



North Australian Aboriginal Justice Agency

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NAAJA Submission: Burial and Cremation Bill 2019

September 2019

About NAAJA

NAAJA provides high quality, culturally appropriate legal aid services to Aboriginal and Torres Strait Islander people throughout the Northern Territory. NAAJA was formed in February 2006, bringing together the Aboriginal Legal Services in Darwin (North Australian Aboriginal Legal Aid Service), Katherine (Katherine Regional Aboriginal Legal Aid Service) and Nhulunbuy (Miwatj Aboriginal Legal Service). From 1 January 2018 NAAJA has been providing legal services for the southern region of the Northern Territory formerly provided by CAALAS (Central Australian Aboriginal Legal Aid Service). NAAJA and its earlier bodies have been advocating for the rights of Aboriginal people in the Northern Territory since 1974.

NAAJA serves a positive role contributing to policy and law reform in areas affecting Aboriginal peoples' legal rights and access to justice. NAAJA travels to remote communities across the Northern Territory to provide legal advice, deliver community legal education and consult with relevant groups to inform submissions. Consultations in communities have taken place to inform this submission. Aboriginal lawyers and law students have been involved in the development of this submission.

This submission draws on the cultural authority of an Aboriginal board which governs NAAJA as an Aboriginal Community Controlled Organisation. NAAJA staff are inspired by the strength and resilience of the Aboriginal people who are board members and come from across the Northern Territory including a strong focus and representation from regional and remote areas. We particularly acknowledge the Elders of our board and the contribution of Aboriginal and Torres Strait Islander people who developed and strengthened NAAJA over the years.

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Consultation process

NAAJA appreciates the opportunity to make a submission to this Bill.

We recognise the work of the Department of Local Government, Housing and Community Development (Department) in consulting with NAAJA prior to drafting the Bill. Given the sensitivities of the subject matter, we acknowledge the Department's work consulting with stakeholders and the community as a deliberate approach that is not often done for the development of legislation. The fact that public consultations included translating messages in language served to complement this deliberate consultation process.

Given our commitments at the time, and also the content of the consultations as distinct from the wording of the Bill, we did not contribute substantially to these consultation processes. At the time, we agreed with many of the proposals and principles put to inform the Bill. Our primary feedback is this submission, and based on an understanding of the legal technicalities of the Bill.

The need for new legislation

NAAJA recognises the need for new legislation and significant improvements to the existing Cemeteries Act 1952.

An example of outdated legislation is section 21 that reads:

A person shall not, except with the consent in writing of the Minister, bury the body of a deceased person elsewhere than in a cemetery.

Maximum penalty: 2 penalty units.

Since 1952, it is likely that burials have taken place without the consent in writing of the Minister, and in circumstances entirely appropriate and in accordance with Aboriginal custom and tradition. It is likely these have taken place without a person receiving a penalty.

The opportunity of developing new legislation and with similar expectations may create the impression on enforcement agencies such as Police that penalties should be put in place. By presenting a new Bill it can also create the impression upon Aboriginal groups of changed practices by way of legislation, because these groups may not have been subject to the enforcement of the 1952 Act. Enforcement of the new provisions in circumstances where similar provisions have not been enforced in the past will be particularly problematic for individuals and families, especially that it relates to such a sensitive matter.

In the Northern Territory, with an Aboriginal population of approximately 30% and with strong cultural practices and traditions, we have an opportunity develop new legislation properly reflecting our values and the dignity and respect particularly for Aboriginal led decision-making and frameworks appropriate to our circumstances. Some provisions in this Bill do not reflect this opportunity.

Significance to Aboriginal people

The proposed reforms reflected in the Bill impact Aboriginal people significantly.

Whilst the general population particularly in urban and regional centres are accustomed to burial practices developed over hundreds of years in Australia (and, as an extension, cultural practices spanning many more thousands of years in other countries such as England and many other countries), Aboriginal people have their own traditions relating to their own country. These practices can be very different. The decision-making authority and governance structures in which to make such decisions are very different to the organisation of governments. When it comes to decisions in relation to deceased persons, questions of Aboriginal sovereignty and decision-making authority are relevant. These matters also relate directly to Aboriginal law, or customary law.

In many cases, the preference and decision-making authority of Aboriginal groups are in circumstances that are non-controversial, in that there is broad agreement about a practice. Some of these practices have been modified based on movement of people to settlements or other areas not associated with a person's traditional country. Other factors, such as a deceased person's parent who may be a non-Aboriginal person or another Aboriginal group where there are not established and common understandings, impact the way decisions are made. We acknowledge the complexity of this context and the sensitivities of constructing legislation to appropriately reflect sensitivities. Our submission is informed by a principle to support Aboriginal sovereignty as it relates to burials and customs and, where there may be disputes, to propose a direction that is more in line with Aboriginal sovereignty.

Objects

Because Aboriginal people should have sovereignty in decisions that relate to deceased persons to which they belong, the role of the State (or Territory) must be tempered. This role concerns decisions about the release of a body, likely by a hospital or morgue or coroner (releasing authority). The releasing authority should have clearly understood capability to identify disputes and clearly understood direction to deal with these appropriately. The policies that relate to cultural safety and security of a releasing authority are relevant (such as the Department of Health). These strategies must be robust with independent accountability mechanisms back to the relevant Aboriginal community or group that the deceased person belongs, and also to the Aboriginal community or group of the land that is subject to a decision.

The legislative framework must be robust in the way it reflects and respects Aboriginal sovereignty in these matters. Aboriginal led trauma-informed practice, particularly in the health sector, provide guidance and direction. In broader policy frameworks for public servants involved in decisions relating to deceased persons the work of Aboriginal led trauma-informed practice ought to be included and in ways that are seen as acceptable by community controlled organisations such as Aboriginal Medical Services Alliance Northern Territory (AMSANT).

As principles, or objects to guide the Bill, clause 3 currently reads:

- a) to ensure human remains are treated with dignity and respect; and
- b) to provide for different methods of burial and disposal of human remains; and
- c) to accommodate different practices for and beliefs regarding the burial and disposal of human remains; and
- d) to regulate cemeteries for the burial of human remains; and
- e) to regulate facilities for the disposal of human remains.

In our view, the objects should go further and in more detail to recognise and respect the specific position of Aboriginal peoples. The objects as presented, and whilst positive and respectful, are general in context.

- **NAAJA recommends the inclusion of at least one object that specifically refers to the Aboriginal context and assists in guiding, as an object, other parts of the Bill (for example, in our submission we have proposed Aboriginal sovereignty and mechanisms to properly respect and reflect this and, in the event these are included, an object should state this).**

Clause 103 as an example of seeking to respect Aboriginal law, custom or tradition

We recognise the intent of many of the sections to properly respect Aboriginal law, custom or tradition.

Clause 103, of the Bill expresses its potential to respect and follow the guidelines of Aboriginal law, custom and tradition when defining Aboriginal communities as a 'cultural group'. Clause 103(1) explains that the responsible entity may, in writing, seek an application to transform a closed cemetery into a public park. Of particular interest to NAAJA are the sub-clauses that state:

(2) If a cemetery or a portion of a cemetery has been consecrated according to the rites or practices of a religious or cultural group, the responsible entity may offer an opportunity to control or maintain the area of land that the cemetery or the portion of the cemetery resides on to that group before making an application under sub-clause(1).

(3) If the religious or cultural group does not accept an offer under sub-clause(2), the group may request that the responsible entity not interfere with the places of burial in the cemetery or portion of the cemetery.

(4) The responsible entity must fulfil all reasonable requests mentioned in sub-clause(3) of the religious or cultural group.

NAAJA notes that Clause 103(2) demonstrates the greatest potential of a culturally competent legislative framework to properly reflect respect for Aboriginal aspirations. Sub-clauses (3) and (4) infers that the Bill acknowledges the content of some clauses will have specific ramifications for particular groups in the Northern Territory. From this Clause NAAJA can see that the Bill does understand the significance of respecting the traditions of religious and cultural groups. The feedback we have received emphasises

the importance of notions of respect for Aboriginal people reflected in the Bill as a whole and across the provisions.

Next of kin in the Aboriginal context

Matters pertaining to next of kin deal directly with the decision-making processes that relate to a deceased person.

The Explanatory Statement says:

Clause 7 lists the categories of people, in relation to a deceased person, who are recognised as next of kin. A next of kin is someone with a defined relationship to a deceased person, and in accordance with this Act, may be able to make decisions or be involved in processes concerning the deceased person's human remains, such as being able to apply for a disposal approval under clause 80(2)(b).

Paragraph (a) provides that a next of kin is a person who, according to the customs and tradition of the community or group to which the deceased person belonged, is appropriate to perform that role. For this category of next of kin to apply, the deceased person must have been an Aboriginal or Torres Strait Islander person with strong cultural and traditional ties to the community or group to which the person belonged.

...

Clause 8(1) provides a hierarchy, listed in descending order, in relation to the concept of a 'senior next of kin' for a deceased person. The senior next of kin for a deceased person is the person who holds the decision-making power and may decide the outcome in relation to any disputes when making decisions relating to a deceased person's human remains under this Act.

Paragraph (a) provides that the senior next of kin, for a deceased person who was an Aboriginal or Torres Strait Islander person with strong cultural and traditional ties, is the appropriate person according to the customs and traditions of that community or group to which the deceased person belonged.

NAAJA appreciates the approach of seeking to improve legislation by more closely aligning, and authorising, Aboriginal customary law in relation to the rules that govern decision-making powers for a deceased person. This approach is reflected in the inclusion of clause (8) (1) (a). The proposed wording provides scope for an approach based on the community or group to which the deceased person belongs. There is sufficient scope and flexibility for a case-by-case approach.

- **NAAJA supports the intent of the above provisions and notes the submissions set out below for related provisions.**

Disputes

Matters pertaining to a deceased person must be considered on a case-by-case basis. In many cases, Aboriginal customs and traditions can be supported and are not controversial or in dispute.

Challenges arise, however, when there are disputes about:

- (a) what constitutes the customs and traditions of a community or group, or
- (b) there are inconsistent views between different individuals or groups that relate to the same deceased person, or
- (c) a decision involves land where there is a dispute between a community or group of the deceased person and another community or group.
- (d) a combination of factors.

Unresolved disputes have lasting and negative consequences and adversely impact a complex set of relationships between individuals, families and groups. A dispute can arise based on a range of decisions: where they should be buried (or cremated), how, the procedures that attach to this, sorry business, ceremony, timing, how these things connect to certain traditions of different family lines, what might be the wishes of the deceased (if relevant), how these things connect to perceived cultural obligations, etc.

It is unreasonable to conceive that all possible disputes can be resolved by any number of hypothetical scenarios. It is also not possible for legislation or policy to determine a precise method for resolving all disputes. However, legislation must establish, as best possible, and with the widest scope available, options for disputes to be resolved in a timely and staged way and with a clear framework reflecting Aboriginal sovereignty in the first instance. Decisions should also be made based on ensuring high standards of cultural competency for the person making any decision.

An alternative mechanism vesting Aboriginal sovereignty in Aboriginal people

The appeals mechanism as established by the Bill involves the Northern Territory Civil Administrative Tribunal with certain powers to determine the senior next of kin (dealt with below).

Scrutiny should be applied to legal appeals processes that involve non-Aboriginal people as key decision-makers or criteria that departs from Aboriginal custom and tradition, either of the community or group that a deceased person belongs or a community or group of the land subject to a decision. Legal frameworks must be culturally competent if they are to be trauma-informed. This is not to say that NTCAT is not a relevant step in an appeals process (and also other levels of courts or tribunals), but that there should at least be one level of appeal that is Aboriginal led and draws on the authority of Aboriginal people.

The primary focus, in the first instance, should be Aboriginal-led ways of dispute resolution or mediation, or at least drawing on the cultural authority of Aboriginal people who are respected members of a group or community and are senior people. This authority ought to be enlarged and empowered in making important decisions in

circumstances where there are disputes. These steps ought to at least be the initial steps before a court or tribunal is involved. Land based organisations including Land Councils, Sacred Site authorities, native title based groups and land trusts are the relevant organisations to assist in designing an appropriate model.

- **NAAJA recommends the development of a culturally appropriate authority as an appeals mechanism to deal with disputes, and prior to an appeal to the NTCAT or other courts.**

Senior next of kin and decision-making process

The decision-making process for determining the senior next of kin is dealt with in Clause 9 of the Bill, as stated in the Explanatory Statement:

The Northern Territory Civil and Administrative Tribunal may determine senior next of kin. Clause 9(1) provides that any person or category of person mentioned in the senior next of kin hierarchy in clause 8(1) has standing to apply to NTCAT for a determination as to who is the senior next of kin. This provision allows for the identification of the senior next of kin in circumstances where there is no executor or administrator of the estate of the deceased person and the senior next of kin is either unclear or there are disputes concerning who is the senior next of kin.

Clause 9(2) requires NTCAT to take three factors into consideration when determining the senior next of kin for a deceased person, depending on the categories of persons outlined in clause 8(1).

First, NTCAT is required to consider the hierarchy as set out in clause 8(1).

Second, if two or more people have equal status as senior next of kin, NTCAT is required to take into account whether each person provides an undertaking (in other words, a formal promise) to organise and pay for any relevant cost for the burial or disposal of the deceased person. This applies in relation to the following circumstances: if there are two or more people according to customs and tradition and the deceased person was an Aboriginal or Torres Strait Islander person with strong cultural and traditional ties; the parents of the deceased person; and if there are two or more people who had a relationship with the deceased person immediately before death and are all considered to be appropriate people (in the opinion of the manager of the cemetery or facility).

Third, if two or more people have equal status as senior next of kin because they are a parent, or because they are considered to be an appropriate person under clause 8(1)(h), NTCAT is required to take the nature of the relationship, immediately before death, into account.

Clause 9(3) provides that NTCAT, after determining an application, can make an order that a person is the senior next of kin for the deceased person (for the purposes of this Act). NTCAT may also make any other order that NTCAT considers appropriate.

Clause 9(4) provides that section 140 of the Northern Territory Civil and Administrative Tribunal Act 2014 does not apply to a decision of NTCAT under clause 9. An application under this clause will be considered by NTCAT in its original jurisdiction, which means this dispute or issue has not been the subject of an earlier adjudication (this is in comparison to the reviewable decisions under Schedule 1 of this Act, which fall within NTCAT's review jurisdiction). In other words, not applying section 140 of the Northern Territory Civil and Administrative Tribunal Act 2014 means that NTCAT's determination under this clause cannot be reviewed again by NTCAT.

The criteria as set out in clause 9 for the NTCAT to determine who is a senior next of kin is a departure from the focus of clause 7 (a) and 8 (1) (a) which is 'Aboriginal custom and tradition pertaining to a community or group that the deceased belongs'. That is, in the scenario of a dispute, the next step of the appeal process is for the NTCAT to make a decision on other factors that are clearly outside the scope of the focus of clause 7 (a) and 8 (1) (a). This is of significant concern, and is unnecessary. An appeals process should consistently set out the criteria for decisions to establish who is a next of kin.

By allowing the proposed staged process of appeal this diminishes, and likely in many cases will make redundant, the purpose of focusing on 'Aboriginal custom and tradition' as the primary consideration. Whilst it is possible a court may exercise inherent jurisdiction in relation to an administrative decision and clause 7 (a) and (8) (1) (a) of the Bill, these clauses should not be absent from the criteria set out for the NTCAT in how it arrives at a decision (or order).

- **NAAJA submits clause 9 of the Bill ought to be amended substantially to retain the importance of focusing on Aboriginal custom and tradition. The legislation should go further to provide guidance and detail in relation to determining Aboriginal custom and tradition.**

Aboriginal sovereignty in decisions relating to a deceased person

Under the proposed Bill, the CEO of the Department and Minister have broad discretion to consent for burials outside of approved cemeteries. Currently, the Department also includes Territory Housing and Local Government. Should the Bill pass, it is likely that requests will be made for burials that overlap directly with considerations of Territory Housing and Local Government, particularly as it relates to burials in close proximity to houses and matters where Local Government support may be required to facilitate a burial.

In our view, this overlap of considerations is sufficient for an alternative process to be put in place so that a person who makes a decision does not have other interests to serve.

- **NAAJA submits the decision-making authority for such matters should exercise this role exclusive to all other considerations, and re-iterates the recommendations made in this submission for Aboriginal-led frameworks.**

In relation to burials outside cemeteries, the Bill indicates some bases on which the CEO might make a decision concerning applications for burials outside of approved cemeteries. Under section 39(3), the applicant is required to lodge any objections, known to the applicant, from the executor or any next of kin to the deceased's burial outside a cemetery. Under section 39(4), the CEO must be satisfied that the landowner and relevant lessee consent to the burial of human remains on the land and other matters prescribed by regulation.

The information sheet provides additional "requirements" that will be imposed for burials outside of cemeteries. Some of these requirements, such as the land must be at least 5 hectares in area and that the burial site must not be adjacent to occupied buildings, would likely impede on current cultural practices for some Aboriginal people in the Northern Territory. We submit there is no public health basis, or any other reasonable basis, to provide a blanket provision such as and for it to apply for all practices. Each matter should be dealt with on a case-by-case basis, and with input of Aboriginal people with decision-making authority.

Further, for highly sensitive matters of dealing with a deceased person we question the suitability of Aboriginal people needing to seek permission from a Chief Executive Officer of government, particularly if the criteria is very broad. This is based on direct feedback to us from senior Aboriginal people.

Matters that affect burials for Aboriginal people residing in regional and remote areas can be significantly different to people living in urban areas. Under the proposed Bill, an Aboriginal person in a remote area will require permission from the CEO or Minister who will often reside in Darwin, and they will have no direct dialogue or engagement with that person. To the Aboriginal person in a remote community, there is no understanding of the cultural competency or background of a person who has this significant decision-making power as it relates to a deceased person. In many cases the CEO or Minister will be a non-Aboriginal person, or an Aboriginal person not familiar to, or from the area of, the Aboriginal person seeking permission. This is stark departure from Aboriginal ways of dealing with deceased persons conducted over tens of thousands of years and on their own country.

In the event there is disagreement about the decision of a CEO and a person seeking permission, this will lead to perceptions of a significant sense of disempowerment, inappropriate control over a highly sensitive and sacred matter, and modern manifestations of colonial practices. Governments have established mechanisms to deal with Aboriginal matters that are sacred and there are legislative frameworks in place to deal with these (such as Sacred Site authorities). These frameworks vest control and authority in Aboriginal-led processes. It is possible to design an alternative model of decision-making consistent with the sanctity and sensitivities of these matters and outside the ambit of CEO control. And whilst a CEO may consult with relevant bodies such as Sacred Site authorities, the very notion to a sovereign Aboriginal person who practices Aboriginal law and is required to obtain permission in this way is problematic and unnecessary.

The Statement of compatibility with human rights states:

2. B. Cultural sensitivities

The Chief Executive Officer (CEO) of the Agency may refuse to approve a burial at a location outside a cemetery (see clause 39(5)) and this may conflict with the wishes of the family. However, the CEO of the Agency would only refuse to give an approval under considerations prescribed by regulation and in the Agency's policy. The CEO of the Agency would not refuse to give an approval to bury at a location outside a cemetery unless there is a valid reason (for example, if the traditional owners do not consent to the burial taking place on that land). In relation to burials at a location outside a cemetery, a person must provide the GPS coordinates of the place where the human remains are buried (see clause 43(1)(b)). The exact burial location - or its proximity to particular sacred sites - may be sensitive and cause issues for some applicants. However, in these circumstances it may be appropriate for the applicant to provide an approximate location (for example, the parcel of land where the burial is occurring) and provide a declaration that the location satisfies the requirements of a burial at a location outside a cemetery, as prescribed by regulation.

With reference to the above, the situation of Traditional Owners not consenting to a burial taking place on their land is used as an example of the CEO not approving a burial outside of a cemetery. The direct feedback we have received in consultations questions why a CEO of a Department should have the authority to make this decision? What if approval is sought where other family members of the deceased person are buried at the same place notwithstanding the Traditional Owners input?

- **NAAJA recommends a discussion paper is prepared by Aboriginal people exploring options acceptable to NTG for Aboriginal-led control and decisions concerning burials and cremations.**

Practices on Aboriginal land

NAAJA questions the requirement for permission from the CEO or Minister in relation to burials on Aboriginal land.

Funeral ceremonies, including burials, are culturally important and can be managed safely and effectively by Aboriginal people. Significant government regulation in this area is not appropriate or required.

NAAJA notes the Objects of the Act in section 3, in particular the objects to ensure human remains are treated with dignity and respect, to provide for different methods of disposal of human remains; and to accommodate different practices for and beliefs regarding the burial and disposal of human remains. We submit these objects can best be achieved by allowing Aboriginal people to bury their family members on Aboriginal land without the need to seek permission from government organisations.

- **NAAJA submits that the provisions as they relate to burials and the seeking of a Minister's permission should not apply to Aboriginal land, especially to homelands or outstations.**

Under the proposed Bill, cemetery managers and the CEO of the Department are granted very broad powers to grant or not grant approvals for burials.

In relation to burials within cemeteries, the Bill does not provide for the basis on which cemetery managers can approve or refuse to give burial approvals. This is an example of where greater and improved protections recognising the cultural and spiritual significance of Aboriginal led decision-making can be useful. As it currently reads, this Bill and for these provisions do not protect, and reflect, principles of trauma-informed practice and cultural competency.

Section 16 does provide that in exercising any powers under the Act, the responsible entity must have regard to the following: the values of that community the cemetery serves, the heritage value of the cemetery, and the most efficient way of maintaining the cemetery. The reference to the values of the community is positive. In practice, however, many cemetery managers will not be members of the community for whom they are making decisions. It will likely be difficult for some decision-makers to consider community values in relation to burials in their decision-making process due to a lack of cultural knowledge, or the weight they place on values of the community the cemetery serves or a particular group. In small population centres, the manager may be influenced by other considerations not relating to matters concerning a burial. The decision-making process does not appear to be as transparent as it could be

- **NAAJA recommends the inclusion of a transparent process in relation to the decisions of managers and a clear, culturally appropriate appeals process should an applicant not receive permission.**

Access to justice

For many of NAAJA's clients, extensive regulatory requirements are often barriers to justice. For example, completing the documentation required for access to government entitlements often requires significant assistance from family members and service providers, particularly for clients who speak English as a second, third or fourth language.

For burials inside cemeteries, under section 23(3), applicants will be required to provide personal information about themselves, submit a death certificate, and complete a "burial form" with information about the deceased. NAAJA also notes with approval that managers of cemeteries are able to request a death certificate from providers. The proposed legislation also recognises that personal information about the deceased (such as the deceased's date of birth) might not be available, noting that personal information about the deceased must be provided "if known". However, NAAJA cautions that the strict liability offences under section 26 (applied to approvals granted without a "complete application") may lead managers to be conservative about accepting applications that appear to be "incomplete" due to a lack of recorded information about the deceased.

For burials outside cemeteries, applicants will be required to submit the same information as required under section 23(3). Additionally, applicants will need to submit any known objections to the burial from the executor or administrator of the estate or

any next of kin. The CEO must be satisfied there is consent from the landowner and the relevant lessee.

Section 39(3)(b) requires applicants to submit “any objections, known to the applicant, from the executor or administrator of the estate of the deceased person or any next of kin of the deceased person to the burial of the human remains at a location outside a cemetery.” As previously discussed, it is positive that “next of kin” includes reference to Aboriginal customs or traditions. However, the requirement that objections from any next of kin must be submitted to the CEO may impose an undue burden on applicants and the Department. For applicants who are Aboriginal and in accordance with their tradition and custom, in many cases they will likely have a much larger group of people included as a ‘next of kin’, and so Aboriginal applicants will be required to submit objections from a large number of relevant next of kin. No further information has been provided about how these matters will be dealt with by the Department, and the Department is not directed by legislative provisions in this context and consistent with the objects of the Act.

Of note, the Department’s proposed policies appear to allow a single next of kin, regardless of whether they are “senior next of kin”, to prevent burial outside of cemetery. Amongst the additional “requirements” in the information sheet for burial outside a cemetery, the Department notes that there must be “no objections” to the burial. This creates a likely scenario of an Aboriginal applicant being asked to make an application in circumstances where approval will not be provided because of the fact of an objection and a requirement upon the applicant to list any objection. This scenario will likely lead to decisions relating to the deceased person being made inconsistent with Aboriginal law.

Section 39(4)(a) requires the CEO to be satisfied that there is consent from the landowner and any relevant lessee for the burial of human remains. Under section 6, the landowner of Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* would be the relevant land trust. Relevant lessees could include, for example, the Department of Government, Housing and Community Development. It is not clear from the Bill what processes the CEO may put in place to be satisfied of this requirement.

In addition, placing requirements on applicants to furnish the relevant information including any objections may place applicants in situations where they are required to share information about relatives where, under Aboriginal custom and tradition, they may be obligated not to share. Doing so in times of grieving is particularly sensitive.

- **NAAJA reiterates our previous recommendations in relation to an alternative Aboriginal-led process to resolve disputes. This should be resourced in a way where access to justice and access to services is appropriate for Aboriginal people in relation to dealing with deceased persons.**

Contraventions of the Bill as offences attracting fines or imprisonment

Clause 40 lists the penalties for a burial taking place outside a cemetery without a permit as 200 penalty units or 2 years imprisonment.

The following table depicts the financial value of penalty units as at the date of this submission:

<i>Date</i>	<i>Single unit</i>	<i>50 units</i>	<i>100 units</i>	<i>400 units</i>	<i>500 units</i>
2018-2019	\$155	\$7,750	\$15,500	\$62,000	\$77,500

Figure 1. NTG, Penalty Units Table (2019)¹

Clause 41 sub-section (1) states that a person commits an offence if (a) an approval mentioned in section 39(1) has been given to a person; and (b) the approval is subject to a condition under section 29(2); and (c) the person intentionally engages in conduct; (d) that results in a contravention of the condition and the person is reckless in relation to that result. The penalty for this is 100 penalty units.

There is no reference in the Bill for circumstances where a person is adhering to Aboriginal law, tradition or custom and these activities lead to an offence being committed.

NAAJA submits that these penalties are harsh and potentially detrimental to Aboriginal people who may bury human remains outside of cemeteries as previously and currently practised, or commit any other offence under the Act.

- **NAAJA disagrees with the fines and imprisonment arrangements, and also the strict liability provisions, for offences against the Act. These arrangements already impact Aboriginal people significantly and should not be extended to Aboriginal practices concerning decisions relating to deceased persons and especially where this is done in accordance with Aboriginal law, custom or tradition.**

Given the current statistics of Aboriginal male adults in custody in the Northern Territory making up more than 84% of the total prison population, this Act can only potentially maintain or increase these statistics². A person being subject to a court process or receiving a fine for activities that are entirely reasonable and in accordance with their Aboriginal law, custom or tradition may have a significant and unnecessary affect on that person's mental health and health.

We are concerned these provisions are sending the message that Aboriginal people must stop practising traditional ways of burial and assimilate into the law of Parliament, because it criminalises Aboriginal customary tradition.

¹ Northern Territory Government (NTG), *Territory Revenue Office*, Website, <<https://nt.gov.au/employ/money-and-taxes/taxes,-royalties-and-grants/territory-revenue-office/penalty-units>>, accessed on 4/9/19.

² Australian Bureau of Statistics 2018, *Proportion of Prisoners 2018*, viewed 4/9/2019, <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics%20~13>>.

Article 8 of the *United Nations Declaration on the Rights of Indigenous Peoples (Declaration)* states that:

- 1) Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
- 2) States shall provide effective mechanisms for prevention of, and redress for:
 - a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - b) ...
 - c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - d) Any form of forced assimilation or integration;
 - e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Further Article 11 of the Declaration, sub-clause 1, states that:

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.³

The effect of this Bill if passed, and particularly as it relates to the fines and imprisonment system (and related provisions), will force Aboriginal people to assimilate⁴ their practices as it relates to deceased persons to a legislative framework that does not properly protect their interests in the Declaration.

The people affected by Clauses 40 and 41, will be Aboriginal people who are grieving. The NTG be criminalising grieving people for burying human remains on country, on homelands, at outstations, near family; expressed in the Act as 'outside cemeteries'. This Act is a discriminatory piece of legislation that disproportionately affects Aboriginal people in the Northern Territory. Aboriginal people living in rural and remote

³ UN Declaration on the Rights of Indigenous Peoples, Australian Human Rights Commission, website, accessed on 5/09/2019 at < <https://www.humanrights.gov.au/our-work/un-declaration-rights-indigenous-peoples-1>>.

⁴ Australian Human Rights Commission, *Bringing Them Home Report - Chapter 2*, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, April 1997, viewed 4/9/2019, <<https://www.humanrights.gov.au/our-work/bringing-them-home-chapter-2#Heading23>>. The report defined assimilation "in practical terms...the expect[ation] that all persons of Aboriginal blood or mixed blood in Australia ...live like other white Australians do". Further, sociological academics Phillips and Osmond on discussing Australian Indigenous identities explained that: Assimilation for Aboriginal people meant adopting settler ways — language, customs and lifestyle — and discarding their own complex systems of culture, family structure and traditional existence. (Phillips, G M and Osmond G, 'Marching for Assimilation: Indigenous Identity, Sport and Politics', Australian Journal of Politics, Volume 64, Issue 4.)

areas are the people who will be negatively affected by these penalties, for Aboriginal Customary Law burial practices. Article 31 of the *Declaration*, sub-clause 2 states:

In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

In criminalising Aboriginal peoples' right to practice ceremony and traditions, the Northern Territory is directly going against the recommendation of the United Nations to 'protect the exercise of these rights'.

NAAJA acknowledges that Aboriginal people in the Northern Territory have been burying human remains for millennia. We know that this is an ancient practice that is delicately thought out and thoroughly executed. NAAJA suggests alternatives to the penalising and criminalisation of people for continuing Aboriginal law, custom or tradition. Instead of binding legislation, we seek to encourage the development of mediated communication between organisations such as Land Councils Burial Policy that can be shared through educational programs on safe burial practices on homelands, at outstations and near family. We reiterate that the criminalisation of people for burying outside of a cemetery is excessive, and deeply problematic.