.

Strategies 16 & 17 share common goals and actions and are, in our view, of paramount importance to ensure justice for Aboriginal people. One of the most important and sorely needed actions is the provision of interpreters at all stages in the justice system. While there are now laudable protocols in place for use of interpreters in proceedings conducted in the Local and Supreme Courts, it is our experience that rarely, if ever, are interpreters used at earlier or later stages in the justice system such as at the police station, by court staff or by Community Corrections either in provision of assessments, reports, or delivery of therapeutic programs.

Marty Aust
CLANT President
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